

It Benefits You Your Employee Benefits Newsletter

November 2020

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“VEGETABLES ARE A MUST ON A DIET. I SUGGEST CARROT CAKE, ZUCCHINI BREAD, AND PUMPKIN PIE.”

– JIM DAVIS

Thanksgiving is a time for feasting! At McGriff, we look forward to gathering at the table to enjoy turkey, gravy, dressing and of course, that extra serving of pumpkin pie. Although the holiday gathering may be a smaller affair this year, we hope your celebration is filled with an abundance of health and happiness. Thanksgiving is also time to give thanks. We'd like to take this opportunity to give thanks to YOU for putting your trust in us as your Benefits Consultants. We strive to continue to provide you with the best service from our outstanding Account Teams, National Specialty Practices, and preferred vendor relationships.



Upcoming Compliance Deadlines

January



Form W-2 Reporting of Employer-Sponsored Coverage

The ACA requires employers who issued 250 or more Forms W-2 in the preceding calendar year to disclose the aggregate cost of employer-sponsored coverage provided to employees on the Forms W-2.

March



Sections 6055 and 6056 IRS Filing Deadline

An ALE must file Form 1094-C, as well as the 1095-C forms sent to all full-time employees, with the IRS by March 1, 2021 (since February 28 is a Sunday). A self-funded employer with under 50 full-time employees will file Form 1094-B, as well as the 1095-B forms sent to employees covered under the self-funded plan. (March 31, 2021 is the electronic filing deadline for employers filing 250 or more forms.)

March



Sections 6055 and 6056 Individual Statements Extended Deadline

Pursuant to I.R.C. Section 6055, a self-funded employer (including level-funded) with less than 50 full-time employees must provide 1095-B individual statements to full-time employees covered under their group health plan. Pursuant to I.R.C. Section 6056, an ALE must provide 1095-C individual statements to full-time employees with specific information relating to each employee's offer of coverage for every month during the 2020 year. **The IRS issued Notice 2020-76 automatically extending the January 31 deadline to provide 1095-C forms to individuals. In addition, a small self-funded ALE does not need to automatically furnish 1095-B statements to covered individuals, but must provide upon request.*

Key Definitions to Help You Understand the ADA



If you hadn't engaged with the Americans with Disabilities Act (ADA) before the pandemic, you probably have by now. The ADA comes up a lot these days, both with respect to the confidentiality of medical information (like employee temperatures) as well as with reasonable accommodation for those who are, in general, at higher risk for a more serious case of COVID-19. In this article, we'll tackle some of the key terms in the ADA that every employer should be comfortable with.

First, though, let's cover the basics. The ADA is a federal law that prohibits discrimination against applicants and employees with disabilities and requires that employers provide them with reasonable accommodations under certain circumstances. The law applies to all private employers with 15 or more employees, but many states have similar disability laws that take effect at lower employee counts. Most state disability discrimination laws are similar to the ADA, so even if you're a very small employer, this article may include useful information.

The original language of the law has been around for roughly three decades. Nevertheless, there's a lot of confusion about what the law requires and what its terms entail. A big reason for this confusion is the language of the law itself; the ADA has nebulous concepts, such as undue hardship and reasonable accommodation. Words like undue and reasonable are by their nature open to some interpretation, which is not exactly a comfort to employers.

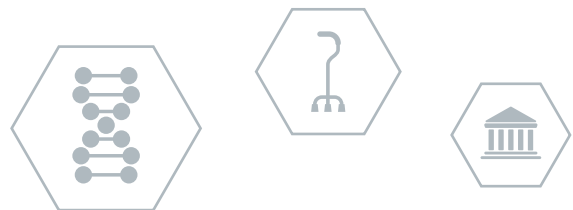
Fortunately, while there's no getting completely around the inherent ambiguity of the ADA, employers can feel more confident in their application of the law by reviewing and understanding its most important concepts, so below we'll look at four key terms worth knowing.

