From the HR Hotline

2022 Q1

Zywave's HR Consultants continue to provide expertise and serve as a valuable resource for navigating the pressing challenges facing employers today. This team — the HR Hotline — fields dozens of questions each day from employers seeking answers to their HR questions. In 2021, the ongoing threat of the COVID-19 pandemic continued to create challenges for workplaces; this trend is likely to continue in 2022.

In recent months, employers have navigated new rules and guidance from federal agencies. This fast-moving landscape has led employers to continue to seek out answers to COVID-19-related topics, among other HR and workplace challenges. Common questions have revolved around vaccine mandates, Affordable Care Act (ACA) reporting, midyear election changes, and COVID-19 and the Americans with Disabilities Act (ADA).

This article explores some questions and answers to common HR topics.

What is the current status of the Occupational Safety and Health Administration's (OSHA) COVID-19 vaccination and weekly testing emergency temporary standard (ETS)?

On Jan. 25, 2022, OSHA provided notice that it is withdrawing its COVID-19 vaccination and weekly testing ETS. The withdrawal is effective as of Jan. 26, 2022.

The ETS was adopted to protect unvaccinated employees working for employers with 100 or more employees from the risk of contracting COVID-19. This ETS required employers to adopt either a mandatory vaccination policy or a weekly testing and face-covering policy for all employees. When the ETS was published, OSHA also stated it was using the ETS as a proposed rule. OSHA is required by federal law to publish and accept public commentary on proposed rules before promulgating a new permanent occupational safety and health standard.

On Jan. 13, 2022, the Supreme Court of the United States (SCOTUS) stayed the vaccination and testing ETS. Because of this ruling, OSHA is withdrawing the ETS as an enforceable ETS. However, the agency is not withdrawing the ETS as a proposed permanent rule, and the standard rule-making process will continue.

States with OSHA-approved plans must implement and enforce workplace standards that are at least as effective as federal standards. However, since there are no new federal vaccination or testing requirements at this time, state plans are not required to take any action.

As of this writing, employers are not required to comply with OSHA's ETS at this time. However, employers are still expected to provide a safe and healthy workplace for their employees and follow other existing OSHA COVID-19 guidance. Employers should also monitor OSHA communications for information about the possible permanent standard.

When is ACA reporting due for Section 6055 and Section 6056?

ACA reporting under Section 6055 and Section 6056 for the 2021 calendar year is due in early 2022. Specifically, as of this writing, reporting entities must:

- Furnish statements to individuals by **March 2, 2022**; and
- File returns with the IRS by **Feb. 28, 2022** (or **March 31, 2022**, if filing electronically).

Penalties may apply for reporting entities that fail to file and furnish required returns and statements by the deadline.

A proposed rule issued on Nov. 22, 2021, extended the annual furnishing deadlines under Sections 6055 and 6056 for an additional 30 days. This rule is in proposed form and has not been finalized. However, reporting entities may rely on the proposed rule for 2021 reporting even before it is finalized. Reporting entities are generally encouraged to furnish statements to individuals as soon as they are able.

When are midyear election changes permissible under cafeteria plans?

Internal Revenue Code (Code) Section 125 cafeteria plans may recognize certain events as entitling a plan participant to change his or her elections (if the change is consistent with the event). Although a cafeteria plan may not be more generous than the IRS permits, it may choose to **limit to a greater extent** the election change events that it will recognize.

Only an employee of the employer sponsoring a cafeteria plan is allowed to make, revoke or change elections in the employer's cafeteria plan. The employee's spouse, dependent or any other individual other than the employee may not make, revoke or change elections under the plan.

