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Compliance Connection

September 2021

Federal Compliance Update

Federal: Final Tip Rule

The U.S Department of Labor (DOL) [Tips CMP final rule](#) will be effective on November 23, 2021 and under it:

- The DOL can assess penalties—of up to \$1,100 per violation—against employers who take the tips their employees earned, regardless of whether it was repeated or willful; and
- The 2020 Tip final rule was clarified by explaining that although managers and supervisors are prohibited from receiving tips from mandatory tip pools, they can contribute to them for eligible employees.

Federal: OSHA Expands its Protections from Extreme Heat

On September 20, 2021, the federal Occupational Safety and Health Administration (OSHA) [announced](#) its new:

- Heat-related hazards [enforcement initiative](#).
- [National Emphasis Program](#) on heat hazard cases, which will target high-risk industries and focus agency resources and staff time on heat inspections. The 2022 National Emphasis Program will build on the existing Regional Emphasis Program for Heat Illnesses in OSHA's Region VI, which covers Arkansas, Louisiana, New Mexico, Oklahoma and Texas.
- Rulemaking process to develop a workplace heat standard in October 2021.
- [National Advisory Committee on Occupational Safety and Health](#) Heat Injury and Illness Prevention Work Group.

OSHA also recently implemented an intervention and enforcement initiative to prevent and protect workers from heat-related illnesses and deaths while they are working in hazardous hot environments that:

- Prioritizes heat-related interventions and inspections of work activities on days when the heat index exceeds 80 degrees Fahrenheit; and
- Applies to indoor and outdoor worksites in general industry, construction, agriculture, and maritime where potential heat-related hazards exist.

On days when a recognized heat temperature can result in increased risks of [heat-related illnesses](#), OSHA will increase its enforcement efforts. Employers are also encouraged to implement intervention methods on heat priority days proactively, including regularly taking breaks for water, rest, shade, training workers on how to identify common symptoms and what to do when a worker suspects a heat-related illness is occurring, and taking periodic measurements to determine workers' heat exposure.

OSHA has required its Area Directors across the nation to institute the following:

- Prioritize inspections of heat-related complaints, referrals, and employer-reported illnesses and initiate an onsite investigation where possible.
- Instruct compliance safety and health officers, during their travels to job sites, to conduct an intervention (providing the agency's heat poster/wallet card, discuss the importance of easy access to cool water, cooling areas, and acclimatization) or open an inspection when they observe employees performing strenuous work in hot conditions.

- Expand the scope of other inspections to address heat-related hazards where worksite conditions or other evidence indicates these hazards may be present.

President Biden also released a [statement](#) about mobilizing the administration to address extreme heat.

Federal: Long COVID as a Disability

On September 9, 2021, the EEOC announced that it recognizes that long COVID may be a disability under the Americans with Disabilities Act (ADA) and [Section 501](#) of the Rehabilitation Act in certain circumstances. The EEOC agreed with the analysis of “long COVID” by the Department of Health and Human Services (HHS) and Department of Justice (DOJ) in their [“Guidance on ‘Long COVID’ as a Disability Under the ADA, Section 504, and Section 1557.”](#) The EEOC will release technical assistance about COVID-19 and ADA “disability” in the employment context in the coming weeks. On August 2, 2021, the White House, HHS, Department of Education, and Department of Labor also hosted [“A Conversation about Long COVID,”](#) reviewing and providing support to the HHS and DOJ guidance.

Brief Summary of HHS and DOJ Guidance

According to the guidance, long COVID is a disability under the:

- [ADA](#) (Titles II and III at 42 U.S.C. §§ 12101-12103, and 12131-12189);
- [Section 504](#) of the Rehabilitation Act of 1973 (29 U.S.C. § 794); and
- [Section 1557](#) of the Patient Protection and Affordable Care Act (42 U.S.C. § 18116).

Note: Read more on the Office of Disability Employment Policy’s JAN website about [long COVID and the ADA](#).

PERSON WITH A DISABILITY

A **person with a disability** is someone:

- With a physical or mental impairment that substantially limits one or more of their major life activities;
- With a record of such an impairment; or
- Who is regarded as having such an impairment.

