



# SHORTS

## ON LONG TERM CARE

News for the North Carolina LTC Community

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## Considerations for Employers:

### *COVID-19 Vaccinations and Updated Workplace Safety Protocols*

*By: Brett Carpenter*

As COVID-19 vaccines are being administered across the country, facilities are implementing vaccination plans for their workforces and updated safety protocols to keep employees, customers, and patients safe from the virus. Such policies can implicate the Americans with Disabilities Act ("ADA") and Title VII of the Civil Rights Act of 1964, among other employment laws. Considerations that employers should keep in mind when rolling out vaccination plans and updated safety rules include the following:

1. Employers should continue to enforce safety protocols and restrictions in the workplace to prevent the spread of COVID-19.

Implementing screening measures to prevent the spread of COVID-19 in the workplace that are consistent with continued Centers for Disease Control and Prevention (CDC) and other federal/state guidance are permissible. Such measures may include:

- Asking employees if they have been vaccinated and to show proof of vaccination;
- Asking employees if they have symptoms of COVID-19;
- Asking employees where they have traveled that could have exposed them to a greater concentration of individuals with COVID-19; and
- Taking employee temperatures.

In the event an employee gets COVID-19, employers should make every effort to limit the number of people who know the name of the infected employee. Employers should also remember to keep all employee medical information related to an illness in a confidential medical file, separate and apart from the employee's personnel file.

2. The CDC has published guidance on how fully vaccinated employees should interact with vaccinated and nonvaccinated employees in healthcare settings.

The CDC's latest [guidance](#) could directly impact healthcare employers' updated COVID-19 safety rules. For instance, the CDC now says that fully vaccinated healthcare personnel (HCP) do not need to undergo routine COVID-19 testing, but should continue to be tested during an outbreak, if experiencing symptoms, or if the HCP has a higher-risk exposure. The CDC further advises that fully vaccinated HCP should generally continue to wear source control (defined as well-fitting cloth masks, facemasks, or respirators to cover a person's mouth and nose) while at work, but that fully vaccinated HCP can dine and socialize together in breakrooms and conduct in-person meetings without face masks or physical distancing. Still, the CDC cautions that if unvaccinated HCP are present, everyone should wear source control and that unvaccinated HCP should physically distance from others.

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3. Employers should immediately address any complaints involving the risk of unsafe working conditions involving potential contraction of COVID-19 and refrain from retaliation against employees who make such safety-related complaints.

The Occupational Safety and Health Administration (OSHA) issued a [National Emphasis Program](#) on March 12, 2021, targeting high-hazard industries or work tasks that have an increased exposure risk to COVID-19. Through this program, OSHA is seeking to reduce COVID-19 exposures in the workplace by increasing targeted, planned, and follow-up inspections, focusing its enforcement efforts on complaints, referrals, and severe incident reports. OSHA will ensure workers are protected from retaliation by preventing retaliation where possible, distributing anti-retaliation information during inspections, and referring allegations of retaliation to the Whistleblower Protection Program. To avoid OSHA violations, employers should continue to enforce safety rules in the workplace to prevent the spread of COVID-19, take employee complaints involving potential safety risks seriously, address such complaints by enforcing additional safety measures if necessary, and refrain from retaliating against employees who lodge safety complaints.

4. An employer who requires its employees to be vaccinated should provide reasonable accommodations for employees who do not get the vaccine due to a disability or sincerely held religious belief.

The EEOC has published [guidance](#) that notes the ADA allows employers to maintain 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 employer’s vaccination requirement disqualifies an individual with a disability from working, the EEOC cautions against excluding the unvaccinated individual from the workplace without first conducting an individualized assessment to determine whether the unvaccinated individual 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.” A “direct threat” is determined by analyzing the following four factors:

- i. the duration of the risk;
- ii. the nature and severity of the potential harm;
- iii. the likelihood that the potential harm will occur; and
- iv. the imminence of the potential harm.

