

## Insights

### **"Leave" It to the Employer: American Rescue Plan Act Provides Covered Employers with Option to Continue Employee Paid Leave under FFCRA, with Certain Changes**

---

March 31, 2021

By: Shelley M. Jackson and Kate Trinkle

On March 11, 2021, Congress passed the **American Rescue Plan Act** ("ARPA"), the third piece of legislation providing comprehensive relief to Americans for COVID-19 related issues. For covered employers that elect to continue providing COVID-19 related paid leave, ARPA extends and expands certain paid leave provisions of the Families First Coronavirus Response Act ("FFCRA"). Covered employers must now decide whether or not to continue to provide COVID-19 related paid leave to employees. If they do, they must comply with ARPA's paid leave provisions.

#### **FFCRA Leave Before ARPA**

In 2020 Congress passed FFCRA to address a multitude of issues relating to COVID-19, including establishing a right to paid leave for eligible employees of covered employers (for purposes of this discussion, private employers<sup>1</sup> with fewer than 500 employees) when such employees were unable to work or telework due to a qualifying reason. FFCRA's **paid leave provisions** are set forth in two sections of the law: Emergency Paid Sick Leave and the Emergency Family Medical Leave Expansion Act.

FFCRA's Emergency Paid Sick Leave Act ("EPSLA") provisions established a right to paid leave for eligible employees if they met at least one of six qualifying reasons: (1) the employee was subject to a COVID-19 related federal, state, or local quarantine or isolation order; (2) the employee was advised by a health care provider to self-quarantine due to concerns related to COVID-19; (3) the employee was experiencing COVID-19 symptoms and is seeking a medical diagnosis; (4) the employee is caring for an individual subject to the conditions described in items 1 or 2; (5) the employee is caring for his or her son or daughter whose school or place of care has been closed or whose child care provider is unavailable due to COVID-19 related reasons; or (6) the employee is experiencing a substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor (note: no substantially similar condition was identified). Intermittent leave was available under EPSLA if elected by the employer. Full time employees were entitled to up to 80 hours of paid leave at their full regular rate (up to \$511 per day) for reasons 1-3 and 2/3 of their regular rate (up to \$200 per day) for reasons 4-6. Part time employees were entitled to less paid leave based on their normal hours or a calculation.

The Emergency Family Medical Leave Expansion Act ("EFMLEA") provided expanded family and medical leave for eligible employees (who had been employed with the employer for at least 30 days) when they were unable to work or telework due to caring for a minor child or adult child with a disability whose school or child care provided was closed or unavailable for COVID-19 related reasons. Pay was for up to 10 weeks at 2/3 of the employee's regular rate (capped at \$10,000 in the aggregate).

The Department of Labor's Wage and Hour Division issued and **revised** a temporary rule (which expired on December 31, 2020) and has maintained a **FFCRA: Questions and Answers** page to assist employers with FFCRA compliance.

FFCRA's mandatory paid leave provisions expired on December 31, 2020. After that date, covered employers were no longer required to provide FFCRA paid leave, though they were obligated to compensate employees for qualifying FFCRA leave previously taken. In late 2020 Congress passed a short-term extension permitting employers to continue to receive tax credits for qualifying FFCRA leave taken through March 31, 2021. With the passage of ARPA, covered employers now have the option to receive tax credits for qualifying FFCRA leave taken between April 1 and September 30, 2021.

### **ARPA's Changes to the FFCRA**

Offering FFCRA paid leave became *optional* for employers as of January 1, 2021, and ARPA has now extended and expanded upon FFCRA's paid leave provisions. Specifically, ARPA affected FFCRA paid leave in the following ways:

- Extends the existing March 31, 2021 expiration date for FFCRA through September 30, 2021, with **dollar-for-dollar tax credits** (subject to applicable limits) remaining available to qualifying employers.
- Requires that employers seeking tax credits **not discriminate** "in favor of highly compensated employees<sup>2</sup> (within the meaning of section 414(q)), full-time employees, or employees on the basis of employment tenure[.]"

### *EPSLA-specific changes as of April 1, 2021*

- Creates **three additional qualifying reasons** under which an employee will be eligible for up to two weeks of EPSLA leave. Such qualifying reasons include:
  - "the employee is seeking or awaiting the results of a diagnostic test for, or a medical diagnosis of, COVID-19 and such employee has been exposed to COVID-19 or the employee's employer has requested such test or diagnosis;"
  - "the employee is obtaining immunization related to COVID-19;" or
  - the employee is "recovering from any injury, disability, illness, or condition related to [receiving a COVID-19 related] immunization."
- **Resets employees' eligibility for EPSLA** leave as of April 1, 2021, allowing employees who may have previously exhausted leave to seek EPSLA-qualified leave again.

*EFMLEA-specific changes as of April 1, 2021*

- **Expands EFMLEA-qualifying reasons** to include all EPSLA-qualifying reasons (those originally listed in 5102(a) of the FFCRA and the new ones identified above).
- Removes the requirement that employers first provide **10 days of unpaid EFMLEA leave**, which allows employees to receive up to 12 weeks of paid EFMLEA-qualified leave.
- Increases the **aggregate EFMLEA cap** from \$10,000 to \$12,000.

To ensure tax credit eligibility, covered employers electing to continue offering FFCRA paid leave to employees through September 30, 2021, should take steps to establish compliance with all provisions of FFCRA as modified by ARPA.

### **Takeaways**

ARPA provides covered employers with the ability to continue providing FFCRA paid leave to employees while also receiving tax credits in return for such leave until September 30, 2021. Although this leave is *optional*, if employers elect to provide such leave, they must do so in accordance with the requirements of the FFCRA, as supplemented by ARPA. Covered employers choosing to continue offering this paid leave should do so through a uniform and consistent policy, particularly in light of the non-discrimination provision within ARPA.

If you have any questions about how ARPA's changes to the FFCRA may affect your business or any other questions related to leave for COVID-19, please contact **Shelley M. Jackson**, or any other member of Krieg DeVault LLP's **Labor and Employment Team**.

*Disclaimer. The contents of this article should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult with counsel concerning your situation and specific legal questions you may have.*

[1] FFCRA and ARPA also address paid leave entitlements for certain government employees as well, albeit with different provisions and funding mechanisms.

[2] Internal Revenue Code Sec. 414(q) generally establishes a highly compensated employee as one who is a 5% owner or who makes in excess of \$120,000 as determined by the required test.