Under the change in status events, for an employee to be eligible to change his or her cafeteria plan election during a plan year, the following general rules apply:

- The employee must experience a midyear election change event recognized by the IRS. The IRS considers the following events to be changes in status that may permit a midyear election change if the event affects eligibility for coverage under the underlying benefit or cafeteria plan:

- Change in the employee's legal marital status (marriage, death of spouse, divorce, legal separation and annulment)
- Change in number of dependents (birth, death, adoption and placement for adoption)
- Change in employment status of the employee, employee's spouse or employee's dependent (for example, a termination or commencement of employment, a strike or lockout, commencement of or return from an unpaid leave of absence, or a change in worksite)
- A dependent satisfies or ceases to satisfy dependent eligibility requirements (including attainment of age, student status or any similar circumstance)
- Change in place of residence of the employee, spouse or dependent
- Commencement or termination of adoption proceedings, for purposes of adoption assistance benefits

- The cafeteria plan must permit midyear election changes for that event.
- The employee's requested change must be consistent with the midyear election change event.

Also, employees' midyear election changes must be effective prospectively. The one exception to this rule is for retroactive election changes that are permissible under the HIPAA special enrollment event for birth, adoption or placement for adoption.

Some of the IRS' midyear election change events apply to all qualified benefits that can be offered under a cafeteria plan. However, other midyear election change events only apply to certain qualified benefits — for example, not all of the IRS' midyear election change events apply to elections for health flexible spending accounts (FSAs).

For more information, here are some resources from the IRS:

- IRS regulations on midyear election changes
- IRS Notice 2014-55, which expanded the midyear election change rules in response to the ACA
- IRS Notice 2004-50, which explains that the irrevocable election rules for cafeteria plans do not apply to HSAs
- IRS Notice 2021-15 and IRS Notice 2020-29, which temporarily expand the midyear election change rules due to COVID-19

How does the ADA define disability, and how does the definition apply to COVID-19?

On Dec. 14, 2021, the Equal Employment Opportunity Commission (EEOC) issued additional answers to frequently asked questions (FAQs) about how employers should comply with Title VII of the federal Civil Rights Act (Title VII), the ADA and other federal fair employment laws while also observing all applicable emergency workplace safety guidelines during the coronavirus pandemic.

According to the EEOC, the ADA's three-part definition of disability applies to COVID-19 in the same way it applies to any other medical condition. A person can be an individual with a "disability" for purposes of the ADA in one of three ways:

- "Actual" disability: The person has a physical or mental impairment that substantially limits a major life activity (such as walking, talking, seeing, hearing, or learning or operation of a major bodily function);

- "Record of" a disability: The person has a history or "record of" an actual disability (such as cancer that is in remission); or

- "Regarded as" an individual with a disability: The person is subject to adverse action because of an individual's impairment or an impairment the employer believes the individual has, whether or not the impairment limits or is perceived to limit a major life activity unless the impairment is objectively both transitory (lasting or expected to last six months or less) and minor.

The definition of disability is construed broadly in favor of expansive coverage to the maximum extent permitted by the law. Nonetheless, not every impairment will constitute a disability under the ADA. The ADA uses a case-by-case approach to determine if an applicant or employee meets any one of the three above definitions of "disability."

When is COVID-19 an actual disability under the ADA?

Applying the ADA rules stated in N.1. and depending on the specific facts involved in an individual employee's condition, a person with COVID-19 has an actual disability if the person's medical condition or any of its symptoms is a "physical or mental" impairment that "substantially limits one or more major life activities."

An individualized assessment is necessary to determine whether the effects of a person's COVID-19 substantially limit a major life activity. This will always be a case-by-case determination that applies existing legal standards to the facts of a particular individual's circumstances. A person who is infected with the virus causing COVID-19 and asymptomatic or a person whose COVID-19 results in mild symptoms similar to those of the common cold or flu that resolve in a matter of weeks with no other consequences does not have an actual disability within the meaning of the ADA. However, depending on the specific facts involved in a particular employee's medical condition, an individual with COVID-19 might have an actual disability. Determining whether a specific employee's COVID-19 is an actual disability always requires an individualized assessment, and such assessments cannot be made categorically.

For more information, employers can review the EEOC's FAQs.

Employers should note that compliance requirements vary by locality, and they should contact local legal counsel for legal advice. We'll continue to keep you apprised of noteworthy updates to these topics. For resources on any of these topics discussed, contact us today.