

COVID-19 . . . 20 . . . 21

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Presenters



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Overview

- Unwinding the PHE COVID Waivers
- COVID Vaccination
- American Rescue Plan

Unwinding the PHE COVID Waivers

PHE COVID Waivers

- Stark Law Waivers
- Licensure Waivers
- Telemedicine Waivers
- HIPAA Waivers
- Other CMS Waivers

Stark Law COVID Waivers

- CMS Issued Blanket Waivers for Stark, retroactively effective March 1, 2020
- Allowed waivers of certain transactions for COVID-19 Purposes:
 - Diagnosis or medically necessary treatment of COVID-19 for any patient or individual, whether or not the patient or individual is diagnosed with a confirmed case of COVID-19;
 - Securing the services of physicians and other health care practitioners and professionals to furnish medically necessary patient care services, including services not related to the diagnosis and treatment of COVID-19, in response to the COVID-19 outbreak in the United States;
 - Ensuring the ability of health care providers to address patient and community needs due to the COVID-19 outbreak in the United States;
 - Expanding the capacity of health care providers to address patient and community needs due to the COVID-19 outbreak in the United States;
 - Shifting the diagnosis and care of patients to appropriate alternative settings due to the COVID-19 outbreak in the United States; or
 - Addressing medical practice or business interruption due to the COVID-19 outbreak in the United States in order to maintain the availability of medical care and related services for patients and the community.
- Will automatically end with the end of the PHE

Licensure Waivers

- Most states have issued waiver of licensure requirements during the PHE
- Resource for waivers related to telemedicine -
<https://www.fsmb.org/siteassets/advocacy/pdf/states-waiving-licensure-requirements-for-telehealth-in-response-to-covid-19.pdf>
- End of waivers may vary by state

Telemedicine Waivers

- Types of Services
 - 2021 fee schedule distinguished permanent from temporary
 - Temporary are through December 31 after end of PHE
- Waivers requiring statutory change for extension
 - Originating site requirements
 - Additional practitioners as telehealth providers
 - OPPS billing for telehealth
 - Audio only communication
 - Hospice and home health face-to face
- Waivers that CMS could extend
 - Providers at home
 - Direct supervision
 - Recording HCCs
 - Frequency limitations

Telemedicine Waivers

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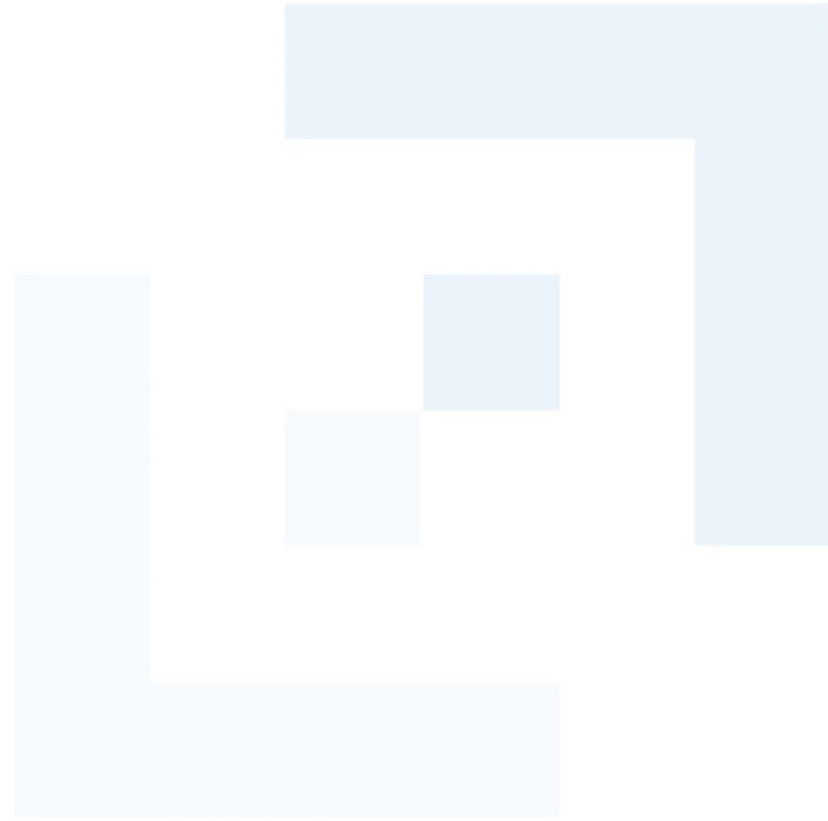
HIPAA Waivers

