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Vaccine Update



Vaccine Update

- › Pfizer-BioNTech vaccine granted Emergency Use Authorization (“EUA”) by U.S. FDA on Friday, December 11, 2020.
- › First Pfizer vaccine administered in the United Kingdom on December 8, 2020 and in the United States on December 14, 2020.
- › Approval of EUA for Moderna vaccine expected very soon, with others to follow.

Vaccine Update

- › Vaccine expected to be available for entire U.S. population by late May or June 2020.
- › Until a COVID-19 vaccine has been administered to most of the population, precautions such as social distancing, masks, and frequent cleaning of high touch areas will continue to be necessary.

Vaccine Update

- › FDA guidance suggests that vaccination with a vaccine that only has Emergency Use Authorization cannot be made mandatory.
- › Vaccination with regular Authorization can generally be made mandatory, subject to some exceptions.

Vaccine Update

- › Employees with medical conditions might be excused from taking a vaccination if doing so would be a reasonable accommodation under the Americans with Disabilities Act.
- › ADA interactive process would need to be followed to determine whether non-vaccination is a reasonable accommodation under the circumstances.
- › Employees with sincerely held religious beliefs regarding vaccinations may be entitled to reasonable accommodations of their beliefs.

Jacobson v. Massachusetts

- › The U.S. Supreme Court held in Jacobson v. Massachusetts, 197 U.S. 11 (1905), that governmental entities can require individuals to be vaccinated.
- › A local health department in Cambridge, Massachusetts issued an order directing all adults who had not been vaccinated for smallpox within the preceding 5 years to be vaccinated on the basis that doing so was “necessary for the public health and safety.”
- › At the time of the order, smallpox was “prevalent” and continuing to increase in the community.

Jacobson v. Massachusetts

- › The Supreme Court noted that “The liberty secured by the Constitution of the United States does not import an absolute right in each person to be at all times, and in all circumstances, wholly freed from restraint, nor is it an element in such liberty that one person, or a minority of persons residing in any community and enjoying the benefits of its local government, should have power to dominate the majority when supported in their action by the authority of the State.”
- › The Supreme Court further recognized that “It is within the police power of a State to enact a compulsory vaccination law, and it is for the legislature, and not for the courts, to determine in the first instance whether vaccination is or is not the best mode for the prevention of smallpox and the protection of the public health.”
- › Although subsequent court cases have recognized the continuing validity of Jacobson, more recent developments in constitutional law involving the right to privacy could potentially lead to a different result in future litigation.

Vaccine Rollouts Do Not Mean the Old “Normal” Has Returned Yet

- › Without the vaccine widely available yet, COVID-19 related precautions must continue to be taken.
- › The scientific understanding of COVID-19 and how it spreads continues to develop. This can lead to changing messages and confusing media reports.
- › As restrictions are relaxed, it is essential to continue being careful.
- › The current fall/winter surge in COVID-19 cases is consistent with prior epidemics. Spanish Flu of 1918 emerged in the spring and returned in the fall. Similar patterns were seen with the SARS outbreaks in 2002-2004.

Vaccine Rollouts Do Not Mean the Old “Normal” Has Returned Yet

- › Social distancing measures should continue to be observed – spread out employees, no large meetings.
- › Employers are generally requiring masks in common areas, and doing so is currently mandatory in Pennsylvania.
- › Employers should continue increased cleaning of commonly touched surfaces like door knobs, copiers and counters.
- › Limit or preclude shared use of tools and equipment (staplers etc.).
- › Sanitize areas where an infected person was present.

Vaccine Rollouts Do Not Mean the Old “Normal” Has Returned Yet

- › Continue to be careful about kitchen areas and community food - might be best to prohibit for now.
- › Consider shifting key number entry systems to key fob touchless entry.
- › Make sanitizer, paper towels and masks available to employees and guests.
- › Some are using Plexiglas shields at counters where members of the public are served.

Vaccine Rollouts Do Not Mean the Old “Normal” Has Returned Yet

- › Consider continuing to limit non-essential travel.
- › Consider allowing some staff to continue teleworking on a temporary basis.
- › Consider rotating staff between telework and in office work to reduce the number of employees in the office at one time.
- › Plan for increased restrictions as winter wave of COVID-19 cases continues, with the onset of the winter flu season and other seasonal events (Halloween, Election Day, Thanksgiving, Hanukkah, Christmas, New Years Eve, New Years Day).

What if an employee refuses to work due to fears of Coronavirus?