DISABILITY

Let's start with the term disability. According to the ADA, a person with a disability is someone who has a physical or mental impairment that substantially limits one or more major life activities, someone who has a history or record of such an impairment, or someone who is regarded as having such an impairment.

While the law does not have a list of impairments that are covered, it does identify some major life activities that could be limited by a disability. These include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. Major life activities also include major bodily functions (e.g., the immune system, digestive functions). In short, the definition of disability under the ADA is broad.

The most often misunderstood part of this definition is the phrase "regarded as disabled." This phrase becomes important if the employer takes any adverse action because they believe a disability may exist. For example, if a hiring manager removes a candidate from consideration (adverse action) because the manager believed, rightly or wrongly, that the candidate has social anxiety, then the manager has illegally discriminated against the candidate because they regarded the candidate as disabled. In this situation, the candidate – even if they did not have social anxiety – would have a claim under the ADA.



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REASONABLE ACCOMMODATION

Employers also encounter the ADA when an applicant or employee asks for a reasonable accommodation. According to the Equal Employment Opportunity Commission (EEOC), a reasonable accommodation is "any change in the workplace or the way things are customarily done that provides an equal employment opportunity to an individual with a disability." Reasonable accommodations "can cover most things that enable an individual to apply for a job, perform a job, or have equal access to the workplace and employee benefits such as kitchens, parking lots, and office events."

Common types of accommodations include modifying work schedules, altering the way job duties are done, eliminating a non-essential job duty (like asking the receptionist to stack the monthly 100 lb paper delivery in the storage room), granting additional breaks, providing accessible parking, and providing materials in alternative formats (e.g., Braille, large print). During the pandemic, working from home is an oft-requested accommodation that will almost always be reasonable for employees who do most of their work at a computer.

Not every requested accommodation will be reasonable, however. For one, employers are not required to remove an essential job function (the receptionist can still be expected to answer the phone). Employers also aren't required to provide items for personal use, like wheelchairs or hearing aids.

If accommodation is made, it's important to evaluate its effectiveness. An accommodation set up today might not work well for the employee or the company two years from now. It's okay to reassess later whether an accommodation remains reasonable given changed circumstances.

UNDUE HARDSHIP

Under the ADA, an employer is required to provide reasonable accommodations as long as doing so does not create an undue hardship on the organization. According to the EEOC, an undue hardship is a significant difficulty or expense. The cost of accommodation could be an undue burden on the employer, but so could an accommodation's duration, expansiveness, or disruption.

An accommodation that would fundamentally alter the nature or operation of the business would be an undue hardship, even if the cost was negligible. But if cost alone is the basis for claiming that an accommodation is unreasonable, employers should remember that the standard is "significant expense." The federal regulations instruct employers to consider the size of the organization and affected facility, their overall financial resources, and any tax credits, deductions, or outside funding available. Whether an accommodation would cause an undue hardship is something employers must assess on a case-by-case basis.

INTERACTIVE PROCESS

If an employee requests an accommodation, such as working from home during the pandemic or taking unpaid leave if their job doesn't lend itself to telework, the employer should engage in an interactive process to determine if that request is reasonable. The EEOC describes the interactive process this way: the employee and the employer "communicate with each other about the request, the precise nature of the problem that is generating the request, how a disability is prompting a need for an accommodation, and alternative accommodations that may be effective in meeting an individual's needs."

Basically, the interactive process is an ongoing conversation with an employee who has indicated that they need an adjustment or change at work related to a physical or mental issue. They may specifically request a reasonable accommodation under the ADA, but expressing their needs in "plain English" is acceptable as well. Then, together, the employer and the employee determine what can be done to accommodate the employee so that the essential functions of the job get done and the employee is able to enjoy the equal benefits and privileges of employment.

Keeping these core concepts in mind can make accommodation requests easier and smoother.

This article was published on October 13, 2020 by our strategic partners at ThinkHR (authored by Kara Govro) and reprinted with permission.





