FAMILIES FIRST CORONAVIRUS RELIEF FAQ
POST-SECOND STIMULUS BILL

1. After December 31, 2020, do I have to pay employees if they take leave for COVID-19 related reasons?

No. The parts of the Act requiring employers to give the up to 80 hours of paid leave expires on December 31, 2020. However, you can choose to give them paid sick leave and receive the 100% tax credit until March 31, 2021.

2. If a staff member gets COVID after December 31, can we still pay them and get 100% reimbursed on payroll taxes?

Yes, until March 31, 2021. Under the new Act, employers can continue to voluntarily choose to give the up to 80 hours of leave and receive the 100% tax credit through March 2021, but it is not required. Keep in mind that the Act only allows for up to 80 hours in a 2-week period ONCE. So, if an employee gets sick again later or a family member gets sick later and they want to take leave but have already used their 80 hours, they are not entitled to additional paid sick leave.

3. Can we pay someone that got the vaccine and then became ill and refuse to pay someone that refused the vaccine and then became ill?

We caution against this differential treatment at this time. When treating employees differently, employers should make sure that they don’t violate any state or federal discrimination laws. While “persons who refuse a vaccine” is not a protected class, an employee’s refusal could be related to a protected class. For instance, an employee may refuse the vaccine because he or she has a disability or a sincerely held religious belief. Until the Department of Labor provides more guidance on whether discretionary application of the FFCRA could be discriminatory, it may be best practice to treat similarly situated
employees the same to protect the employer from any discrimination claim.

4. **Can I require my employees to get the COVID-19 vaccine?**

   Yes. There have been no court rulings on this issue, but the Equal Employment Opportunity Commission has made it clear that employers are lawfully permitted to require employees vaccinated before returning to the office, subject to certain limitations and exceptions. If an employee refuses to get the vaccine and states that it is based upon a sincerely held religious belief or a medical condition which they can substantiate with medical certification from their medical provider, you are required to engage in the interactive process with them to determine if an accommodation is necessary. More information on this process is found in question #5 and #6 below.

5. **If an employer requires vaccinations when they are available, how should it respond to an employee who indicates that he or she is unable to receive a COVID-19 vaccination because of a disability?**

   The Americans with Disabilities Act (AwDA) allows an employer to have a qualification standard that includes “a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace.” However, if a safety-based qualification standard, such as a vaccination requirement, screens out or tends to screen out an individual with a disability, the 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.” 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. If an employer determines that an individual who cannot be vaccinated due to disability poses a direct threat at the worksite, the employer cannot exclude the employee from the workplace—or take any other action—unless there is no way to provide a reasonable accommodation (absent undue hardship) that would eliminate or reduce this risk so the unvaccinated employee does not pose a direct threat.

   If there is a direct threat that cannot be reduced to an acceptable level, the employer can exclude the employee from physically entering the workplace, but this does not mean the employer may automatically terminate the worker. Employers will need to determine if any other
rights apply under the EEO laws or other federal, state, and local authorities. For example, if an employer excludes an employee based on an inability to accommodate a request to be exempt from a vaccination requirement, the employee may be entitled to accommodations such as performing the current position remotely. This is the same step that employers take when physically excluding employees from a worksite due to a current COVID-19 diagnosis or symptoms; some workers may be entitled to telework or, if not, may be eligible to take leave under the Families First Coronavirus Response Act, under the FMLA, or under the employer’s policies.

6. **If an employer requires vaccinations when they are available, how should it respond to an employee who indicates that he or she is unable to receive a COVID-19 vaccination because of a sincerely held religious practice or belief?**

   Once an employer is on notice that an employee’s sincerely held religious belief, practice, or observance prevents the employee from receiving the vaccination, the employer must provide a reasonable accommodation for the religious belief, practice, or observance unless it would pose an undue hardship under Title VII. Courts have defined “undue hardship” under Title VII as having more than a de minimis cost or burden on the employer. EEOC guidance explains that because the definition of religion is broad and protects beliefs, practices, and observances with which the employer may be unfamiliar, the employer should ordinarily assume that an employee’s request for religious accommodation is based on a sincerely held religious belief. If, however, an employee requests a religious accommodation, and an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer would be justified in requesting additional supporting information.

7. **Does my ability to require employees to get the COVID-19 vaccine depend on the job duties the employee performs?**

   Not necessarily. The AwDA allows an employer to have a qualification standard that includes “a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace.” If an employee cannot get vaccinated for COVID-19 because of a disability or sincerely held religious belief, practice, or observance, and there is no reasonable accommodation possible, then it would be lawful for the employer to exclude the employee from the workplace. This does not mean the employer may automatically terminate the worker. Employers will need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities.
8. If someone refuses to get the COVID-19 vaccine and then they contract COVID-19, do I have to pay them paid sick leave under the FFCRA?

There is not an exemption in the Act related to refusal to take the vaccine or inappropriate behavior outside of the office leading to a quarantine/positive. However, the parts of the Act requiring employers to give the up to 80 hours of paid leave expires on December 31st. Under the new Act, employers can continue to voluntarily choose to give the up to 80 hours of leave and receive the 100% tax credit through March, but it is not required. Keep in mind that the Act only allows for up to 80 hours in a 2-week period ONCE. So, if an employee gets sick again later or a family member gets sick later and they want to take leave but have already used their 80 hours, they are not entitled to additional paid sick leave.

As always, ASDA encourages you to check with your CPA or tax attorney for your individual situation