Employee Benefits Report

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Employee Benefits, Investments & Insurance

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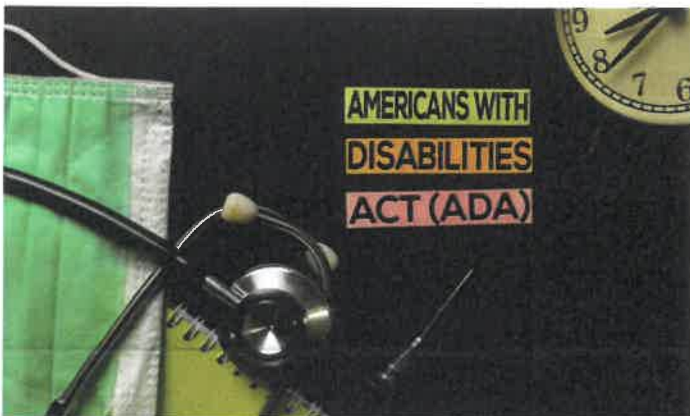
How to Determine When Protections Apply to ADA and COVID "Long Haulers"

COVID-19 survivors who suffer long-term health challenges might qualify for protections under the Americans with Disabilities Act (ADA).



The emphasis is on "might" since the ADA does not provide a checklist of covered conditions. Employees' cases must be reviewed on an individual basis to determine whether they have physical or mental impairments that substantially limit a major life activity such as breathing, thinking, sleeping or working.

The ADA, implemented in 1990, ensures that people with disabilities have the same rights and opportunities as everyone else. It also guarantees equal opportunity for individuals with disabilities in public accommodations, employment, transportation, state and local government services and telecommunications.

This year the Department of Justice (DOJ) and Health and Human Services (HHS) jointly issued guidance on COVID-19 disabilities. While some people who have mild or moderate COVID-19 can have symptoms that last about two weeks, others — referred to as long haulers — can be left with debilitating side effects.

Examples of situations where a COVID-19 long-hauler might be substantially limited in a major life activity would include, according to the DOJ and HHS:

- Lung damage that causes shortness of breath, fatigue and related effects
- Intestinal pain, vomiting and nausea that have lingered for months
- Memory lapses and brain fog.

Employees with these symptoms do not automatically qualify for assistance under the ADA. An individualized assessment is necessary. Assessments must be based on reliable medical or other objective evidence rather than on generalizations, subjective impressions, fear, patronizing attitudes or stereotypes.

In addition, employees who recover quickly from the disease and are not covered by the ADA may be covered by the Family and Medical Leave Act (FMLA). The FMLA provides certain employ

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The Cost of Poor Mental Health in the Workplace

While not uncommon before the COVID-19 pandemic, mental health issues have increased due to isolation, economic issues and social upheaval, according to organizations like the National Institute of Mental Health

This is bad news for employers. When employees bring these problems to the workplace, lost workdays can mean lost productivity. The National Safety Council's cost calculator estimates that a manufacturing company in New Jersey with 250 employees could lose $284,504 annually because of missed workdays due to mental distress and illness.

Employers have options. For every $1 invested in the treatment and support of mental health disorders, an employer can see a return of $4 in improved health and productivity, according to estimates by The World Health Organization.

To promote employee mental health, employers can:

- **Educate employees on the value of good mental health**
- **Offer employees telehealth access to providers through a laptop or cell phone.**
- **Train managers to support employees in understanding mental well-being**
- **Provide access to an employee assistance program (EAP) for referrals to mental health professionals.**

To calculate what the costs of lost productivity to your workplace from mental health issues might be, visit www.nsc.org/mentalhealthatwork#/.

Make Sure Voluntary Insurance Plans Are Really Voluntary

A voluntary plan that turns out not to be voluntary can also be a complicated maze of paperwork for an employer

Voluntary plans provide benefits exclusively funded by employee premiums with limited employer involvement. The plans are popular because they allow employees to choose benefits that best fit their needs. Voluntary plans range from dental to life insurance and from financial counseling to pet insurance.