WATCH OUT FOR IRS NOTICES 972CG!

The IRS has recently issued a large batch of IRS Notices 972CG. These notices are different from the IRS Letters 226J that many of us may recognize. The Letters 226J assesses penalties against Applicable Large Employers (ALEs) for failing to offer coverage as required by the Affordable Care Act's (ACA) Pay or Play rules. **The IRS Notices 972CG assess penalties for late filing of the 2018 1094/1095 forms as required under I.R.C. Sections 6055 and 6056. Employers might also receive this penalty notice for unresolved TIN validation errors and/or not filing the ACA returns electronically when required.** The notices assess penalties based on the number of late forms and the length of time the forms were filed beyond the deadline.

Employers have 45 calendar days from the notice date to respond to the Notice 972CG (an extension is available but must be requested prior to the due date). If the employer agrees with the proposed penalty, it should follow the notice's instructions, checking the box (a) on the response page attached to the notice, and sending in payment with its response. If the employer disagrees in part or in full, the employer should check box (b) or (c), and can provide a signed statement explaining why they disagree with supporting documents that show "reasonable cause" why the penalty should be reduced or dismissed altogether ([see Internal Revenue Code \(IRC\) Section 6724](#)). The "reasonable cause" standard requires that an employer establish "significant mitigating factors" or that "failure was the result of circumstances beyond the filer's control"; further, the employer will have to show that it "acted in a responsible manner both before and after the failure occurred" (see [Section 20.1.7.12.1](#) of the Internal Revenue Manual).

In the signed statement, employers should thoroughly explain why the filing was late/incomplete, summarizing:

- What happened and when did it happen?
- What facts and circumstances prevented the employer from filing the return timely (between the due date and the date the returns were actually filed)?
- How did the facts and circumstances affect the employer's ability to file or perform other day-to-day responsibilities?

Based on the IRS internal manual, when reviewing a defense of reasonable cause and request for an abatement/waiver of the penalty, the IRS may consider questions/issues such as the following (for a full list, see [Section 20.1.7.12.1](#) of the Internal Revenue Manual):

- Do the reasons address the penalty that was assessed?
- Should the event that caused the noncompliance have reasonably been anticipated?
- Was the penalty the result of carelessness or did the filer appear to have made an honest mistake? Per the IRS, carelessness and forgetfulness are not examples of ordinary business care and prudence.
- Has sufficient detail (e.g., dates, relationships) been provided to determine whether the filer exercised ordinary business care and prudence?
- Has the filer documented all pertinent facts (e.g., death certificate, doctor's statement, insurance statement for proof of fire, etc.)?
- Could the filer have requested an extension or filed an amended return?

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- A waiver should not be automatically granted if the filer claims ignorance of the filing requirements; however, ignorance of the law may be considered as one factor which may indicate that the filer acted in a responsible manner if all the other facts support this contention.
- For a filer to establish reasonable cause under the category of "significant mitigating factors," they must show they acted in a responsible manner as well as the existence of a significant mitigating factor, which may include, for example:
 - First-time filer;
 - The filer has a history of complying with the information return reporting requirements.
- For a filer to establish that the untimely filing was due to "events beyond the filer's control," the filer must show they acted in a responsible manner as well as the specific event being beyond the filer's control, including but not limited to:
 - Actions of an Agent (i.e., vendor engaged to file returns on employer's behalf)
 - Unavailability of business records.



Any employer who receives a Notice 972CG will want to work with their tax/legal counsel to prepare any statement challenging this proposed penalty. With these letters, any defense boils down to an analysis of whether there was reasonable cause for the late filing or whether it was due to willful neglect. These are very technical and legal terms that require an application of

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specific facts and circumstances. Therefore, the McGriff Employee Benefits Compliance Team is unable to create a template or draft response for our clients.

