

# Client Alert **Employment & Labor**

## **Important COVID-19 Employment Law Updates: The EEOC and Congress Take Further Action**

Employment law developments related to the COVID-19 pandemic continue to evolve. On December 16, the Equal Employment Opportunity Commission (“EEOC”) issued guidance on the parameters of employers mandating employee COVID vaccinations as a condition of their employment. Separately, on December 23, Congress passed a new COVID relief bill, which was signed by President Trump on December 27, addressing, among other matters, the availability of employee leave rights under the Families First Coronavirus Response Act (“FFCRA”) once that statute expires on December 31.

### **To Mandate Vaccinations or Not?**

The EEOC’s Guidance answered the critical question whether an employer legally can require its employees to receive a COVID vaccination. The EEOC responded YES, but subject to several caveats.

The EEOC updated its Technical Assistance guide, [“What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,”](#) on the subject of vaccines. The primary legal restriction on vaccines arises under the Americans with Disabilities Act (“ADA”), which limits a covered employer’s ability to require employees to undergo medical examinations and make disability-related inquiries. Helpfully, the EEOC’s latest guidance confirmed that a vaccination is not a “medical examination” and that asking employees about whether they have been vaccinated is not a “medical inquiry.” However, the inquiry does not end there and there are other legal issues to consider before mandating COVID vaccines.

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According to the EEOC, pre-screening questions related to the vaccines, which are asked by an employer or a contractor at the employer's request, may implicate the ADA's prohibition on disability-related inquiries, as they are likely to elicit information about an employee's disability. Such questions generally must be job-related and consistent with business necessity so as not to violate the ADA, unless (1) the vaccination is offered by the employer on a voluntary basis and the pre-screening questions are voluntary; or (2) if the vaccination is mandatory, the vaccine is provided by a third party that does not have a contract with the employer.

In addition, employers contemplating a mandatory vaccine program are required, upon an employee's request, to provide, pursuant to federal, state, or local laws, "reasonable accommodations" to employees based on their disabilities or sincerely-held religious beliefs. Employers will be required to engage in the interactive process (in New York City, called a "cooperative dialogue") if they are asked, as an accommodation, to waive a vaccination requirement, and employers must provide an accommodation unless it creates an "undue hardship" on the employer, a term which is narrowly construed.

Moreover, where the employee's refusal to be vaccinated is based on medical grounds, the employer must consider whether the unvaccinated employee poses a "direct threat" to the safety of others based on a number of factors. Even if the employer determines that such an employee poses a direct threat and thus may not physically enter the workplace, employers must still assess each case individually and should not automatically terminate an employee on direct threat grounds.

### **What Is the Status of the Scheduled December 31, 2020 Expiration of Paid Leave Rights?**

By now, most employers have learned that the latest COVID-19 relief bill, passed by Congress on December 23, 2020 and ultimately signed into law by President Trump on December 27, 2020, provides a weekly unemployment insurance enhancement of \$300 (down from the previous \$600 supplement) as well as \$600 direct payment checks to every child and adult earning up to \$75,000, with a lesser amount paid to those earning between \$75,000 and \$99,000.

What is not as well-known is that the new legislation does *not* extend *mandatory* paid sick leave or paid expanded family and medical leave for specified reasons related to COVID-19, which the FFCRA had made available. Those rights will still expire on December 31, 2020.

Instead, the new legislation allows employers to continue to offer such paid leave rights, but on a *voluntary* basis. If private employers elect to do so, they may apply for tax credits, to the extent such paid leave rights are provided during the period January 1, 2021 through March 31, 2021. Any paid leave rights previously available under FFCRA that employers voluntarily offer after March 31 are ineligible for those tax credits.

**Takeaways on Both Developments:**

Although employers can mandate that employees receive a COVID-19 vaccine, based on the recent EEOC guidance, there are several issues to consider before doing so. First, the vaccine will not be readily available to most individuals until next spring or summer, at the earliest. Second, it is clear that a substantial portion of the population has misgivings about the safety and efficacy of the vaccine. Third, is it more effective and preferable from an employee relations standpoint to encourage the vaccine rather than require it? Fourth, requiring the vaccine will inevitably result in an influx of employee requests for an exception based on religious or medical grounds; if that happens, and depending on the specifics of the situation (including consideration of the employee's job duties), then the employer may be required to provide a reasonable accommodation, such as telework. Fifth, despite the EEOC's guidance, future restrictions imposed by state or local authorities on mandating vaccines as a condition of employment may need to be evaluated. Ironically, employers may find that they have fewer employees working on site if they require the vaccine than if they simply encourage it. The bottom line is that mandating the vaccine may raise many complicated logistical issues, as well as practical and legal concerns.

As for paid leave rights previously mandated under FFCRA, employers will need to decide if they wish to continue offering them on a voluntary basis starting January 1, 2021. It would be prudent to make those decisions on an individualized basis. In doing so, employers should take into account any COVID-related medical issues the employees requesting such leave or their dependent family members may have, the status of local remote learning requirements where those employees live, and the advantages offering such leave may provide to the employer from the standpoint of retaining staff and boosting their morale while the pandemic continues to rage. A blanket denial of a request for paid leave (or, for that matter, selective approval of such leave) starting January 1 may lead, depending on the circumstances for which the leave is sought, to potential discrimination liability. As always, employers will be well-served to make decisions based on legitimate non-discriminatory business reasons and to be as consistent as practicable.

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Attorneys in our Employment and Labor Law Practice Group  
can assist employers regarding the issues raised in this alert.

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