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## Compliance Connection

### April 2022 – Part II

#### Federal Compliance Update

#### **Federal Form I-9 Rule Flexibilities Ending Soon: Compliance Reminder**

##### **DHS Ending Temporary Policy for Form I-9 Identity Documents**

Beginning May 1, 2022, the Department of Homeland Security (DHS) is ending its temporary Form I-9 policy that allows employers to accept List B documents that expired on or after March 1, 2020.

DHS adopted the temporary policy in response to the difficulty of renewing documents during COVID. Since then, document-issuing authorities have reopened or provided alternatives to in-person renewals. Starting May 1, 2022, employers must return to only accepting unexpired List B documents.

##### **Action Item**

If an employee presented an expired List B document between May 1, 2020, and April 30, 2022, you need to update their Form I-9 by July 31, 2022, as follows:

- If the employee is still employed, they must present an unexpired document from either List A or List B. If presenting a List B document, it could be a renewed version of the document previously provided, or a different List B document. You should enter the document title, issuing authority, document number, and expiration date in the “Additional Information” field of Section 2, and initial and date the change. USCIS provides an example of how to do this [here](#).
- If the employee is no longer employed, no action is needed.
- If the List B document was auto extended by the *issuing authority* so that it was technically unexpired when it was presented, no action is needed.

##### **Remote Form I-9 Document Inspection Flexibility Scheduled to End April 30**

In March 2020, DHS began providing flexibility to certain employers who were hiring fully remote workers due to COVID by suspending the in-person Form I-9 document inspection requirement.

This flexibility has been extended several times, most recently through April 30, 2022. While DHS could still announce another extension, given the end of the expired document flexibility described above, we anticipate that this in-person inspection flexibility may also come to an official end.

##### **Action Item**

Prepare to resume in-person Form I-9 document examination. You can keep an eye on [this page](#) for additional Form I-9 news and can revisit Form I-9 Instructions [here](#).

## Federal EEO-1 Reporting Is Now Open

The Equal Employment Opportunity Commission (EEOC) has announced that the 2021 EEO-1 Component 1 data collection is now open. The deadline to file the report is May 17, 2022.

Employers should visit the [EEO-1 Component 1](#) website for the latest filing updates and additional information. Employers can also visit the [Filer Support Center](#) to request assistance and find helpful resources, including fact sheets and FAQs.

### Who Must File

An employer must file an EEO-1 report if they answer YES to *one or more* of these questions:

1. Does the entire company (at all locations combined) have at least 100 employees?
2. Is the company affiliated through common ownership or centralized management with other entities in an enterprise with a total employee count of 100 or more?
3. Does the company or any of its establishments have a contract with the federal government worth \$50,000 or more and have 50 or more employees?
4. Is the company or any of its establishments a federal government contractor that serves as a depository of government funds in any amount or a financial institution that is an issuing and paying agent for U.S. Savings Bonds and Savings Notes in any amount?

If you answered NO to all of the questions above, you do *not* need to file an EEO-1 report.

## Federal: National Program to Protect Workers from Heat Hazards

On April 8, 2022, and effective for three years unless canceled or extended, the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) launched an inaugural, federal [National Emphasis Program](#) (NEP) to protect workers from heat illness and injuries. As part of the program, OSHA will perform inspections in over 70 high-risk industries in indoor and outdoor work settings when the National Weather Service has issued a heat warning or advisory for a local area. The NEP also establishes heat priority days—days when the heat index is expected to be 80°F or higher—and on these days OSHA will:

- Initiate compliance assistance in the targeted high-risk industries; and
- Inspect any alleged heat-related fatality/catastrophe, complaint, or referral regardless of whether the worksite falls within a targeted industry of the NEP.

OSHA also provides a NEP [fact sheet](#) and [website](#).

## Federal Department of Labor's Independent Contractor Test Revised

On March 14, 2022, a federal court reinstated a Trump-era Department of Labor (DOL) rule that changes the test for when a worker can be classified as an independent contractor (IC) rather than an employee.

The revised test makes it easier for employers to classify gig workers as independent contractors because it removes the focus on whether the service being provided by the worker is an integral part of the employer's business.

However—and this is a big however—the IRS has not changed its test for IC classification. The IRS test is very similar to the DOL's previous test. So, while an employer may find they have more leeway with the DOL if someone classified as an Independent Contractor submits a claim that they should have been an employee, the employer doesn't have any new leeway with the IRS. Should an investigation or audit reveal that a worker should have been classified as an employee under the IRS test, the DOL test result will not shield an employer from IRS penalties.

Additionally, several states apply their own tests for IC classification (such as California with the ABC test) that make it more difficult to classify a worker as an IC. Employers in those states will be held to the state standard.

It's expected that the DOL will appeal the judge's decision, take swift action to implement a new test, or both. In the meantime, employers who wish to use the revised DOL test can do so, but they should understand that if a worker doesn't also qualify as an IC under the IRS test and applicable state law, there will be significant potential for liability.

The revised test indicates that employers should focus on the following factors:

#### **Primary Factors**

- The nature and degree of control over the work
- The individual's opportunity for profit or loss

#### **Secondary Factors (only to be used if the primary factors are not conclusive)**

- The amount of skill required for the work
- The degree of permanence of the working relationship between the individual and the potential employer
- Whether the work is part of an integrated unit of production
- Additional factors that indicate an individual is in business for themselves

The entire revised test and commentary can be found [here](#).

## **State Compliance Update**

### **Utah Adds to Existing Vaccine Exemptions: Compliance Reminder**

Effective May 3, 2022, Utah has made several changes to its law limiting COVID vaccine mandates. Here are the highlights:

- Employers must allow employees and applicants to opt out of a workplace vaccine mandate if they provide a note from their primary care provider that they previously had COVID (in addition to the existing reasons employees can opt out of a vaccine mandate).
- Employers can deny a vaccine exemption request if they can show that their vaccine mandate is connected to the employee's job duties and responsibilities and reassigning the employee isn't practical.
- Employers can deny a vaccine exemption request if the vaccine mandate comes from someone else (other than the employer) and reassigning the employee isn't practical.
- Employers are prohibited from keeping records of employees' COVID test results, unless otherwise required by law.
- Employers don't have to comply with any of these requirements to the extent that doing so would "substantially impair" compliance with a contract they entered before May 4, 2022.
- Employers still must pay for all COVID workplace testing.
- Federal contractors are now covered by the law (with some health care related exceptions).

These requirements apply to employers of all sizes, with several exceptions. For more information, see the [COVID-19 State Vaccine Mandate Limitations laws page](#) on the platform.

#### **Action Item**

If you require employees to get vaccinated against COVID, update your policy and practices to ensure compliance with the changes outlined above.

# Compliance Calendar

## April

4/12 – 2021 EEO-1 Component 1 Data Collection Opening

4/30 – Remove your OSHA Form 300A

## May

5/2 – Form 941 Filing Deadline (1<sup>st</sup> Quarter)

5/17 – 2021 EEO-1 Component 1 Data Collection Deadline

## June

No reporting to discuss for June

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