



# COVID-19: One Year Later

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# COVID VACCINATIONS – THE BASICS

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- Yes, an employer can mandate its employees be vaccinated but . . . the legal realities are not that simple
- A vaccination itself is NOT a medical examination under the ADA BUT the required prescreening questions ARE.
  - If an employer administers vaccines it's mandating, those pre-screening questions must be **"job related and consistent with business necessity."**
    - As such, if an employee refuses to answer the pre-screening questions (and, therefore, does not get the vaccine), an employer cannot take an adverse employment action against the employee unless it can demonstrate that the employee now poses a **direct threat** to him or herself or others.
  - If an employer offers the vaccine to its employees on a voluntary basis, the decision to answer the pre-screening questions also must be voluntary.
    - In this scenario, if any employee refuses to answer the pre-screening questions, the employer may not retaliate against, intimidate, or threaten that employee for that refusal.

# COVID VACCINATIONS – THE BASICS

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- If an employee receives an employer-required vaccine from **a third party, not contracted with the employer**, the “**job-related and consistent with business necessity**” restrictions **do not apply**.
  - However, if the employer learns the employee did not receive the vaccine, further **inquiries by the employer as to “why”** may be a disability-related inquiry subject to the ADA’s “job-related and consistent with business necessity” standard.
  - Direct threat assessment applies
- **An employer asking for proof of vaccination is not a medical examination (but confidentiality).**
- An employee can refuse the vaccine **due to a disability**.
  - Interactive Process
  - Direct Threat
  - Undue Hardship

# COVID VACCINATIONS – THE BASICS

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- **Religious accommodations**
  - Employee may be refused based on sincerely held religious belief
  - **BUT REMEMBER - the definition of religion under Title VII is extremely broad and is not limited to just organized religions.**
  - **Reasonable accommodation UNLESS** would pose **undue hardship**
    - Title VII – Undue Hardship – having more than a de minimis cost or burden on employer
- **What about employees who volunteer they won't get vaccinated because:**
  - They are waiting on more long-term data about side effects
  - They think the vaccine is a government science experiment.
  - They don't need a vaccine because they're taking a cow dewormer which will protect them from getting sick from COVID.

# COVID VACCINATIONS – OTHER EMPLOYMENT LAW ISSUES

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- OSHA
- Wage and hour
- Liability for Adverse Reactions to Vaccine
- GINA
- Unionized? Partner with your Union.
- Data Privacy/Security – including State Law
- Disparate Impact?
- State law

# COVID VACCINATIONS – DEVELOPING ISSUES

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- As more members of the workforce become vaccinated, new workplace issues develop.
  - CDC recommends fully vaccinated people follow workplace rules
  - Use of masks, social distancing measures, etc.
    - CDC's latest guidance allows fully vaccinated individuals to gather indoors in small groups without a mask
  - Exposure protocols now vary.
    - If a fully vaccinated person is in close contact with someone with COVID-19, they are not required to quarantine unless they are experiencing symptoms (same for those who have had virus in last 90 days)

Fully vaccinated = at least two weeks since final shot.
  - Travel is still not recommended by the CDC, even for vaccinated individuals.

# WORK FROM HOME CONSIDERATIONS

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- Productivity and Performance
  - Work Time/Non-Work Time
  - Absences, Leaves, and PTO
- Connection and Culture
  - Equipment
  - Travel
- Protections and Policies
  - Security and Privacy
  - Insurance
  - Hiring and Separation
  - **Remote Work Policy**



# OSHA Issues During the COVID-19 Pandemic



# Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace

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- There is no specific OSHA standard covering COVID-19 (yet....), however on January 29, 2021, OSHA issued stronger, more detailed guidance.  
[www.osha.gov/coronavirus/safework](https://www.osha.gov/coronavirus/safework)
- While the guidance does not create new legal obligations, it states that employers should implement COVID-19 prevention programs and should include:
  - Conducting a hazard assessment
  - Identifying a combination of measures that limit the spread of COVID-19 in the workplace
  - Adopting measures to ensure that workers who are infected or potentially infected are separated and sent home from the workplace; and
  - Implementing protections from retaliation for workers who have COVID-19 related concerns.

# Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace

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- Elements of the recommended COVID-19 prevention program include:
  - Assignment of a workplace coordinator
  - Identification of where/how workers might be exposed to COVID-19 at work
  - Identification of measures that will limit the spread of COVID-19 in the workplace
  - Consideration of protections for workers at higher risk via supportive policies/practices
  - Establishment of effective communicating system (in language workers understand)
  - Education/training of workers on COVID-19 policies/procedures (accessible formats/language)
  - Instructing workers who are infected/exposed to stay home and isolate/quarantine
  - Minimizing the negative impact of quarantine and isolation of workers
  - Isolating workers who show symptoms at work
  - Performing enhanced cleaning and disinfection after people with suspected/confirmed COVID-19 have been in the facility

# Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace

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- Elements of the recommended COVID-19 prevention program include (cont):
  - Recording and reporting COVID-19 infections/deaths as required by OSH Act and state health departments
  - Implementing protections from retaliation and setting up an anonymous process for workers to voice concerns about COVID-19 related hazards
  - Making a COVID-19 vaccine available at no cost to eligible employees
  - Not distinguishing between worker who are/are not vaccinated; workers who are vaccinated must continue to follow protective measures
  - Compliance with all applicable OSHA standards

# OSHA GUIDANCE

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Four key OSHA standards that apply in COVID-19 Era:

- **Personal Protective Equipment (PPE)** standard (in general industry, 29 CFR 1910 Subpart I)
- **Respiratory Protection** standard (29 CFR 1910.134)
- **Recordkeeping** (29 CFR 1904)
- **General Duty Clause**, 29 USC 654(a)(1) which requires employers to furnish to each worker “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.”

# OSHA's COVID-19 National Emphasis Program (NEP) and Enforcement Response Plan (ERP)

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- Issued March 12, 2021 and effective immediately
- National Emphasis Program (NEP):
  - Targeting specific high-hazard industries or activities in which there is a hazard of contracting COVID-19
  - Including an added focus to ensure that workers are protected from retaliation
- Updated Interim Enforcement Response Plan for COVID-19 (ERP)
  - Provides new instructions and guidance to Area Offices and Compliance Safety and Health Officers for handling COVID-19 related complaints, referrals, and severe illness reports.

# OSHA's COVID-19 National Emphasis Program (NEP) and Enforcement Response Plan (ERP)

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- Goal
  - To significantly reduce or eliminate worker exposures to COVID-19 by targeting industries and worksites where employees may have a high frequency of close contact exposures
- Accomplished by:
  - Inspection targeting
  - Outreach to employers
  - Compliance assistance

# OSHA's COVID-19 National Emphasis Program (NEP) and Enforcement Response Plan (ERP)

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- Industries Targeted
  - Healthcare Industry Employers (Table 1)
    - Physician/Dentists offices
    - Hospitals
    - Facilities for nursing care, assisted living, and retirement
    - Home healthcare services; and
    - Ambulance services



# OSHA's COVID-19 National Emphasis Program (NEP) and Enforcement Response Plan (ERP)

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- Industries Targeted
  - Non-Healthcare Industry Employers (Table 2)
    - Meat and poultry processing
    - Grocery stores
    - Discount department stores
    - General warehousing and storage
    - Restaurants
    - Correctional institutions; and
    - Temporary help services (where services occurred at healthcare facilities or other high-hazard workplaces)

# OSHA's COVID-19 National Emphasis Program (NEP) and Enforcement Response Plan (ERP)

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- Who will OSHA inspect first?
  - Unprogrammed Inspections
  - Programmed Inspections
- Outreach Period?
  - No. Targeting for programmed inspections will begin on March 26, 2021
- How will NEP inspections differ from regular OSHA inspections?
  - “Inspections should be conducted in a manner to achieve expeditious issuance of COVID-19 related citations and abatement.”
- Is OSHA still planning to issue an ETS
  - “In the event that OSHA issues an [ETS], those provisions will take precedence over citations of the general duty clause.”

# OSHA's COVID-19 National Emphasis Program (NEP) and Enforcement Response Plan (ERP)

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- What should employers in Targeted Industries do now?
  - Review NEP to understand new targeting priorities
  - Make sure exposure control measures meet the recommended guidance of OSHA, the CDC, and other public health agencies
  - Conduct periodic audits regarding understanding of/compliance with COVID-19 related protocols
  - Review OSHA logs and safety records to identify any potential COVID-19 work-related issues
  - Review ERP for details on how COVID-19 related inspections will be conducted and consider training safety personnel and managers on different inspection elements.