- › Assuming public health orders permit your workplace to operate, contact the employee and determine basis for fears
 - Review the workplace precautions that are being taken
 - Many private employers and governmental entities provide essential services, cannot do that without employees
- › Unless medical basis exists for absence, employee can be required to come to work.
- › If the employee provides medical basis, such as a mental health disorder or pre-existing conditions that result in weakened immunity, engage in the ADA interactive process.

Families First Coronavirus Response Act

- › FFCRA is a collection of laws including Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Acts.
- › The two benefits are effective April 1, 2020 through December 31, 2020. The end date could potentially be extended by Congress in a future law.
- › Both are paid using formulas that are based on the average FLSA “regular rate” (would include additional payments like longevity, shift differential, non-discretionary bonuses etc.) over the past 6 months.
- › Both apply to (1) all governmental employers; plus (2) private employers with fewer than 500 employees.

Emergency Paid Sick Leave Act

- › Any employee, regardless of length of employment, eligible for paid sick time if employee is unable to work (or telework) “but for” 1 of 6 reasons.
- › 80 hours total for those who work 40 hours per week.
- › For those who work less than 40 hours per week (“part-time”), average number of hours worked over a 2 week period over last 6 months.

Emergency Paid Sick Leave Act

- › Employers may, but are not required to, exempt emergency responders, defined as “anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19.”
- › Emergency responders include but are not limited to “law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel” and those with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency, as well as individuals whose work is necessary to maintain the operation of facilities.
- › Certain health care providers can also be excluded.

Emergency Paid Sick Leave Act

- › (1) The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
- › (2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
- › (3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.

Emergency Paid Sick Leave Act

- › (4) The employee is caring for an individual who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19 or who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
- › (5) The employee is caring for his or her son or daughter if the school or place of care of the son or daughter has been closed, or the childcare provider of such son or daughter is unavailable, due to COVID-19 precautions.
- › (6) Other circumstances specified by the U.S. Secretary of Health and Human Services in consultation with the U.S. Secretary of the Treasury and the U.S. Secretary of Labor.

Emergency Paid Sick Leave Act

- › At the employee's regular rate of pay and based on the hours the employee is normally scheduled for work, capped at no more than \$511 per day and \$5,110 in total for leave taken under in paragraphs (1), (2), or (3) above; and
- › At two-thirds (2/3) of the employee's regular rate of pay and based on the hours the employee is normally scheduled for work and capped at no more than \$200 per day and \$2,000 in total for leave taken under in paragraphs (4), (5), or (6) above.

Emergency Paid Sick Leave Act Regulations

- › To take Emergency Paid Sick Leave Act to care for another individual due to a COVID-19 related reason, the employee must have a “genuine need to care for the individual” and the employee will not qualify if he or she has “no personal relationship” with the individual.
- › Although it does not have to be an immediate family member, there needs to be “a relationship that creates an expectation that the employee would care for the person if he or she self-quarantined or were quarantined.”

Legislative Proposals

- › FFCRA December 31, 2020 end date could be extended by Congress, but that has not happened yet.
- › Two bills with bipartisan support would provide a combined \$980 billion in COVID-19 aid are being considered by Congress.

Bipartisan Emergency COVID Relief Act of 2020

Would provide \$748 billion in funding, including:

- › a \$300 weekly unemployment compensation supplement for the first 16 weeks of 2021;
- › \$25 billion in rent and utility assistance and would also preclude evictions through January 31, 2021;
- › \$82 billion for schools;
- › \$13 billion for emergency food assistance;
- › \$16 billion for vaccine development/distribution as well as funding for COVID-19 testing and contact tracing; and
- › \$300 billion in additional Paycheck Protection Program funding, expanded to also include 501(c)(6) entities and with a simplified forgiveness process for smaller recipients.

Bipartisan State and Local Support and Small Business Protection Act of 2020

- › Would provide \$160 billion in additional aid to state and local governments, potentially with fewer restrictions than the CARES Act and related U.S. Treasury guidance.
- › Funds distributed to states in three rounds or tranches, with 1/3 distributed based on population and 2/3 distributed based on revenue loss levels.
- › At least 40% to be distributed to local governments, with state to determine whether based on population or revenue loss or both.
- › Funding could not be used to cover pension costs and pension benefits could not be expanded by state while funding is being received.
- › Would provide certain COVID-19 related liability protections.
- › Would extend CARES Act Coronavirus Relief Fund deadline to December 31, 2021.

Legislative Proposals

- › A White House proposal would include \$600 stimulus payment to each adult and some Democratic Senators are advocating for a stimulus payment of up to \$1,200.
- › More comprehensive legislation similar to the March 2020 CARES Act is considered more likely to happen in early 2021.