- Privacy waivers only relevant during 72 hours after hospital implements disaster protocol
- Enforcement discretion regarding good faith use of telehealth
 - Business Associate Agreements
 - Risk Assessment for telehealth platform
- Ends with the end of the PHE (and discretionary related to telehealth)

Other CMS Waivers

- Expansion of locations under EMTALA and COPs
- Flexibility in credentialing and privileges
- Supervision requirements for residents and incident to
- Expansion of verbal orders
- Waiver of administrative requirements related to discharge, and patient disclosures

COVID Vaccines



Vaccines – Legal considerations

- OSHA General Duty Clause
 - Employer obligation to maintain health and safety in the workplace
- Whether vaccination is “medical examination” under ADA
 - EEOC states it is not
- If employer institutes mandatory vaccine requirement, this is a “qualification standard” and must be job related and consistent with business necessity.

Vaccines – Legal Considerations

- Status of Vaccines: Emergency Use Authorization by FDA
 - States vaccine must be “voluntary”
 - Lawsuit has been filed in New Mexico seeking to restrain public agency from terminating employee who refused vaccine that is approved only under the emergency use authorization
 - EUA law applicability in workplace

Vaccines: The Business Case

- Health and safety of patients, employees and visitors
- Employee attitudes

Vaccines: The Business Case Choices

- Options
 - Mandatory for all
 - Mandatory for some
 - Incentives
 - Exceptions to social distancing requirements
 - Gift cards or cash
 - Offered (but voluntary)
 - Encouraged
 - No position

Vaccines: Legal and Business Considerations

- Mandatory
 - Consider business justification
 - Do unvaccinated employees pose a direct threat?
 - If so, then vaccines may be required to the extent they are job related and consistent with business necessity
 - Assessment of job relatedness and business necessity
 - Industry
 - Departments
 - Positions
 - Geographic locations
 - Other considerations

Vaccines

- If employer is *requiring* vaccine, best practice is to do so based upon judgment that immunity from COVID-19 is job related and consistent with business necessity.
- “Employer must show that an unvaccinated employee would pose a direct threat due to a ‘significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.’” [29 C.F.R. 1630.2\(r\)](#) (cited in <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> K. 5).

Mandatory Vaccines

- Consider state and local law
 - Some states are considering legislation to mandate vaccines in certain industries.
 - Some states are considering legislation to *prohibit* employer vaccine mandates.
- Consider employee attitudes
 - Published public polling
 - Employee surveys
 - Informal assessment

Mandatory Vaccine Policy

- Ensure accommodation process in place
 - ADA
 - Religious exemptions
- Consider practical implications
 - How to respond if employee refuses, not due to ADA or religious concern
- Consider impact on protected groups
- Timing concerns
- Consider EUA

Non-Mandatory Vaccines

- Employers may encourage employees to get vaccines.
- If encouragement includes “incentives” to get the vaccine, it may be a wellness program.
 - Consider using resources through health plans which provide a safe harbor under ACA and do not result in collection of health information for the employer.
- New EEOC regulations provide only for *de minimus* benefits.
 - Is additional time off to get vaccine *de minimus*?
 - Is \$100 *de minimus*?

