

December 28, 2020

LEGAL ALERT

As the Pandemic Continues Into 2021 – What Employers Need to Know

As employers head into 2021, it is important to keep track of the lessons we learned in 2020 and make certain we are prepared for the additional challenges and questions employers will face as the pandemic continues into 2021. To help employers begin to prepare for those additional questions, we have set forth some common questions and answers regarding specific issues employers are likely to face. Please keep in mind that guidance governing these topics is constantly developing and changing.

Q: Are small employers required to provide paid sick leave under the FFCRA after December 31, 2020?

A: President Trump signed the COVID relief bill approved by Congress. The relief bill includes a limited extension of paid sick leave under the FFCRA. The FFCRA is set to expire as of December 31, 2021. Under the relief act, small employers (less than 500 employees) will no longer be required to provide paid sick leave under either portion of the FFCRA. However, under the relief bill, small employers can voluntarily elect to continue to provide paid sick leave under the FFCRA and receive the tax credit for paid leave provided between January 1, 2021 and March 31, 2021.

Q: If an employer elects to voluntarily continue to provide paid sick leave under the FFCRA, are employees awarded a new bucket of leave?

A: No. Under the relief act, while employers can voluntarily extend coverage under the FFCRA, employees are not entitled to an additional 80 hours of paid sick leave. If an employee has already exhausted the leave available to him or her under the emergency paid sick leave portion, he or she is not entitled to a new bucket of leave. Employers may choose to offer additional time, but employers will not be able to claim a tax credit for paid leave which is in excess of the up to 80 hours provided under the FFCRA.

Q: Can employers require employees to obtain the COVID-19 vaccine as it becomes available?

A: Yes. From a legal perspective, employers can require employees to obtain and provide proof of receipt of a COVID-19 vaccine if certain exceptions are allowed. If the vaccination requirement screens out, or tends to screen out, an individual with a disability, employers must provide a reasonable accommodation to those employees who are unable to be vaccinated and who potentially pose a direct threat unless the accommodation creates an undue hardship for the employer. Employers are also required to accommodate employees who have a sincerely held religious belief, practice or observance that prevents the employee from receiving the vaccination.

Employers must train managers to recognize an accommodation request from an employee and how to respond to any such requests.

Q: Should employers require employees to obtain the COVID-19 vaccine as it becomes available?

A: It depends. Employers must keep in mind, that for at least the first few months of 2021, the vaccine will not likely be readily available to the public. If an employer is leaning towards requiring its employees to be vaccinated, they should ensure the requirement is realistically able to be accomplished and that employers bear the cost of the vaccine. The decision to require vaccinations requires an individualized assessment based on the type of industry involved, the demographics of an employer's employees, as well as the level of employees' interaction with the public. A healthcare employer may want to require vaccination as opposed to a call center where employees have very little interaction with each other or the public. Employers should also be aware of and prepared for potential push back from employees who for various reasons do not want to obtain the vaccine. Employers need to be proactive and assess the specifics of their workforce and develop a plan and make certain the plan is properly communicated to employees. Even if an employer decides not to require its employees be vaccinated, employers should revise their pandemic response plans to ensure that it includes a recommendation for employees to be vaccinated.

Q: Will an employer face increased liability if it does not require its employees to be vaccinated?

A: Not likely if the employer is otherwise meeting the CDC's guidance for businesses and employers operating during the pandemic. Under OSHA, employers have a general duty to provide a workplace free from recognized hazards that are causing or are likely to cause death or serious physical harm. COVID-19 is a recognized hazard. While OSHA requires certain types of employers to mandate specific vaccinations, no such requirements have been published yet with respect to COVID-19. In 2009, in response to an inquiry on the flu vaccine, OSHA issued a response encouraging healthcare employers to offer the flu vaccine but did not go so far as to require healthcare employers to mandate the flu vaccine. Currently it does not appear that OSHA will mandate employers to require the COVID-19 vaccine, and, based on OSHA's handling of other airborne diseases, it appears unlikely that it will use the general duty clause to cite employers for failing to require a vaccine. This does not mean that OSHA will not issue citations under the general duty clause to employers who fail to protect employees from COVID-19. OSHA has already issued hundreds of citations to employers who failed to furnish a place of employment free from the hazard of contracting COVID-19. Employers must continue to be vigilant in following their pandemic guidelines and ensuring that they are continuing to follow safety protocols even as more of the population is able to be vaccinated.