

# COVID-19 Looking Forward Series:

## The 2021 Winter Surge: Legal Developments and Employer Strategies

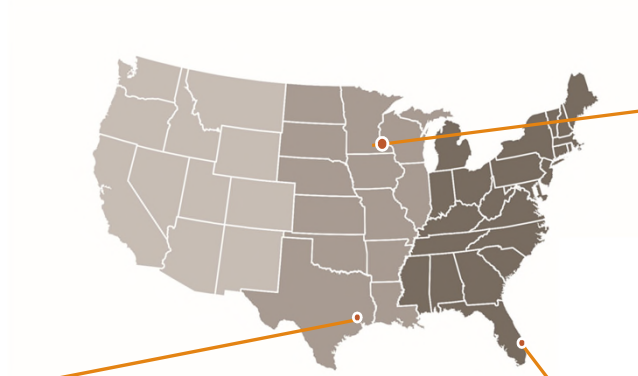
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DAVID BARRON, STEVE DICKINSON, & JENNIFER TAYLOR



# Today's Presenters

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**Minneapolis**  
Steve Dickinson



**Houston**  
David Barron



**Miami**  
Jennifer Taylor

# What Happened To The Families First Coronavirus Response Act?

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JENNIFER TAYLOR



# The Consolidated Appropriations Act: How Did We Get Here?



The Families First Coronavirus Response Act (FFCRA or Act) requires certain employers to provide their employees with paid sick leave and expanded family and medical leave for specified reasons related to COVID-19. These provisions will apply from April 1, 2020 through December 31, 2020.

**PAID LEAVE ENTITLEMENTS**

Generally, employers covered under the Act must provide employees:

Up to two weeks (80 hours, or a part-time employee's two-week equivalent) of paid sick leave based on the higher of their regular rate of pay, or the applicable state or Federal minimum wage, paid at:

- 100% for qualifying reasons #1-3 below, up to \$511 daily and \$5,110 total;
- ⅔ for qualifying reasons #4 and 6 below, up to \$200 daily and \$2,000 total; and
- ⅓ to 10 weeks more of paid sick leave and expanded family and medical leave paid at ⅓ for qualifying reason #5 below for up to \$200 daily and \$12,000 total.

A part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

**ELIGIBLE EMPLOYEES**

In general, employees of private sector employers with fewer than 500 employees, and certain public sector employees, are eligible for up to two weeks of fully or partially paid sick leave for COVID-19 related reasons (see below). Employees who have been employed for at least 30 days prior to their leave request may be eligible for up to an additional 10 weeks of partially paid expanded family and medical leave for reason #5 below.

**QUALIFYING REASONS FOR LEAVE RELATED TO COVID-19**

An employee is entitled to take leave related to COVID-19 if the employee is unable to work, including unable to telework, because the employee:

- |  |  |
|--|--|
| <ol style="list-style-type: none"> <li>1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;</li> <li>2. has been advised by a health care provider to self-quarantine related to COVID-19;</li> <li>3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis;</li> <li>4. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);</li> </ol> | <ol style="list-style-type: none"> <li>5. is caring for his or her child whose school or place of care is closed (or child care provider is unavailable) due to COVID-19 related reasons; or</li> <li>6. is experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services.</li> </ol> |
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**ENFORCEMENT**

The U.S. Department of Labor's Wage and Hour Division (WHD) has the authority to investigate and enforce compliance with the FFCRA. Employers may not discharge, discipline, or otherwise discriminate against any employee who lawfully takes paid sick leave or expanded family and medical leave under the FFCRA, files a complaint, or institutes a proceeding under or related to this Act. Employers in violation of the provisions of the FFCRA will be subject to penalties and enforcement by WHD.



