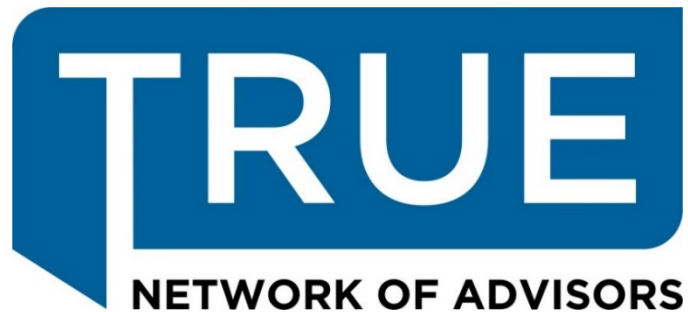


2021: What Employers Need to Know for the New Year



Presented By
Matt Stiles & Matthew Cannova
Maynard, Cooper & Gale, P.C.
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AGENDA

- ▼ **Consolidated Appropriations Act, 2021**
- ▼ **FFCRA Update**
- ▼ **EEOC Guidance regarding Vaccines**
- ▼ **GHP Vaccine Coverage**
- ▼ **FSA and DCAP Updates**
- ▼ **Updates for Grandfathered Health Plans**
- ▼ **ACA Reporting**
- ▼ **Federal Agency Enforcement**

Consolidated Appropriations Act, 2021

- ▼ Signed into law on December 27, 2020
 - ▼ After months of (mostly) partisan negotiations and threat of presidential veto
 - ▼ 5,593-page, \$1.4 trillion omnibus spending agreement encompasses many different provisions and includes an additional \$900 billion in coronavirus relief
- ▼ Extension of unemployment benefits, including \$300 per week for weeks of unemployment beginning on or after December 26, 2020 and ending before March 14, 2021
- ▼ Benefits provisions, including for FSAs and DCAPs
- ▼ Extension of employer tax credits, including Employee Retention Tax Credits and FFCRA Tax Credits

FFCRA Update

▼ The requirement for employers with fewer than 500 employees to provide **FFCRA leave and benefits ended on 12/31/20**

▼ Effect of Year-End Stimulus Bill

- ▼ The year-end stimulus legislation signed by the President on 12/27/20 **did not extend FFCRA**
- ▼ It did, however, **re-authorize the same payroll tax credits through 3/31/21** for employers who **voluntarily offer FFCRA leave and benefits**

FFCRA Update cont'd

▼ What Must Employers Do to Receive 2021 FFCRA Tax Credits?

- ▼ Employers who want to continue to receive payroll tax credits for providing FFCRA benefits **must continue to provide those benefits as authorized under the original FFCRA**
- ▼ The relief package **does not change anything about the FFCRA benefit**, i.e. (1) qualifying reasons, (2) caps on paid benefits, or (3) duration or amount of available leave
- ▼ Under the original FFCRA, full time employees are entitled to a one-time allotment of 80 hours of EPSL, 12 weeks of EFMLA. Under the relief bill, an employer **is not entitled to a second tax credit for an employee taking leave in 2021, when that employee already took leave in 2020.**

FFCRA Update cont'd

▼ FMLA/EFMLA Extension Caveats?

- ▼ It seems **possible** that an employer may be able to provide a new, additional paid EFMLA benefit in 2020 and still receive tax credits through 3/31/21
- ▼ The original FFCRA's EFMLA benefit was an **amendment to the FMLA**, itself
- ▼ Where an **employer covered by traditional FMLA uses a calendar year for its FMLA benefit year**, it seems plausible that an employer could provide a **second EFMLA leave in 2021** and receive a payroll tax credit for it through 3/31/21
- ▼ We will closely monitor any DOL or IRS guidance on the relief law's effect on providing any renewed EFMLA benefit

FFCRA Update cont'd

▼ Effect of Expiration of FFCRA

- ▼ **Did you have employees on FFCRA leave on 12/31/20?** The requirement to provide leave under FFCRA ended on 12/31/20, regardless of whether an employee was out on leave at that time. Be sure you have communicated expectations for return to work. If you wish to continue the leave and receive a tax credit through 3/31/21, do not alter the terms of the leave
- ▼ Affected employers will need to communicate with employees regarding COVID-19 related leave options for 2021
- ▼ It seems possible that FFCRA could be reauthorized after the inauguration
- ▼ Any employer decision to continue providing FFCRA benefits in 2021 should be (1) in writing, (2) specify it is temporary, and (3) explain that it terminates upon the implementation of any new law requiring a similar benefit