Employers like voluntary plans because they can attract and help keep employees who appreciate the opportunity to personalize their coverage. Plus, if the plans meet federal guidelines for a voluntary plan, the plans will be exempt from ERISA (Employee Retirement Income Security Act of 1974) regulations, which sets the minimum standards for voluntarily established retirement and health plans in private industry.

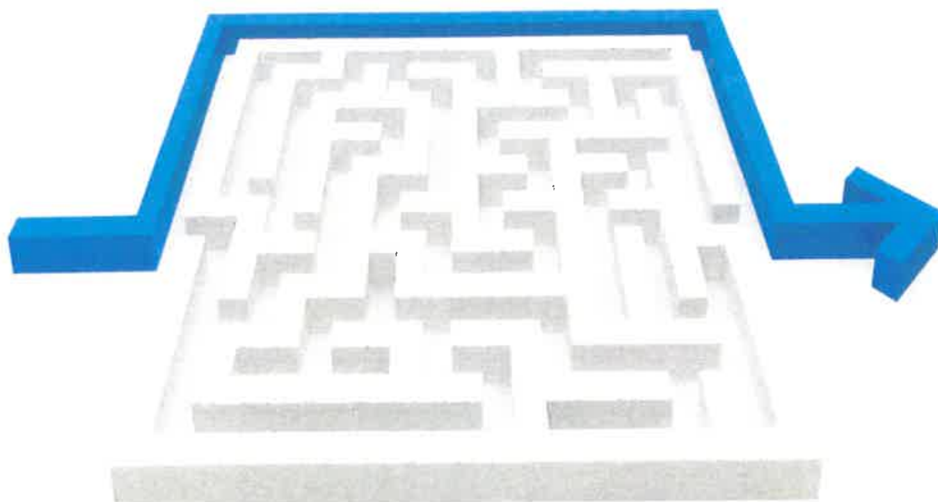
Although most employee benefit plans offered through an employer are subject to ERISA, the regulations have a safe harbor exemption that allows employers to offer certain types of insurance programs without having to follow extensive reporting, disclosure, and fiduciary requirements. These compliance obligations can include:

- Preparing and operating the plan according to a written plan document
- Providing employees with a summary plan description and summary of material modifications when there are substantial changes made to the plan
- Annual reporting requirements and other obligations under COBRA, HIPAA, and other laws and regulations governing employee benefit plans.

Exempt plans usually fall within the following categories: medical, surgical, hospital, vacation and prepaid legal services.

However, if the employer fails to meet the stringent requirements of the voluntary plan safe harbor, a medical plan, such as a vision or dental, can be subject to ERISA.

There are four requirements a plan must meet to qualify for safe harbor:



- **Voluntary participation:** The benefit plan must be completely voluntary. If the employee automatically receives the coverage and it's paid for by the employer, then it is not voluntary. Plus, employers cannot require employees to attend meetings about voluntary benefits.
- **No employer contributions:** Employers cannot contribute to the costs. Nor can they allow salary contributions to be made on a pre-tax basis through a Cafeteria/Section 125 plan since these are considered employer contributions. Therefore, all employee contributions must be after-tax. Safe harbor rules also do not allow employers to reimburse employee premium expenses, which includes payments under tax-advantaged reimbursement arrangements like health reimbursement accounts (HRAs).
- **No employer endorsement:** An employer should not take any action that makes it look like they are endorsing a benefit plan. An employer is showing they are endorsing a plan when they select the insurer, negotiate the terms of the plan, limit coverage to select groups or classifications of employees, or assist employees with making claims for benefits. However, employers can make the plan available to employees and publicize the availability of the plan, collect premiums through payroll deductions, and submit the premium payments to the insurer.
- **Employers receive no reimbursement:** Employers shouldn't receive any compensation other than reasonable compensation, excluding any profit, for administrative services rendered in connection with payroll deductions.

If you're in doubt as to what qualifies as safe harbor, confer with qualified counsel to be sure your voluntary plans are not subject to ERISA.

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ees up to 12 weeks of unpaid, job-protected leave per year. It also requires that the employee be allowed to keep their group health benefits during the leave.