For additional information or to file a complaint:  
**1-866-487-9243**  
 TTY: 1-877-889-5627  
[dol.gov/agencies/whd](https://dol.gov/agencies/whd)



WH1422 REV 03/20

- March 2020 – Congress passed the FFCRA (Eff. 4/1/20 – 12/31/20)
  - Emergency Paid Sick Leave (“EPSL”)
  - Emergency Family and Medical Leave Act (“EFMLA”)
- April 1, 2020 – United States Department of Labor (“DOL”) issued regulations implementing the FFCRA
- December 27, 2020 – Congress passes Consolidated Appropriations Act & declines to extend the substantive leave requirements beyond December 31, 2020
- December 31, 2020 – DOL published additional guidance



# The Consolidated Appropriations Act

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- Effective January 1, 2021, employers no longer have legal duty to provide employees with leave under either the Emergency Paid Sick Leave Act or the Family & Medical Leave Expansion Act.
- The Act does provide employers with the option of continuing voluntary compliance until March 31, 2021; employers who do so will also be able to take tax credits.
- Record keeping obligations remain in place – both for employers who cease providing FFCRA benefits and those who continue voluntary compliance into 2021.

# The Consolidated Appropriations Act: What Does Continuing Record Keeping Mean?

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- Original legislation contained a 4-year obligation for record keeping.
- Employers (in order to justify taking tax credits) have to maintain the below documentation for to provide at least:
  - Individual employees had leave benefits available to them at the times they were given;
  - Individual employees demonstrated eligibility that met reasons for leave under EPSLA & EFMLEA; and
  - FFCRA benefits were properly calculated for each individual employee – at either full pay or 2/3 pay.

# The Consolidated Appropriations Act: How To Handle Employees on Leave as of December 31<sup>st</sup>?

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- **2 potential scenarios:**
- The employee was approved for leave under the FFCRA in December 2020 but not yet released back to work; and
- The employee has been released to work but does not want to return.

# The Consolidated Appropriations Act: According to the Department of Labor

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- On December 31, the Department of Labor published on the FFCRA's expiration in the form of updated FAQs
- <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>



# The Consolidated Appropriations Act: According to the Department of Labor

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- Question 105 – I used 6 weeks of FFCRA leave between April 1, 2020 and December 31, 2020 because my childcare provider was unavailable due to COVID-19. My employer allowed me to take time off, but did not pay me for my last 2 weeks of FFCRA leave. Is my employer required to pay me?
- Yes – WHD will continue to enforce the FFCRA for leave taken or requested during the effective period of April 1, 2020 through December 31, 2020 for complaints made within the statute of limitations

# What Are Other Government Agencies Saying?

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- On January 8, 2021, the Department of Health & Human Services extended its “public health emergency” through April 2021
- **As a result of the continued consequences of the Coronavirus Disease 2019 (COVID-19) pandemic, on this date and after consultation with public health officials as necessary, I, Alex M. Azar II, Secretary of Health and Human Services, pursuant to the authority vested in me under section 319 of the Public Health Service Act, do hereby renew, effective October 23, 2020, my January 31, 2020, determination, that I previously renewed on April 21, 2020 and July 23, 2020, that a public health emergency exists and has existed since January 27, 2020, nationwide.**

# What Are Other Government Agencies Saying?

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- On January 7, 2021, the EEOC issued a Notice of Proposed Rule Making for employer wellness programs under the Americans with Disabilities Act and GINA
- The Notice proposes to limit the “voluntary” incentive employers can provide for employee participation:
- **Employers may offer no more than a *de minimis* incentive to encourage participation in wellness programs**
- Not directly on point; however, the EEOC is the government agency charged with enforcing the Americans with Disabilities Act and employer obligations to provide employees with reasonable accommodations for medical conditions.

## Has President-Elect Biden Addressed The FFCRA?

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- Not directly = the Biden transition team is expected to release a proposed COVID-19 relief package this week
- Among the elements of this package is expected to be Paid Family Leave
- We also know that President-Elect Biden intends to ask that across the US everyone wear masks “when they are around people outside their household”
- President-Elect Biden wants State/Local authorities to issue mandatory mask requirements.

# State/Local Paid Leave Laws May Still Apply

- This will continue to be critical for national and regional employers
- However, approximately 14 states as well as multiple localities have paid leave laws with varying designs
- Colorado's new paid sick leave law and new paid family medical leave law illustrate how states have moved to fill the void



# 2020 Is Over But Quarantining Continues – Now What?

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## What Are The Current Quarantine Requirements?

