

Managing COVID-19 in the Workplace: Return to Work, Vaccine Campaigns, and Employee Benefits

Article By:

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It is now more than a year into the COVID-19 pandemic, and while we all hoped that things would be back to normal by now, it is clear that “normal” workplaces are a long way off. Here are the areas of concern that you need to continue to focus on as we head into spring, as well as some new legislation that needs to be addressed.

Return-to-Work Planning

Before employers reopen the doors to employees and customers, it is wise to have thought through COVID-19 exposure issues, developed a comprehensive COVID-19 policy, and communicated that policy to your staff. A COVID-19 policy should address when an employee should report a possible exposure, a COVID-19 test, or a COVID-19 diagnosis; when employees should refrain from coming in to work; and mitigation measures such as hygiene, cleaning, social distancing, and mask wearing. Once you have a policy in place, you should communicate it to your employees regularly, and make sure the policy is kept up-to-date as pandemic conditions and local rules evolve.

Employers should also be prepared to address concerns from employees who want to continue to work at home due to health conditions that place them at increased risk from COVID-19. In some situations, the Americans with Disabilities Act (ADA) may require an employer to consider a reasonable accommodation for employees who are at high risk due to a pre-existing disability. Accommodations can take many forms, including possible continued work from home. Employers should keep in mind that you aren't required to implement the employee's first choice of accommodation — any reasonable accommodation that will allow the employee to perform the essential functions of his or her job will satisfy the ADA requirements. If you have employees who are hesitant to return, the place to start is with an interactive discussion between you and the employee. It is possible that just discussing the employee's concerns and sharing the steps you are taking to lessen risk will be enough to encourage the employee to return to the workplace.

Vaccination Campaigns

Many employers would like very much for 100% of their workforce to be vaccinated as soon as possible. Widespread vaccination is widely recognized as essential for the United States to return to full economic activity. In addition to preventing illness, and the associated lost productivity and

increased healthcare costs, vaccination prevents absences related to contact tracing and quarantining. Until very recently, the availability of vaccines has been a major impediment to this goal. However, as of the writing of this article, the United States is administering on average three million vaccine doses per day, with the pace expected to continue to increase in the coming weeks. In many places, all adults are now eligible to receive a vaccine. The time is right for employers to take steps to strongly encourage your employees to become vaccinated. Basic strategies include leading by example, giving extra paid time off for vaccination, providing assistance in scheduling vaccinations, and sharing reliable information about vaccine safety and benefits. Some employers are also adopting creative methods of encouragement: gift cards after vaccination is completed; a large cash pool that whole departments can enter to win if they reach a certain vaccination percentage; goody bags, including company swag, upon inoculation; a “selfie station” where staff can capture a picture post-vaccination and share it on social media; and COVID-19 “vaccine parties” complete with cake and ice cream.

Don’t forget to implement a tracking mechanism as part of your vaccination campaign; it is important to know which of your employees are fully vaccinated, and it is lawful to ask employees for this information. Simply requesting proof of receipt of a COVID-19 vaccination is not a disability-related inquiry under the ADA. However, subsequent employer questions, such as asking why an individual did not receive a vaccination, may elicit information about a disability and would be subject to the pertinent ADA standard that such questions must be “job-related and consistent with business necessity.”

What about requiring employees to be vaccinated? It is generally accepted that employers can mandate vaccination as a condition of employment. However, until vaccines are easily available in all areas to all adults, mandatory vaccination policies are not likely to be very effective. If you do decide to implement a mandatory vaccination policy, keep in mind that accommodations will likely need to be made for employees with disabilities that prevent them from being vaccinated and for employees with a sincerely held religious belief, practice, or observance that prevents them from receiving the vaccination.