# American Rescue Plan Act



## American Rescue Plan Act - FFCRA

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- Payroll tax credits extended to September 30, 2021
- Expanded Eligibility for paid leave
- Changes to EFMLA pay
- Anti-discrimination provisions for tax credit
- EPSL banks reset April 1, 2021

## American Rescue Plan Act - FFCRA

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- Expanded Eligibility for paid leave
  - When an employee is obtaining a COVID-19 vaccine
  - When an employee is suffering or recovering from side effects of vaccine; and
  - When an employee is seeking or waiting the results of a COVID-19 test if employee has either been exposed or employer has requested the test.

## American Rescue Plan Act - FFCRA

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- Changes to EFMLA pay
  - All 12 weeks of EFMLA can be paid
  - EFMLA benefits expanded to include all of the reasons an employee can take EFMLA
  - Remainder 2/3 regular rate; capped at \$200
  - Total cap increased from \$10K to \$12K

## American Rescue Plan Act - FFCRA

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- Anti-discrimination provisions for tax credit
  - Employers may not choose to limit the categories of employees eligible for paid leave (highly compensated, full-time, based on tenure)
  - Applies separately to EPSL and EFMLA
- EPSL banks reset April 1, 2021



# Outbreak Period - Public Health Emergency

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**Deadlines Extended** – Pursuant to EBSA Notice 2020-01 – deadlines occurring between March 1, 2020 through 60 days after end of public health emergency – were extended but no later than February 28, 2021, the one year limit contained in ERISA section 518:

- **ERISA** –
  - Periods for filing claims and appeals
  - Periods for requesting external review of an adverse benefits determination under the ACA
  - HIPAA Special Enrollment Periods of 30 and 60 days
- **COBRA** –
  - Deadline for plan administration to send out COBRA election notices (44 days)
  - COBRA election period of 60 days
  - COBRA premium payment deadline of 45 days initially and 30 days subsequently
  - Deadline to notify the plan administrator of certain qualifying events or SS disability determination by COBRA qualified beneficiaries
- **Health FSAs, DCAPs and Cafeteria Plans** –
  - IRS Notice 2020-29 provides flexibility to allow additional mid year election changes and extension of grace periods of unused amounts during the year of 2020.

# Outbreak Period Extension

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## Deadlines Extended again – EBSA Disaster Relief Notice 2021-01

- **One year limit applied to an individual's specific time period (instead of application to the Outbreak Period itself)**
  - 1 year limit is added to the original due date
  - Example: COBRA election period would have ended on June 30, 2020. Election deadline would be June 30, 2021.
- **Disregarded time periods**
  - The time periods subject to the relief under the Notices will have the applicable periods under the Notices disregarded until the earlier of:
    - 1 year from the date the individual/plan was first eligible for relief; OR
    - 60 days after the announced end of the National Emergency (end of the Outbreak Period)
  - The time periods that were previously disregarded under the Notices will resume.
  - The disregarded period shall not exceed 1 year.
  - Example: If 30 days of an individual's 60 day election period (starting on March 1, 2020) had occurred on April 1, 2020, the individual would have until May 1, 2021 (one year after end of original deadline) to elect.

# Outbreak Period Extension

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- **Unknowns**

- Does extension of one payment extended all monthly COBRA payments for 1 year from each month's due date?
- Notice 2020-01 stated that all outstanding payments would be due 30 days after the Outbreak Period, but payments likely due within the one year limitation.
- Do disclosures or notices due during the Outbreak Period have to be resent or amended notices required?
- Notice 2021-01 provides that “plan fiduciaries should make reasonable accommodations to prevent the loss of or undue delay in payment of benefits in such cases and should take steps to minimize the possibility of individuals losing benefits because of a failure to comply with pre-established time frames.”
  - If a beneficiary is at risk of loss of a right or protection, “plan fiduciary should consider affirmatively sending a notice regarding the end of the relief period.”
  - Plan “disclosures issued prior to or during the pandemic may need to be reissued or amended if such disclosures failed to provide accurate information as to the time period to take action.
  - Upon loss of coverage, fiduciaries should make sure participants and beneficiaries are aware of other coverage options, including special enrollment periods through the exchanges (Marketplace).

