



Monthly Strategies

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COVID-19 Deal Extends FFCRA Tax Credits, Not Leave Mandate

As Congress debated the new COVID-19 relief package, there was a great deal of speculation as to whether the legislation would extend the leave mandates of the Families First Coronavirus Response Act (“FFCRA”) beyond their current expiration date of December 31, 2020. Now that a deal has been reached, it looks like we have the answer to that question: the FFCRA emergency sick leave and expanded FMLA leave mandates will indeed expire on December 31, 2020. However, covered private sector employers that allow employees to take leave that *would* have been mandated by the FFCRA if the law had remained in effect through March 31, 2021 may continue to claim a tax credit to cover the cost of the leave.

What this means for employers?

- Employers may, but are not required to, continue providing paid leave that would have been required by the FFCRA from January 1, 2021 forward.
- Private-sector employers currently covered by the FFCRA who continue to provide paid leave can continue to claim a tax credit to cover the cost of voluntarily providing FFCRA leave through March 31, 2021.
- The amendment does not increase the total amount of the tax credit available to pay for leave for any single employee. FFCRA sick leave or expanded FMLA leave taken before December 31, 2020 will still count against the total amount of any tax credits that can be claimed for leave taken through March 31, 2021.
- Even though FFCRA leave will no longer be mandatory, employers must still comply with the ADA, FMLA, and leave mandates under state and local law.
- Employers with unionized workforces must also be mindful of contract and bargaining

obligations related to any changes in their leave policies.

- Keep in mind that things could still change.

Time to Update Your AAP's

Many Affirmative Action Plans (AAPs) expired on December 31, 2020. Under federal law, government contractors and subcontractors with 50 or more employees who have entered into at least one contract of \$50,000 or more with the federal government must prepare and maintain a written affirmative action program, which must be developed within 120 days from the commencement of the contract and **must be updated annually**.

AAP's should be submitted to DOL during the first quarter of 2021.

How to Handle an Employee's Request for Accommodation to a Vaccine Requirement

Many employers require employees to receive vaccinations to reduce the spread of communicable diseases in the workplace and have for years, such as flu shots. Employers who want to require employees to take the COVID-19 vaccine should know that federal law allows employees to ask to be exempted from the requirement due to medical or religious reasons.

Follow this process to handle a current employee's accommodation request to be exempt from the employer's vaccination requirement(s).

Determine whether the employer is covered by the ADA and Title VII: All employers, including state and local government employers, with 15 or more employees are covered under the ADA and Title VII.

Ensure that a policy and procedure exists for handling accommodation requests:

Organizations should implement or review policies and procedures for handling requests for medical and religious accommodations. Job descriptions should also be reviewed to confirm

they include all aspects of the job and include any requirements for mandatory vaccinations.

Review requests from the vaccine requirement:

Employee requests for exemption from the vaccination requirement should be reviewed to determine if the request falls under the ADA or Title VII obligations for the employer to consider accommodation. A request for exemption due to a personal preference not to receive a vaccine is not protected by law, and the employer should reiterate the company policy and the consequences for not complying with the vaccination mandate. Requests for accommodation due to a disability or religious belief should be further reviewed following the steps below.

Initiate the interactive Process: Upon learning of the possible need for a reasonable accommodation, employers should engage in a process in which the employee, his or her health care provider or religious leader, and the employer share information about the nature of the disability or religious belief and the limitations on receiving an employer-required vaccination. This process is referred to as the interactive process and involves a good-faith effort by the employer and the employee to discuss the employee's specific circumstances. The purpose of this discussion is to determine what (if any) accommodations may be needed.

For ADA accommodations, the employee should be asked to provide appropriate documentation from his or her health care provider regarding the nature of any impairment(s), the duration of the need for accommodation and the extent to which the impairment(s) conflict with the employer's vaccination requirement.

For religious accommodations, the employee should be asked to provide an explanation of his or her sincerely held religious beliefs and, if necessary, appropriate documentation from his or her religious leader regarding the religious belief that conflicts with the employer's vaccination requirement.

Determine whether the employee has a disability under ADA: Organizations should use the definition of a "disability" and a "qualified individual with a disability" under provisions of the ADA, along with information obtained during the interactive process, to help make this determination.

