



535 Grand Avenue, Grand Junction, CO 81501
PO Box 1449, Grand Junction, CO 81502
970-243-7789 ♦ www.lighthousehrs.net

Compliance Connection

December 2021 – Happy New Year

Federal Compliance Update

There is a lot to cover in this edition, but we wanted to take this opportunity to thank you all for your continued support for our business environment and your workforce. We hope you all have a peaceful and prosperous 2022.

OSHA Withdraws Most of ETS for Healthcare Workers

On about December 28, 2021, OSHA announced the withdrawal of most of the ETS aimed at healthcare workers. However, employers must still comply with recording COVID-19 logs and case reports regardless of work-related status. Additionally, OSHA strongly encourages healthcare entities to continue with compliance of the entire ETS to remain in compliance with the General Duty clause. As a refresher, the General Duty clause in part requires employers to provide *“employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees...”* This includes respiratory protection, personal protective equipment (PPE), and protecting employees from hazards.

Also keep in mind that if the healthcare entity employees 100 or more employees, they still must comply with that portion of the ETS.

OSHA Emergency Temporary Standard (ETS) Reinstated by 6th Circuit Federal Court of Appeals

On Friday Dec. 17, 2021 the 6th Circuit Federal Court of Appeals [reinstated](#) the Occupational Safety and Health Administration’s (OSHA) [federal emergency temporary standard](#) (ETS) for COVID-19. The 6th Circuit decision reverses the [stay ordered](#) in November by the 5th Circuit and allows OSHA to resume ETS implementation and enforcement nationwide. Click [here](#) to read a summary of the ETS.

It is anticipated that the 6th Circuit Federal Court of Appeals will provide further guidance early in January 2022.

The ETS establishes a mandatory vaccination policy requirement for private employers with 100 or more employees. ETS opponents have already filed an appeal with the U.S. Supreme Court challenging the 6th Circuit’s decision.

OSHA Response and Guidance

OSHA has [published](#) the following guidance regarding the reinstatement:

To account for any uncertainty created by the stay, OSHA is exercising enforcement discretion with respect to the compliance dates of the ETS. To provide employers with sufficient time to come into compliance, OSHA will not issue citations for noncompliance with any requirements of the ETS before January 10 and will not issue citations for noncompliance with the standard's testing requirements before February 9, so long as an employer is exercising reasonable, good faith efforts to come into compliance with the standard. OSHA will work closely with the regulated community to provide compliance assistance.

Impact on Employers

The 6th Circuit's decision suggests the ETS may survive its legal challenges. Employers subject to the ETS should monitor legal developments closely. They should also consider what measures they would need to adopt to be considered to have made reasonable, good faith efforts to comply if the Supreme Court upholds the ETS.

Important Dates to Keep In Mind

Jan. 10, 2022 – Planned enforcement deadline for most ETS requirements.

Feb. 9, 2022 – Planned enforcement deadline for ETS testing requirements.

EEOC Issues New Guidance on COVID-19 and ADA Disability

On Dec. 14, 2021, the Equal Employment Opportunity Commission (EEOC) issued 14 new answers to frequently asked questions ([FAQs](#)) about what employers may or may not do to comply with federal fair employment laws during the COVID-19 pandemic. The new FAQs specifically address the definition of "disability" and how to determine whether an individual with COVID-19 meets it under the Americans with Disabilities Act (ADA).

ADA and COVID-19 Background

Under the ADA, employers with 15 or more employees may face liability if they take certain adverse employment actions against individuals who have been diagnosed with or are believed to have COVID-19. The ADA also requires these employers to provide reasonable accommodations for individuals with disabilities, including any related to COVID-19. Smaller employers may be subject to similar rules under applicable state or local law.

Three-Part Definition

The EEOC's new FAQs clarify that COVID-19 may qualify an individual for ADA protection based on "actual" disability, a "record of" disability or being "regarded as" having a disability. Employers must perform an individualized assessment to determine whether a specific employee's COVID-19 meets any of these definitions.

Disability Types

COVID-19 is an actual disability if it is a physical or mental impairment that "substantially limits one or more major life activities." The FAQs provide examples of situations in which an individual with COVID-19 would (and would not) meet this definition.

The FAQs also explain and provide examples illustrating how certain adverse employment actions may violate the ADA even if an individual only had COVID-19 in the past ("record of" disability) or is mistakenly believed to have COVID-19 ("regarded as" having a disability).

COVID-19 as a Disability

Determining whether COVID-19 is a disability is determined on a case-by-case basis and always requires an individualized assessment.