WHAT IS AN IMPAIRMENT

A person with long COVID has a disability if their condition or any of its symptoms is a physical or mental impairment that substantially limits one or more major life activities. A **physical impairment** includes any physiological disorder or condition affecting one or more body systems, including, among others, the neurological, respiratory, cardiovascular, and circulatory systems. A **mental impairment** includes any mental or psychological disorder, such as an emotional or mental illness. Long COVID is a physiological condition affecting one or more body systems. For example, some people with long COVID experience:

- Lung damage
- Heart damage, including inflammation of the heart muscle
- Kidney damage
- Neurological damage
- Damage to the circulatory system resulting in poor blood flow
- Lingering emotional illness and other mental health conditions

Accordingly, long COVID is a physical/mental impairment under the ADA, Section 504 and 1557.

WHAT IS A MAJOR LIFE ACTIVITY

Long COVID can substantially limit one or more **major life activities**, which include a wide range of activities, such as caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, writing, communicating, interacting with others, and working. It also includes the operation of a major bodily function, such as the functions of the immune system, cardiovascular system, neurological system, circulatory system, or the operation of an organ.

WHAT SUBSTANTIALLY LIMITS

To “substantially limit” is construed broadly under these laws and shouldn’t require extensive analysis. The impairment doesn’t

need to prevent or significantly restrict an individual from performing a major life activity, and the limitations don't need to be severe, permanent, or long-term. Whether an individual with long COVID is substantially limited in a major bodily function or other major life activity is determined without the benefit of any medication, treatment, or other measures used by the individual to lessen or compensate for symptoms. Even if the impairment comes and goes, it is considered a disability if it would substantially limit a major life activity when the impairment is active.

Long COVID can substantially limit a major life activity and when someone with long COVID might be substantially limited in a major life activity are varied, for instance:

- A person with long COVID who has lung damage that causes shortness of breath, fatigue, and related effects is substantially limited in respiratory function, among other major life activities.
- A person with long COVID who has symptoms of intestinal pain, vomiting, and nausea that have lingered for months is substantially limited in gastrointestinal function, among other major life activities.
- A person with long COVID who experiences memory lapses and "brain fog" is substantially limited in brain function, concentrating, and/or thinking.

However, long COVID isn't always a disability. It requires an individualized assessment to determine whether a person's long COVID condition or any of its symptoms substantially limits a major life activity.

PROTECTIONS

People whose long COVID qualifies as a disability are entitled to the same rights and protections from discrimination as any other person with a disability under the ADA, Section 504, and Section 1557 (full and equal opportunities to participate in and enjoy all aspects of civic and commercial life).

Vaccinations or Weekly Testing Required for All Employers with 100+ Employees, Paid Time Off, and More

On September 9, 2021, President Biden released his [COVID-19 Action Plan](#) requiring all employers with 100 or more employees to ensure their workers are vaccinated or tested weekly. According to the President, "The Department of Labor's Occupational Safety and Health Administration ([OSHA](#)) is developing a rule that will require all employers with 100 or more employees to ensure their workforce is fully vaccinated or require any workers who remain unvaccinated to produce a negative test result on at least a weekly basis before coming to work. OSHA will issue an Emergency Temporary Standard (ETS) to implement this requirement."

OSHA is also developing an additional ETS requiring employers with more than 100 employees to provide paid time off for workers to get vaccinated or recover from vaccination. The administration is preparing for boosters to start the week of September 20th, subject to authorization or approval by the FDA and a recommendation from the Advisory Committee on Immunization Practices.

The President's plan also calls on entertainment venues like sports arenas, large concert halls, and other venues where large groups of people gather to require that their patrons be vaccinated or show a negative test for entry.

We will provide more information about these new rules when they are released.

IRS Guidance on Reporting Qualified Sick and Family Leave Wages for 2021

On September 7, 2021, the Internal Revenue Service issued [Notice 2021-53](#) to help employers with their Form W-2 reporting and the amount of qualified sick and family leave wages paid to employees for the leave they took in 2021 under the Families First Coronavirus Response Act (FFCRA), as amended by the COVID-Related Tax Relief Act of 2020, and the American Rescue Plan Act of 2021. Employers must report these wage amounts to employees either on Form W-2, Box 14, or in a separate statement provided with the W-2.

The guidance also contains model language (starting on page 18) that employers can use—as part of the Instructions for Employee for the Form W-2 or on the separate statement provided with the W-2—to explain to employees that these qualified sick and family leave wages may limit the amount of qualified sick leave *equivalent* or qualified family leave *equivalent* credits they may be entitled to for any of their self-employment income. The wage amount required by the notice on the Form W-2 will give employees who are also self-employed the information they need to figure out the amount of any sick and family leave

equivalent credits they may claim in their self-employed capacities.

