

LOOKING AHEAD

Need-to-Know COVID-19 Employment Issues for 2021

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Overview

- ❑ Families First Coronavirus Response Act (FFCRA) alternatives
- ❑ COVID-19 Vaccine



Families First Coronavirus Response Act (FFCRA)

Two types of paid leave were previously required to be made available to eligible employees of covered employers (less than 500 employees) under the Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Act

Emergency Paid Sick Leave

Leave for parents

Families First Coronavirus Response Act (FFCRA)

Temporary
law
expired
12/31/20

The diagram consists of two light blue circles with dark blue borders. The left circle contains the text 'Temporary law expired 12/31/20'. A dark blue arrow points from the right side of the left circle to the left side of the right circle. The right circle contains the text 'Need for leave continues'.

Need for
leave
continues

Families First Coronavirus Response Act (FFCRA)

As of 1/1/21, are covered employers required to provide paid sick and/or family leave to eligible employees under FFCRA?

- *Survey says...*



COVID STIMULUS BILL

- December 27, 2020, President Trump signed the Consolidated Appropriations Act into law.
- As of January 1, 2021, covered employers may now *voluntarily* provide FFCRA paid sick and/or family leave to qualified employees through March 31, 2021 and collect payroll tax credits if done so.
- Substantive FFCRA provisions remain the same: maximum of 2 weeks/80 hours of EPSL leave, and a maximum of 12 weeks of EFMLEA leave between 4/1/20 and 3/31/21. No more.

Voluntary FFCRA Paid Leave through 3/31/21

- Per DOL Guidance issued on 12/31/20, employers are NOT required to provide additional FFCRA leave to employees who already have used and exhausted their allotted FFCRA paid leave prior to December 31, 2020.
- In other words, employee FFCRA leave banks **are not replenished as of January 1, 2021.**
- But, if an employee did not exhaust his/her allotted FFCRA paid leave entitlement prior to 12/31/20, **and** if the employer agrees to voluntarily provide FFCRA, the employee may use whatever time remains through 3/31/21 for any qualifying FFCRA reason.

Voluntary FFCRA Paid Leave through March 31, 2021

- If a full time (40 hours/week) employee exhausted his 80 hours of paid sick leave under the EPSL prior to 12/31/20, and the employer voluntarily provides FFCRA through 3/31/21, he is not entitled to an additional 80 hours of EPSL leave beginning 1/1/21 through 3/31/21, even if he qualifies.
- If a full-time employee used 60 hours of EPSL leave prior to 12/31/20, then uses 20 hours of EPSL leave in January 2021 (if the employer voluntarily provides FFCRA), the employee will then have exhausted his total EPSL allotment, and now is ineligible for additional FFCRA leave.

Voluntary FFCRA Paid Leave and Payroll Tax Credits

- The CAA extended employer tax credits for paid sick leave and expanded family and medical leave voluntarily provided to *eligible* employees until March 31, 2021.
- If an employee used 60 hours of EPSL leave prior to 12/31/20, then uses the remaining 20 hours of EPSL leave in January 2021, the employer can take the tax credits for those 20 hours.
- If employee exhausted his 80 hours of EPSL leave prior to 12/31/20, and the employer approves another 80 hours of EPSL leave for this employee in January 2021, employer cannot take the payroll tax credits for the additional hours, because the employee is **not eligible for the additional 80 hours** of EPSL leave.

Voluntary FFCRA Paid Leave EFMLEA Considerations

- There remains a lack of clarity where an employer's or an employee's "rolling" 12 month FMLA period resets *prior* to 3/31/21 (e.g. 1/1/21), and after such an employee already exhausted his 12-week EFMLA allotment prior to 12/31/20.
- For example, EE used 4 weeks of FMLA beginning 1/1/20; 4 weeks of FMLA beginning 6/1/20; and 4 weeks of FMLA beginning 12/1/20.
- In this hypothetical situation, *at this time*, it is unclear whether the employee would be entitled to 12 weeks of paid EFMLA benefits on 1/1/21, since under the "rolling" method, he would only be entitled to one new day of FMLA leave each day for four weeks beginning 1/1/21; another 4 weeks on 5/1/21; and another 4 weeks on 12/1/21.
- Classic FMLA example, different story. Employer uses a calendar year for its 12-month FMLA leave period. If employee used 8 continuous weeks of EFMLA in 2020, as of 1/1/21, employee earns back another 12 weeks, so he could use the remaining 4 weeks of EFMLA through 3/31/21.