Where the employer determines that the unvaccinated employee poses a direct threat by exposing others to the virus at the worksite, it should only exclude the employee from the workplace if there is no way to provide a reasonable accommodation (e.g., screening measures, increased personal protective equipment, etc.) absent undue hardship that eliminates or reduces the risk of the direct threat. Similarly, if an employee has a sincerely held religious belief, practice, or observance that prevents him/her from getting the vaccination, the EEOC advises that the employer must provide a reasonable accommodation unless it would pose an undue hardship. Under Title VII, an undue hardship means more than a de minimis cost or burden on the employer. In such cases where the direct threat cannot be reduced or eliminated or the employee’s refusal to get the vaccine because of a religious belief poses an undue hardship on the employer, the employer can exclude the unvaccinated employee from entering the workplace, but should still consider alternative accommodations such as extended leave or work-from-home arrangements where appropriate.

5. To best avoid ADA violations, employers should avoid administering the COVID-19 vaccine to employees, and instead have a third-party who is not hired by the employer to administer the COVID-19 vaccine.

Healthcare providers must ask pre-vaccination medical screening questions before administering the COVID-19 vaccination. Such questions are likely to elicit information about a disability. As a result, if the questions are asked by an employer or a contractor on the employer’s behalf, they are considered “disability-related” under the ADA. Disability-related screening inquiries must be “job-related and consistent with business necessity.” Under this standard, an employer must have a reasonable belief, based on objective evidence, that employees who do not answer the screening questions and, therefore, do not receive a vaccination, will pose a direct threat to the health or safety of themselves or others in the workplace. This standard involves a detailed, individualized analysis outlined in section #4 above.

In contrast, the ADA’s “job-related and consistent with business necessity” restrictions on disability-related inquiries do not apply to the pre-vaccination medical screening questions if the employer-required vaccination is administered by a third party that does not have a contract with the employer, such as a pharmacy or other health care provider. Given these considerations, employers should avoid administering vaccinations or contracting with third-parties to administer the vaccinations to avoid potential ADA issues or violations arising out of disability-related prescreening questions.

6. If an employer grants telework to stop the spread of COVID-19, after reopening the workplace, the employer is not required to grant telework as a reasonable accommodation for every employee with a disability who requests to continue the telework arrangement.

For example, if an employee does not have a disability-related limitation that requires teleworking, the employer does not have to provide telework as an accommodation. In addition, an employer that excused a disabled employee from performing an essential function of their job during COVID-19 by permitting telework does not have to grant a request to continue telework as an accommodation if the arrangement continues to excuse performance of an essential function of the employee’s job.

7. Employers that offer an incentive to their employees who get the vaccination, such as a monetary bonus, should draft clear policies explaining the amount, conditions for payment, and when payment will be made to avoid wage and hour disputes.

Many employers are offering small bonuses to employees who receive the vaccination to help incentivize their workforce to get vaccinated. Such bonus policies should be clearly drafted so that employees know the conditions they must meet to receive the bonus. Employers requiring the COVID-19 vaccination might consider paying their employees for the time spent getting vaccinated by offering a set number of hours of pay to vaccinated employees to avoid claims that employees were not paid for “work,” e.g., fulfilling the employer-mandated requirement of getting the COVID-19 vaccine.



**BRETT CARPENTER** focuses on preventing and resolving employment issues for employers of varying sizes, based throughout the country, with matters in North Carolina and in federal court. You can reach Brett at 919.783.2923 or [bcarpenter@poynerspruill.com](mailto:bcarpenter@poynerspruill.com).



# The American Rescue Plan Act: Updates to COVID-19 Leave

By: *Kate Dewberry*

The American Rescue Plan Act (ARPA) passed on March 11, 2021 extends tax credits available to employers who opt (but are not required) to provide paid leave to their employees for certain COVID-related absences through September 30, 2021. More information about those tax credits is available on the [IRS's website](#).

