

2021 US Labor & Employment Webinar Week  
**Insights and Compliance Strategies for a New World**

February 1 – 4, 2021

The background of the slide features a light blue gradient with several 3D rendered COVID-19 virus particles. These particles are spherical with a textured surface and several protruding spike proteins. One large particle is centered in the upper left, while others are scattered in the background, some appearing as faint, semi-transparent overlays.

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# COVID-19 Update: Even Hindsight Isn't 20/20

Tuesday, February 2, 2021

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# COVID-19 Update: Leaves and Accommodations

Tuesday, February 2, 2021

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# Presenters

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# Topics

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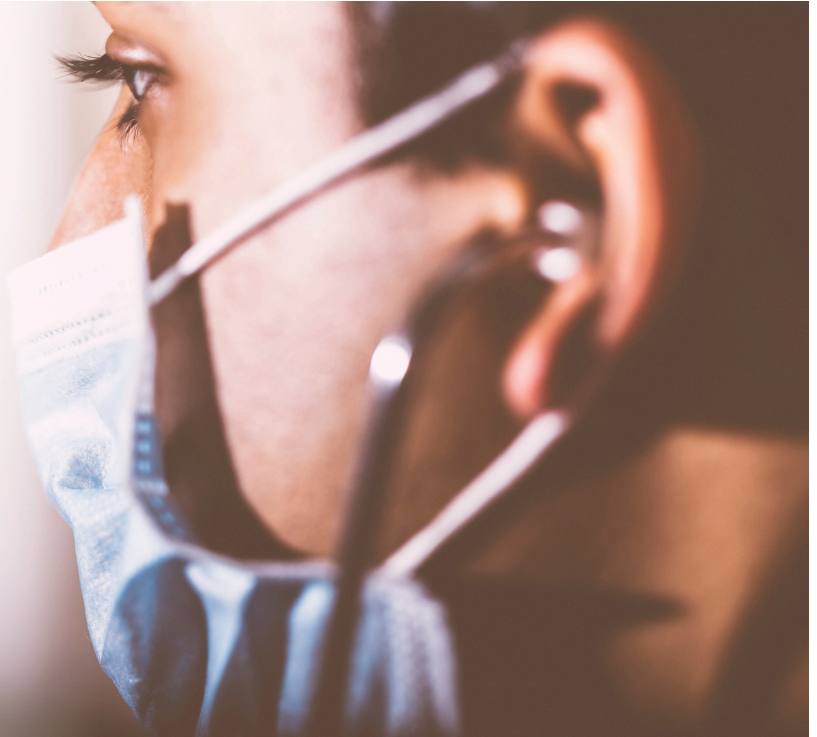
Federal Leave Statutes

COVID-19 State Paid  
Leave Statutes

Existing State and Local  
Paid Sick and Family  
Leave Statutes

COVID-19 and ADA  
Accommodation Requests

Special Challenges with  
Accommodating  
Vaccination Refusal





Families First  
Coronavirus  
Response Act  
(FFCRA)

# Families First Coronavirus Response Act

April 1, 2020 – December 31, 2020

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## First federal legislation requiring paid time off for illness or family care

**Provided up to 80 hours** of emergency paid sick leave (EPSL) to employees:

- (i) subject to COVID-19 quarantine orders,
- (ii) directed to self-isolate by health care provider due to fears of infection with or vulnerability to COVID-19,
- (iii) seeking COVID-19 diagnosis,
- (iv) caring for a family member subject to a COVID-19 quarantine order or directed to self-isolate, or
- (v) caring for minor children whose schools or daycares were closed due to COVID-19

**Provided up to 12 weeks** of emergency family leave, 10 weeks of which would be paid, to care for minor children whose schools or daycares were closed or care providers were unavailable due to COVID-19

Applied to public employers and private employers with fewer than 500 employees

# Families First Coronavirus Response Act

April 1, 2020 – December 31, 2020

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- FFCRA expired by its terms on December 31, 2020 without Congressional extension
- **December 21, 2020:** Congress passes the Consolidated Appropriations Act (CAA), including stimulus payments, reopening the Paycheck Protection Program (PPP loans), and extending unemployment benefits
- Section 286 of the CAA: extends payroll tax credit for paid sick leave and paid family leave that had been available under the FFCRA through March 31, 2021
- **As of January 1, 2021**, providing EPSL and EFL is ***optional***, but covered employers may claim the corresponding payroll tax credit if FFCRA-like leave is granted
  - No new bank of leave or changes to eligibility
  - Not available in excess of daily pay limits
  - Same IRS tax documentation required