Of note, in July 2020, the IRS issued Notice 2020-54 with guidance about W-2 reporting of qualified sick leave and family leave under FFCRA for wages paid to employees for leave taken in 2020. The IRS has more tax relief information for employers affected by the COVID-19 pandemic on its [website](#).

President Biden to Mandate COVID-19 Vaccine for Federal Employees and Large Employers

On Thursday, Sept. 9, 2021, President Joe Biden signed executive orders requiring federal workers and contractors to get vaccinated against COVID-19. Biden also directed the Occupational Safety and Health Administration (OSHA) to draft a new emergency rule requiring all businesses with 100 or more employees to ensure all of their workers are either tested for COVID-19 once a week or fully vaccinated.

These new rules come shortly after the Pfizer-BioNTech coronavirus vaccine was fully approved for use by the Food and Drug Administration, enabling the White House to fight the pandemic more aggressively.

The federal employee mandate will apply to executive branch employees and members of the armed services, among others. Applicable federal employees will not be provided the option for weekly testing in lieu of vaccination.

The OSHA emergency rule—which is expected in the coming weeks—could affect as many as 80 million Americans. It will reportedly require large employers to provide their workers with paid time off to get vaccinated and recover from any vaccination-related side effects (e.g., chills). Companies that fail to comply may be subject to up to \$14,000 in fines per employee.

Additionally, COVID-19 vaccinations will be required for more than 17 million health care workers at hospitals and other facilities that receive Medicare or Medicaid reimbursement. This requirement covers a majority of health care workers throughout the country.

What's Next?

This hardline stance on vaccines is a stark contrast to the hands-off approach taken by most employers earlier in the year. However, as Delta continues to cause upticks in hospitalizations and deaths throughout the country, employers will need to ramp up efforts to protect their organizations.

Health experts and business leaders agree that vaccination is the most effective way to limit the spread of Delta and maintain uninterrupted operations. Employers should expect the Biden Administration to continue to take measures to increase vaccination rates.

Large employers affected by these new rules should begin preparing to comply. Employers with less than 100 employees that are interested in their own vaccine mandates should consult with legal counsel before moving forward.

Stay tuned as this is a rapidly developing situation. We will keep you updated on any new developments. Reach out to Lighthouse HR Support for more content on vaccines and the workplace.

Background Screening for California Records

California Supreme Court denied to review a court case (*All of Us or None v. Hamrick*) in which parties requested the upper Court to review the decision of the lower Court that prohibits clerks from searching for records that match a date of birth. Additionally, this same rule prohibits using driver's license numbers or social security numbers for matching. Under this new regulation, parties and attorneys alike must "redact where inclusion is necessary, the following identifiers from all pleadings and other papers filed in the court's public file, whether filed in paper or electronic form, unless otherwise provided by law or ordered by the court:

- Social security numbers. If an individual's social security number is required in a pleading or other paper filed in the public file, only the last four digits of that number may be used.
- Financial account numbers. If financial account numbers are required in a pleading or other paper filed in the public file, only the last four digits of these numbers may be used."

This denial means criminal record checks in the state of California will continue to become increasingly difficult and makes it nearly impossible to obtain necessary information to protect your assets.

Please review the entire [Regulation](#).

<p>Ever wonder if your HR processes meet the needs of your company?</p>	<p>HR Discovery Tools: Perform a GAP analysis based on 10 main categories</p>
<p>HR Assessment: Receive a detailed report of areas for improvement for your processes</p>	<p>Let's find out together!</p>

State Compliance Update

Healthcare Businesses - Stay On Alert!

On September 21, 2021, the Joint Budget Committee approved a plan put forth by the Polis-Primavera administration and the Department of Health Care Policy and Financing to increase wages for direct care workers that in community-based or in-home settings. The proposed increase raises the minimum wage for this group to \$15.00 per hour and is supported by state dollars. These groups include personal care workers, personal care providers (formerly known as homemakers), direct support professionals, and others.

In addition, the website states "The Medicaid rate increase needed to achieve this will be initially funded through federal American Rescue Plan Act funds dedicated to Home and Community-Based Services."

For more information, please see [Direct Care Workers](#).

Compliance Calendar

September

9/30 – VETS-4212 Filing Deadline (federal contractors)

October

10/14 – Medicare Part D Creditable Coverage Notice

10/25 - 2019/2020 EEO-1 Component 1 Data Collection Deadline

November

11/1 – Form 941 Filing Deadline (third quarter)

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