



## COVID-19 and Employment Law: Then and Now How 2020's Lessons Inform Planning for 2021 and Beyond<sup>1</sup> April 8, 2021

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### 1. The American Rescue Plan Act of 2021 ("ARPA")

- a. FFCRA Emergency Family Medical Leave Expansion Act ("EFMLEA") and Emergency Paid Sick Leave Act ("EPSLA") leave was extended again:
  - i. March 31, 2021 previous end date now September 30, 2021
  - ii. EFMLEA and EPSLA employer provided leave is now voluntary
  - iii. Similar rules and processes for tax credits, which equal 100 percent of qualifying wages paid
  - iv. Common theme here and throughout COVID-19 employment planning, employers must be mindful not to discriminate between which employees are provided leave and under what circumstances
  - v. Important changes beyond the September 30, 2021 expansion include:
    1. EFMLEA and EPSLA leave reset on March 31, 2021 so that all eligible employees are now re-eligible to take EFMLEA and EPSLA leave, regardless of their previous use of that leave. Prior, unused leave does not rollover after March 31<sup>st</sup>.
    2. FFCRA's six (6) reasons for EPSLA now qualify for EFMLEA leave and both are expanded to now include:
      - a. The worker is getting a COVID-19 vaccine;
      - b. The employee is recovering from complications due to receiving the vaccine; and
      - c. The worker is awaiting the results of a COVID-19 test or diagnosis for coronavirus (regardless of presence of symptoms).
    3. The first two (2) weeks of 12 weeks of EFMLEA leave under the FFCRA was unpaid, but now if employers voluntarily provide EFMLEA leave, they may provide the full 12 weeks as paid leave. Correspondingly, the tax credit cap was increased from \$10,000 to \$12,000.

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<sup>1</sup> This handout is for informational purposes only and does not constitute legal advice. If you have specific questions, you should consult with your legal counsel.

4. Eligibility for EFMLA has been expanded to include all qualifying reasons for EPSLA.
  5. The changes above create the ability for employers to offer 14 weeks paid leave.
- b. *New subsidy for Consolidated Omnibus Budget Reconciliation Act (“COBRA”) Payments Created:*
- i. Eligible employees who are involuntarily terminated from employment between April 1, 2021 and September 30, 2021 may elect for continuation of the employer’s health insurance through COBRA (also PA-mini-COBRA) which will be paid by the employer. This benefit runs until September 30, 2021.
  - ii. Employers will receive a 100 percent subsidy for the insurance premiums paid under COBRA, including administrative fees. Reimbursement runs through payroll taxes similar to those for EFMLEA and EPSLA.
  - iii. The subsidized coverage is only for the above period and not for the general maximum eligibility period under COBRA.
  - iv. Employees who lost their group health coverage due to a qualifying event on or after November 1, 2019, but who either did not elect COBRA or let it lapse, will have 60 days after receipt of the notice to elect COBRA coverage.
  - v. Employers have an obligation to notify impacted employees of the ARPA’s COBRA provisions. The Department of Labor will be issuing a model notice. Employers should identify any employees who lost group health coverage for a qualifying reason on or after November 1, 2019, and ensure that these employees are provided the model notice.
- c. *Employee Retention Credit Extended:*
- i. Timing—
    1. *CARES Act:* Wages paid between March 13, 2020 through Dec. 31, 2020  
*CAA:* Wages paid between Jan. 1, 2021 through June 30, 2021  
*ARPA:* Wages paid between July 1, 2021 through Dec. 31, 2021
  - ii. Payments—
    1. *CARES Act:* 50% of the qualified wages paid to the employee, plus the cost to provide health benefits to the employee  
*CAA:* Effective Jan. 1, 2021, the credit amount is increased to 70% of qualified wages, which includes the cost to continue providing health benefits  
*ARPA:* Retains 70% credit for qualified wages paid between July 1, 2021 and Dec. 31, 2021, which includes the cost to provide health benefit
  - iii. Eligibility—
    1. *CAA:* Effective Jan. 1, 2021, for wages paid when business operations that are either fully or partially suspended by a COVID-19 lockdown order; or, for any quarter in 2021, if gross receipts are less than 80% of gross receipts compared to the same quarter in 2019. There is an election to use the prior quarter’s gross receipts for purposes of determining if the company’s gross receipts were less than 80% of gross receipts compared to the same quarter in 2019.

ARPA: Same as CAA

2. CAA: Effective Jan. 1, 2021, this threshold was raised to a company that had more than 500 employees in 2019, so that for the first two quarters of 2021, a company that had 500 or fewer employees in 2019 will be eligible for the credit, even if its employees are working.