# Families First Coronavirus Response Act

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Retention of documentation necessary to claim a tax credit for payment of EPSL or EFL

Job restoration (to same or substantially equivalent position, pay, perks, and benefits)

Although leave entitlements ended December 31, 2020, employers have continuing obligations under the FFCRA

Prevention of retaliation

Statute of limitations: 2 years from date of violation, 3 years if willful

# Emerging FFCRA Case Law

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*Kofler v. Sayde Steeves Cleaning Serv.*  
(M.D. Fla. Aug. 25, 2020):

Plaintiff survived motion to dismiss on FFCRA interference and retaliation claims where she alleged employer terminated her employment and told her she would be ineligible for rehire for six months one week after she requested FFCRA leave to care for her two minor children whose school closed due to COVID-19 reasons.

*Gomes v. Steere House*  
(D.R.I. Nov. 2, 2020):

Plaintiff, a nursing home LPN, survived motion to dismiss on claim of interference and retaliation after employer terminated her immediately after disclosing her exposure to and infection with COVID-19 and requested paid leave; employee's invocation of wrong statute in her request did not preclude claim.

Temporal proximity of termination to request for paid leave sufficient evidence of causation at the pleading stage in both cases.



Family and  
Medical Leave Act

# Family and Medical Leave Act

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- FMLA remains in effect, and has been throughout the FFCRA's implementation.
- **Covered employers:** Public employers and private employers with 50 or more employees
- **Covered employee:** Works for a covered employer, has worked for employer for at least 12 months, with 1,250 hours of service during the 12-month period immediately preceding leave, and works at a location where the employer has 50 or more employees within 75 miles
- Up to 12 weeks of unpaid leave for a covered reason, including, without limitation, the employee's own **serious health condition** that renders employee unable to perform essential functions of his/her job, or to care for a parent, spouse, or child with serious health condition



# Family and Medical Leave Act

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- **Serious health condition:** “an illness, injury, impairment, or physical or mental condition that involves:
  - Inpatient care in a hospital, hospice, or residential medical care facility; or
  - Continuing treatment by a health care provider.”
- *Inpatient care* requires at least one overnight stay.
- *Continuing treatment* includes, without limitation: (a) incapacity of more than three consecutive days that involves (i) treatment two or more times by a health care provider or (ii) treatment once with a regimen of continuing treatment; (b) chronic conditions; and (c) conditions requiring multiple treatments

# Family and Medical Leave Act

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Provide notice of eligibility within five business days of the initial request for leave or when employer acquires knowledge that an employee leave may be for an FMLA-qualifying reason

Inform employee of his/her eligibility status (and if not eligible, at least one reason why)

Provide “Rights and Responsibilities” notice with notice of eligibility (e.g., Form WH-381, [www.dol.gov/agencies/whd/fmla](http://www.dol.gov/agencies/whd/fmla))

In determining leave entitlement, deduct time taken for EFL and prior FMLA leaves

Require certification, and if applicable recertification, of need to be out of work

Explore telecommuting options

# Family and Medical Leave Act

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Eligibility for FMLA leave because of a serious health condition requires actually **having** a serious health condition (or caring for a covered family member with one), not merely **fearing** the risk of contracting a serious health condition.

*Thornberry v. Powell County Det. Ctr.* (E.D. Ky. Sept. 22, 2020):

Detention center substance abuse counselor did not state a claim under the FMLA (or FFCRA, or state whistleblower statute) after being terminated for refusing to attend work out of fear of exposure to coronavirus.

