

Update: COVID legal considerations for employers



There are new COVID legal considerations for employers as the pandemic rages on. With cases rising and hospitals filling, employers should expect both legislation and agency orders aimed at slowing the spread. It's looking more and more likely that Congress will temporarily extend the Families First Coronavirus Response Act (FFCRA). That means more paid leave. More support for unemployment is on the horizon, making it harder to attract workers to jobs perceived as high risk. OSHA will step up rule-making and enforcement. Finally, as vaccines come online, whether you can demand an immunized workforce remains up in the air.

Paid leave may return - eventually.

Leave granted by the FFCRA is likely to return - though there may be a gap if Congress doesn't act soon. The FFCRA created the first-ever private sector federal paid leave entitlement. Workers affected by COVID-19 pandemic related closures, infections, and quarantine orders received up to two weeks of fully paid emergency leave. They were eligible for 10 weeks of partially paid emergency FMLA leave for COVID school and daycare closures. The FFCRA is currently scheduled to sunset on December 31, 2020.

However, Congress has signaled that extending the FFCRA may be part of the coming spending bill. If that doesn't happen during the lame-duck session, the incoming Biden administration will send Congress a bill. President-elect Biden's pandemic plans call for an expanded FFCRA. It would provide for 100 percent wage coverage up to \$1,400 a week rather than the lower current limit. It would also provide paid leave during a

mandatory quarantine or isolation period. In addition, Biden's plan calls for expanding coverage to independent contractors and domestic workers. Employers would also continue to receive tax deductions and reimbursement for COVID-19-related paid leave.

Additional Resource: See more on what may happen if the [FFCRA isn't extended](#).

Some industries see labor shortages despite high unemployment

While unemployment remains historically high and may rise again, some employers are struggling to hire enough workers. That's especially true in the service and retail industries and even in manufacturing. Potential employees fear getting sick on the production line and while dealing with uncooperative customers in restaurants and stores.

Recently employers have been having some success attracting workers who have used up their unemployment entitlement and stimulus payments. However, if the expanded eligibility for unemployment benefits that expires December 31 does lapse, even more workers may accept job offers. That's especially true for 'gig' workers who were newly eligible as self-employed for unemployment payments.

Congress, as part of the "must-pass" spending bill to prevent a December shutdown, may extend unemployment benefits. That could make more workers reluctant to take jobs and keep 'gig' workers out of the labor pool.

Expect stricter OSHA regulations on COVID

The incoming Biden administration has already signaled that it will make OSHA rules binding on employers, creating new legal considerations for employers. The administration will immediately get to work on issuing COVID-19 emergency temporary standards (ETS). Controlling the COVID-19 pandemic is the incoming Biden administration's "Day One" priority.

The Trump administration never appointed an Assistant Secretary of Labor for OSHA. Expect that the Biden administration will have a nominee in place immediately for Senate confirmation. The Biden transition team has not yet announced a potential candidate for the job. But a likely candidate is Dr. David Michaels, an epidemiologist and professor, on the transition team. He was the Assistant Secretary of Labor for Occupational Safety and Health under President Obama.

OSHA may borrow from state plans already issued in states like Michigan, Oregon, or Virginia. Here's what likely will be included in an OSHA ETS:

- Preparedness planning;
- Required social distancing, screening, masking, hygiene, and infection control rules for various industries;
- Procedures for employee and health department positive test result sharing; and
- Recordkeeping and training rules.

OSHA regulations will be more aggressively enforced

On the campaign trail, Biden called for more aggressive enforcement of existing worker safety rules and suggested OSHA should double its existing staff of inspectors. While that will take time, hiring and training inspectors will be a priority. The new administration can step up enforcement using existing inspectors. Thus, expect more inspections, citations, and fines. Employers should also expect more whistleblowing as workers expect a more positive OSHA response to such complaints.

A vaccine is here, with more likely on the way

By now, we've all heard that "the cavalry is on the way" in the form of a COVID-19 vaccine. When the history of the pandemic is finally written, Operation Warp Speed will be hailed as an astonishing success. Launched on May 15, 2020, the public-private partnership to accelerate the development, manufacturing, and distribution of COVID-19 vaccines has succeeded. Three different vaccines have been developed and tested and two are awaiting emergency approval at the Food and Drug Administration (FDA). The previous record was a vaccine for mumps – which took 4 years to develop and approve for use.

One vaccine has already started distribution and another may deploy before year-end. The companies with vaccines and their characteristics are:

- AstraZeneca: Clinical results show that AstraZeneca's vaccine candidate is 90 percent effective. It has not yet applied for emergency FDA approval.
- Moderna: Clinical results for Moderna's vaccine candidate show it to be 95 percent effective overall. In addition, this vaccine appears to be 100 percent effective in preventing severe COVID-19 infection. It applied for FDA emergency approval on November 30 and had an FDA hearing on Thursday, December, 17th. If approved, Moderna expects to have 20 million doses by the end of the year.
- Pfizer and BioNTech: The first clinical trial results of this vaccine developed by Pfizer and a German biotech partner were announced on November 9. It is said to be over 95 percent effective at preventing both mild and severe COVID-19 infections. Pfizer's vaccine was given emergency use authorization by the FDA on December 11, and the first vaccine was given in the US on Monday, December 14. Pfizer will have 50 million doses available before the year ends.

Can you require employees to be vaccinated?

Rapid FDA emergency approval is expected. Already, the Centers for Disease Control and Prevention (CDC) is working on prioritizing who gets first access to approved vaccines. It's expected that health care workers will have first access to vaccines, followed by other high-risk groups. These groups will include workers at high exposure risk, people in nursing homes, and others with preexisting conditions.

Once vaccines are approved and prioritized, there will be additional legal considerations to take into account. Employers will have to decide whether to require vaccination as a condition of employment. Employer-required vaccines are considered medical examinations under the Americans With Disabilities Act (ADA). Employers must show the vaccine is "job-related and of business necessity" or prevents a "direct threat" to workplace safety. Employers have used this argument to justify vaccine requirements for employees who interact with infected or vulnerable co-workers and customers.

Under the ADA, an employee may request a reasonable accommodation if the vaccination poses a health risk. It's unclear how successful such claims will be. Employees may also have religious objections.

Most potentially troublesome for employers is the emergency nature of these vaccines' FDA approval. It's generally agreed that employers cannot force workers to take experimental drugs. Emergency FDA approved drugs fall into that category. Once the vaccines undergo the lengthier regular FDA approval process, employers will have a more solid legal ground for mandates. Meanwhile employers will have to rely on persuasion. Employers should consult counsel before taking adverse action against a protesting worker.