Non-FFCRA Considerations

- Company provided paid leave
- Temporary flexible work policy
- Local/State paid sick leave
- FMLA
- ADA
- STD
- Unemployment

Vaccines

The vaccine is here!!



Vaccines

- Can a private employer require an employee to get the vaccine once it is available?
 - Generally, yes.
- Private employers can require that employees receive the COVID-19 vaccine (once it is available) as a condition of returning to, or remaining in, the workplace.

<https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>

COVID Vaccine Distribution: IL

(as of 1/6/21)

- **Phase 1a:** – frontline healthcare workers, residents and staff of long-term care facilities
- **Phase 1b: frontline essential workers (1.3 million) and Illinois residents who are age 65 and older (1.9 million).**
 - First responders, education, food and agriculture, manufacturing, corrections workers and inmates, USPS workers, public transit workers, grocery store workers and staff at shelters and day care.
- **Phase 1c: persons aged 16-64 years old with high risk medical conditions and other essential workers.**
 - Transportation & Logistics, Food Service, Housing (e.g., Construction), Finance (e.g., bank tellers) Information Technology & Communication, Energy, Media, Legal, Public Safety (e.g., Safety Engineers), Water & Wastewater Public Health Workers

Mandatory COVID Vaccination Policy Legal Exceptions

- Employees who cannot take the vaccine due to a **medical disability**
- Employees who seek an exemption based on **sincerely held religious beliefs**

Mandatory COVID Vaccination Policy

Medical Exemption

- Scenario: “I cannot get the COVID vaccine because I have a disability that makes it unsafe for me to take it.”
- Americans with Disabilities Act (ADA) implicated.
 - “Disability” is defined as *any* “physical or mental impairment that substantially limits one or more major life activities of an individual.”
- Examples of disabilities that may preclude employees from receiving COVID vaccination include:
 - Life threatening allergies
 - Disorders that compromise the immune system
 - Severe and well documented anxiety associated with side effects of receiving the vaccine.
- Ask for medical documentation corroborating the disability.

Mandatory COVID Vaccination Policy

Medical Exemption

- Once an employer determines that an employee qualifies for a medical exemption due to a “disability,” the employer must determine whether allowing the employee the exemption from the COVID vaccine as a reasonable accommodation would pose an “undue hardship” and/or “direct threat” to the safety of others in the workplace.
- ADA permits employers to require that employees with disabilities not pose a “direct threat” to the health and safety of individuals in the workplace.
 - *Per IDPH:* If you do not get vaccinated, you will not be protected against the virus that causes COVID-19 and will be more likely to be infected with the virus. Additionally, you will be at risk of transmitting this deadly virus to loved ones and other community members.
- *Per EEOC,* “[A] conclusion that there is a direct threat would include a determination that an unvaccinated individual will expose others to the COVID in the workplace.”
 - EEOC specifically stated, **“Based on guidance of the CDC and public health authorities as of March 2020, the COVID-19 pandemic meets the direct threat standard.”**

Mandatory COVID Vaccination Policy Medical Exemption

- If an employer determines that an individual who cannot get the COVID vaccine due to a medical disability poses a direct threat to the workplace, the employer cannot automatically exclude the employee from the workplace—or take any other action . . . But . . .
- Employer must first engage in the ADA-required “interactive process” to determine whether there is a reasonable accommodation (absent undue hardship) that would eliminate or reduce this risk so the unvaccinated employee does not pose a direct threat to the workplace.