- **Actual Disability:** COVID-19 is an actual disability if it substantially limits one or more major life activities.
- **Substantial Limitations:** Limitations from COVID-19 do not have to last any length of time or be long-term to be substantially limiting.
- **Major Life Activities:** Major life activities include major bodily functions, such as respiratory, lung or heart function, and most daily activities, such as walking or concentrating.

Understanding the Omicron Variant

A new variant of coronavirus is prompting renewed concern regarding the pandemic. The World Health Organization (WHO) named the new variant “Omicron.” Omicron is [labeled](#) a “variant of concern,” the agency’s serious category for tracking. Such a designation is reserved for dangerous variants that may be more transmissible or virulent or could decrease the effectiveness of vaccines or treatments.

This article features [Omicron information](#) from the Centers for Disease Control and Prevention (CDC).

The Emergence of Omicron

On Nov. 24, 2021, a new coronavirus variant was reported to the WHO. This new variant was first detected in Botswana and South Africa.

On Dec. 1, 2021, the first confirmed U.S. case of Omicron was identified. The CDC continues to collaborate with global public health and industry partners to learn about Omicron and monitor its course. At the time of publication, experts don’t yet know how easily it spreads, the severity of illness it causes, or how well available vaccines and medications work against it.

Despite the increased attention of Omicron, Delta remains the main variant circulating in the United States.

What Is Known About Omicron

The CDC shared the following information about the infection and spread of Omicron.

How easily does Omicron spread?

The Omicron variant likely will spread more easily than the original coronavirus strain, but how easily Omicron spreads compared to Delta remains unknown. The CDC expects that anyone with an Omicron infection can spread the virus to others, even if they are vaccinated or don’t have symptoms.

Will Omicron cause more severe illness?

More data is needed to know if Omicron infections, especially reinfections and breakthrough infections in fully vaccinated people, cause more severe illness or death than infection with other variants.

Will vaccines work against Omicron?

Current vaccines are expected to protect against severe illness, hospitalizations, and deaths due to infection with the Omicron variant. However, breakthrough infections in fully vaccinated people are likely to occur. With other variants, like Delta, vaccines have remained effective at preventing severe illness, hospitalizations, and death. The recent emergence of Omicron further emphasizes the

importance of COVID-19 vaccination and boosters.

Will treatments work against Omicron?

Scientists are working to determine how well existing treatments for COVID-19 work. Based on the changed genetic makeup of Omicron, some treatments are likely to remain effective while others may be less effective.

Tools to Fight Omicron

There are several tools available today in the United States to fight the Omicron variant. According to the CDC, the following tools can help reduce the spread of Omicron in our country:

- **Vaccines remain the best public health measure to protect people from COVID-19, slow transmission and reduce the likelihood of new variants emerging.** The CDC recommends everyone 5 years of age and older protect themselves from COVID-19 by getting fully vaccinated.
- **Masks offer protection against all variants of COVID-19.** Regardless of vaccination status, the CDC recommends wearing a mask in public indoor settings in areas of substantial or high community transmission.
- **Tests can tell you if you are currently infected with COVID-19.** Visit your [state](#), [tribal](#), local or [territorial](#) health department's website to look for the latest local information on testing.

While we learn more about the risk of Omicron, it's essential to use all tools available to [protect yourself and others](#).

Stay Tuned

CDC experts are working to gather data and virus samples that can be studied to answer important questions about the Omicron variant. Scientific experiments have already started, and the CDC will provide updates as soon as possible.

Source: CDC

IRS Announces 2022 Standard Mileage Rates

On Dec. 17, 2021, the IRS issued the 2022 optional standard mileage rates, which are used to calculate the deductible costs of operating an automobile for business, charitable, medical or moving purposes.

The 2022 standard mileage rates for the use of a car (also vans, pickups or panel trucks) will be:

- 58.5 cents per mile driven for business use, up 2.5 cents from the rate for 2021;
- 18 cents per mile driven for medical purposes or for moving purposes for qualified active-duty members of the Armed Forces, up two cents from the rate for 2021; and
- 14 cents per mile driven in service of charitable organizations. The rate is set by statute and remains unchanged from 2021.

Under the Tax Cuts and Jobs Act, taxpayers cannot claim a miscellaneous itemized deduction for unreimbursed employee travel expenses. Taxpayers also cannot claim a deduction for moving expenses, unless they are members of the Armed Forces on active duty moving under orders to a permanent change of station.

Taxpayers always have the option of calculating the actual costs of using their vehicle rather than using the standard mileage rates.

Taxpayers can use the standard mileage rate but must opt to use it in the first year the car is available for business use. Then, in later years, they can choose either the standard mileage rate or actual expenses. Leased vehicles must use the standard mileage rate method for the entire lease period (including renewals) if the standard mileage rate is chosen.