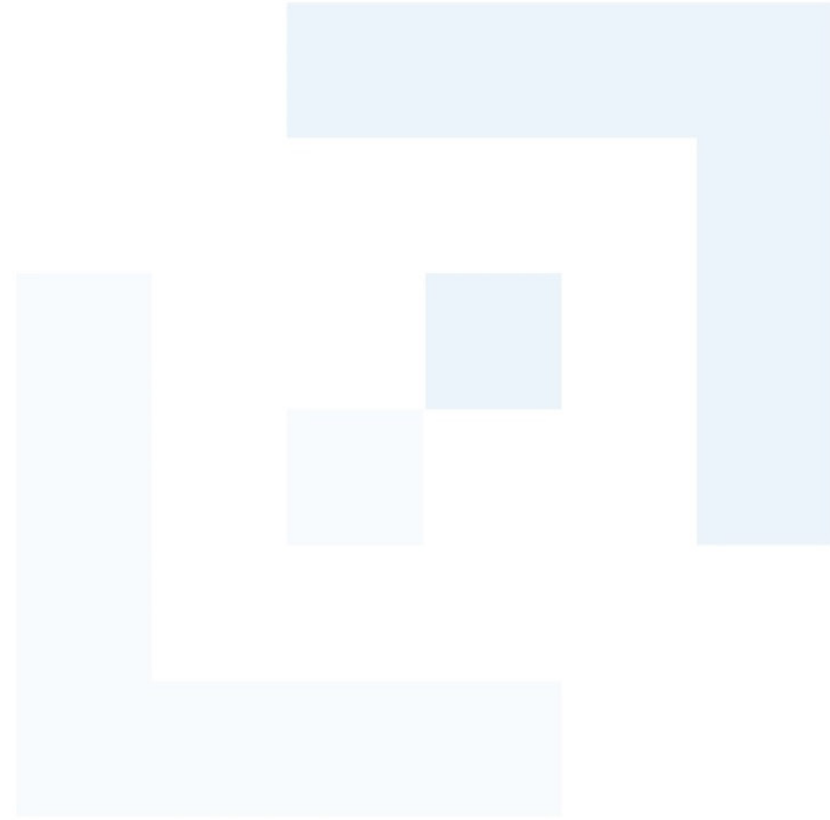
Non-Mandatory Vaccines

- Communicate and provide information for employees
- CDC COVID-19 Vaccine Communication Toolkit for Essential Workers:
<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/toolkits/essential-workers.html>
- Vaccine-related policies

FAQs

- If most everyone in our workplace is vaccinated or eligible to be vaccinated, do we still need social distancing and face coverings? For how long?
- We are a unionized workplace. What role does the union play in getting the workforce vaccinated?
- May employer provide time during regular workday for employees to obtain vaccine?

American Rescue Plan



ARPA Impact on Health Care Employers

- COBRA Subsidy
- Extension of Tax Credit for COVID-19 Paid Leave (under 500 employees)
- Extension of Federal Unemployment Benefit
- Increase of Dependent Care FSA Limits
- Extension of Employee Retention Tax Credit

What's NOT in ARPA?

- Mandatory COVID-19 Paid Leave for All Employers
- Elimination of Health Care Provider Exemption from COVID-19 Paid Leave
- \$15 Federal Minimum Wage

American Rescue Plan: COBRA Subsidy

COBRA Subsidy

- Premium assistance covering 100% of COBRA continuation coverage cost.
- Six month period from April 1 to September 30, 2021.
- Covers “assistance eligible individuals” (AEIs) under group health plans.
- Gives certain AEIs a second bite at the COBRA apple.

COBRA Subsidy: Who is an AEI?

- COBRA qualified beneficiary who either:
 - (1) was involuntarily terminated (except for gross misconduct), or (2) experienced a reduction of hours, **and**
 - (3) is currently covered by COBRA and whose coverage period includes at least some portion of April 2021, or (4) first becomes eligible for COBRA between April 1 and Sept. 30 and elects COBRA.

COBRA Subsidy: Who is an AEI?

- Can include someone who is still within her original 18-month COBRA coverage period.
- This means someone laid off as far back as November 2019 (pre-pandemic!) could be covered.
- Can include someone who declined COBRA at the time of her involuntary termination or reduction of hours.
- Can include someone who previously elected COBRA but then dropped it.