*Department of Labor Informal FMLA Guidance:*

“The FMLA protects eligible employees who are incapacitated by a serious health condition, as may be the case with COVID-19 where complications arise, or who are needed to care for covered family members who are incapacitated by a serious health condition. **Leave taken by an employee for the purpose of avoiding exposure to COVID-19 would not be protected under the FMLA.**”





# State COVID-19 Leave Laws



# State COVID-19 Paid Sick Leave

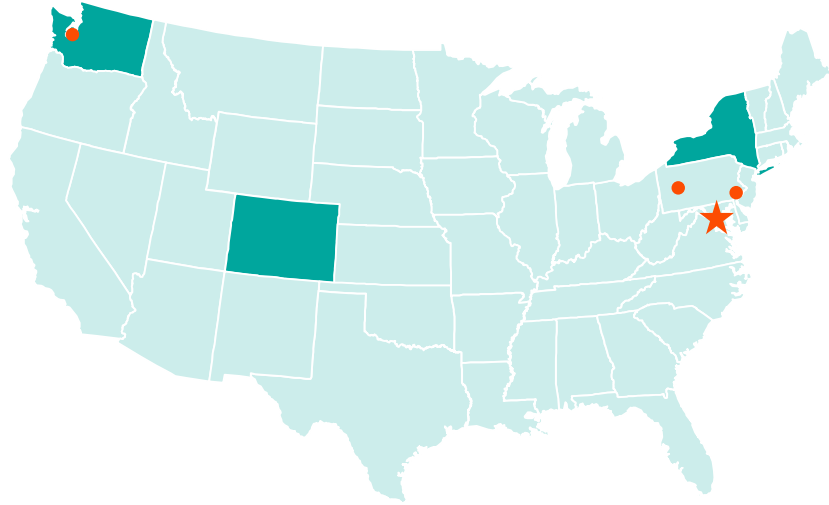
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- A number of states adopted measures to provide paid sick leave specifically for COVID-19-related reasons, generally to build upon and extend the protections of the FFCRA.
- California: Eligible employees include those working for private employers with 500+ employees, health care workers, and emergency responders needing time off due to quarantine orders, to self-isolate, or prohibited by the employer from working due to risk of COVID-19 transmission; up to 80 hours of paid sick leave; statewide leave entitlement expired Dec. 31, 2020.
  - Some California local COVID-19 ordinances have been extended to specific dates in 2021 (e.g., City and County of Sacramento; San Francisco; San Jose; San Mateo County) while others are indefinite or uncertain in duration (e.g., Emeryville; Long Beach, County of Los Angeles, City of Los Angeles)
  - Many include different coverage and eligibility requirements than under the federal or state statutes (e.g., elder care, seniors with underlying health conditions)

# State COVID-19 Paid Sick Leave

- Other states and municipalities adopted COVID-19-specific paid sick leave statutes:

- Colorado
- District of Columbia
- New York State
- Philadelphia
- Pittsburgh
- Washington State
- Seattle, WA



- Different expiration dates, eligibility requirements, pay provisions, employer coverage, and post-leave protections in each requires individualized attention and consideration

The image features a white background with several items: a blue stethoscope, a pile of yellow, blue, and white pills, and two stacks of US dollar bills. One stack is a \$100 bill with a green rubber band, and the other is a \$100 bill with a yellow rubber band. An orange semi-transparent rectangle is overlaid on the right side of the image, containing the title text.

# Existing Paid Sick and Family Statutes

# Pre-COVID State Paid Sick and/or Family Leave Acts

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- Absence of consistent federal legislation providing paid time off for illness or family care led to patchwork of state statutes and local ordinances providing paid time off from work
- 19 states have adopted statewide paid sick leave requirements
- Local ordinances in 5 more states extend limited protection to certain employees
  - Many provide paid time off due to illness or obtaining medical treatment, including preventive treatment (e.g., vaccination)
  - Some provide PTO due to work or school closures related to public health emergencies, others for elder care closures
- 10 states have adopted some form of family leave, most of which provide for time off to care for family members with serious health conditions

# COVID-19-Related Time Off Decisional Map

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- Has my company elected to extend FFCRA benefits through March 31, 2021?
  - Employer coverage? Prior exhaustion of leave? Daily wage caps? Documentation?
- Is there a state and/or local statutory requirement to provide COVID-19 paid or unpaid time off for which the employee requesting leave qualifies?
- Is the leave being requested (i) because the employee's COVID-19 diagnosis or complications constitute a serious health condition under the FMLA, or (ii) to care for a parent, spouse, or child with a serious health condition, such as COVID-19 related hospitalization?
  - Employee eligibility? Employer coverage? Exhaustion of leave entitlement?
- Is the employee eligible for leave under a collective bargaining agreement or company paid time off/sick leave policy? If multiple leaves are available to the employee, can they run concurrently or must one be first exhausted before others apply?
- What job restoration rights and retaliation protections apply upon the employee's return to work?