Voluntary FFCRA Leave

While the Families First Coronavirus Response Act (FFCRA) paid leave mandate expired on December 31, 2020, the emergency paid sick leave (EPSL) and expanded FMLA (EFMLA) leave may still be provided to employees on a voluntary basis. Recall that the FFCRA expanded FMLA to cover leave and loss of income when an employee needs to care for children because of school and child care closures due to COVID-19; created two weeks (80 hours) of paid sick leave related to the coronavirus; and provided tax credits related to the paid leave provided by the FFCRA. Beginning on January 1, 2021, employers could voluntarily elect to continue providing FFCRA leave to their employees and receiving the tax credit. However, the leave availability remained subject to the same limits that were in effect in 2020: 80 hours of paid sick leave and 10 weeks of EFMLA.

The recently passed American Rescue Plan Act (ARPA) extends the FFCRA tax credits through September 30, 2021. ARPA also expands the EPSL qualifying reasons to include three reasons that were not previously covered: (1) obtaining a COVID-19 immunization; (2) recovering from an injury, disability, illness, or condition related to the immunization (i.e. side effects of the vaccine); and (3) seeking or awaiting the result of a COVID-19 test or diagnosis when the employee either has been exposed to COVID-19 or the employer has requested the test or diagnosis. The leave is still voluntary, but for employers who choose to provide the leave, ARPA allows employers to grant employees a new 10-day EPSL bank beginning April 1, 2021, even if employees already used up

their 10 days of emergency sick leave before April 1. As for EFMLA, previously it could be taken only by employees caring for children whose schools or place of care was closed, or whose care provider was unavailable for reasons related to COVID-19. However, beginning April 1, 2021, ARPA expanded the qualifying reasons for EFMLA leave to include any of the EPSL qualifying reasons. In addition, ARPA removed the requirement that the first two weeks of EFMLA leave be unpaid. As a result, employers may now voluntarily provide up to 12 weeks of paid EFMLA leave and receive the related payroll tax credit. ARPA also increases the cap on the aggregate paid leave from \$10,000 to \$12,000, so that employers can now take an additional \$2,000 in payroll tax credits per employee for qualifying EFMLA leave.

Keep in mind that providing FFCRA leave benefits is currently optional, and employers may choose to provide coverage under the EPSL, the EFMLA, or both. Qualifying employers who decide to voluntarily continue providing FFCRA leave to employees should ensure that leave is offered to all employees. ARPA dictates that FFCRA leave, if offered, must be offered to all employees and must not be restricted to highly compensated employees, full-time employees, or tenured employees.

New Paid COBRA Subsidies

ARPA provides relief for individuals who are eligible for continuation coverage under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) as a result of involuntary termination from employment or reduction in hours. The relief comes in the form of a 100% COBRA premium subsidy for the six-month period beginning April 1, 2021, and ending September 30, 2021. These new requirements apply to group health plans subject to COBRA (both fully insured and self-insured) as well as health plans subject to similar continuation coverage requirements under applicable state laws (commonly known as “mini-COBRA” laws). Premium subsidy relief is only available to “assistance eligible individuals,” which includes any individual (i.e., the covered employee and his or her dependents covered under the plan immediately prior to the event, but excluding domestic partners) who loses health coverage due to a reduction in hours or involuntary termination from employment (other than by reason of gross misconduct) and whose COBRA maximum period has not expired by April 1, 2021. As a result, the following groups of people will be eligible for the subsidy:

- Individuals who become eligible for COBRA during the COBRA subsidy period, defined below (e.g., an employee who is involuntarily terminated on April 3, 2021)
- Individuals who previously elected COBRA but dropped coverage for any reason (including for failure to pay premiums) and whose eligibility for coverage would have extended through the COBRA subsidy period
- Individuals who previously did not elect COBRA but are eligible for coverage during the COBRA subsidy period (e.g., an employee terminated in January 2021)

The ARPA subsidy is available from April 1, 2021, through September 30, 2021 (the COBRA subsidy period). Employers are required to provide written notice of this new subsidy to certain persons. The Department of Labor (DOL) issued [model notices](#) on April 7, 2021. Employers should monitor guidance from the DOL and the IRS for further developments and clarifications and should begin identifying individuals who qualify for the subsidy.

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