COBRA Subsidy: Extended Election

- Extended election period beginning April 1 and ending 60 days after a new required election notice is provided to the AEI.
- Coverage effective on and after April 1. Not retroactive to qualifying event.
- Coverage extends only through the maximum COBRA continuation period measured from the date of the original qualifying event.
 - Typically 18 months
 - So someone who became eligible for COBRA in November 2019 might only be an AEI for April 2021. Not entitled to subsidized coverage through September.

COBRA Subsidy: Required Notices

- Plans must make AEs aware of COBRA premium subsidy.
- Requires **updating one notice** and distributing **two new notices**.
- **Standard Election Notice:** Must be updated to include information about...
 - Availability of premium assistance
 - Any forms required to establish eligibility for premium assistance
 - Qualified Beneficiary's obligation to notify plan administrator if she ceases to be eligible for the subsidy (e.g., because she becomes eligible for other group health coverage or Medicare).

COBRA Subsidy: Required Notices

- **Second Election Period Notice:** This is a new requirement.
 - Plan administrators must provide notice of the extended election period and premium assistance to AEs who now have second opportunity to elect prospective COBRA coverage.
 - Must be sent to AEs no later than May 31, 2021.
 - AEs will have up to 60 days after notice is provided to make a second COBRA election.
 - The sooner the new notice is sent, the sooner the election period expires.
 - DOL expected to issue model notice by April 10.

COBRA Subsidy: Required Notices

- **Expiration of Premium Assistance:** This is a new requirement.
 - Plan administrators must notify AEIs when their COBRA premium assistance is about to expire.
 - Must include information about the availability of continued coverage without the subsidy.
 - Not required if the AEI terminates coverage due to eligibility for another group health plan or Medicare.
 - Must be provided at least 15 but no more than 45 days before the premium assistance expires.
 - DOL expected to issue model notice by April 25.

COBRA Subsidy: Reimbursement

- Employer must provide the subsidy and then claim reimbursement via tax credit against quarterly employment taxes.
- Amount of tax credit generally cannot exceed amount of taxes owed.
- But the credit is refundable and treated as a tax overpayment.
- For multiemployer group health plans, the plan must provide the subsidy.
 - Typically don't pay employment taxes; additional guidance expected on reimbursement.
- Subsidy also applies to fully insured group health plans that are not subject to COBRA (e.g., because the employer typically employs fewer than 20 full-time employees) but are subject to state continuation laws.
 - Insurer must provide the subsidy and then claim the tax credit.

COBRA Subsidy: Action Items

- Subsidy and Notice Requirements already in effect (since last Thursday).
- Plan Administrators (typically the employer) obligated to provide COBRA notices and coverage.
- Coordinate with vendors (e.g., third-party administrators and insurers) in writing to confirm who will be responsible for issuing the new and revised COBRA notices.
- Consider waiting until DOL issues model notices: These may answer outstanding questions.