Pandemic Fatigue: What It Is and How to Cope

"If you're going through hell, keep going." – Sir Winston Churchill

Remember in March of 2020, when we were first hit with COVID-19 restrictions? We heard "two weeks" to flatten the curve, and the mention of restrictions staying in place until July seemed beyond comprehension. We set up online meetings, baked cookies, and committed ourselves to follow the guidelines with the promise that this would be over soon and we were all in this together.

Ah, those were the days.

Now over six months later, we are battle-fatigued. The montage has played, and instead of the triumphant ending we hoped, we are in for many sequels, full of uncertainty and compounding problems and fears.

Short periods of stress can lead to bursts of adrenaline, which can cause people to feel energized and eager. However, as that short-term stress leads to long-term stress, we are more prone to burning out, and experiencing emotional, mental, and physical fatigue. Normal life can be stressful as is, but placed under the backdrop of a pandemic, our coping mechanisms become overly taxed. Our bandwidth is spent, and we may feel we have nothing left to give.



There are pragmatic concerns from financial strain, job losses, changes in routines, and juggling of responsibilities, along with the on going mental and emotional stress from fear, anxiety, and loneliness. The combination of having distance from people socially while also no longer having any space from people at home can create relationship stress. We may find ourselves growing tired of restrictions and taking fewer precautions. We feel starved for connection and binge on things that feel normal, only to later feel guilt and fear that we might have increased our risk.

Even if some people have not experienced many changes in their daily life, there is a sense of ambient stress surrounding everyone and everything. It can be difficult to escape reminders of the situation that we are facing and the fear of the unknown. Grief is also a common feeling, not just for the loss of life, but also for the feeling of loss from a job, our favorite places, and activities, events, and other major life milestones that have been sidelined.

While there are no easy solutions and there likely will not be a quick return to feeling normal, here are some ways to help you and your employees cope with the sense of "Pandemic Fatigue."

- **Recognize that you aren't alone:** People are likely hitting their breaking points at different times and in different ways. No matter how people's situations may vary, most everyone is experiencing some degree of mental strain. By acknowledging that you may not be feeling or acting your best, you can also acknowledge that others are feeling the same, and we can lend ourselves and others compassion to have some bad days.
- **Focus on putting one foot ahead of the other:** It can be difficult to watch long-term plans begin to look uncertain or try to plan for the future. By focusing on what you need to do at the moment, and finding good moments every day, you can promote being mindful.
- **Keep some space (socially and otherwise):** Even though we are tired of it, it is important to continue to follow guidelines as they adapt and change, and not lose our commitment. It is also OK to need some space and give others some space if experiencing feelings of crankiness and exhaustion.
- **Don't lose hope:** While it seems like this will never end, in the grand scheme of life, this is a snapshot. Testing, treatments, and adjustments continue to evolve and improve, which will likely mean a slow return to safety vs. a quick return to "normal."
- **Keep your health and well-being in mind:** With the disruption in our normal routines, combined with stress, and isolation, it can be easy to fall into bad habits, such as binging on food, alcohol, television, and social media. Try to find new ways to stay active, and tend to your physical, mental, and emotional health to encourage resiliency.
- **Resource reminders:** Keep employees aware of wellness programs and Employee Assistance Programs to help them stay healthy and navigate the complex emotions associated with the pandemic.

Most importantly, don't forget to take the time to "forget." While it is important to stay informed, it can also be beneficial to take a break from the news and reminders of the pandemic. Spending some time in nature, reading a book, or focusing on a new project can help provide a-welcomed mental break and sense of purpose.



Recorded webinar:

Click [HERE](#) to hear more about pandemic fatigue and ways that employers can help employees get through this difficult time. Presented by Katie O'Neill, McGriff Director of Clinical Wellness, and Janie Warner, McGriff HR Advisory Practice Leader.

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This article originally appeared in HR Professionals Magazine in October 2020. For your free digital subscription, visit www.hrprofessionalsmagazine.com.



