

Navigating Employee Leave and Benefits During the Pandemic

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Throughout the COVID-19 pandemic, employers have been grappling with the ever-changing federal leave laws and unemployment benefits. The American Rescue Plan Act, signed into law on March 11, 2021, offers additional relief to workers via expanded federal unemployment benefits, and to employers via tax credits for providing paid leave to employees. Although in 2020 employers were required to provide paid sick and family leave related to COVID-19, the focus has shifted to incentivizing employers to do so with tax credits. If employers choose not to utilize the government tax incentives, then employees must rely on existing federal and state leave laws or their employer's leave policies.

Employers are no longer required to provide employees with paid sick leave or family leave under the Families First

Coronavirus Response Act, which expired on Dec. 31, 2020, but are encouraged to

do so voluntarily to receive federal tax credits. The FFCRA, which applied to employers with fewer than 500 employees, had two major components – the paid sick leave provision and the paid Emergency Family and Medical Leave Expansion Act. Under the sick leave provision, employers had to pay sick leave of up to 80 hours (or roughly 10 days) at the employee's regular rate to employees who needed to take leave for coronavirus-related reasons. Under the family leave expansion act, employees were eligible for an additional 10 weeks of family leave paid at two-thirds their regular wages to care for a child whose school or place of care is closed, or whose caregiver is unavailable due to COVID-19. Although employers are no longer required to pay for such leave, tax credits continue to be available for employers that voluntarily offer such paid leave through September 30, 2021. An eligible employer may claim a fully refundable tax credit equal to the total amount of the qualified sick leave and family leave wages the employer pays, including allocable qualified health plan expenses and

the eligible employer's share of Medicare tax on the qualified wages.

ARPA expands the eligibility for paid leave. ARPA adds the following qualifying reasons for paid leave for which an employer may receive tax credits: the employee is obtaining COVID-19 immunization; the employee is recovering from a condition, illness or disability related to the vaccination; and, the employee is seeking or awaiting the results of a COVID-19 test or diagnosis.

ARPA also resets the limit on the tax credit available for sick leave and increases the cap per employee for expanded family leave. As of April 1, 2021, ARPA resets the 80 hours per full-time employee limit available for sick leave. Therefore, any days the employee took before April 1 will not count toward the cap following that date. Additionally, ARPA increases the amount of wages for which an employer may claim the tax credit for paid expanded family leave from \$10,000 to \$12,000 annually.

In addition to the paid employee leave incentives, ARPA extends three federal unemployment insurance benefits through Sept. 6, 2021. If an individual is unemployed, partially unemployed, or unable to work due to a pandemic-related reason (e.g. the individual is out sick with COVID-19), the duration of coverage has been extended at the federal level.

First, ARPA extends the federal Pandemic Unemployment Assistance, which

provides benefits for people who do not qualify for regular state unemployment benefits (independent contractors, business owners, self-employed workers and those who have used all regular and any extended unemployment insurance benefits). Second, ARPA extends the federal Pandemic Emergency Unemployment Compensation, which provides benefits for those who have exhausted their state unemployment benefits. Third, PUA and PEUC are continued at the current \$300 per week boost to unemployment benefits.

If employers choose not to take advantage of the federal tax credits and offer paid leave for the reasons discussed above or an employee does not qualify for unemployment, the employer must rely on federal and state leave laws or its own sick leave policies. An employer is covered by the Family and Medical Leave Act if it employs 50 or more employees in 20 or more work weeks in the current or previous calendar year. If so, then employees may be eligible to take unpaid leave under FMLA if they are incapacitated by COVID-19 where complications arise, or if they need to care for covered family members who are incapacitated by COVID-19. Eligible employees of covered employers could take up to 12 weeks of unpaid leave.

If an employer is not covered by FMLA, then the employer must default to its own leave policies. For instance,

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vaccination due to a medical condition (and/or an employee that is unvaccinated for religious purposes) by creating separate and unequal working situations. Instead, employers should focus on safety precautions for all employees that return to the workplace and/or remote work policies that would not have potentially discriminatory effects. Segregating vaccinated and non-vaccinated employees by shift, team or location can also raise the risk of a bias claim, and should be carefully considered and only implemented based on a strong argument that such segregation is necessary for worker or customer/client safety and cannot be achieved through other methods. The same concern would apply to identifying vaccinated versus unvaccinated employees through badges or differentiated office space.

Discrimination on the Basis of Age

Employers should also consider the protections against age discrimination in the employment context when developing and administering remote work policies. For private employers with 20 or more employees, state and local governments, employment agencies, labor organizations and the federal government, the Age Discrimination in Employment Act of 1967, codified at 29 U.S.C. Chapter 14, prohibits discrimination based on age for employees who are age 40 or older. New Hampshire’s Law Against Discrimination also prohibits age discrimination related to employment. While it has been found by the Centers for Disease Control and

Prevention that individuals age 65 and over are at higher risk of contracting a severe case of COVID-19, employers cannot exclude employees from the workplace simply based on age, even if well-intentioned. Additionally, while reasonable accommodations are not required under the ADEA, certain medical conditions of an employee age 40 or over could trigger protection of an individual under the ADA and/or the New Hampshire Law Against Discrimination as a qualified disability, which would require an employer to analyze the considerations described above when deciding on any continuation of remote work or other flexible work arrangements.

Creation and Application of Remote Work Policies

Keeping the specific guidance set forth above in mind, employers should generally aim to create and apply remote work policies that apply to all employees, if possible, or that apply across classes of employees specific to job duties. As individuals approach an employer with specific requests, employers should examine and document each situation on its own and be mindful of compliance with any discrimination laws that may apply, such as those set forth above.

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Publicly, the governor has denied any intentional misconduct. He said he “never knew at the time [he] was making anyone feel uncomfortable.” That is irrelevant. It’s not about the intent of the actor – it’s about the impact on the target or bystander. Even if he was unaware the effect his conduct had on others, what matters is how a reasonable person would have perceived that conduct. While expressing regret and remorse is good, it carries no weight in deciding whether misconduct occurred, or a policy has been violated.

Allegations that a high-ranking executive in the private or public sector has engaged in sexual misconduct with employees and, worse, created a toxic culture permeated with such conduct and retaliation, are disturbing and need to be taken seriously. Following standard practices, the investigators should conduct interviews and assess all available evidence before reporting findings. In the end, a fair process leads to the right result.

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employees may use accrued sick time, paid time off, or unpaid leave. If the employee is out for a significant amount of time because the individual has a serious case of COVID-19 or is suffering from the long-term impacts, then short-term disability may be an option if offered by the employer. If so, the employee must meet the elimination period and must be unable to work as a direct result of the virus. Employees may also be wise to consider whether long-term impacts from COVID-19 require a reasonable accommodation under the various disability discrimination laws.

Ultimately, there is no indication that the COVID-19 virus or variants will suddenly disappear, and so employee leave issues related to the virus are something employers are left to deal with for a while, perhaps even after the federal programs end. Evolving paid time off policies have now become critical for the health and well-being of employees. Employers should take time to analyze both the federal and state leave requirements and their own leave policies so that they can manage these issues and thereby enable employees to continue working to their maximum potential.

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