# COBRA Subsidy – American Rescue Plan Act

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## COBRA Subsidy for 6 Months of full COBRA premium for Eligible Individuals starting April 1, 2021 and ending September 30, 2021

- **Eligibility for Subsidy**

- Employees (and their family members) who lost or will lose their health care coverage due to job loss or reduction in hours on or after April 1, 2021 and before September 30, 2021
- Employees (and their family members) who became eligible for COBRA prior to April 1, 2021, and the period of COBRA coverage includes any month between April and September 2021
  - Even if the individual did not elect COBRA when it was initially offered or elected COBRA but discontinued it before April 1, 2021.

- **Amount and Length of Subsidy**

- **100%** of the full COBRA premium during the **six-month** period from April 1, 2021 through September 30, 2021.
- Ends sooner than six months if (1) maximum COBRA coverage period (ex. 18 months) ends earlier than September 30, 2021, or (2) individual becomes covered under another group health plan or Medicare
- Individuals required to notify the plan of eligibility for other coverage or face a penalty.
- Other coverage does not include excepted benefits (FSA, dental or vision).

# COBRA Subsidy – American Rescue Plan Act

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## Notice of the Subsidy

Group health plans must provide notice of the availability of the new subsidy to:

- any individual who becomes eligible to elect COBRA between April 1, 2021 and September 30, 2021, or
- any individual who is eligible for the subsidy due to job loss or reduction of hours followed by a loss of coverage before April 1, 2021.
  - Federal government is required to issue model notices by April 10, 2021 (30 days after enactment).
  - Group health plans are required to notify individuals if their subsidy will terminate before September 30, 2021,
    - but notice is not required if subsidy will terminate due to an individual's eligibility for other coverage.
  - Federal government is required to issue model notices by April 25, 2021 (45 days after enactment).
  - **Payment of the Subsidy**
  - The subsidy will be paid to the plan or plan sponsor, including private, governmental, and multiemployer plans, as a credit against quarterly payroll taxes.
  - Credit is refundable and can be advanced.

## COBRA Subsidy – American Rescue Plan Act

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- **Preparing for Notice of the Subsidy**
- Plan sponsors should:
  - coordinate with COBRA Administrator,
  - identify individuals who will need to receive a notice, and
  - watch for additional guidance or FAQ and model notices
- The notice will have to be sent to any one who would be eligible for the eligibility for at least one month and/or who could have or had COBRA from November 2019. (18 months – November 2019 – April 2021)
- Plan sponsors should determine which coverage options will be available (same plan or all plans options).
- Plan sponsors should locate addresses and prepare to send the notice.

# Affordable Care Act Subsidies – American Rescue Plan Act

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- **ACA subsidies**

- For **2021 and 2022**, ARPA eliminates the upper income limit for eligibility for premium tax credits (currently set at 400% of the federal poverty level), and increases the amount of the premium tax credits by decreasing the amount that an individual must contribute to the cost of coverage.
- Individuals must contribute a percentage (8.5% of household income for those with incomes of 400% of the federal poverty level or more) of their income toward coverage.
- Decreasing tax credits based on increasing income
  - The more an individual makes, the more that individual will be expected to contribute toward the cost of coverage.
- Because the amount of premium tax credits available will vary based on the cost of coverage, there will be a level of income at which the individual's required contribution will exceed the cost of coverage, and then no premium tax credit will be available.

## Affordable Care Act Subsidies – American Rescue Plan Act

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- **ACA subsidies relating to receipt of unemployment compensation**
  - For **2021**, a taxpayer who receives or is approved to receive unemployment compensation for a week or more is treated as eligible for premium subsidies and any income above 133% of the federal poverty level is disregarded for purposes of determining the contribution percentage the taxpayer must contribute toward coverage.
  - Because the contribution level for incomes up to 150% of the federal poverty level is zero under ARPA, an individual who received unemployment compensation is not be expected to contribute toward the cost of subsidy-eligible coverage.
  - ARPA suspends repayment of excess subsidies for 2020.



