

# COVID-19, Vaccinations, and Leave: What Employers Need To Know

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## Article

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North Carolina opened COVID-19 vaccinations to everyone over age 16 on April 7, 2021. Both the U.S. Centers for Disease Control and Prevention and the N.C. Department of Health and Human Services have excellent resources for employers to use to encourage employees to become vaccinated. The Raleigh News & Observer recently reported that over a quarter of the adult population of North Carolina (more than 2 million people) have already been fully vaccinated.

## Employers May Ask About Vaccinations

Under current Equal Opportunity Employment Commission guidance, employers can ask employees their vaccination status and request or require proof of vaccination from those who have been vaccinated without running afoul of the Americans with Disabilities Act. However, they should avoid follow-up questions that would elicit information about disabilities. Employers should also be careful to keep vaccination records in employees' separate medical files, and not in regular personnel files.

## Employers Should Exercise Caution in Mandating Vaccinations

Employers eager to fully return their workforces should exercise caution in implementing programs requiring or providing incentives for vaccinated employees. Any vaccine mandates are subject to reasonable accommodation obligations for disabilities and religious objections. Additionally, all available COVID-19 vaccinations were released under Emergency Use Authorizations from the U.S. Food and Drug Administration that require vaccination providers to communicate that recipients have the option to accept or refuse the shots. While EEOC guidance suggests that employers could mandate vaccinations, it goes on to explain:

→ ADA allows an employer to have a qualification standard that includes “a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace.” However, if a safety-based qualification standard, such as a vaccination requirement, screens out or tends to screen out an individual with a disability, the employer must show that an unvaccinated employee would pose a direct threat due to a “significant risk of substantial harm to the health or safety of the individual or others **that cannot be eliminated or reduced by reasonable accommodation**” (emphasis added).

(citing 29 C.F.R. 1630.2(r)). The guidance further explains:

→ 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.

The EEOC guidance does not address the fact that before vaccinations were available, many employers effectively managed the spread of COVID-19 in the workplace through masks, social distancing, and telework for some employees (all of which would be considered reasonable accommodations). Further, the current CDC guidance indicates that both vaccinated and unvaccinated people should continue to wear masks and socially distance in public spaces (which include workplaces) given the still-emerging scientific understanding of whether the vaccine reduces transmission of the virus in addition to reducing illness in the vaccinated person.

The EEOC guidance goes on to explain, “If there is a direct threat that cannot be reduced to an acceptable level, the employer can exclude the employee from physically entering the workplace, but this does not mean the employer may automatically terminate the worker.... some workers may be entitled to telework or, if not, may be eligible to take leave under the Families First Coronavirus Response Act, under the FMLA (Family Medical Leave Act), or under the employer’s policies.”

## Tax Credits Continue for COVID-19 Leave

The American Rescue Plan Act (ARPA) extended the Families First Coronavirus Response Act (FFCRA) to allow employers with fewer than 500 employees to voluntarily provide paid sick leave and family medical leave for specific COVID-related reasons and receive tax credits to offset those costs through Sept. 30, 2021. ARPA added immunization-related absences to the previous leave covered by the FFCRA and also reset the clock for employees who have already received FFCRA emergency sick leave or family and medical leave payments on April 1, 2021.

FFCRA had two relevant components: Employers with fewer than 500 employees were required to pay emergency paid sick leave (EPSL) for certain COVID-related absences and for emergency paid family and sick

leave (EFMLA), which was an expansion of the FMLA and provided 12 weeks of leave for absences related to school and daycare closings related to the pandemic. The act offset these payments through tax credits. Its paid leave requirements ended Dec. 31, 2020, but the tax breaks have been extended for employers who voluntarily continue to provide covered leave.

Under the FFCRA, the following reasons (related to self-care) entitled an employee to EPSL if they were unable to work or telework:

- The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
- The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
- The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.

The following reasons (related to care for others) entitled an employee to \$200 per day or \$2,000 total of EPSL:

- The employee is caring for an individual who is subject to a quarantine or isolation order or has been advised by a health care provider to self-quarantine;
- The employee is caring for a son or daughter because the child's school or place of care has been closed or the child's childcare is unavailable due to COVID-19 precautions; or
- The employee is experiencing any other substantially similar condition specified by the Secretary of the HHS in consultation with the Secretary of the Treasury and the Secretary of Labor.

Finally, for employees caring for a son or daughter because of unavailability of school or childcare (the second reason related to care for others), the FFCRA provided for 12 weeks of EFMLA: two unpaid weeks (which would be covered by EPSL) followed by 10 weeks at two-thirds pay, capped at \$200 per day or \$10,000 total.

Congress extended the FFCRA tax credit components through March 31, 2021, for employers who voluntarily chose to make the payments for qualified reasons in the first quarter of this year. ARPA further extends the time period in which employers can voluntarily make payments for the reasons covered by the FFCRA and receive tax credits. It also adds three new reasons (related to self-care) for which employers can provide paid leave and receive the coverage:

- The employee is seeking or awaiting the results of a COVID-19 diagnosis;
- The employee is obtaining a COVID-19 immunization; or
- The employee is recovering from any injury, disability, illness, or condition related to a COVID-19 immunization.

These three reasons and the self-care related reasons for EPSL can be paid at 100 percent of pay (capped at \$511 per day, or \$5,110 total) and offset by a tax credit.

ARPA eliminates the requirement that the first two weeks of EFMLA be unpaid, and incorporates the EPSL reasons for leave into EFMLA eligibility. So employers can provide paid leave for all nine reasons as EFMLA at two-thirds of pay capped at \$200 per day or \$12,000 total and offset them with tax credits.

While these payments are voluntary, if employers choose to provide them, they should be careful to do so on a non-discriminatory basis. To avoid discrimination claims, employers should offer these benefits to all employees who qualify under any of the nine reasons to take paid leave authorized by ARPA or not provide them at all. Alternately, employers should establish clear policies governing what leave will be paid and what will be unpaid. Nexsen Pruet's Employment and Labor lawyers are available to assist with any questions about COVID-19 leave, vaccinations, and related issues.