Other notable changes to paid COVID leave under ARPA include:

1. Expansion to the list of COVID-related absences an employer can provide paid sick leave and seek tax credit to include absences where:
  - The employee is getting a COVID-19 vaccine.
  - The employee is recovering from complications due to receiving the vaccine.
  - The employee is waiting for results from a COVID-19 test.
2. Replenishment of employees' 80 hour COVID leave bank, effective April 1, so that any paid COVID leave an employee took before April 1 will not count toward their 80 hour cap.
3. Increase in the per employee tax credit cap for emergency family leave from \$10,000 to \$12,000.
4. Addition of restrictions on tax credits if paid COVID leave policies favor highly compensated employees, full-time workers, or employees based on tenure.
5. Elimination of the 10-day unpaid period at the beginning of Emergency Family and Medical Leave Expansion Act (EFMLEA) leave.

The Families First Coronavirus Response Act (FFCRA) required employers with between 50 and 500 employees to provide two weeks of paid sick leave and up to 10 weeks of paid family leave to employees who needed it for pandemic-related reasons between April 1, 2020 and December 31, 2020. Once the FFCRA expired, the tax credits were extended through March 31, but employers were no longer mandated to provide employees with paid leave. For additional background on the FFCRA and its extension, see our previous articles: [Work in the Time of COVID-19](#); [FAQs for Employers](#); [USDOL Revises Regulations Under the Families First Coronavirus Response Act](#); [FFCRA Update and Electronic Workplace Posters](#).

Employers seeking to obtain the tax credit should: (1) have written COVID leave policies that comply with ARPA and DOL guidance; (2) document paid COVID leave absences in accordance with IRS guidance; and (3) work with an accountant to ensure they are submitting required forms or making appropriate deductions from their federal employment tax deposits.



**KATE DEWBERRY** counsels and represents employers on employment law issues and litigation arising under federal and state laws covering leave, discrimination, termination, affirmative action, and wage and hour law. You can reach Kate at 919.783.2869 or [kdewberry@poynerspruill.com](mailto:kdewberry@poynerspruill.com).



# We're Growing:

## *Poyner Health Law Team Welcomes Mysty Blagg*

*By: Ken Burgess*



Over 5 years ago now, my close colleague and partner in my long term care practice, Iain Stauffer, joined the Poyner Health Law Team. Iain's now a partner at Poyner Spruill, having survived 5 years of my "mentoring." I recently looked around the Health Law Team and thought "we need a bright, experienced, cracker-jack associate." Thus began our search for the newest member of the Poyner Health Law Team.

We identified a bunch of appropriate candidates, put them all (and ourselves) through the rigors of law firm interviews and, when all was said and done, it was a no-brainer – we hired Mysty Blagg. I got to know Mysty when I served as her "mentor" during part of her 3d year at Campbell Law School. I knew that Mysty was near the top of her academic class, had won numerous academic and "moot court/trial advocacy" awards, and was an all-around super nice and smart person. I also knew that she understood the health care field, having been a licensed dental hygienist for many years and later working for a company that performed Medicaid audits on dental provider Medicaid claims.

All of those skills, and her off-the-charts references from law professors and former employers made her a prime candidate for us. But, that's not why we hired her or, at least, those characteristics and accomplishments weren't the only reason.

My final decision on hiring Mysty came down to popsicles. Yes, that's what I said – popsicles. Anyone who knows me knows that I value family, creativity in lawyering, philanthropic involvement and hard work – and the ability to combine them all – above all else. So, as we were debating which of our final two candidates to hire, I ran across a blog that Mysty wrote while in law school called "Popsicles For Breakfast: Confessions of a Law School Working Mom." I read the story, laughed and we hired Mysty.

