

Employer Takeaways From Latest NY And Federal Guidance

By **Jonathan Trafimow**

New federal legislation and guidance with frequently asked questions from the Empire State regarding the application of the New York State Paid Family Leave law to COVID-19 provide updated guidance to state employers regarding their obligations to employees seeking to take leave in connection with the coronavirus.

Separately, the Equal Employment Opportunity Commission, or EEOC, has issued guidance regarding employer obligations in connection with COVID-19 vaccine programs.



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COVID-19 Leaves of Absence

On Dec. 27, 2020, former President Donald Trump signed into law the Coronavirus Response and Relief Supplemental Appropriations Act.

As of Jan. 1 this act discontinues paid COVID-19 leaves of absence mandated by the Families First Coronavirus Response Act.

The Coronavirus Response and Relief Supplemental Appropriations Act extends the tax credit through March 31 for qualified private employers continuing to offer paid sick and family leave to their employees.

It does not, though, offer the tax credit to public employers.[1]

A leave under the Families First Coronavirus Response Act is available to employees of private employers with fewer than 500 employees if they are unable to work or telework for any of the following reasons:

1. The employee is subject to a federal, state or local or isolation order related to COVID-19;
2. The employee has been directed by a health care provider to self-quarantine due to COVID-19;
3. The employee has symptoms of COVID-19 and is seeking a medical diagnosis;
4. The employee is caring for someone subject to a federal, state or local quarantine or isolation order or for someone who has been directed by a health care provider to self-quarantine due to COVID-19;
5. The employee is caring for a child if the child's school or place of care is closed or otherwise unavailable due to COVID-19; and
6. The employee is experiencing any other substantially similar condition specified by the secretary of health and human services with the secretaries of Treasury and labor.

For qualifying reasons 1-3, the tax credit would remain the employee's regular rate of pay, up to \$511 a day, for a maximum of \$5,110 in the aggregate, and for qualifying reasons 4-6 the tax credit would remain to two-thirds of the employee's regular pay, up to \$200 per day, for a maximum of \$2,000 in the aggregate.

Covered employers should consider the advantages to both their employees and themselves of utilizing the tax credit so long as it is available.

To employees, the benefits of a paid leave for a qualifying reason is paid leave without having to draw down on other forms of paid time off leave, if any.

Indeed, the Centers for Disease Control and Prevention explains that "employers that do not currently offer sick leave to some or all of their employees may want to draft non-punitive 'emergency sick leave' policies."

Still, future tax credits may seem far away to businesses struggling to survive through the current pandemic.

New York employers need to consider the state's Feb. 2 guidance with frequently asked questions on how paid family leave applies to Covid-19 orders of quarantine or isolation.

Even prior to Feb. 2, employers had continuing leave obligations under New York state law summarized in the chart below:

Employer Size and Net Income	Leave Requirements
Employers with 10 or fewer employees <u>and</u> less than \$1 million in revenue in the previous tax year	Must provide employees with unpaid leave until the end of the quarantine or isolation period
Employers with 10 or fewer employees <u>and</u> more than \$1 million in revenue in the previous year	Must provide employees with at least five days of paid sick leave <u>and</u> unpaid leave for the remainder of the quarantine or isolation period.
Employers with 11 to 99 employees	Must provide employees with at least five days of paid sick leave <u>and</u> unpaid leave for the remainder of the quarantine or isolation period
Employers with 100 and more employees	Must provide employees with at least 14 days of paid sick leave <u>and</u> unpaid leave for the remainder of the quarantine or isolation period
Public employers	Must provide employees with at least 14 days of paid sick leave <u>and</u> unpaid leave for the remainder of the quarantine or isolation period

For the paid applicable leave period — five or 14 days — the frequently asked questions forum explains that "employers must pay the amount that the worker would have otherwise received."

New York paid family leave provides employees with capped paid leave for certain reasons, paid by an employer's insurer. In connection with COVID-19, the frequently asked questions state that:

[I]f you are under a mandatory or precautionary order of quarantine or isolation issued by the State, New York State Department of Health, local Board of Health, or other authorized government entity you may be eligible for job-protected sick leave and compensation through a combination of disability and Paid Family Leave COVID-19 quarantine leave benefits.

These benefits become available after the employee has used such paid leave as their employer is required to provided, the above chart shows.

This leave must be provided separately from any other sick leave accruals, and employees cannot be fired for taking leave. Importantly, "once an individual is no longer subject to an order of quarantine or isolation, they are no longer eligible for New York's COVID-19 quarantine leave benefits."

However, the frequently asked questions advise an employee who cannot immediately receive an order of quarantine or isolation from their local health department to "submit documentation from a licensed medical provider that has treated you, or your minor dependent child, attesting that you, or your child, qualify."

The frequently asked questions also address the situation where an employer voluntarily provides leave benefits under the Families First Coronavirus Response Act to an employee

who also qualifies for New York COVID-19 quarantine leave benefits.

Essentially, if the employee will receive more money under New York's state benefit than the federal benefit, then the employee "may be able to receive your federal benefit and the difference between the federal benefit and your [New York state] maximum benefit." If the federal benefit is greater, then the employee would receive only the federal benefit.

EEOC'S COVID-19 Vaccine Guidance

On Dec. 16, 2020, the EEOC updated its COVID-19 guidance with frequently asked questions regarding vaccines.

The guidance consists of the broad categories: guidance under the Americans with Disabilities Act, or ADA; guidance for employees with religious objections to receiving the vaccine; and guidance under Title II of the Genetic Information and Nondiscrimination Act, or GINA.[2]

ADA/Disability Accommodation Guidance

The vaccination itself is not a medical examination for purposes of the ADA because "the employer is not seeking information about an individual's impairments or current health status" solely by providing the vaccine.