Accommodations

Any request for accommodation must provide an opportunity for the employee with a disability to achieve the same level of performance and to enjoy benefits equal to someone who doesn't have a disability.

Reasonable requests for accommodating a disability can include:

- Making existing facilities used by employees readily accessible to and usable by an individual with a disability
- Restructuring a job
- Modifying work schedules
- Acquiring or modifying equipment
- Providing qualified readers or interpreters
- Modifying examinations, training, or other programs
- Reassigning an employee to a vacant position they may be qualified for if they are unable to do their original job.

Whatever the accommodation, the employer does not have to provide any accommodation that creates an undue hardship on the business. For instance, employers are not required to lower quality or production standards as an accommodation; nor are they obligated to provide personal use items such as wheelchairs, prescription glasses or hearing aids.

Resources

The Equal Employment Opportunity Commission (EEOC) enforces workplace anti-discrimination laws, including the ADA, and the Rehabilitation Act. These acts include the requirement for reasonable accommodation and non-discrimination based on disability, and rules about employer medical examinations and inquiries. Visit www.eeoc.gov/coronavirus for more information.

Since guidance from public health authorities has been changing as COVID-19 has evolved, employers should continue to seek the most current information on maintaining workplace safety. Some resources include:

- The Centers for Disease Control and Prevention's (CDC) "Interim Public Health Recommendations for Fully Vaccinated People" at www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html
- The CDC's Frequently Asked Questions about COVID-19 Vaccination: https://www.cdc.gov/coronavirus/2019-ncov/vaccines/faq.html
- The EEOC publication "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act" at www.eeoc.gov/sites/default/files/2020-04/pandemic_flu.pdf
- The EEOC "3/27/20 Webinar" at www.eeoc.gov/coronavirus

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- $198,000 to $208,000 – A taxpayer not covered by a workplace retirement plan married to someone who's covered.

Income phase-out ranges for taxpayers making contributions to a Roth IRA:

- $125,000 to $140,000 – Single taxpayers and heads of household.
- $198,000 to $208,000 – Married, filing jointly.

Not withdrawing funds: Employees must start to withdraw funds from their retirement accounts by April 1 of the year following the year they turn 72. Each year thereafter, distributions must be made by Dec. 31. If they're still working at age 72 and their plan allows it, they can put off required minimum distributions from their 401(k), 403(b) or other defined-contribution plan until they retire (unless they own 5 percent or more of the business). However, these employees must start minimum withdrawals from previous employers' plans as well as IRAs and self-employed retirement plans including SEPs and SIMPLEs.

- The IRS penalty is 50 percent of the amount that should have been withdrawn.

Employees who realize they made an excess contribution can withdraw the excess and any earnings associated with it to avoid the penalty as long as they do it before they file income taxes. However, the withdrawal will be taxed as income. If the money came from an IRA, the employee may owe a 10 percent early withdrawal penalty on earnings if they're under 59 ½.

How Employers Can Help

To get a clear picture of how important saving for retirement is to your employees, look at your company's 401(k) participation and savings rates. If they are low, you can help your employees take steps to make saving easier.

Education is key. Many employees are not saving because they are living paycheck to paycheck – not because they don't make enough – but because they don't have a budget or plan. Employees should encourage and hear success stories from people who have improved their financial situation by focusing on new and healthy habits like budgeting, saving for emergencies and eliminating debt.

Also talk to them about compound interest. For instance, if an employee starts saving $2,000 of their salary annually starting at age 22 — even if they stopped saving at age 30 — they'd have $1.6 million by age 65 (assuming future economic conditions resemble historical trends). That same employee would only have a little more than $1 million at retirement if they didn't start saving until age 30, even if they kept saving $2,000 annually until the day they retired.

Many companies automatically enroll new employees in a 401(k) plan. The typical savings amount is 3 percent of each employee's pay. Automatic enrollment has been successful in getting more employees to save in 401(k) plans, but employees should be encouraged to increase the amount of their savings annually.

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Is It Possible to Save Too Much for Retirement?

While some employees aren't saving enough for retirement, some save too much in their plans and pay the price in penalties.