ARPA: Continues the 500-employee threshold as in CAA, but adds a new category, a Severely Financially Distressed Employer (SFDE). This is a company whose gross receipts for the quarter are less than 10% of gross receipts for the same quarter in 2019 (i.e., a reduction in gross receipts of more than 90%). A SFDE is allowed the credit if its employees are performing services, even if it had more than 500 employees in 2019. This would potentially apply to companies in severely distressed industries, such as the cruise, hospitality, and entertainment industries.

iv. Credits—

1. Added an advance payment provision, which allows the monetization of the credit even before any wages have been paid for a company that had 500 or less employees in 2019. The advance payment would be based on 70% of the average quarterly payroll for the same quarter in 2019.

d. Paycheck Protection Program (“PPP”) and Tax Credit Reimbursements

- i. The PPP is in its third iteration and businesses should seek the advice of their lenders, accountants, and other tax professionals before applying for PPP or similar loans and tax credit reimbursements for employee retention or employee provided leave.
- ii. The various federal regulatory agencies are using ARPA to remind businesses again that no double-dipping is allowed with regard to tax credit reimbursement, where tax credits can only be sought once for each reimbursable expenditure even if multiple avenues of reimbursement are available.

**2. OSHA Enforcement**

a. Biden Administration Directive and National Emphasis Program (NEP) Response

- i. No nationwide federal standard for workplace safety requirements related to COVID-19
- ii. Lack of nationwide standard compensated for through increased, targeted inspection and enforcement

b. Enforcement Justification will Focus on the Well-Known “General Duty Clause”

- i. Furnishing “employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees”
- ii. Employers must “take reasonable steps to prevent or abate the hazard” or risk citation
- iii. [OSHA Guidance](#); [CDC Guidance](#); and [Pennsylvania Guidance](#)

c. Beyond the “General Duty Clause”

- i. OSHA has advised that, particularly in the healthcare context, the Personal Protective Equipment and Bloodborne Pathogens standards may apply
- ii. Employers still have a duty to report or log COVID-19 illnesses that are contracted at the worksite

### 3. Pennsylvania Specific Regulations Related to COVID-19 and Employers/Businesses

- a. In-person business restrictions continue to be rolled back for all business types and mitigation measures, which have changed numerous times, are starting to coalesce into what might be the more permanent regime businesses and customers can expect moving forward.
- b. The following is an overview of the current requirements for employers and operating businesses:
  - i. Business still must post the COVID-19 Safety Procedures for Businesses flyer at all public entrances and in worker common areas. The poster can be found [here](#).
  - ii. Teleworking—Telework is still required unless impossible.
  - iii. Cleaning—Reinforce existing cleaning protocols and double down on cleaning high-touch and shared areas.
    - 1. Adjust business hours to allow non-operating hours for cleaning/restocking.
    - 2. Close off areas visited by a person who is a case of COVID-19. Open outside doors and windows and use ventilation fans to increase air circulation in the area. Wait a minimum of 24 hours, or as long as practical, before beginning cleaning and disinfection. Cleaning staff should clean and disinfect all areas such as offices, bathrooms, common areas, including but not limited to employee break rooms, conference or training rooms and dining facilities, shared electronic equipment like tablets, touch screens, keyboards, remote controls, and ATM machines used by the ill person, focusing especially on frequently touched areas;
    - 3. Assign employees to wipe down carts/handbaskets.
    - 4. Clean registers once every hour.
  - iv. Mitigation—Implement temperature screening before employees enter the business, before the employee starts work, and send employees home that have a temperature or fever of 100.4 degrees Fahrenheit or higher. Require employees to practice physical distancing while waiting to have temperatures screened by placing marks at six-foot distances.
    - 1. Stagger work start and stop times for employees when practicable to prevent gatherings of large groups entering or leaving at the same time.
    - 2. Provide a sufficient amount of space and provide staggered timing for employees to have breaks and meals while maintaining a physical distance of 6 feet, arranging seating to have employees facing forward and not across from each other in eating and break settings.
    - 3. Limit persons in employee common areas so employees can maintain a physical distance of six feet.
    - 4. Conduct meetings and trainings or other gatherings virtually (i.e., by phone or through the internet). If a meeting must be held in person,

limit the meeting to the number of individuals permitted to be present under Section 9 (Specific Requirements For Events And Gatherings Other Than In-Person Retail Businesses or Businesses In The Retail Food Services Industry).