But "pre-screening vaccination questions may implicate the ADA's provision on disability-related inquiries."

Thus, employers who choose to administer the vaccine themselves must show that the prescreening questions it asks employees are "job-related and consistent with business necessity."

Employers must keep medical information obtained in the course of a vaccination program confidential.

Because prescreening questions, whether asked by the employer or by a contractor on the employer's behalf, are likely to elicit disability-related information, the employer must show that these disability-related screening inquiries are "job-related and consistent with business necessity."

To meet this standard, an employer would need to have a reasonable belief, based on objective evidence, that an employee who does not answer the questions and, therefore, does not receive a vaccination, will pose a direct threat to the health or safety of her- or himself or others.

This raises a question: When does an employer have a reasonable belief that an employee who declines to answer prescreening questions, because they claim to have a disability, poses a direct threat? The answer, according to the EEOC, is that:

Employers should conduct an individualized assessment of four factors in determining whether a direct threat exists: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) 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 the employer concludes that an individual who cannot be vaccinated due to disability does pose a direct threat, the employer must determine whether it can "provide a reasonable accommodation (absent undue hardship) that would eliminate or reduce this risk so the unvaccinated employee does not pose a direct threat."

Even if an employee with a disability does pose a direct threat "that cannot be reduced to an acceptable level," it does not necessarily follow that the employer can bar the employee from the workplace. The employer must first determine its obligations under applicable law, such as:

If an employer excludes an employee based on an inability to accommodate a request to be exempt from a vaccination requirement, the employee may be entitled to accommodations such as performing the current position remotely.

An employer likely does not implicate the ADA merely by requesting proof of receipt of a COVID-19 vaccination because such a request, by itself, "is not likely to elicit information about a disability."

Employers, however, will need to consider follow-up questions carefully, as inquiries "such as asking why an individual did not receive a vaccination, may elicit information about a disability and would be subject to the pertinent ADA standard that they be 'job-related and consistent with business necessity.'"

Religious Accommodation Guidance

"Once an employer is on notice that an employee's sincerely held religious belief, practice, or observance prevents the employee from receiving the vaccination, the employer must provide a reasonable accommodation for the religious belief, practice, or observance unless it would pose an undue hardship under Title VII of the Civil Rights Act."

According to the guidance, once an employer is "on notice that an employee's sincerely held religious belief, practice, or observance prevents the employee from receiving the vaccination," the employer is required to make reasonable accommodation "unless it would pose an undue hardship under Title VII of the Civil Rights Act."

If there is no reasonable accommodation possible, it would then be "lawful for the employer to exclude the employee from the workplace." The employer would then need to consider its obligations under applicable anti-discrimination law.

GINA Guidance

Similar to the ADA, merely administering a vaccine does not implicate GINA because "it does not involve the use of genetic information to make employment decisions, or the acquisition or disclosure of 'genetic information' as defined by the statute."

Prescreening questionnaires, however, that ask about genetic information, including family members' medical histories, may implicate GINA.

Among other things, GINA prohibits employers from acquiring or disclosing genetic information "except in six narrow circumstances."

According to the EEOC guidance, GINA defines genetic information to be:

- Information about an individual's genetic tests;
- Information about the genetic tests of a family member;
- Information about the manifestation of disease or disorder in a family member, i.e., family medical history;
- Information about requests for, or receipt of, genetic services or the participation in clinical research that includes genetic services by an individual or a family member of the individual; and
- Genetic information about a fetus carried by an individual or family member or of an embryo legally held by an individual or family member using assisted reproductive technology.

Based on the above definition, the guidance says:

[I]f the pre-vaccination questions do not include any questions about genetic information (including family medical history), then asking them does not implicate GINA. However, if the pre-vaccination questions do include questions about genetic information, then employers who want to ensure that employees have been vaccinated may want to request proof of vaccination instead of administering the vaccine themselves.

Even if the employer asks the employee to obtain proof of vaccination from the employee's doctor:

The employer may want to warn the employee not to provide genetic information as part of the proof. As long as this warning is provided, any genetic information the employer receives in response to its request for proof of vaccination will be considered inadvertent and therefore not unlawful under GINA.

The EEOC then refers the reader to a federal regulation containing a sample warning.

Employers sued in connection with a vaccine program will have defenses to raise.

For example, on Jan. 29, the Occupational Safety and Health Administration issued its own guidance, "Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace," recommending that employers make a COVID-19 vaccine or vaccination series "available at no cost to all eligible employees."

The Public Readiness and Emergency Preparedness Act^[3] may well provide broad immunity to employers in connection with such programs and require that claimants proceed in an administrative forum.^[4]

Conclusion

Without question, these developments have significantly altered employer obligations in connection with COVID-19, and employers will want to update their policies and procedures accordingly.

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[1] A public employer in New York includes the state of New York and other governmental entities.

[2] The EEOC's guidance is available at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>. The vaccine FAQs are located in Section K. Thus, references to the FAQs are cited below as FAQ K-1, FAQ K-2, etc.

[3] U.S.C. § 247d-6d.

[4] Marc Dupervil, as the Proposed Adm'r of the Estate of Frederic Dupervil, Deceased, v. Alliance Health Operations, LCC, d/b/a Linden Center for Nursing and Rehabilitation & John and Jane Does 1-10, No. 20CV4042 (PKC) (PK), 2021 WL 355137, at *2 (E.D.N.Y. Feb. 2, 2021).