Mandatory COVID Vaccination Policy Medical Exemption

- Workers with disabilities *generally* do not have the right to the accommodation of their choice, unless it is one that “reasonably” accommodates and does not pose an “undue hardship” (significant difficulty or expense) to the company.
- A reasonable accommodation to eliminate or reduce the risk of a “direct threat” *likely* is NOT, not receiving the vaccination and otherwise resuming work as normal (i.e. no mask, no social distancing). So, what may be?
 - If position and duties permit, and if physical presence at the worksite is not an essential function of the job, allow remote work.
 - **Temporary approval, does not negating physical presence requirement and give rise to permanent teleworking.**
 - Alternatively, require to attend work, continue to social distance and wear masks and/or other PPE, *even after vaccinated employees may in the future not be required to do so.*
 - Shifting unvaccinated workers to other workplace roles that have less contact with others.
 - Relocating worksites within a building to reduce contact with others.

Mandatory Vaccination Policy

Medical Exemption

- If there is a direct threat that cannot be reduced to an acceptable level by a reasonable accommodation, the employer may exclude the employee from physically entering the workplace, but this does not mean the employer may *automatically* terminate the worker.
- Employers will need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities (e.g. FMLA, if disability is a serious health condition).
- Decision to exclude or terminate should be well documented with a clear explanation as to why, based on the nature of your business, the employee's job, etc., direct threat cannot be reduced or eliminated through a reasonable accommodation.

Mandatory COVID Vaccination Policy

Religious Exemption

- Scenario: “I cannot get the vaccine based on my sincerely held religious belief or religion-like philosophical system that prohibits vaccinations.”
 - E.g. Churches/religious groups that rely on faith-healing (i.e. healing through prayer)
- “Sincerity” – EEOC permits employers to make a “limited inquiry to determine if belief or practice is “religious” or “sincerely held.”
- Very easy threshold to meet: Written materials; Employee’s own firsthand experiences; or “Verification” by others.
- The belief may be newly adopted, inconsistently observed, not part of a formal religious practice, or different from the common tenets of the individual’s religion.
- No legal obligation to accommodate political, scientific, personal, medical views, or isolated ideas (e.g. vaccines are dangerous)
- No “significant difficulty or expense” – rather “de minimis cost” on business.

Employee Who Has Or Already Had COVID

- COVID-19 vaccination should be offered to these employees and required (if a mandatory policy) *regardless* of whether employee has and/or already had COVID-19 infection.
- *Per IDPH:* People who have already had COVID-19 should plan to take the COVID-19 vaccine, because the science is currently inconclusive as to whether you will be naturally protected from a second COVID-19 infection in the future.
- *Per IDPH:* The CDC currently suggests that if you were infected with COVID-19 during the previous 90 days, it is likely that you still have immune protection and that you will be asked to wait to receive your vaccine to allow others to be vaccinated first.

Continued PPE and Social Distancing Requirements

- Can or should a COVID vaccination policy replace mask requirements, distancing or other measures?
- As of now, **NO!**
- *Per CDC:* “While experts learn more about the protection that COVID-19 vaccines provide under real-life conditions, it will be important for everyone to continue using all the tools available to us to help stop this pandemic.”
- *Per CDC:* “Experts need to understand more about the protection that COVID-19 vaccines provide before deciding to change recommendations on steps everyone should take to slow the spread of the virus that causes COVID-19.”

Requiring Proof of Receipt of COVID Vaccine

- Can employers require employees to provide proof of a receipt of a COVID-19 Vaccine?
 - Yes.
 - But, instruct employees not to provide any medical information as part of the proof in order to avoid implicating the ADA.

COVID Vaccines: Legal Considerations

- Non-discrimination; equal application of policy.
- If you are going to draw the line about who must get a COVID vaccine and what action will be taken against employees who refuse to get one, be sure to make even handed, across-the-board requirements and repercussions to avoid discrimination claims.

Vaccines: Legal Considerations

- Section 7 of the National Labor Relations Act grants employees the right to engage in protected concerted activities for the purpose of collective bargaining or other mutual aid or protection.
- There is “protected concerted activity” when two or more employees act together to improve their terms and conditions of employment.
- *E.g.* protesting against a mandatory vaccination policy (or the lack of one); organized office communications or flyers among coworkers concerning a vaccination mandate; or discussions among coworkers about the vaccine.
- Consider whether the collective bargaining agreement permits a mandatory vaccination policy or not.
 - If so, then the employer may be able to unilaterally implement the work policy without first bargaining with the union.
 - If not, requiring COVID-19 vaccinations *likely* is considered a mandatory subject of bargaining that gives rise to a duty to bargain with the union prior to implementation.