5. Provide employees access to regular handwashing with soap, hand sanitizer, and disinfectant wipes, including scheduling handwashing breaks as necessary, and ensure that common areas (including but not limited to break rooms, locker rooms, dining facilities, rest rooms, conference or training or conference rooms) are cleaned on a regular basis, including between any shifts.
  6. Require employees to wear face coverings during their time at the business, except to the extent the employee is using break time to eat or drink.
  7. Have a sufficient number of employees to perform all measures effectively and in a manner that ensures the safety of the public and employees.
  8. Prohibit non-essential visitors from entering the premises of the business.
  9. Make all employees aware of these required procedures by communicating them, either orally or in writing, in their native or preferred language, as well as in English or by a methodology that allows them to understand.
- v. Contact Tracing—Identify employees and customers, to the extent possible, who were in close contact (within about six feet for about 15 minutes) with a person with COVID-19 from the period 48 hours before symptom onset (or 48 hours prior to test date if asymptomatic) to the time at which the patient isolated and, upon request, provide those names and contact information to the Pennsylvania Department of Health or a local health department.
1. Promptly notify employees who were close contacts of any known exposure to COVID-19 at the business premises, consistent with applicable confidentiality laws.
- vi. Employee Isolation/Quarantine— If an employee becomes sick during the workday, the individual must be sent home immediately. As employee who has symptoms of COVID-19 before reporting to work should notify the employee’s supervisor and remain home.
1. An employee who is a close contact (within 6 feet of an infected person for a cumulative of 15 minutes in a 24-hour period) of a person who is diagnosed with or tests positive for COVID-19, may not continue to work at an in-person business, and must quarantine in accordance with the direction of the Department or the local health department unless PA-HAN-551 or its successor is applicable.
    - a. If an individual is fully vaccinated (2 more weeks after all doses for the applicable vaccine have been received), and remains

asymptomatic since the exposure to COVID-19, the employee does not need to quarantine.

b. If an individual is not fully vaccinated or experiences new or unexplained COVID-19 symptoms, they must leave or not return to work and quarantine for:

- i. 14 days since last exposure for best protection (should be considered where social distancing is not possible at work facility);
- ii. 10 days if no symptoms since last exposure (monitoring symptoms through day 14);
- iii. 7 days if no symptoms, and a negative test within 48 hours before the time of return to work; and
- iv. 0 days if no symptoms with positive COVID-19 test and recovery (14 days without symptoms) within past three months.

2. If an employee is diagnosed with or tests positive for COVID-19, the employee may no longer work at an in-person business, even if asymptomatic, and must isolate in accordance with the direction of the Pennsylvania Department of Health or a local health department.

vii. General Requirements for Businesses Serving the Public in a Physical Space, including Inside or Outside of a Building:

1. Require employees and customers to maintain a physical distance of 6 feet at check-out and counter lines.
2. Place signage at the entrance to and throughout the business mandating universal face coverings and physical distancing for all individuals, including employees, entering the business.
3. Provide markings or other signage showing where 6-foot distances are, to help all individuals entering the business, including employees, maintain physical distancing.
4. Post, at every entrance, a maximum capacity limit to ensure that a minimum of 6-foot physical distance can be maintained throughout the location. This maximum capacity limit shall be clearly identified and displayed.
5. Arrange store aisles to be directionally one-way, if required to achieve appropriate physical distancing.
6. Place hand sanitizer stations at high-contact locations.
7. Designate a COVID-19 compliance officer who is responsible for ensuring compliance with this Order and all other mitigation orders incorporated therein.
8. Install plexiglass shields at registers and check out areas to shield employees and customers or take other measures to ensure physical distancing of customers from checkout personnel, or close lines and counters to maintain a physical distance of 6 feet between customers.