# ADA Accommodations

# Accommodations Under ADA/State Disability Law

Protecting employees with underlying disabilities vulnerable to COVID-19 complications

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Plexiglas dividers	Allowing leaves of absence
Other barriers between customers and coworkers and the disabled employee	Work-from-home arrangements (and equipment needed to effectively WFH)
One-way aisles/directional signage	Temporary job restructuring
Engineering and administrative controls	Reallocation of marginal job duties
Providing additional PPE	Temporary transfers to different departments
Providing private workspaces	Modifying work schedules to reduce exposure during work hours and commuting
Time off from work	Permitting virtual meetings in lieu of in-person gatherings and travel

# Reasonable Accommodation Process

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- May still request information or medical documentation to determine whether the employee has a disability and whether the disability necessitates an accommodation
- May still engage in interactive dialogue to determine whether a requested accommodation addresses the limitation posed, and whether other accommodations that pose less of a hardship may suffice
- May provide accommodations on an interim or trial basis, or during certain high-risk periods, or only while employees are working from home, or until medical documentation is provided
- May consider unique pandemic-related hardships in the “undue burden” analysis
- Although employers may not discriminate against employees based on their association with a person with a disability, employers need not provide “accommodations” to employees because of their family members’ or spouse/partner’s disability



# Telework as an ADA Accommodation

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- Even if teleworking was offered on a short-term basis to mitigate the spread of the coronavirus, employers need not *automatically* provide telework arrangements as a reasonable accommodation when the workplace reopens:

The fact that an employer temporarily excused performance of one or more essential functions when it closed the workplace and enabled employees to telework for the purpose of protecting their safety from COVID-19, or otherwise chose to permit telework, does not mean that the employer permanently changed a job's essential functions, that telework is always a feasible accommodation, or that it does not pose an undue hardship. These are fact-specific determinations. The employer has no obligation under the ADA to refrain from restoring all of an employee's essential duties at such time as it chooses to restore the prior work arrangement, and then evaluating any requests for continued or new accommodations under the usual ADA rules.

- However, if a prior request for telework was denied and the employee worked effectively during the COVID-19 closure, the request may need to be reconsidered.

<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

A blurred background image of a laboratory setting. In the foreground, a syringe with a needle is visible, resting on a reflective surface. The background shows various pieces of glassware, including what appears to be a large Erlenmeyer flask and other containers, all out of focus. The lighting is soft and blue-toned, creating a clinical and scientific atmosphere.

# Accommodating Vaccination Refusal

# Vaccination and the ADA

- EEOC okays diagnostic COVID-19 tests as a condition of working/returning to work; neutral screening measures, such as temperature checks and symptom screening; and asking (and excluding) employees if they have tested positive for COVID-19
- Vaccinations – more invasive, so added scrutiny:
- Administration of a vaccine is **not** an ADA medical examination, but information obtained before administration (such as to identify contraindications to vaccination) may be.
  - If vaccination is optional, answering pre-vaccination screening questions must be optional, and declining to respond may result only in disqualification from vaccination and no other adverse action
  - All responses to prescreening questions must be kept in confidential medical file.
  - Requiring proof of vaccination is **not** a medical inquiry. Asking why an employee is unable to vaccinate safely is a medical inquiry.



# Vaccination and the ADA

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- Under the ADA, an employer may require vaccination to prevent a direct threat to the health or safety of individuals in the workplace.
- If a mandatory vaccination requirement would tend to screen out an individual with a disability, employer must show employee would pose a direct threat due to a **significant risk of substantial harm** to the health or safety of him/herself or others that cannot be eliminated or reduced by reasonable accommodation.