Biden Emergency Paid Sick Leave Plan

- › COVID-19 related emergency paid sick leave for 14 days for those who are sick, exposed, or subject to quarantine.
- › Would provide 100% of weekly pay capped at \$1,400 a week (annual equivalent of about \$72,800 a year).
- › Paid Leave for sick employees.
- › Paid Leave for employees caring for family members or other loved ones.
- › Paid Leave for those unable to continue work because they are at increased risk of health complications due to COVID-19.
- › Paid Leave and Child Care Assistance related to school closings.
- › Paid Leave for domestic workers, caregivers, gig economy workers, and independent contractors.

Biden Emergency Paid Sick Leave Plan

- › Stated intent is to ensure “that employers will not bear any additional costs for such additional leave in the midst of this crisis.”
- › Plan would “provide reimbursement to employers or, when necessary, direct payment to workers for up to 14 days of paid sick leave or for the duration of mandatory quarantine or isolation.”
- › Would be in addition to existing paid leave provided by employer.
- › Businesses would be reimbursed or given tax credits.

Staying at Home Due to Fever?

- › May currently be eligible for FFCRA paid sick leave if they are seeking a medical diagnosis.
- › If they do not seek a medical diagnosis, then not entitled to FFCRA – could use sick leave.

COVID Vacation?

Absent a State order requiring travelers to quarantine (such as the one currently in effect in Pennsylvania), a doctor's note is not enough to support leave when an employee travels out of state unless the doctor advises the employee to self-quarantine based on a belief that:

- › (A) Employee has COVID-19;
- › (B) Employee may have COVID-19; or
- › (C) Employee is particularly vulnerable to COVID-19; and
- › (D) Following the advice of a health care provider to self-quarantine prevents the employee from being able to work or telework.
- › (E) However, an employee is not eligible for Emergency Paid Sick Leave if no work is available (e.g., lay off).

Emergency Family and Medical Leave Expansion Act

- › A “public health emergency” exists (emergency declared by a Federal, State, or local authority related to COVID-19).
- › Employed at least 30 calendar days.
- › Unable to work (or telework) due to a need for leave to care for a child of the employee because (1) the child’s elementary school, secondary school, or place of care has been closed, or (2) the paid child care provider of the child is unavailable, due to a public health emergency.
- › Regulations permit EFMLEA leave to be used for a child 18 years old or older if the child is incapable of self-care because of a mental or physical disability.

Emergency Family and Medical Leave Expansion Act of the FFCRA

- › The EFMLEA states that “The first 10 days for which an employee takes leave . . . may consist of unpaid leave.”
- › Employee can elect to (but cannot be required to) use paid leave during the first 10 days.
- › After the first 10 days, paid at two-thirds (2/3) of the employee’s “regular rate” (capped at \$200 a day and \$10,000 total).
- › After the first two weeks, employer can require employee to use paid leave concurrently with EFMLEA leave.
- › Counts as part of 12 weeks of FMLA entitlement.

FFCRA Regulations

- › The regulation indicates that to qualify for either type of FFCRA leave based on a school closure and child care provider unavailability, there must not be another “suitable individual” (such as another parent, or grandparent) available to care for the child.
- › The regulations provide that the period of unpaid EFMLEA leave is two weeks, not 10 days (even though the EFMLEA says 10 days) because the DOL believes that this is consistent with Congressional intent that the benefits under the EPSLA and the EFMLEA be applied consistently.

FFCRA Regulations and Documentation

- › An employer must keep for at least 4 years records related to requests for leave; denials of leave; grants of leave (and longer if a litigation hold is in place).
- › Employers must document/record unwritten requests for leave.

Using FFCRA leave concurrently with other paid leave (DOL March 28 guidance)

- › “During the first two weeks of unpaid expanded family and medical leave, you may not simultaneously take paid sick leave under the EPSLA and preexisting paid leave, unless your employer agrees to allow you to supplement the amount you receive from paid sick leave with your preexisting paid leave, up to your normal earnings.”
- › “After the first two workweeks (usually 10 workdays) of expanded family and medical leave under the EFMLEA, however, you may elect—or be required by your employer—to take your remaining expanded family and medical leave at the same time as any existing paid leave that, under your employer’s policies, would be available to you in that circumstance.”
- › “This would likely include personal leave or paid time off, but not medical or sick leave if you are not ill.”