Employee Wellness and Safety: A Merging Partnership

Many companies often view employee benefits and workers' compensation as two very different insurance challenges. However, companies can positively impact their bottom line with an employee-centric strategy around health. Join the McGriff Risk Solutions Group as we outline ways companies can align employee wellness and safety initiatives as well as mitigate claim costs.

Join us on November 19, 2020 at 2:00pm EST - Click [HERE](#) to register!



THE CATCH-UP PAYMENT PROVISION FOR OVERTIME EXEMPT EMPLOYEES

The U.S. Department of Labor's (DOL) final rule on defining and delimiting the exemptions for executive, administrative, professional, outside sales and computer employees (EAP employees) became effective January 1, 2020. Among other things, the final rule updated the standard salary level employees must satisfy to qualify for an overtime exemption. The final rule increases the standard salary level for the EAP exemptions to \$684 per week (\$35,568 per year) and the salary level for highly compensated employees to \$107,432 per year.

The final rule also allows employers to use non-discretionary bonuses and incentive payments (including commissions) to satisfy up to 10% of the standard salary level if these payments are made at least on an annual basis. To enable compliance with the nondiscretionary bonus option, the final rule allows employers to make a "catch-up" payment at the end of each 52-week period.

Catch-up Payment Provision

Employers should review their EAP exempt employee's compensation annually (every 52 weeks) to make sure all requirements for the exemption have been met. If at the end of the 52-week period the sum of the salary paid plus the nondiscretionary bonuses and incentive payments (including commissions) paid is less than the required salary level, the employer has one pay period to make up the shortfall for the 52-week period.

If the catch-up payment is not made within the pay period immediately following the 52-week period, the EAP overtime exemption does not apply and the employer will need to determine whether there are any overtime payments owed during the entire previous 52-week period.

Discretionary Versus Nondiscretionary Bonuses

As noted above, the final rule allows employers to use nondiscretionary bonuses to satisfy up to 10% of the standard salary level.

A bonus is discretionary when the employer retains the freedom to decide what should be done with it. Freedom to decide may include the timing and amount of the bonus. Similarly, the bonus may be paid for any specific reason or for no reason at all. A discretionary bonus should not create an expectation of payment from the employee and it should be seen as arbitrary and almost whimsical. This means that the bonus cannot be due or tied to any prior promise, contract or agreement, or with employee performance (meeting specified goals or standards). To maintain bonuses as discretionary, employers should be careful and avoid any form of advance notice or other cautions that may, in any way, raise the expectation of payment.

Promised bonuses such as those announced to employees to induce them to work more efficiently or to remain with the firm are considered nondiscretionary. Examples include bonuses based on a predetermined formula (for example individual or group production bonuses), bonuses for quality and accuracy of work, retention bonuses, and commission payments based on a fixed formula.

If the employer does not make the catch-up payment, the employee is entitled to overtime pay for any overtime hours worked during the previous 52-week time period.

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Impact of COVID-19 on Cost and Utilization of Employer-Sponsored Health Plans

Last month, McGriff's Actuaries and Clinical team shared our findings on the impact from the coronavirus pandemic on the cost and utilization of medical services for a significant cohort of McGriff's large self-funded clients. In this recorded webinar, we take a look at the impacts we are seeing related to medical spending and utilization patterns in the first half of 2020 vs prior years, as well as what we may expect as a result of these shifts for the rest of 2020 and into early 2021. Click [HERE](#) to watch. [Password - McGriff 2020!]



Join Us for a McGriff Sponsored ThinkHR Demo!



We are excited to bring you ThinkHR – a robust web-based resource with live advisors, reliable content and interactive technology solutions that provides an end-to-end People Risk Management solution! If you are involved with HR compliance or employee issues at any level, this will be another valuable benefit from your trusted McGriff team that can save you time and money.

Join us on **November 17, 2020 at 2:00 pm EST** for a brief overview of ThinkHR and its benefits available to you as a client of McGriff. Click [HERE](#) to register!

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