Current State of Saving

More than one-third of the U.S. population is unprepared for retirement, according to a poll by TechnoMetrica Institute of Policy and Politics. Thirty-six percent of Americans do not have savings earmarked for retirement, while 38 percent plan to work beyond age 65 to build their retirement portfolio. In addition, the number of 401(k) participants has not increased from an estimated 60 million Americans since 2017.

This is particularly poignant in that stock market gains have made many employees millionaires. According to Fidelity Investments, the number of 401(k) accounts with balances of at least $1 million or more has recently grown 74.5 percent. Plus, the average 401(k) held $129,300 at the end of the second quarter of 2021, up 24 percent from 2020; the average IRA was $139,000, a 21 percent gain.

These gains are in large part attributed to the run-up in the stock market: The S&P 500 rose 38.6 percent, while the Nasdaq Composite jumped 44.2 percent.

Too Much of a Good Thing

While many employees understand the power of a 401(k) and compound interest, ignoring Internal Revenue Service (IRS) tax law limits can kill gains that 401(k)s provide.

Encourage your employees to save as much as possible, but also to be aware of IRS annual limits:

- **401(k):** In 2021, employees are allowed to save $19,500 annually in their workplace retirement plan. Employees who are 50 or older can take advantage of catch-up contributions of $6,500.
- **Penalty:** There is a 6 percent penalty for excess contributions and the penalty continues for each year that the excess contribution remains in the account. Also, an excess 401(k) contribution can trigger double taxation: The excess contribution and earnings are taxed when they're withdrawn, but the contribution also is added to taxable income for the year the contribution was made.
- **All retirement plans:** An employee who is 49 or younger can contribute a maximum of $58,000 to all of their retirement plans in 2021. For those 50 and older, the limit is $64,500. No employee can contribute more than they earned.

If an employee or their spouse is covered by a retirement plan at work, the deduction may be reduced or phased out. This reduction goes until the deduction is eliminated. The amount of the deduction depends on the taxpayer's filing status and their income. If neither the taxpayer nor their spouse is covered by a retirement plan at work, the phase-outs don't apply.

These are the traditional IRA phase-out ranges for 2021 (allowable contributions are phased out from 100% to 0% in these ranges):

- $66,000 to $76,000 – Single taxpayers covered by a workplace retirement plan.
- $105,000 to $125,000 – Married couples filing jointly. This applies when the spouse making the IRA contribution is covered by a workplace retirement plan.

RETIREMENT—continued on Page 3

Using Health Insurance Discounts to Fight Vaccination Hesitancy

The lure of lower health insurance premiums is enticing some employees to get vaccinated against COVID-19. If as experts predict, premiums will be rising substantially soon, any way to lower premium becomes an important consideration.

COVID-19 is highly transmissible — especially its delta variant. While the Centers for Disease Control and Prevention report that 71.3 percent of American adults have received at least one shot, experts say that 90 percent or more of the total population must be fully vaccinated for the country to reach wide protection.

The disease is expensive to treat. A brief hospital stay in Marietta, Georgia, could cost $17,000; while a 14-day hospitalization in Miami could be $104,000, according to projections by NPR-Kaiser Health News.

To help cover these costs some insurers, like those in Connecticut, are proposing average group rate increases of 7.4 to 15.8 percent.

Employers who want to keep health plan costs and future premium increases low can make vaccination a requirement of employment. However, a less severe option is to offer incentives instead of edicts. That's why offering employees lower health insurance premiums in exchange for getting vaccinated is gaining traction.

The Affordable Care Act and the Health Insurance Portability and Accountability Act allow employers to adjust individual insurance costs for:

- Age
- Geography
- Tobacco use
- Family size

Depending on how many employees are covered, employers may be allowed to modify premiums to offer tax-free incentives. As part of a wellness program, incentives can be as much as 30 percent of the cost of coverage. To exercise this option, employers must allow proof of vaccination to be voluntary and may not conduct the inoculations themselves.

Employers may include health coverage surcharges for employees who don't want to get vaccinated, though HIPAA and ACA regulations still apply, according to Mercer, a health asset management firm.