Mysty's wise and humorous blog about navigating the competing challenges of being a Mom of young twins and a teenager, a full-time very successful law student, and a wife is the very best introduction I can provide you to our new Health Law associate. So, it's my pleasure to let Mysty introduce herself through her Popsicles for Breakfast story – it won me over and it will you as well, I'm sure. Mysty has hit the ground running at Poyner and her past medical experience, work ethic and maturity sometimes make me forget that she's literally been out of law school for a month (and successfully passed the N.C. Bar Exam). Here's to Popsicles for Breakfast and to Mysty, the newest member of our Health Law Team:

### **Popsicles for Breakfast**

*By: Mysty Blagg*

I have been a working mother for 19 years now, largely due to the fact that I have yet to win the lottery. After 19 years of walking the balance beam of being the best parent I can be and the best employee I can be, reading other parent's funny failure stories brings me the most joy. These stories remind me that parents are human, and it's okay. Mother's guilt is a real thing that brings a real fear of screwing our kids up. One of my huge revelations over the years was the realization that our perfection in child-rearing lies in our imperfect parenting skills.

On this particular morning a couple years ago, my husband and I were navigating the gauntlet of the weekday morning routine with our twins, Luke and Reagan, while making sure our moody teenage daughter got on her way to school. This process requires the precision of a bomb diffusion specialist—one misplaced step can result in chaos. Successful delivery of our tiny packages at daycare requires a careful wake-up routine, picking out clothes (to a three-year-old, this is a critical step), getting dressed, eating breakfast, and timely egress to the car.

Three-year-olds have negotiation skills that can only be equaled by a Fortune 500 CEO. In my home, acquisition of sugar is always a high priority target for Luke and Reagan. They seem to know exactly when my husband and I are at our breaking point, then BOOM! There it is: the refusal to do whatever unless they get sugar. To give some background to the "sugar situation": I worked as a clinical dental hygienist for many years, witnessing the destruction it caused to children's teeth. Basically, sugar is evil because it is the crucial component in tooth decay—at least, these are the thoughts in a dental hygienist's brain.

The morning in question had run smoothly, up until to the breakfast portion. We had gently awoken both kids, selected the appropriate glitter shirt or superhero underwear, and gone downstairs for the remaining steps. Our teenager came downstairs, told us how "stupid" everything in the world was, then got in her car and went to school. Now it was time for breakfast, shoes, and getting to daycare. I opened the pantry, only to realize we were out of the twins' favorite breakfast food. No muffins—how could I forget that we ran out? This answer was unacceptable to them, as they explained in cries and stomps. Negotiations were in full force at this point, and it seemed sugar was on their agenda. The window for leaving on time was closing; they had me at a weak point. Finally, I caved: "Yes, you can have

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popsicles for breakfast.” We were out the door with popsicles in hand within 5 minutes of that decision.

After daycare drop off, all I could think about was what a bad parent I was for giving in to popsicles. The mother’s guilt was riding shotgun with me all day. But two years later, the twins still remember that day as the day mom did something great. I did something unexpected, which surprised them and imprinted my love on their memory.

Now that my parents have passed, the memories I hold dear are the times they did something unexpected and special. If I allowed popsicles every day, the twins surely wouldn’t remember it as anything different from the norm. Our imperfection as parents provides for these treasured memories. Try to avoid harshly scrutinizing yourself for these moments of weakness, because they will likely become your children’s best memories.



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Mysty Blagg is an attorney in our Health Care Group, concentrating her practice on a wide range of regulatory, litigation, compliance, and operations issues.

She received her BS in Zoology/Animal Biology from North Carolina State University. She also received a BS in Dental Hygiene from the University of North Carolina at Chapel Hill. She received her JD from Campbell University School of Law.

Prior to joining Poyner Spruill, Mysty worked as a registered dental hygienist as well as a healthcare compliance investigator. Her experience with reviewing medical charts, complex problem solving, NC Medicaid Policy, False Claims Act, occupational licensing, as well as communicating with clients brings a unique and valued perspective

## FutureCare Foundation of North Carolina, Inc. is Awarded \$2.4 Million Grant to Address CNA in North Carolina SNFs

*By: Ken Burgess*

FutureCare Foundation of North Carolina, Inc. is the research and educational nonprofit 501(c)(3) foundation sponsored by the N.C. Healthcare Facilities Association. Earlier this year, after nearly a year of applications, revisions and ongoing dialogue with both CMS and the N.C. Division of Health Service Regulation, FutureCare was awarded a \$2.4 million grant to implement a 3-year program designed to help address the shortage of certified nursing aides in North Carolina SNFs. We’re calling this project the Caregivers Project.