Federal: Extension of Form I-9 Flexibility Into 2022

The U.S. Immigration and Customs Enforcement (ICE) extended the Form I-9 compliance flexibility until April 30, 2022, due to necessary COVID-19 precautions. This extension continues to apply the guidance previously issued for employees hired on or after April 1, 2021, and who work exclusively in a remote setting due to COVID-19-related precautions. Those employees are temporarily exempt from the physical inspection requirements for the Employment Eligibility Verification Form (I-9) until they are working non-remotely on a regular, consistent, or predictable basis, or when the extension ends—whichever is earlier.

On March 20, 2020, the Department of Homeland Security announced its deferral of the physical presence requirements for the Form I-9 to protect employees and employers from COVID-19. However, this policy only applies to employers and workplaces that are operating remotely. If there are employees physically present at a work location, no exceptions are being implemented at this time for in-person verification of identity and employment eligibility documentation for the form.

Overwhelmed with recruiting efforts?	We provide recruiting services including the following:
<ul style="list-style-type: none">• Job ads and posting• Application review and filtering	<ul style="list-style-type: none">• Conducting first interviews• Checking references

State Compliance Update

Colorado Wage and Hour Updates: Compliance Reminder

Colorado has issued several new wage and hour rules effective January 1, 2022. While the rules are extensive, the issues discussed below are likely to be the most relevant. For additional details, please review the [COMPS Order #38](#).

Minimum Wage

The minimum wage in Colorado will increase to \$12.56 per hour. The minimum base wage for tipped employees will be \$9.54 per hour.

Agricultural Workers

Agricultural workers (except for “range workers”) will now be entitled to the state minimum wage.

Denver

The minimum wage in Denver will increase to \$15.87 per hour. The minimum base wage for tipped employees will be \$12.85 per hour.

Minimum Exempt Employee Wages

The minimum salary for exempt executive, administrative, professional, and computer employees will be \$865.38 per week (\$45,000 per year).

The minimum wage for an exempt computer employee who is paid on an hourly basis will be \$28.92 per hour.

Highly Compensated Employee Exemption

Colorado does not currently recognize the Highly Compensated Employee (HCE) exemption to minimum wage and overtime, which is available under federal law. Beginning January 1, employers in Colorado can use this exemption so long as the employee meets the HCE duties test, makes at least \$865.38 per week, and makes at least \$107,432 total per year. (Colorado law says the minimum yearly salary is \$101,250, but since the federal minimum is higher, it must be met.)

Use-It-Or-Lose-It Paid Time Off Policies

Colorado's requirements on vacation and PTO payout have been murky in recent years but have now been clarified. All earned paid time off that can be used at an employee's discretion is non-forfeitable. This means employers can't have a rule that employees will lose their vacation or PTO at the end of each year or forfeit it upon termination. Time off can be used "at an employee's discretion" when it doesn't require a precipitating event (like FMLA, state sick leave, or a specific holiday) to be used. If an employer offers a bank of paid leave that can be used for any purpose, no part of it can be forfeited.

Healthy Families and Workplaces Act (HFWA)

In 2022, Colorado's paid sick leave law will apply to employers of all sizes. (In 2021, regular paid sick leave only applied to employers with 16 or more employees but the public health emergency leave portion applied to all employers.) You can read an overview of the requirements of the law on the platform.

The state has recently answered several questions about determining an employee's regular rate of pay for the purpose of paying their sick time under the HFWA, namely:
Bonuses do not need to be included in the calculation
Employers must use a 30-day lookback to determine an employee's regular rate of pay (or their entire employment if less than 30 days)

The rate for employees with variable pay rates must be determined by adding all of their wages for the last 30 days, then dividing by the total number of hours worked.

Action Items

Display the updated [Colorado Paid Leave & Whistleblower Poster](#) where your employees can easily access it. If you have 15 or fewer employees, add a paid sick leave policy to your handbook. Note that you are not required to provide additional public health emergency leave (PHEL) hours for 2022, although employees are entitled to carry over their unused PHEL hours if they have any remaining.

Compliance Calendar

May

- 1/31 – Deadline to Distribute Forms 1095-B and 1095-C
- 1/31 – Form 940 Filing Deadline
- 1/31 – Form 941 Filing Deadline (fourth quarter)
- 1/31 – Forms W2 and 1099-MISC Distribution Deadline
- 1/31 – Forms W3 Filing Deadline

February

- 2/1 – Deadline for posting OSHA Form 300A
- 2/28 – Forms 1094-B, 1095-B, 1094-C, and 1095-C Filing Deadline (paper filers)

March

- 3/31 – Forms 1094-B, 1095-B, 1094-C, and 1095-C Filing Deadline (electronic filers)

Disclaimer:

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