## Dependent Care Assistance Program Increase

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- For **2021 only**, ARPA increases the amount which may be elected tax-free through a Section 129 Dependent Care Assistance Program (DCAP) from \$5,000 to \$10,500 (or from \$2,500 to \$5,250 for individuals who are married but filing separately).
- Plan sponsors have the option, but are not required, to increase the election amount on plans they sponsor.
- Plan sponsors will need to amend their DCAP plan by the end of the 2021 plan year to allow for this increased amount.
- It is unclear whether amounts from a 2020 carryover or grace period would count toward the total 2021 amount that may be reimbursed on a tax-favored basis.
- Plan sponsors should:
  - coordinate with DCAP administrators to increase contribution limits,
  - communicate the option to increase elections, and
  - adopt a plan amendment by end of the 2021 plan year.

# Tax Credits – American Rescue Plan Act

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- **Employee Retention Credit**

- In December 2020 under the Consolidated Appropriations Act, the Employee Retention Credit:
  - had been extended through June 30, 2021,
  - the percentage increased from 50% to 70%,
  - qualifying wages per employee were increased to \$10,000 with a cap of \$7,000 per quarter,
  - Maximum credit of \$28,000 for each employee.
- Extension of the CARES Act's employee retention credit for two additional quarters – **from July 1, 2021 to December 31, 2021**.
- Effective **July 1, 2021**, the credit will be applied against an employer's Medicare hospital insurance taxes (rather than OASDI taxes).
- Credits are refundable if exceed tax liability.

## FAQ Part 44 on COVID-19 - Testing

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- **Triagency (DOL, HHS, and IRS) issued FAQ Part 44**
  - Group health plans cannot require enrollees to have COVID-19 symptoms or recent exposure to receive coverage of virus testing without cost sharing, prior authorization, or other medical-management requirements.
  - Group health plans must assume an individualized clinical assessment occurred and cover testing without cost sharing regardless of where testing occurred (state or local government, drive-through site, or another site that does not require appointments).
    - Plans should monitor inappropriate cost sharing imposed on participants.
    - Cost sharing ban includes an item or service relating to the furnishing of or administration of the test or the evaluation of an individual's need for a test.
  - Group health plan coverage of COVID-19 testing for workplace health and safety (employment or public health purposes) is still not required with no cost sharing, but plan can voluntary cover it.

## FAQ Part 44 on COVID-19 - Vaccines

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- Group health plans must cover vaccines (and other COVID-19 preventive items and services), without cost sharing, on an expedited basis
  - Pfizer vaccine - January 5, 2021
  - Moderna vaccine - January 12, 2021
  - Johnson and Johnson – March 19 (to be confirmed)
- Group health plans must cover the vaccine and vaccine administration fee, regardless of how the vaccine is billed and whether multiple doses are required. If a third party covers the vaccine itself, the plan must cover the administration fee without cost-sharing.
- Safe harbor for testing and vaccines – a plan that communicated the mandated COVID-19 coverage terms as soon as possible – via an updated SBC or a separate communication – will not face enforcement action for failing to provide 60 days advance notice of the change.

## FAQ Part 44 on COVID-19 - Vaccines

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- **EAP** – Employee assistance programs can provide the testing, vaccines, and COVID-19 testing and diagnosis, if it does not charge cost-sharing and other excepted benefits requirements.
- **Onsite Medical Clinic** – Employers can provide COVID-19 vaccines, testing and even treatment through an on-site medical clinic to all employees – regardless of health plan enrollment – without the clinic have to meet all the ERISA and ACA rules for plans.
- **Coverage options for uninsured employees** – provides information on available sources of federal funding to reimburse providers for COVID-19 related services provided to uninsured.
  - To obtain reimbursement from federal funding for these services, providers must agree not to balance bill patients.
  - Employers could encourage employees to seek services (testing and vaccination) from the available providers, or enroll in the special enrollment period that ends on May 15 for the federal and most state health insurance marketplaces.

## FAQ Part 44 on COVID-19 – Action items

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- **Plan sponsors should:**
  - Check coverage for COVID-19 testing and vaccines.
  - Confirm that plan covers all COVID-19 vaccines timely.
  - Communicate with employees.
  - Monitor the guidance.

## Questions?



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