I have the distinct honor of serving at Chairman of the Board of Trustees of FutureCare and along with a very committed and hard-working Board of Trustees, our FutureCare Executive Director, Erik Kivisto and our project Director, Renee Batts, we’re excited to see this project come to fruition. The Caregivers Project grant is funded from Civil Money Penalties assessed against N.C. SNFs. The FutureCare Board of Trustees is comprised of:

- Paul Babinski, Liberty Healthcare, Vice-Chairman
- Andy Page, Dixon Hughes, Secretary-Treasurer;
- Ted Goins, Lutheran Services for Aging;
- Carron Suddreth, Liberty Healthcare;
- Sarah Watson Lynch, Southern Pharmacy;
- Sabrina Harding, Medical Facilities of America; and
- Lauren Cecil, White Oak Manor.

Obtaining a grant from CMS and DHSR from Civil Money Penalty funds is not for the faint of heart—it’s a long, detailed and sometimes frustrating process. Likewise, the project we’ve undertaken – helping address the chronic shortage of CNAs in our SNFs – ranks among the top challenges of our industry year after year and tackling this problem is also not for the faint of heart.

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But, as a wise man once said, the longest journey begins with a single step. And, with this grant, we're on our way to doing what we can to help SNF providers address these staffing shortages. Over the next 3 years, FutureCare is obligated to and has committed to:

- Developing and implementing a statewide education and marketing campaign designed to recruit up to 4,000 new CNAs to work in N.C. SNFs;
- Promoting the project to roughly 85% of all N.C. SNFs, including those who may not be members of the NCHCFA—a grant requirement;
- Recruiting up to 400 N.C. SNFs who will agree to participate in the project;
- Working through subcontracts with three outside vendors to:
  - Promote and market the project;
  - Track the enrollment in the project both of SNFs and of CNAs who participate in the project and who remain employed in N.C. SNFs;
  - Track employee satisfaction of individuals working in N.C. SNFs; and
  - And implement, monitor and report on a whole range of sub-issues called for by the grant proposal and approval.

As I said, this project is not for the faint of heart—but we're not faint-hearted and one thing the Covid pandemic has reminded me of – neither are the courageous, compassionate and faithful folks who own and operate skilled nursing facilities.

FutureCare and its subcontractors have already begun promoting the grant project, enlisting SNFs to participate and coordinating with our project partners, including Alliant Quality (the N.C. QSO), the North Carolina Community College System, and many others. But, now, we need your help.

When you receive invitations to attend virtual educational and/or training sessions about the grant or, more importantly, to participate in the grant, please say yes. In some cases, our subcontractors at the University of Wisconsin/Oshkosh, Pisgorch Media Design, NRC Health or our Project Director, Renee Batts, may be reaching out to you. But, rest assured, they work for us and are tasked with helping implement the Caregivers Project.

Please be on the lookout for communications from the FutureCare Foundation or one of our project subcontractors letting you know how you can help and participate in this important project. My first “boss” when I was a young lawyer used to always say “Ken, help me help you.” And, that's the perfect motto for the Caregivers Project—help us help you with CNA staffing challenges by signing up now to participate in the project. Many thanks, in advance, on behalf of the FutureCare Foundation Board of Trustees.



**KEN BURGESS** is a health care attorney with over 30 years of experience advising clients on a wide range of regulatory, litigation, compliance and operations issues. Ken's practice focuses heavily, but not exclusively, on issues affecting long term care and acute care providers. Ken may be reached at 919.783.2917 or [kburgess@poynerspruill.com](mailto:kburgess@poynerspruill.com).

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