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- The Centers for Disease updated the agency's guidance in December 2020 about a shortened quarantine process in certain circumstances:
- **when someone who has not developed symptoms could consider stopping quarantine before 14 days from exposure are (1) after day 10 without testing or (2) after day seven after receiving a negative test result (test must occur on day five or later).**
- Otherwise, 14-day guidance remains the CDC's standard.
- Local health departments may have different rules.

## How To Handle Bringing Employees Back To Work Sooner

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- **Positive Test or Symptoms.** Has the employee tested positive for COVID-19 or exhibited symptoms? CDC guidance is based on whether the employee has COVID-19 symptoms. If so, the employee should not come to work:
  - for at least 10 days after the positive test, &
  - not before the employee is symptom-free without medication.



## How To Handle Bringing Employees Back To Work Sooner

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- **Negative Test/No Symptoms.** Has the employee had a negative test for COVID-19 (and the test was at least five days after the exposure)? If so, she can return to work seven days after the negative test.
- **No Test/No Symptoms.** If the employee has not been tested (or had a negative test too early, i.e., in that five-day window, she can return to work after 10 days.
- **Again, only if the employee is symptom-free.**

## How To Handle Continued Quarantine/Leave Requests?

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- No universal answer; however multiple considerations for addressing employee's own need for leave:
- Is continued leave available under the FMLA? Does your FMLA policy operate on an annual basis?
- If not, is the employee requesting leave as an accommodation under the ADA?
- Does your organization offer personal leaves of absence?

## How To Handle Continued Quarantine/Leave Requests?

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- What about scenario where employee's leave or quarantine request is based on the health of a family member?
- No accommodation requirements under the ADA for family member medical conditions
- Unpaid leave may still be available under the FMLA
- Is this a workplace safety issue?
- Does your organization offer personal leaves of absence?

# Implementing Employee Vaccination Programs – Policies and Strategies

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DAVID BARRON



# Mandatory or Voluntary Policy?

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## Dollar General will pay its workers to get a Covid-19 vaccine



By [Nathaniel Meyersohn, CNN Business](#)

Updated 1:04 PM ET, Wed January 13, 2021

## When can YOU get the vaccine? It depends on your health, occupation and where you live



By [Elliott C. McLaughlin, CNN](#)

Updated 12:37 PM ET, Fri January 8, 2021

## LA Schools Chief: Kids Must Get Coronavirus Vaccine to Return

The admission marks the first acknowledgement from the head of a major school system that the coronavirus vaccine is likely headed to the list of required school immunizations.



# EEOC Guidelines on COVID-19 Vaccine

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- EEOC issued new guidance on December 16: “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,” [Section K, Vaccinations](#).
- Vaccination is not a “medical examination” under ADA, but employers should be cautious in administering pre-screening questions for vaccination.
- Asking an employee to show proof of vaccination is lawful.
- Employers may require vaccination subject to disability and religious accommodation (did not address the emergency use authorization question).
- Requiring vaccination does not violate GINA.

# Mandatory Vaccine Considerations

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- **Can employers require workers to get vaccinated for COVID-19?**
- In general, yes, employers may have authority to mandate vaccination under normal conditions, but there are still important legal concerns surrounding the COVID-19 vaccine:
  - ADA accommodation: Is it job-related and consistent with business necessity?
  - Title VII Religious Belief accommodation: Sincerely held belief and undue hardship
  - Effect on employee morale and risk of protected concerted activity in opposition to vaccine policy
  - Legal concerns related to limited Emergency Use Authorization, including public policy exception to employment at will

# Mandatory Vaccine Considerations

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- **Can workers refuse a vaccine based on health concerns?**
  - The ADA requires interactive dialogue and reasonable accommodation if the disability is covered.
  - Employers must determine whether NOT taking the vaccine is a reasonable accommodation for the disability and the job responsibilities involved — and that such accommodation isn't an undue burden for the employer or a direct threat to others.
  - An employer needs to show that the unvaccinated worker would 1) cause an undue burden or 2) pose a direct threat in the workplace. If alternatives are available, like work-from-home, moving to a segregated area, or everyone else is wearing PPE, this might be difficult.