FFCRA Update cont'd

▼ State Law Considerations

- ▼ **New York's** quarantine leave law, requiring New York employers to provide job-protection and sick leave to employees subject to a mandatory or precautionary order of quarantine or isolation, remains in effect for 2021
- ▼ **California's** COVID-19 leave law expires on 12/31/20 or upon the expiration of the FFCRA's EPSL requirement. Unless the state amends the law or issues new guidance, California's leave law will likely expire at the end of the year (note Cal/OSHA's Emergency Temporary Standard remains in effect) and, unlike the federal FFCRA, the California law allows an employee who is on leave on the date that the law expires to complete their leave, even if this extends the leave period past the law's expiration date.
 - ▼ Many local government ordinances have extended their paid sick leave requirements
- ▼ **Colorado's** COVID-19 leave law expires on 12/31/20; however, on 1/1/21 the new CO paid sick leave program begins phasing in

EEOC Issues Guidance on Employer Vaccine Requirements

▼ EEOC Guidance on Employer Vaccine Requirements

- ▼ On December 16, 2020, EEOC issued updated FAQs on its COVID-19 page regarding employer vaccination requirements

<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (see Section K)

- ▼ EEOC acknowledges that employers may require employees to provide proof of vaccination obtained from a third party, that employers may self-administer vaccinations, or that employers may contract with a third party to administer vaccinations
 - ▼ **Note this would be a mandatory subject of bargaining for union employers**
- ▼ **To adequately document the requirement for ADA purposes**, the employer should have a written policy that specifies it is a qualification standard for employment that “an individual shall not pose a direct threat to the health or safety of individuals in the workplace.”

EEOC Issues Guidance on Employer Vaccine Requirements

▼ EEOC Guidance on Employer Vaccine Requirements

- ▼ **Pre-Vaccination Questions:** If employer-administered or requiring a designated third-party, the employer and third-party must comply with ADA on pre-vaccination questions.
- ▼ If answering pre-vaccination questions is mandatory, employer must “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.”
- ▼ Allowing an employee to obtain a vaccination from the provider of his/her choice would avoid this requirement.

EEOC Issues Guidance on Employer Vaccine Requirements

▼ Reasonable Accommodations (ADA/PDA/Title VII)

- ▼ Similar to EEOC's guidance regarding employer accommodations of employees who could not use PPE (masks, etc.) due to a health condition (disability or pregnancy) or religious objection, employers must engage **in a good faith interactive discussion of reasonable accommodation** for employees who object to vaccines for these reasons.

EEOC Issues Guidance on Employer Vaccine Requirements

▼ Reasonable Accommodations Based on Health Factor

- ▼ “Employers should conduct an **individualized assessment** of four factors in determining whether a direct threat exists: the duration of the risk; the nature and severity of the potential harm; the likelihood that the potential harm will occur; and 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.”
- ▼ **Only if there is a direct threat that cannot be reduced by a reasonable accommodation** may an employer **exclude** an employee from the worksite
- ▼ Note that “**exclusion**” is not synonymous with “**termination**”

EEOC Issues Guidance on Employer Vaccine Requirements

▼ Reasonable Accommodations Based on Religion

- ▼ Requires that employee put employer on notice of a sincerely held religious belief, practice, or observance that opposes the vaccine
 - ▼ Do not let your decision be affected by what you think is “sincere” or “legitimate” and instead **“assume that an employee’s request for religious accommodation is based on a sincerely held religious belief”**
- ▼ Employers may **deny the request** for religious accommodation by showing that the **request causes an undue hardship, defined as “more than a de minimus cost or burden on the employer”** and may exclude the employee from work on this basis if no other reasonable accommodation is available
- ▼ Note that **“exclusion”** is not synonymous with **“termination”**

EEOC Issues Guidance on Employer Vaccine Requirements

▼ Approved Status of Vaccines

- ▼ The approved status of the vaccine and disclosures that go with it may result in some conflict with employer vaccine requirements. For example, the vaccines currently have FDA “emergency use authorization” or EUA, which includes disclosures among which is **“that they have the option to accept or refuse the vaccine.”**
- ▼ Some commenters have said that this FDA disclosure **would conflict with EEOC’s authorization** that an employer may require employees to get vaccinated
- ▼ In the absence of further guidance, it appears that **EEOC’s guidance assumes employers require a “COVID-19 vaccine that has been approved or authorized by the Food and Drug Administration (FDA)”** and that this approval or authorization necessarily includes EUA status

EEOC Issues Guidance on Employer Vaccine Requirements

▼ Considerations for Your Workplace Culture

- ▼ Historically, certain work environments like health care providers and educational establishments have regularly utilized vaccination requirements
- ▼ Such requirements will be unprecedented for many employers
- ▼ Look to your industry, associations, peer groups, and geographic markets to determine the sphere of influence on these strategies
- ▼ Think critically about your workplace culture and evolving public opinion on vaccines as part of establishing any policy
- ▼ Given the sensitivity of the topic (from so many perspectives), consider whether to use voluntary vaccination programs or incentives before moving toward requirements