9. Provide for outside or curbside pick-up or delivery options, when feasible, by instituting online ordering or other such means.
  10. Designate a specific time for high-risk and elderly persons to use the business at least once every week if there is a continuing in-person customer-facing component.
  11. Require anyone entering the workplace to wear a facemask, unless a health, safety, or age exemption applies and is required to be provided.
- viii. Additional Capacity Limitations for Businesses—All in-person businesses serving the public within a building or defined area, excluding restaurants may operate at up to 75% of the maximum capacity stated on the applicable certificate of occupancy.
- ix. Additional Requirements for Restaurants—Restaurants may increase non-event capacity limitations to 75% of stated fire code maximum occupancy for indoor dining if the establishment enrolls in and complies with the Open & Certified Pennsylvania program administered by the Department of Community and Economic Development. Discrete events within Open & Certified establishments remain subject to Section 8 (Specific Requirements For Events And Gatherings Other Than In-Person Retail Businesses or Businesses In The Retail Food Services Industry). Restaurants that do not self-certify may operate at a 50% capacity.
- x. Events and Gatherings—Venues hosting events or gatherings, regardless of venue size, must determine their established occupancy limit as defined by the National Fire Protection Association (NFPA) Life Safety Code and then apply these gathering limitations:
1. Indoor events and gatherings are limited to 25% of maximum occupancy, subject to the distancing requirements among groups set forth below.
  2. Outdoor events and gatherings are limited to 50% of maximum occupancy, subject to the distancing requirements among groups set forth below.
  3. For events or gatherings at fixed seating venues: sell reserved seating allowing groups of up to 10 attendees to sit together, with the recommendation that the group be from the same household; allowing groups of more than 10 attendees only if they are all from the same household; separate each grouping by at least 6 feet; implement best practices such as timed entry, multiple entry and exit points, pathways that allow for physical distancing, multiple restrooms, and hygiene stations; require attendees to comply with physical distancing requirements when not seated; and require attendees and workers to wear masks or face coverings in compliance with my Updated Order Requiring Universal Face Coverings, including any subsequent amendments, and to comply with other mitigation measures. Venues and event planners may refer to the CDC Events and Gatherings Readiness and Planning Tool for additional information regarding best practices.

4. For all other events or gatherings, require attendees and workers to comply with 6-foot physical distancing requirements, to wear masks or face coverings in compliance with my Updated Order Requiring Universal Face Coverings, including any subsequent amendments, to comply with other mitigation measures, and to implement best practices such as timed entry, multiple entry and exit points, multiple restrooms and hygiene stations. Venues and event planners may refer to the CDC Events and Gatherings Readiness and Planning Tool for additional information regarding best practices.
5. Religious services and gatherings are still exempt from the above

**4. Employer Liability and Workers Compensation (*Question and Answer Session with Trent Hess of BCF Group, Moderated by Jeff Worley*)**

- a. What are the trends regarding businesses and COVID-19?
- b. What type of risk profile do employers have with regard to COVID-19? What about lawsuits?
- c. How does COVID-19 interact with Pennsylvania's Workers' Compensation system?
- d. What should businesses look out for or ask about when renewing their liability insurance?
- e. What should employer think about from a Workers Comp / Safety perspective as they bring employees back to work?

**5. Vaccinations**

a. Mandatory Programs

- i. Religious and Disability Related Exemptions
  1. Bona fide religious belief versus substantial limitation of major life activity
- ii. Reasonable Accommodations and Undue Hardship
  1. "More than de minimis cost" versus "Significant difficulty or expense"
- iii. Practical Considerations

b. Incentive Programs

- i. Free and voluntary approach or otherwise employer directed/paid health plan
- ii. De Minimis, Equal, and Available
- c. Workers' Compensation Issues
- d. Vaccine Related Inquiries

**6. Wage and Hour Considerations for a Remote Workforce**

a. Rate of Pay

- i. Salaried employees—are paid at the same salary as they were when working in the office. Avoid fluctuations in salaries or risk losing the exemption.
- ii. Hourly employees—are paid for all hours worked regardless of whether the time worked was scheduled or approved. Hourly employees must keep detailed records of all time worked. Time worked may include such tasks as checking emails or messages and preparation time for meetings or other tasks.
- iii. Reminding employees, especially salaried exempt employees, that they should create a schedule with a clear stop time and attempt to stick to it. Employees need to step away from work while at home.



## **7. Requiring Employees to Return to the Office**

- a. Flexibility is important, similar to when work from home policies were adopted.
- b. Coming back, for some, might be as stressful as the prospect of setting up remote work and adjusting to the new normal. Remember, a year has gone by, and this is more than enough time for employees to have adopted routines.
- c. Think of how a return of most employees will necessitate changes to the workplace's COVID-19 protocols. With 50% of employees working from home, social distancing, cleaning, and other measures were more easily accomplished. But once everyone returns and business is back at a full pace, these requirements will not go away, and space and time constraints are not changing either.
- d. Consider your current health information privacy practices – will these need to be more robust with a full office.
- e. Just like how out of office workers became used to their new setups, so too did the office workers that remained in-person. Be prepared for inevitable conflict as working circumstances for employees change.
- f. Blanket return to work policies should be reviewed for non-discrimination both as to the type of worker they apply to and the terms of the policy itself.
- g. A return to work policy will likely need to consider similar ADA/EEOC exceptions/reasonable accommodations like vaccinations or masking.
- h. Inquiring as to whether an employee has been vaccinated is a permissible inquiry according to EEOC guidance.