# Mandatory Vaccine Considerations

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- **What about religious objections to vaccines?**
  - Title VII prohibits workplace discrimination based on religion, giving workers the right to refuse a vaccination mandate based on religious beliefs.
  - The EEOC, which enforces Title VII, defines “religion” beyond membership in a church or belief in a God. “Religion,” for the purposes of federal anti-discrimination law, covers strongly and sincerely-held, moral or ethical beliefs. But employers can still deny religious accommodations if they would create an undue burden.
- **What about conspiracy theory objections to vaccines?**
  - No - there is no protection for workers who are terminated after refusing a mandatory vaccine based on belief in conspiracy theories. (*e.g.* 5-G trackable microchips, pandemic-for-profit, general anti-vaxx, anti-tech, etc.).

# Considerations for Voluntary Vaccine Policy

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- Do your employees know when they are eligible to get the COVID vaccine? Employers crafting vaccine policies should consider communicating this information to employees so they are informed of the applicable vaccine priority schedule.
  - Phase 1(a): health care personnel and long-term care facility residents.
  - Phase 1(b): persons aged  $\geq 75$  years and non-health care frontline essential workers.
  - Phase 1(c): persons aged 65–74 years, persons aged 16–64 years with high-risk medical conditions, and essential workers not included in Phase 1b.
  - Phase 2: all other persons aged  $\geq 16$  years not already recommended for vaccination in Phases 1a, 1b, or 1c.
- Notwithstanding the above, states are free to deviate from the CDC recommendations, and many have done so. For example, Florida and Texas have chosen to prioritize senior citizens over younger non-healthcare essential workers.

# Incentives for Vaccination

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- Paid or unpaid time off to obtain a COVID vaccination;
- Cash bonus upon proof of vaccination;
- Enhanced wellness plan benefits for vaccination;
- Employer sponsored group functions for departments or teams achieving a requisite percentage of employee vaccinations; or
- Entering all employees who are vaccinated into a raffle for prizes.

It is important to keep in mind that any bonuses or additional compensation may be taxed as wages and could affect the regular rate for the calculation of overtime for non-exempt employees.

# Second Wave of PPP Loans – How Should Employers Proceed?

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# PPP “First Draw”

- “First draw” is the reconstituted original PPP program – extended through March 31, 2021.
- In a nutshell:
  - Mostly the same as the original program.
  - Loan of 2.5 times average monthly payroll in 2019, 2020 or TTM to application date, with \$10 million cap.
  - Generally, 500 employee cap. Affiliation rules apply.
  - Certain nonprofits and media companies now eligible.
  - Loan may be spent on payroll and 7 other categories of expenses, including 4 new categories.
  - Forgivable based on FTE levels during 8-24 weeks after receiving loan (“covered period”).
  - Unforgiven portion is 5 years at 1%, with payments deferred until forgiveness is decided.
  - No collateral or personal guarantees.
  - “Necessity” certification still required.



# PPP “Second Draw”

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- “Second draw” is the new PPP program for companies that have spent their first PPP loan. Through 3/31/21.
- In a nutshell:
  - Loan of 2.5 times average monthly payroll in 2019, 2020 or TTM to application date, with \$2 million cap. Multiplier is 3.5 for hospitality companies (NAICS code 72), but still a \$2 million cap.
  - Generally, 300 employee cap. Affiliation rules apply.
  - Must have revenue decrease of at least 25% in at least one quarter of 2020 compared to same quarter of 2019.
  - Use of proceeds, forgiveness and loan terms same as first draw.
  - “Necessity” certification still required.



# Deductibility of expenses paid with PPP proceeds

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- IRS took position expenses not deductible if borrower had reasonable expectation of forgiveness, even if hadn't filed forgiveness application yet.
- Appropriations Act overruled this position.
- IRS withdrew its rulings earlier this month.



# Employee Retention Credit

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- IRS took position expenses not deductible if borrower had reasonable expectation of forgiveness, even if hadn't filed forgiveness application yet.
- ERC is refundable tax credit for wages paid by employers with significant revenue decrease.
  - 50% decrease in 2020, 20% decrease in 2021.
  - Up to \$5,000 per employee in 2020, up to \$14,000 per employee in 2021 (expires 6/30/21).
- PPP borrowers may use ERC, repealing the previous prohibition.
  - Retroactive, so PPP borrowers may be eligible for ERC in 2020.
- PPP and ERC may not be used for the same payroll, but a borrower may elect to exclude some payroll costs from ERC so they can be funded with PPP.
- SBA and IRS to issue guidance. PPP borrowers may want to defer forgiveness filings until guidance is issued, to minimize chance of inadvertently losing double benefits.






