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Schools Soon Eligible For Tax Credits For Voluntary COVID-19 Paid Leave

On March 11, 2021, President Biden signed the American Rescue Plan Act (ARPA) into law. This law funds a variety of programs. One such program provides tax credits to employers that voluntarily provide certain types of paid leave to employees. The big change for school districts is that beginning April 1, 2021, for the first time, districts will be eligible for tax credits to cover some of the costs of this leave.

- Under the Families First Coronavirus Response Act (FFCRA), districts were obligated to provide certain paid leave to employees, even though they were not eligible for tax credits. This law was in effect from April 1, 2020 through December 31, 2020.
- From January 1, 2021 through March 31, 2021, paid leave became voluntary for districts, and districts were still not eligible for tax credits for providing this leave.
- Effective April 1, 2021 through September 30, 2021, tax credits will be available for schools that voluntarily decide to offer certain qualifying leave.

In addition to providing tax credits for the first time, the ARPA modifies what type of leave qualifies for tax credits. The law creates two buckets of tax credits. The first bucket is Emergency Paid Sick Leave (EPSLA Leave), and the second bucket is Expanded Family and Medical Leave (EFMLA Leave). Importantly, these leaves are similar but not identical to those leaves previously required to be provided under the FFCRA. The qualifying reasons for leave have been expanded.

Emergency Paid Sick Leave Tax Credits

Districts can receive certain EPSLA Leave tax credits up to the lesser of the cost of the paid leave or $511 per day, per employee, if an employee is unable to work or telework due to:

1. Being under a federal, state, or local quarantine or isolation order related to COVID-19;

2. Being advised by a health care provider to self-quarantine related to COVID-19; or

3. Experiencing COVID-19 symptoms and seeking a medical diagnosis or COVID-19 test, awaiting the results of such a medical diagnosis or test if the employee has been exposed to COVID-19 or the employee's employer has requested such a test or diagnosis, or the employee is receiving a COVID-19 vaccine or recovering from side effects of the vaccine.

Note that reason number 3 has been greatly expanded from the reasons for leave provided under the FFCRA.

Districts can receive tax credits up to the lesser of 2/3rds of the cost of the paid leave or $200 per day per employee if an employee is unable to work or telework due to:

4. Caring for an individual subject to an order or self-quarantine described above;

5. Caring for the employee's child whose school or place of care is closed or child care provider is unavailable due to COVID-19; or

6. Experiencing a substantially similar condition specified by Department of Health and Human Services (currently no such condition has been named).

Note that reasons 4, 5, and 6 are identical to the reasons for leave provided under the FFCRA.

Tax credits are capped at the value of the EPSLA Leave paid to an employee for up to 10 days for the period from April 1, 2021 through September 30, 2021, rather than capped at a specific dollar amount. An employee's previous use or non-use of any leave prior to April 1, 2021 (under the FFCRA or under a district's own leave policy) does not count against this new tax credit cap.

Expanded Family and Medical Leave Act Leave

Districts can receive up to an additional $12,000 in tax credits for EFMLA Leave per employee from April 1, 2021 through September 30, 2021. Districts can receive a tax credit of up to $200 per day per employee for EFMLA Leave. In a dramatic change from the FFCRA, EFMLA Leave can be taken for any of the reasons EPSLA Leave can be taken (but will be capped at $200 per day regardless of the reason). EFMLA Leave is no longer limited to reason number 5 above.

Because districts were not previously eligible for tax credits, districts can qualify for up to 12 weeks of EFMLA Leave tax credits, including for the first 2 weeks of such leave. Employees no longer have to take the first 2 weeks of EFMLA Leave unpaid, and it is not necessary for employees to substitute other leave to get paid for these first two weeks of EFMLA Leave.

However, use of this leave likely requires employees to draw down from their regular federal Family and Medical Leave Act leave allotments (which means an employee must have regular FMLA leave available in order to take EFMLA Leave). As with EPSLA leave, an employee's previous use or non-use of leave prior to April 1, 2021 (under the FFCRA or under a district's own leave policy), does not count against this tax credit cap.

Policy Considerations

Because providing EPSLA and EFMLA Leave is completely voluntary, districts have broad latitude to tailor their leave programs to take advantage of these tax credits. Districts can likely choose to offer EPSLA Leave but not offer EFMLA Leave. Districts can likely offer less than the full amount of leave for which tax credits are available. Districts can also likely choose to end their leave program prior to September 30, 2021.

However, there are some restrictions in the law regarding how districts can draft their leave policies and still get tax credits. A district's leave policy cannot discriminate in favor of highly compensated employees, full-time employees, or employees with more years of service in a district. Additionally, it is likely that an employer that offers EPSLA or EFMLA Leave must allow employees to use that leave for all 6 of the enumerated reasons for such leave.

If districts intend to take advantage of the tax credits under this new law, districts should review their existing COVID-19 leave policies, if any, and modify or terminate them as appropriate to ensure compliance with the requirements of the new law. While the tax credits are likely intended to encourage districts (and all employers) to provide paid leave to employees, districts should balance providing leave to employees with the need to ensure adequate staffing for their educational programs.

Claiming the Tax Credits

A school district claims the tax credits against the amount of the district's quarterly Medicare taxes paid to the federal government. If the amount of a district's leave tax credit exceeds the amount owed to the federal government, the excess tax credit will be refunded to the district. In practice, the Internal Revenue Service (IRS) is likely to allow districts to account for this tax credit on paper without actually having to send the money into the federal government and receive reimbursement. More details on this process are expected from the IRS.

School districts must pay the employer share of Social Security and Medicare taxes on qualifying leave wages and deduct and remit the employee's share of these taxes. However, the district is also eligible for tax credits equal to the employer's share of Social Security and Medicare taxes. Note that this tax treatment is different than what was required under the FFCRA, so districts should be sure their accounting software is correctly processing the taxes on these new paid leave wages.

School districts should be sure to maintain proper documentation regarding these new qualifying wages. Guidance from the IRS regarding documentation of leave under the FFCRA is likely to be a helpful starting point for maintaining documentation under the new law. See our previous articles on this subject: https://www.boardmanclark.com/publications/school-law-fyi/payroll-tax-considerations-and-irs-documentation-requirements-of-the-ffcra-for-school-districts and https://www.boardmanclark.com/publications/school-law-fyi/dol-releases-latest-guidance-on-ffcra-leave-what-school-districts-should-know.

Conclusion

As was the case when the FFCRA rolled out last year, additional guidance from the IRS and Department of Labor is expected that could alter districts' obligations. Our firm will continue to monitor that guidance and provide updates to districts. For questions about leave policies and these new tax credits, please reach out to the authors of this article or any member of the Boardman Clark School Law Practice Group.

Additionally, on March 18, 2021, Boardman Clark will be offering a webinar discussing this topic in greater detail as well as other relevant legal updates. To sign up for that webinar click here or contact Nadia Riese at nriese@boardmanclark.com. An invitation to the webinar will also be sent separately.

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