Additional Legal Considerations: Workers' Compensation

- Workers' Compensation: The rebuttable presumption provision, (Subsection 1(g) to the Workers' Occupational Diseases Act (820 ILCS 310/1) expired on December 31st.
- Agreed bill negotiations concluded with an agreement to move the sunset of the provision to June 30, 2021 and a suspension of any medical fee increases.
- The presumption can be rebutted by any of the following:
 - 1) the employee was not in the workplace for 14 days prior to the contracting COVID; or
 - 2) the employer complied with all local and CDC guidance to protect its employees from COVID; or
 - 3) the employee was exposed to COVID by another source.

Why Require the Vaccine?

- Protecting workplace and community health
- Getting and staying open
- Reducing costs of absences, lost productivity
- Defend against workers' compensation and civil liability for COVID-19 cases
- OSHA's general duty clause to provide a workplace free from recognized hazards that could cause serious harm.

Why Not to Require the Vaccine

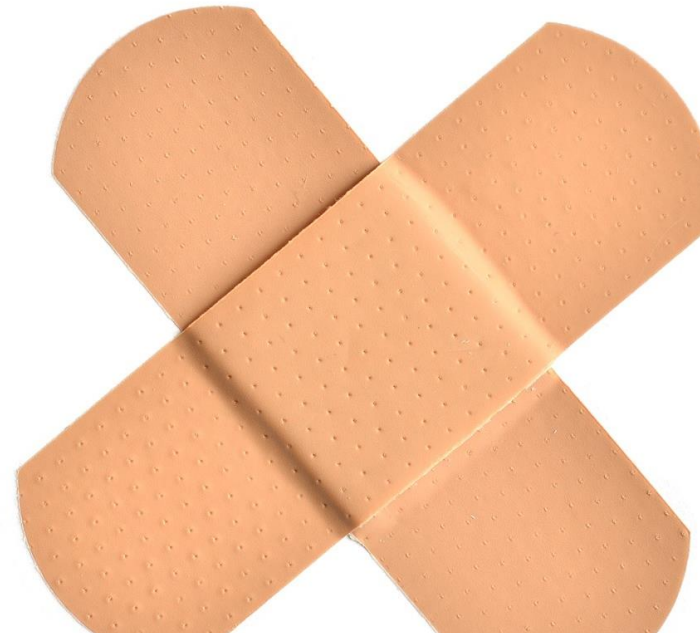
You generally **CAN** require employees to get the vaccine, but **SHOULD** you?

Maybe not.

Why Not to Require the Vaccine

Considerations:

- Vaccine approved through Emergency Use Authorization
- Side effects: fever, flu-like symptoms, allergic reactions
- 2-shot series
- High performers or large group may refuse
- Employee expectations



Build Buy-In and Plan for Conflict Diffusion

- Ensure workplace understands why you've chosen to make it mandatory and/or highly recommend it and give employees a chance to be heard.
 - Lead by example (publicize C-suite/upper management getting vaccine)
 - If mandatory, inform employees of the policy change in advance, so they can meaningfully share their views
 - Clear communication as to the purpose of the requirements/preference: employee safety and allowing a return to normal
 - Tie the vaccine to concrete and visible changes in the workplace.
 - Provide accurate and reader-friendly information.
 - Hold ZOOM call with healthcare professional to discuss vaccines.
 - Pay for the “administration fee” that vaccine providers may charge for giving the shot.
 - Provide paid day(s) off following each COVID vaccination shot.
 - Provide gift cards of “modest value”

Questions?



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More Resources

For updates, visit:

- **Greensfelder COVID-19 Resources page:**

<https://www.greensfelder.com/covid-19-resources.html>

- **SimplyHR Blog:**

<https://www.greensfelder.com/employment-and-labor-blog>

THANK YOU!

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

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