# Other Issues

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- Shuttered venue grants.
- Expansion of other SBA assistance.
- Other PPP issues:
  - Forgiveness application process.
  - Loan “necessity” and SBA review.
  - “Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”
  - Loans over \$2 million will be reviewed after forgiveness filing.
  - Borrower receives form 3509 (for-profit) or 3510 (non-profit) – must respond in 10 business days.



# Questions?

 **COZEN O'CONNOR**

**COVID-19 Human Resources Toolkit:  
Model Forms, Policies and Templates for Employers**

During the COVID-19 crisis, the Labor and Employment Department at Cozen O'Connor has been working to produce forms, templates and policies to guide employers through the maze of new regulations and local requirements. We have now compiled all of these critical documents into one toolkit. While some portions can be used as is, we recommend that each of these documents be reviewed carefully to determine whether they should be appropriately customized to your company's unique business and workforce, as well as to any changes in applicable law at the time a document may be used. This toolkit includes the following materials:

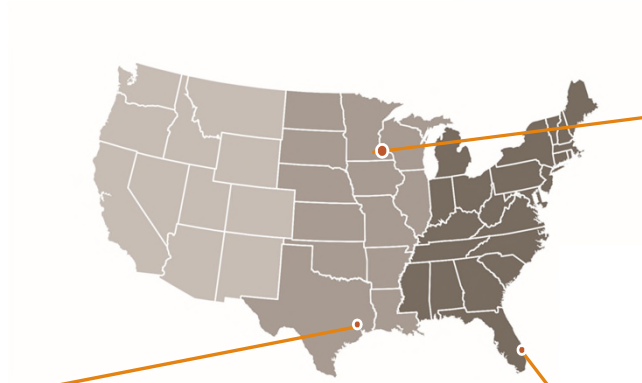
<b>Workplace Policies/Forms Related to COVID-19</b> <ul style="list-style-type: none"><li>• COVID-19 employee distancing, hygiene and mask policy</li><li>• Employee travel policy</li><li>• Work from home/telecommute policy</li><li>• Work letter for essential employee</li><li>• Return to work post-coronavirus checklist</li></ul>	<b>Responding to COVID-19 Exposure in Workplace</b> <ul style="list-style-type: none"><li>• Protocol for COVID-19 case in workplace/contact tracing</li><li>• Protocol for return to work for positive COVID-19 case</li><li>• Notice to potentially exposed employees</li><li>• OSHA reporting protocol</li><li>• Safety compliance/whistleblower policy</li></ul>
<b>Furloughs &amp; Recalls</b> <ul style="list-style-type: none"><li>• Recall letter</li><li>• Return to work from furlough policy</li><li>• Benefits checklist for return to work</li><li>• Medical questionnaire for returning employees</li><li>• Notification to unemployment for employee refusal to return from furlough</li><li>• Reduction in force checklist</li><li>• PPP loan forgiveness – FTE reduction exception memorandum</li></ul>	<b>Employee Medical Screening/Testing</b> <ul style="list-style-type: none"><li>• Employee screening policy</li><li>• Employee health self-screening form</li><li>• Temperature check log</li><li>• Temperature check authorization</li><li>• Temperature check failure/accommodation form</li><li>• COVID-19 testing protocol</li></ul>
<b>Families First Coronavirus Response Act (FFCRA)</b> <ul style="list-style-type: none"><li>• FFCRA policy</li><li>• Paid leave request form</li><li>• Employee letter granting or denying request</li></ul>	<b>Accommodation Requests</b> <ul style="list-style-type: none"><li>• Interactive process checklist/protocol for ADA accommodation requests</li><li>• Letter to employee regarding request</li><li>• Letter granting or denying request</li></ul>

For more information and to gain access to the COVID-19 HR Toolkit, please contact one of Cozen O'Connor's Labor and Employment attorneys.



# Thank You!

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