Does existing paid leave count toward FFCRA requirements? (DOL March 28 Guidance)

- › “No, unless your employee agrees” (and union if applicable!).
- › “Paid sick leave under the EPSLA is in addition to your employee’s other leave entitlements.”
- › “You may not require your employee to use provided or accrued paid vacation, personal, medical, or sick leave before the paid sick leave.”
- › “You also may not require your employee to use such existing leave concurrently with the paid sick leave under the EPSLA.”
- › “But if you and your employee agree, your employee may use preexisting leave entitlements to supplement the amount he or she receives from paid sick leave, up to the employee’s normal earnings.”

Emergency Family and Medical Leave Expansion Act of the FFCRA

- › If an employee is home because of a state or local quarantine or Stay at Home order, but the employer has no work for that employee to perform, the person is not eligible for Emergency Paid Sick Leave Act or Emergency Family and Medical Leave Expansion Act benefits.
- › The employee would qualify for unemployment compensation benefits.

What if I already used my 12 weeks of FMLA leave? (March 28 DOL Guidance)

- › “If you are an eligible employee, you are entitled to paid sick leave under the Emergency Paid Sick Leave Act regardless of how much leave you have taken under the FMLA.”
- › “However, if your employer was covered by the FMLA prior to April 1, 2020, your eligibility for expanded family and medical leave depends on how much leave you have already taken during the 12-month period that your employer uses for FMLA leave.”
- › “If you have already taken 12 workweeks of FMLA leave during this 12-month period, you may not take additional expanded family and medical leave.”

Pennsylvania Act 17 of 2020

- › Pennsylvania Act 17 of 2020 provides Heart and Lung Act-like salary continuation benefits to police officers and paid firefighters (not volunteer firefighters) who contract or are diagnosed with COVID-19 or who are required to quarantine due to COVID-19 exposure.
- › Benefits last up to 60 days per incident.
- › To receive Act 17 benefits, no proof of exposure in the line of duty is required (in contrast to Workers Compensation and Heart and Lung Act claims).

Unemployment Compensation Updates

- › Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) became law on Friday, March 27, 2020.
- › Section 2103 provides a 50% reimbursement of unemployment compensation benefits paid by non-profit and governmental employers that self-insure UC benefits (use the “reimbursable method”).
- › Section 2104 of the CARES Act also provided an additional federally-funded \$600 per week for up to 4 months (through July 31). After July 31, a \$300 supplement was provided under a Presidential Executive Order through late December.
- › Section 2107 provides an additional 13 weeks of unemployment compensation after the standard 26 week eligibility period runs out (39 weeks total).

Unemployment Compensation

- › Pennsylvania enacted Act 9 of 2020 on March 27, 2020, to ease eligibility requirements for unemployment compensation claims related to the COVID-19 outbreak.
- › These changes include formally waiving the one week waiting period for the duration of the COVID-19-related state of disaster and emergency declared by Governor Wolf and waiving job search and registration requirements for that same period of time.

Unemployment Compensation

- › Eligible employers will be granted automatic relief from charges for claims related to the COVID-19 outbreak or the efforts to contain its spread.
- › However, the longstanding rule that self-insured employers that use the “reimbursable method” cannot receive relief from charges unless they pay an annual solvency fee remains in effect, underscoring the importance of the relief that the CARES Act provides to those employers.
- › Under Act 9 such reimbursable employers are granted an extended period of time to repay benefits charged to their account, can qualify for interest-free repayments if they can demonstrate financial hardship, and will not be charged interest on late payments through January 1, 2021.

Unemployment Compensation

- › The practical effect of the automatic relief from charges for employers who use the “contributory method,” or in other words who pay unemployment compensation insurance taxes to the Pennsylvania State Unemployment Compensation Trust Fund, is that their unemployment compensation tax rate will not increase due to COVID-19-related claims.
- › Ordinarily a contributory employer’s UC tax rate is based on the employer’s experience rating, which reflects claims filed by its former or current employees.

Unemployment Compensation

- › Act 9 also directs employers to notify employees at the time of termination of the availability of unemployment compensation benefits for individuals who meet the requirements of the Unemployment Compensation Law, the ability of an individual to file an unemployment compensation claim in the first week that employment stops or work hours are reduced, and the availability of assistance with or information about unemployment compensation claims on the Department of Labor and Industry's Internet website or by calling its toll-free number at 888-313-7284.
- › Employees must also be informed that in order to file a claim they will need to provide their full legal name, Social Security number, and, if they are not a citizen or resident of the United States, information about their authorization to work in this country.

CARES Act: Coronavirus Relief Fund

- › Under Section 5001 of the Cares Act, Coronavirus Relief Fund expenditures must be:
 - › (1) Necessary expenditures incurred due to the COVID-19 public health emergency;
 - › (2) Not accounted for in the budget most recently approved as of March 27, 2020; and
 - › (3) Incurred during the period that begins on March 1, 2020 and ends on December 30, 2020.