## Direct threat test

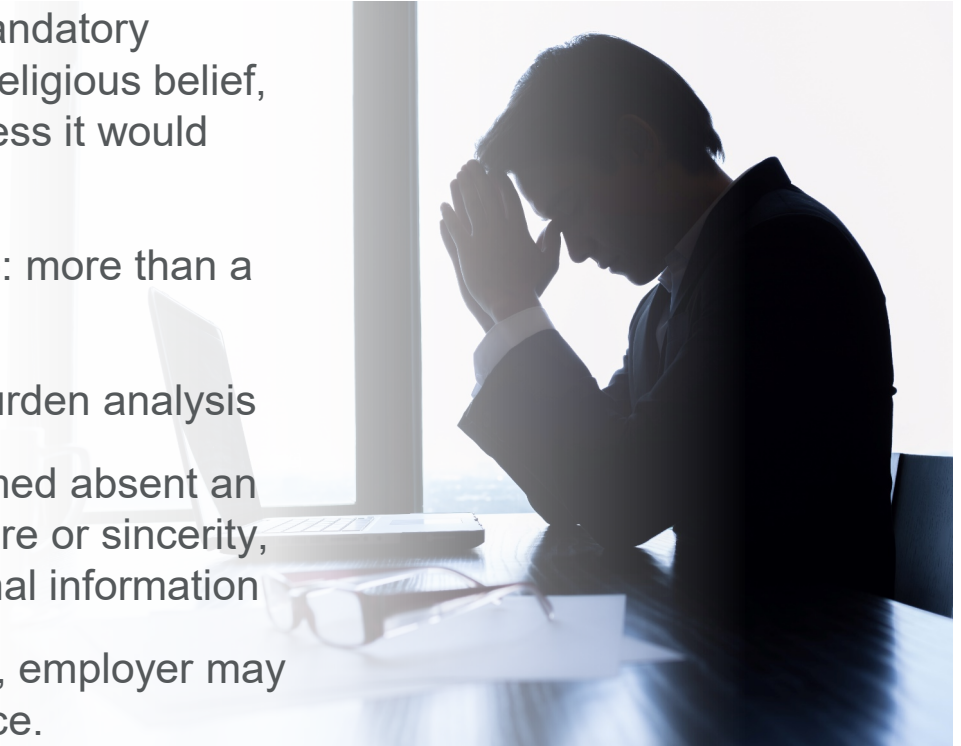
- (1) the duration of the risk
- (2) the nature and severity of the potential harm
- (3) the likelihood that the potential harm will occur
- (4) the imminence of the potential harm

- If a direct threat exists, consider reasonable accommodations that would allow employee to work (e.g., adjust job duties, telework, leave of absence) before excluding from workplace or terminating.

# Vaccination and Title VII – Religious Accommodation

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- Employee request for an exemption from mandatory vaccination due to his or her sincerely held religious belief, practice or observance must be granted unless it would pose an undue hardship
- **Undue hardship** (religious accommodation): more than a *de minimis* cost or burden on employer
  - Different standard than ADA undue burden analysis
- Sincerity of religious belief should be presumed absent an objective basis for questioning religious nature or sincerity, in which case employer can request additional information
- If no reasonable accommodation is possible, employer may lawfully exclude employee from the workplace.



# Vaccination and Title VII – Religious Accommodation

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- ***Fallon v. Mercy Catholic Med. Ctr.* (3d Cir. 2017):**
  - Hospital worker refused influenza vaccination for three years.
  - For two years, he submitted an essay that vaccination ran contrary to his personal, moral beliefs and thus fell within Hospital's religious exemption.
  - In third year, exemption request was denied as insufficient. Hospital asked for statement from clergyperson supporting his request. He refused and was terminated.
  - Court concluded the employee's reasons for refusing the vaccine – that one should not harm his body and the vaccine may do more harm than good – was medical, not religious. That employee felt yielding to coercion would violate his conscience's direction as to right and wrong did not make the objection religious.
  - Court contrasted Christian Scientists, whose rejection of medical intervention is fundamental to their religious belief system.

# How Life May Change Post-COVID

- More careful preparation of job descriptions and essential functions (e.g., travel required, telework limitations, on-site presence and frequency, exposure to medically vulnerable patients/residents)
- Tracking infection, immunization, and immunity data to determine the relative risk of vaccination refusal
- Documenting equipment provided for disability and non-disability related work-from-home requests to ensure consistency in undue burden analysis
- Adjusting management and communication styles to maintain engagement by and with employees in increasingly remote work environment



# Questions? Please let us know.

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