With the United States in the midst of dealing with the coronavirus pandemic, there has been focused attention on the rollout of vaccines approved for emergency use by the U.S. Food and Drug Administration, and the actual number of individuals being vaccinated. Presently, 250 million COVID-19 vaccine shots have been administered and individuals 16 years of age and older are eligible to receive the vaccine. Now, in an effort to get more people vaccinated, employers are being encouraged to provide paid time off for employees who have not yet been vaccinated against the virus.
Federal Tax Incentives to Provide Paid Time Off

With the opportunities for employees to schedule or receive vaccinations generally limited to within business hours, employers have experienced an increased number of requests for leave from work in order to obtain a vaccination. With more than half the adult population in the United States having been vaccinated, but the rate of vaccinations slowing by the day, there is an increasing push for employers to do more. What is an employer to do?

To encourage employers to provide their employees with paid time off to be vaccinated, the federal government has provided certain employers with a tax incentive. Specifically, the American Rescue Plan Act of 2021 (ARPA) extends federal tax credits for private employers with less than 500 employees in the United States that voluntarily decide to provide paid sick leave or family leave for each employee receiving the COVID-19 vaccination and for any time needed to recover from the vaccine through September 30, 2021. For example, if an eligible employer offers employees a paid day off in order to get vaccinated, the employer can receive a tax credit equal to the wages paid to employees for that day (up to certain limits). For more information about the tax credits, the IRS has published guidance for employers. On the federal level, while employers are not required to provide employees paid leave, there is a tax benefit to doing so.

State and Local COVID-19-Related Paid Sick Leave Laws

While the paid leave requirement under the federal ARPA is voluntary for employers, employers need to be aware of legislative developments at the state and local level that require employers to provide paid leave. In California, for instance, employers with more than 25 employees are now required to provide up to 80 hours of paid supplemental sick leave (in addition to other available paid leave under state sick leave laws) for employees unable to work or telework for qualifying COVID-19-related reasons. Those reasons include (i) the employee is subject to a quarantine or isolation period related to COVID-19, has been advised by a healthcare provider to quarantine due to COVID-19, or is experiencing symptoms of COVID-19 and seeking a medical diagnosis; (ii) the employee is caring for a family member who is either subject to a quarantine or isolation period related to COVID-19, has been advised by a healthcare provider to quarantine due to COVID-19, or is caring for a child whose school or place of care is closed or unavailable due to COVID-19 on the premises; and (iii) the employee is attending a vaccine appointment or cannot work or telework due to vaccine-related side effects.

The law is retroactive to sick leave taken beginning January 1, 2021, and prevents employers from requiring employees to use other paid or unpaid leave available before using the COVID-19 supplemental paid sick leave. The law expires on September 30, 2021. For additional information, see 2021 COVID-19 Supplemental Paid Sick Leave FAQs. Note, Massachusetts is proposing a COVID-19-related paid sick leave law. On a local level, Philadelphia has enacted similar legislation. See COVID-19 pandemic paid sick leave resources.

Should an employer in California require its employees to receive a COVID-19 vaccination, the California Department of Industrial Relations (DIR), having recently
updated its Guide to COVID-19 Related Frequently Asked Questions to include wage and hour issues and vaccinations, has indicated that employers must pay for their employees’ time, including travel time as well as any time employees spend waiting to receive the vaccine.

State and Local COVID-19-Related Paid Vaccination Leave Laws

While California has provided for expansive COVID-19-related leave, New York has enacted more narrowly-tailored legislation requiring all employers to provide a paid leave of absence for a “sufficient period of time,” not to exceed four hours (unless otherwise authorized by the employer), for employees specifically to receive the COVID-19 vaccination. Employers are required to provide such leave per COVID-19 vaccine injection. The paid leave is in addition to any other paid leave benefits employees are entitled to, and cannot be charged against such other leave. Unlike the law in California, the paid benefits are not retroactive and only cover the employee. The law does not prevent an employer from requiring proof of vaccination. However, employers should caution employees not to reveal any confidential medical information. The law expires on December 31, 2021. For more information, see Paid Leave for COVID-19 Vaccinations.

New York is the only state presently to require employers to provide paid leave for the express purpose of obtaining a COVID-19 vaccination. However, several municipalities are enacting similar laws. Chicago, for example, passed an ordinance that prevents employers from requiring its employees to be vaccinated only during non-working hours, whether vaccination is voluntarily sought or employer-required. For those employers requiring employees to be vaccinated, the ordinance requires the employer to compensate the employee at the employee’s regular rate of pay for the time spent to get vaccinated, up to four hours per dose. Ordinances in several cities in California also require employers to provide up to four hours of paid leave to attend COVID-19 vaccinations.

Many states and municipalities of course have had paid leave laws providing preventive care prior to COVID-19 that can be used for vaccination-related purposes as well as recovery from vaccination side effects. In fact, to promote health and safety in the workplace, guidance from states, including California, Colorado, Illinois, Massachusetts, Nevada, New Jersey, and Oregon, explicitly confirms employees may use this leave for vaccination-related purposes. Employers need to be mindful of these state and local requirements.

Non-COVID-19-Related Wage and Hour Considerations

Where there are no leave laws requiring employers to provide paid time off to receive COVID-19 vaccinations, the facts and circumstances in each case will determine whether time spent traveling to and from a vaccination site, or waiting for and receiving a vaccine, will be deemed hours worked for purposes of calculating minimum wage and overtime. Under the Fair Labor Standards Act, whether time spent by an employee to receive a vaccination must be treated as compensable likely depends on when the vaccination occurs and whether the vaccination is required by the employer. The U.S. Department of Labor (DOL) has not offered specific guidance on this issue. However, in the context of an employer requiring
COVID-19 testing, similar to requiring receipt of a vaccination, the DOL has indicated that the employer is required to pay employees for time spent waiting for and receiving medical attention at their direction, or on their premises during normal working hours. See COVID-19 and the Fair Labor Standards Act Questions and Answers.

Myriad legal issues arise, at both the federal and state level, related to an employer implementing a mandatory vaccination policy, which is beyond the scope of this blog piece. In addition to wage and hour laws, employers need to consider other potential legal issues including but not limited to employment discrimination and retaliation, family and medical leave, privacy, genetic information, workplace health and safety, collective bargaining, and workers’ compensation. At present, it appears that most employers are choosing to encourage, and not require, employees to obtain their COVID-19 vaccinations.

What Employers Should Do Now

- Review state and local paid sick leave requirements to determine whether and how they may apply to COVID-19, and be on the lookout for any legislative developments;

- Consider adopting a written vaccination policy in order to ensure employee awareness and consistent practices;

- Prohibit retaliation against employees for taking leave for COVID-19-related reasons including receiving the vaccination and provide training to HR personnel and managers to ensure compliance.

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