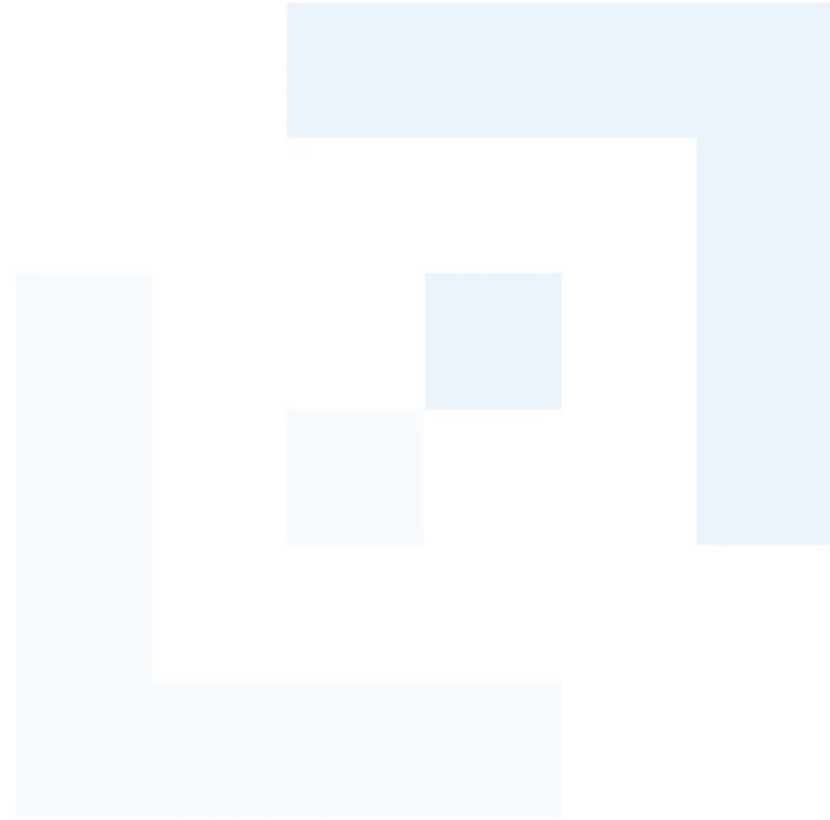
COBRA Subsidy: Action Items

- Determine who the AEs are under your plan.
 - Review employee terminations over the past 18 months. Involuntary or voluntary?
 - Review reductions in hours that may have triggered COBRA coverage.
- Determine whether any AEs are owed a refund of COBRA premiums.
 - Refunds must be issued within 60 days after date of premium payment.
 - The entity that received the premium payment (e.g., employer or insurer) is responsible for issuing the refund.
 - Premiums for April 2021 paid in March?

COBRA Subsidy: More Information

- Spencer Fane Employee Benefits Publications:
 - COBRA Changes Under the American Rescue Plan Act of 2021 – April 1, 2021.
 - <https://www.spencerfane.com/publication/cobra-changes-under-the-american-rescue-plan-act-of-2021/>

American Rescue Plan: COVID-19 Paid Leave



COVID-19 Paid Leave: Extension

- Tax Credit extended for FFCRA paid leave offered between April 1 to September 30, 2021.
- Only employers with fewer than 500 employees eligible for tax credit.
- Qualifying reasons for leave expanded.
- New “buckets” of leave.
- Remains completely optional.
- Can't discriminate in favor of **full-time, highly-compensated, or long-term** employees.

COVID-19 Paid Leave: Expanded Reasons

1. To obtain COVID-19 vaccination.
 2. To recover from vaccine side effects or complications.
 3. To seek or await results of a COVID-19 test or diagnosis after exposure or an employer's request for such test or diagnosis.
- Can't seek tax credit for paid time off taken **before** April 1 for these new reasons.
 - New reasons available for both short-term emergency paid sick leave (EPSL) and long-term emergency family and medical leave (EFML).

COVID-19 Paid Leave: Expanded Reasons

- EFML now also covers **all** the reasons previously available for EPSL:
 1. Employee is subject to gov't quarantine or isolation order.
 2. Employee has been advised by a provider to self-quarantine.
 3. Employee is experiencing COVID-19 symptoms and seeking a diagnosis.
 4. Employee is caring for a family member experiencing 1-3 above.
 5. Employee is caring for a child whose school or daycare is closed or unavailable due to COVID-19.

COVID-19 Paid Leave: New Buckets

- ARPA is clear: Up to 80 hours of additional EPSL available, even for employees who exhausted all EPSL from April 1, 2020 to March 31, 2021.
- Less clear: Up to 12 weeks of additional EFML?
 - Probably. IRS officials have signaled as much.
 - Per employee cap increased from \$10,000 to \$12,000.
 - Eliminates prior FFCRA requirement that first two weeks be unpaid.
- Totally unclear: EFML count against standard FMLA entitlement?

COVID-19 Paid Leave: Why Offer?

- Incentivize vaccination
- Incentivize returning to the office
- Available if regions experience additional waves / variants
- No DOL enforcement or private causes of action
- Gov't reimbursement for wages and prorated health plan, pension plan (CBA), and apprenticeship plan (CBA) expenses.

