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Compliance Connection

July 2022

Federal Compliance Update

EEOC Updates COVID-19 Guidance to Require Justification for Testing

On July 12, 2022, the Equal Employment Opportunity Commission (EEOC) issued [updated guidance](#) on whether and when employers may test their employees for COVID-19. While the previous guidance generally allowed employers to require testing for all employees entering a workplace, the new guidance requires an individualized assessment of current circumstances.

Background

The Americans with Disabilities Act (ADA), which is enforced by the EEOC, prohibits employers from conducting medical examinations of employees unless they can show that an examination is “job-related” and “consistent with business necessity.” Early in the pandemic, the EEOC indicated that, for COVID-19 testing, these standards would virtually always be met for any employees entering a workplace with other people.

Updated Testing Guidance

In its updated guidance, the EEOC makes clear that, going forward, employers will need to assess whether current pandemic circumstances and individual workplace circumstances justify COVID-19 testing requirements.

Assessment Factors

Possible factors to consider in making the assessment include community transmission levels, types of contact between employees and others in the workplace, transmissibility rates of current COVID-19 variants, types of contact employees may have with others in the workplace, and the potential impact on operations if an employee enters the workplace with COVID-19.

In making these assessments, employers should check the latest [guidance from the Centers for Disease Control and Prevention](#) (and any other relevant sources) to determine whether testing is appropriate for their employees.

DHS Ends Temporary COVID-19 Policy for Form I-9 Expired Documents

On **May 1, 2022**, the U.S. Department of Homeland Security (DHS) ended the [COVID-19 Temporary Policy for List B Identity Documents](#). As a result, employers are no longer allowed to accept expired [List B](#) documents when individuals fill out their [Form I-9](#). In addition, if an employee presented an expired List B document between May 1, 2020, and April 30, 2022, employers are required to update their Form I-9 by **July 31, 2022**.

Temporary Policy

DHS issued the temporary policy in response to the challenges many individuals experienced with renewing List B documents during the COVID-19 pandemic.

Now that document-issuing agencies have reopened and provide alternatives to in-person renewals, the DHS has ended this flexibility. Employers will need to update Form I-9 for employees who used expired documents from List B.

Required Form I-9 Updates

Employers must use the “Additional Information” field in the form’s Section 2 to enter the title, issuing authority, number, and expiration date of the unexpired document. Employees may present a renewed List B document, a different List B document or a document from [List A](#). Employers must also initial and date these changes.

Employers should note that no action is required for individuals who used expired List B documents if:

- They are no longer employed; or
- The List B document was auto extended by the issuing authority (the document is considered unexpired when presented).

Federal: Court Finds EEOC Guidance Unenforceable in Certain States

On July 15, 2022, the U.S. District Court, Eastern District of Tennessee at Knoxville [held](#) that the Equal Employment Opportunity Commission (EEOC) [guidance](#) about sexual orientation and gender identity employment discrimination is unenforceable in certain states. However, it's still illegal for employers to discriminate based on sexual orientation and gender identity under Title VII of the Civil Rights Act of 1964.

Temporary and Limited Ruling

The court's ruling is temporary (at least for now) and only applies in the states that sued (Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, and West Virginia). The ruling also only controls the EEOC and doesn't prevent employees from suing for gender discrimination because of sexual orientation or gender identity.

Background

In 2020, the Supreme Court of the United States [held](#) in *Bostock v. Clayton County* that Title VII's prohibition on employment discrimination because of sex includes discrimination on the basis of sexual orientation and gender identity. In response, the EEOC issued guidance that elaborates on these employment protections, providing several scenarios that it considers violate Title VII. Several states sued the EEOC about its guidance, seeking for the guidance to be thrown out. A court has now put a hold on the EEOC enforcing its guidance while the lawsuit proceeds.

Proposed Rule Would Amend Section 1557 Sex Discrimination Regulations

On July 25, 2022, the Department of Health and Human Services (HHS) issued a [proposed rule](#) that would revise existing regulations for the Section 1557 nondiscrimination protections under the Affordable Care Act (ACA). The proposed rule is intended to solidify protections against discrimination based on sex, including sexual orientation and gender identity.

ACA Section 1557

Section 1557 prohibits discrimination based on sex in any health program or activity that receives federal funds or is administered by a federal agency. A 2016 HHS rule defined “sex” to include sex

stereotypes and gender identity, along with pregnancy termination and other pregnancy-related conditions.

In 2020, HHS issued new regulations that changed the 2016 definition of “sex” to allow for distinctions based on “the biological binary of male and female.” However, a federal court blocked HHS from enforcing the 2020 version of the rule. On May 10, 2021, HHS announced that it would now interpret and enforce the Section 1557 prohibition on discrimination based on sex to include discrimination based on **sexual orientation** and **gender identity**.

Proposed Rule

The proposed rule attempts to address gaps identified in prior regulations to advance protections under Section 1557. It would, among other things:

- Clarify the application of Section 1557 nondiscrimination rules to health insurance issuers that receive federal financial assistance;
- Codify nondiscrimination protections on the basis of sex as including discrimination based on sexual orientation and gender identity;
- Clarify that sex discrimination includes discrimination based on pregnancy or related conditions, including “pregnancy termination;” and
- Require covered entities to have Section 1557 policies and training.

Proposed Overtime Rule Expected in October 2022

In its recent spring regulatory agenda, the U.S. Department of Labor (DOL) announced its plans to issue a proposed overtime rule in October 2022. According to the agency’s regulatory agenda, this proposed rule is expected to address how to implement the exemption of executive, administrative and professional employees from the Fair Labor Standards Act’s (FLSA) minimum wage and overtime requirements.

The DOL provided a similar notice last fall but has yet to specify what changes it may be considering. In recent years, some experts note that the agency has contemplated modifying the duties test and salary thresholds for exempt employees.

What Will the Proposed Overtime Rule Address?

This proposed overtime rule could provide clarity for classifying exempt employees and increasing their salary levels under the FLSA. Some experts believe the DOL could even create automatic annual or periodic increases to exempt employees’ salary levels by linking them to the consumer price index, allowing exempt employees’ salary thresholds to adjust without formal rule-making. The current annual salary threshold for exempt employees is \$35,568.

The DOL has held several calls with industry stakeholders and recently conducted multiple regional listening sessions to gather information. Still, there’s no firm date for when the agency will release the proposed overtime rule. Changes to minimum wage and overtime requirements under the FLSA could impact compliance costs and litigation risks for employers.

What’s Next?

Regulatory agendas outline a federal agency’s goals for the upcoming months. Although these agendas aren’t set in stone, they give insight into the current administration’s priorities and activities.

Once the DOL publishes a proposed rule in the Federal Register, there will be time designated for the public comment. Subsequently, the agency will review comments and determine whether to move forward with a final rule.

Even after the DOL publishes the proposed overtime rule, it will likely be some time before this rule becomes final, if ever. Employers are not obligated to change how they classify or pay employees until the DOL's proposed rule becomes final. However, potentially impacted employers will want to follow the DOL's rule-making process closely.

We will keep you apprised of any notable updates.

State Compliance Update

Nothing to report this month.

Compliance Calendar

August

8/1 – Form 5500 Deadline (calendar year plans)

8/1 – Form 941 Filing Deadline (second quarter)

8/1 – PCORI Fee Deadline

8/1 – VETS-4212 Filing Open (federal contractors)

September

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

October

10/14 – Medicare Part D Creditable/Noncreditable Coverage Notice

10/30 – Form 941 Filing Deadline (third quarter)

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