COVID-19 Vaccine Coverage Requirements

- ▼ **New rules speed up the timeline for ACA's required coverage of preventive services with respect to COVID vaccines**
 - ▼ Normal timeline is the first plan year that is at least 12 months after the CDC/USPTF/ACIP preventive recommendation
 - ▼ COVID Vaccine = 15 days
- ▼ **Coverage required whether it is provided by an in-network or out-of-network provider**
- ▼ **Plans must also cover the cost of a vaccine's administration, even if the cost of the vaccine itself is paid by a third party such as the federal government**
- ▼ **Self-funded plans should coordinate with TPAs and stop-loss carriers**
- ▼ **ERISA Notice Requirements**

COVID-19 Vaccine Coverage Requirements

- ▼ **Stand-alone, employer-sponsored Vaccine Programs**
 - ▼ Group Health Plan implications?
- ▼ **Coverage through EAP, OSMC?**

FSA and DCAPs

- ▼ No qualifying reason required for FSA and DCAP election changes for plan years ending in 2021
- ▼ Relief to use left over funds
 - ▼ Carryover plans - No limit on carryovers permitted for plan years ending in 2020 and 2021
 - ▼ Grace Period plans - Grace Period may be extended until the end of the plan year for plan years ending in 2020 and 2021
- ▼ Limited DCAP exception for dependents who age out during pandemic
 - ▼ Employers may allow unused dependent care FSA amounts for children until they turn age 14 (normal rule is age 13), at least through the end of the 2021 plan year
- ▼ Amendments must be made by the end of the calendar year after the end of the plan year in which the amendment is made effective
 - ▼ Plan must be **operated** in accordance with the terms of the amendment from the date the amendment is effective, even if prior to the actual amendment adoption date

Grandfathered Health Plans

- ▼ Final rule provides more flexibility for changes to GF plans without losing GF status
- ▼ Clarifies that grandfathered **HDHP** coverage may increase fixed-amount cost-sharing requirements, such as deductibles, to the extent necessary to maintain its status as a HDHP without losing grandfathered status
- ▼ Provides an alternative method of measuring permitted increases in fixed-amount cost sharing that allows plans to better account for changes in the costs of health coverage over time
 - ▼ For increases made effective on or after June 15, 2021, in addition to the current maximum percentage increase standard, plans may also evaluate the increases in fixed-amount cost sharing using the **premium adjustment percentage** (a figure published by HHS that represents the percentage (if any) by which the average per capita premium for health insurance coverage for the preceding calendar year exceeds such average per capita premium for health insurance for 2013)

ACA Reporting Update

- ▼ Deadline extended for providing employee statements (1095-C) from January 31, 2021 to March 2, 2021
- ▼ Filing deadline **NOT extended**
- ▼ Good Faith Transition Relief Extended
 - ▼ **Likely to be the final year**

ACA Reporting

2021 ACA Reporting Deadlines

To IRS

Paper Filers

February 28, 2021

Electronic Filers

March 31, 2021

To Employees

March 2, 2021

ACA Reporting Update

- ▼ **New Codes for Form 1095-C**
 - ▼ Related to individual coverage HRAs
 - ▼ Also requires employee's age, if offered ICHRA
- ▼ **Plan Start Month (now required)**
- ▼ **1095-B Transition Relief – Does not apply to Part III of 1095-C for full-time employees**
- ▼ **New Line 17 – Zip Code**

Federal Agency Enforcement

- ▼ IRS and DOL Enforcement Priorities
- ▼ HIPAA, ERISA, COBRA, MHPAEA, MEWAs
- ▼ Plan Assets and Prohibited Transactions
- ▼ Recommitment to ACA, Group Health Plan Compliance
- ▼ Independent Contractors vs. Employees
- ▼ More aggressive, less flexible
- ▼ No more ***good faith compliance standard*** for ACA Reporting
- ▼ EEOC collected a record \$535 million for victims of discrimination/harassment/retaliation in FY19

MHPAEA Self-Compliance Tool and Enforcement

- ▼ DOL and other agencies recently updated its MHPAEA Self-Compliance Tool for group health plans
- ▼ MHPAEA remains an enforcement priority for DOL EBSA
 - ▼ Often included as an “add on” in unrelated plan audits
- ▼ MHPAEA generally requires that financial requirements and treatment limitations on mental health and substance use disorder benefits must be comparable to, and applied no more stringently than those that apply to medical and surgical benefits
- ▼ Self-Compliance Tool for Part 7 of ERISA: Health Care-Related Provisions



Matt Stiles

205.254.1071

mstiles@maynardcooper.com



Matthew Cannova

205.254.1193

mcannova@maynardcooper.com

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