COVID-19 Paid Leave: Flexibility

- Offer EPSL but not EFML? Likely permissible.
- Shorten leave window? Likely permissible.
- Limit reasons for leave? Likely impermissible.
- Limit to certain groups of employees? Depends.
 - Facially-neutral reasons
 - Avoid disparate impact on protected groups
 - Can't favor full-time, long-term, or highly-compensated employees.

COVID-19 Paid Leave: Communicate

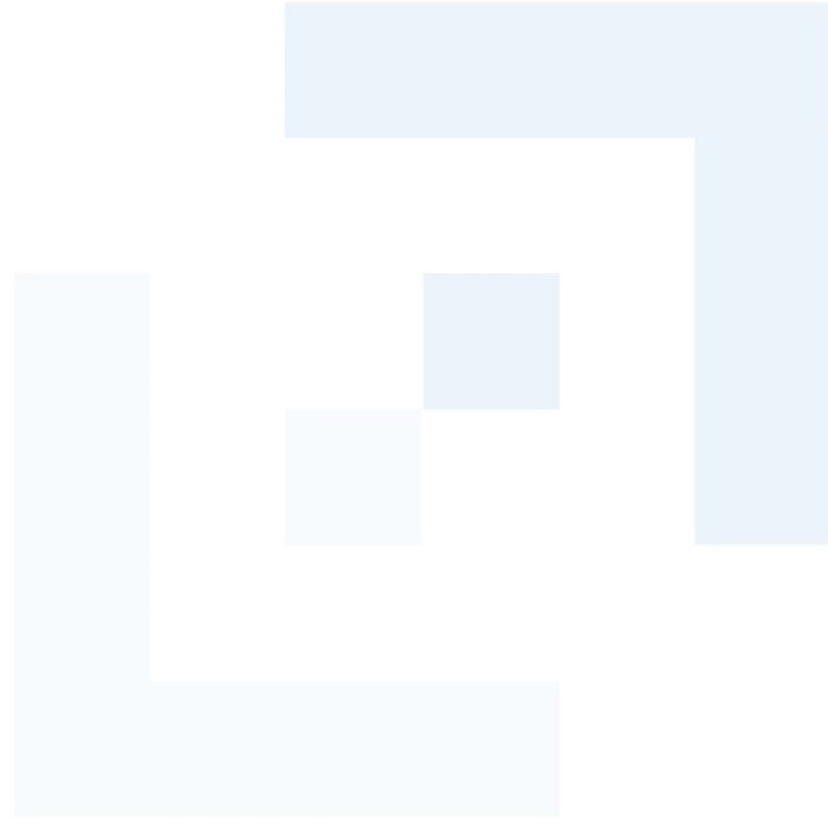
- Establish policy and communicate it clearly up front.
 - **Amount** of paid leave available.
 - **Time period** in which the paid leave is available.
 - **Reasons** for which the paid leave is available (presumably all of them).
 - **Types of Employees** eligible for the paid leave (don't discriminate).

American Rescue Plan: Other Notable Provisions

Other Notable ARPA Provisions

- \$300 weekly federal unemployment benefit extended through Sept. 6.
- Increase to dependent care FSA limits.
 - \$10,500 (up from \$5,000) for individuals and married couples filing jointly.
 - \$5,250 (up from \$2,500) for married individuals filing separately.
 - Change is optional; plans must be amended by end of 2021 plan year.
- Extension of Employee Retention Tax Credit (ERC)
 - Slight expansion of eligibility requirements.
 - ARPA covers wages paid between July 1 through December 31, 2021.
 - 70% of qualified wages, including cost to provide health benefits.

Questions?



Save the Date!

WorkSmarts Half Day Seminar | May 12

The Swinging Pendulum: The Timing of Anticipated Changes at the NLRB Under the Biden Administration

12:30 – 1:30pm CT | Paul Satterwhite and Matt Morrison

A Must-Do Spring Cleaning Project: Updating Your Leave Management Policies and Practices

1:45 – 2:45pm CT | Sue Willman and Ruthie White

OFCCP: The Times They Are-A-Changin'

3:00 – 4:00pm CT | Fred Johnson and Elizabeth Wente

Thank You!



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