CARES Act: Coronavirus Relief Fund

- › Seven counties in Pennsylvania with populations of 500,000 or more received Coronavirus Relief Fund money directly from the U.S. Treasury.
- › Sixty other smaller counties received their money from the Commonwealth of Pennsylvania pursuant to Pennsylvania Act 24 of 2020.
- › Counties had to determine how to use funds in a way that best benefits the citizens of the county and had a great deal of discretion in determining how to distribute funds, within the limits imposed by the U.S. Treasury and DCED.

CARES Act: Coronavirus Relief Fund

Where permitted by a county distributing funds, Coronavirus Relief Fund money can be used to cover costs such as:

- › Reimburse costs of COVID-19 related expenditures (PPE, sanitizer, disinfectant, other mitigation efforts).
- › Reimburse COVID-19 related paid administrative leave and FFCRA leave (Note: DCED guidance issue).
- › Reimburse certain unemployment compensation costs of reimbursable employers.

Eligible COVID-19 Response Activities: Unemployment Costs

- › Section 2103 of the CARES Act provides a 50% reimbursement of unemployment compensation benefits paid by employers using the reimbursable method from March 13, 2020 through December 31, 2020.
- › Section 5001 of the CARES Act provides a way for Coronavirus Relief Fund money to be used to cover the other 50% of a reimbursable employer's COVID-19 related claims between March 1, 2020 and December 30, 2020, if the County distributing the funds permits.

CARES Act: Coronavirus Relief Fund

Where permitted by a county distributing funds, Coronavirus Relief Fund money can be used to cover costs such as:

- › Up to 100% of police and paid fire payroll costs (as well as county corrections officers, 911 dispatchers and deputy sheriffs) between March 1, 2020 and December 30, 2020 (counties provided funding to municipalities to cover no more than a month or two, if any).
- › Payroll costs of employees who otherwise would have been laid off but were instead reassigned to COVID-19 related activities.
- › Payroll costs related to time spent on COVID-19 related activities.

CARES Act: Coronavirus Relief Fund

- › Cost of communicating and enforcing governmental COVID-19 public health orders.
- › Expenses for quarantining individuals.
- › Costs related to COVID-19 testing.
- › Costs related to COVID-19 contact tracing.
- › Emergency medical response expenses, including emergency medical transportation, related to COVID-19.
- › Expenses for care for homeless populations provided to mitigate COVID-19 effects and enable compliance with COVID-19 public health precautions.

Reinstatement of Laid Off Employees

- › Generally laid off employees do not have an absolute right to reinstatement.
- › FFCRA does not protect an employee from layoffs that would have affected the employee regardless of whether he or she had taken leave, but it is the employer's burden to show this.
- › Reinstatement rights may exist under the FMLA, Uniformed Services Employment and Reemployment Rights Act ("USERRA"), or other laws. If a job is eliminated, the obligation generally is to attempt to place the individual in a job with equivalent status, wages and benefits.
- › Collective Bargaining Agreements may address recall and bumping rights for union-represented employees.

Do We Still Have To Bargain With The Union?

- › Under Pennsylvania's labor laws and the National Labor Relations Act, even during pandemics employers with union-represented employees generally continue to have a duty to bargain over mandatory subjects of bargaining such as wages, hours and working conditions and to provide information relevant to the Union's representation of employees upon request.
- › Employers should generally inform a union in advance of changes that are being contemplated and give the union an opportunity to discuss its concerns.
- › Unions are very concerned about the Coronavirus outbreak and may be very responsive to your plans if you keep them in the loop.

Bargaining Considerations

- › National League of Cities survey released in December 2020 indicated that this year municipal revenue is down 21% and expenses are up 17% (many related to COVID-19 costs such as PPE, teleworking expenses and overtime).
- › Several projections indicate that municipalities may be down 10% to 30% or more in revenue in 2021, due to decreased state funding and decreased tax revenues.
- › Now more than ever is the time to ensure that wages and benefit packages are truly sustainable.
- › Current conditions will have a significant economic impact that must be taken into account in bargaining and interest arbitration.

For More Information:

- › Campbell Durrant – COVID-19 Employer Resource Page:
- › <https://www.cdblaw.com/covid19.php>
- › DOL Families First Coronavirus Response Act Questions and Answers:
- › <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>
- › Required DOL Poster:
- › https://www.dol.gov/sites/dolgov/files/WHd/posters/FFCRA_Poster_WH1422_Non-Federal.pdf