The ADA defines disability as an impairment that substantially limits a major life activity.

Determine whether the employee has a sincerely held religious belief: Title VII requires employers to accommodate only those religious beliefs that are "sincerely held." Because the definition of religion is broad and protects beliefs and practices with which the employer may be unfamiliar, the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief. If, however, the employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief or practice, the employer would be justified in seeking additional supporting information.

Determine if the accommodation poses a direct threat or creates an "undue hardship:" The ADA requires employers to grant an accommodation request unless the accommodation would result in undue hardship on the employer or poses a direct threat to the health and safety of others.

When evaluating the existence of a direct threat, the Equal Employment Opportunity Commission (EEOC) provides the following guidance, "employers should conduct an individualized assessment of four factors in determining whether a direct threat exists: the duration of the risk; the nature and severity of the potential harm; the likelihood that the potential harm will occur; and the imminence of the potential harm. A conclusion that there is a direct threat would include a determination that an unvaccinated individual will expose others to the virus at the worksite. If an employer determines that an individual who cannot be vaccinated due to disability poses a direct threat at the worksite, the employer cannot exclude the employee from the workplace—or take any other action—unless there is no way to provide a reasonable accommodation (absent undue hardship) that would eliminate or reduce this risk so the unvaccinated employee does not pose a direct threat."

Similarly, employers should be careful when using the undue hardship defense as a rationale to not provide an accommodation. Under the ADA, undue

hardship must be based on an individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense. Under Title VII, the undue hardship defense to providing religious accommodation requires a showing that the proposed accommodation in a particular case poses a "more than de minimis" cost or burden.

Employers should seek input from the employee's supervisor, who has knowledge about the duties of the position and the worksite, to help determine the feasibility of what may be a "reasonable" accommodation, including alternative accommodations to the one requested by the employee.

According to the EEOC, "if an employee cannot get vaccinated for COVID-19 because of a disability or sincerely held religious belief, practice, or observance, and there is no reasonable accommodation possible, then it would be lawful for the employer to exclude the employee from the workplace. This does not mean the employer may automatically terminate the worker. Employers will need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities."

Notify the Employee: The next step is to notify the employee in writing that their requested accommodation has been approved or denied. If the request is denied, the employer should communicate and document any available alternative accommodations.

The company must maintain all copies of accommodation requests, supporting information and documentation, including denials, in a file separate from the employee personnel file, consistent with the confidentiality requirements of the ADA and to protect sensitive religious preference information.

Managers and supervisors must understand that it is unlawful to disclose that an employee is receiving a reasonable accommodation or to retaliate against an employee for requesting an accommodation.

Review and Modify: The accommodation process is not set in stone and may need to be reviewed, especially if an employee's circumstances change or the needs of the business change.

Delaware Anti-Sexual Harassment Law Training Requirements

The Delaware law that specifically addresses prohibition against sexual harassment under the Delaware Discrimination in Employment Act (DDEA), requires anti-sexual harassment training requirements for employers, with 50 or more employees in the state, every two years. The law went into effect on January 1, 2019 and in January 2021 it will be time to conduct the mandatory interactive training again.

The law mandates all new employees must be trained within one year of hire and all employees every two years.

Mandatory Sexual Harassment Training

Required: The training for staff must include all of the following elements:

1. The illegality of sexual harassment;
2. The definition of sexual harassment using examples;
3. The legal remedies and complaint process available to the employee;
4. Directions on how to contact the Department of Labor; and
5. The legal prohibition against retaliation.

In addition, the interactive training for the supervisors must further include all of the following:

1. The specific responsibilities of a supervisor regarding the prevention and correction of sexual harassment; and
2. The legal prohibition against retaliation.

HR Strategies, LLC is available to present interactive training programs consistent with Delaware's training requirements. We can provide the training in-person or virtually. Contact HR Strategies to schedule your organization's required training or schedule individual employees for a live upcoming online interactive class.

Contact HR Strategies staff at 302.376.8595 or info@hrstrategies.org if you would like support or would like to learn more about the items in this newsletter. Please contact us if you would like to be removed from our Monthly Strategies mailing list or if you would like for us to add someone to our mailing list.