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FFCRA Paid Leave Expires on December 31, 2020

At the time of publication, President Trump indicated he may not sign the version of the COVID-19 relief bill passed by Congress on December 21, 2020. Any subsequent changes to the bill or its failure to pass prior to December 31, 2020 may change the information presented in this article.

Since its creation in March 2020, employers have navigated the paid leave entitlements provided to employees through the federal Families First Coronavirus Response Act (FFCRA). The FFCRA, the largest paid leave program ever implemented by the federal government, was passed in the wake of the COVID-19 pandemic and provided up to two weeks of emergency paid sick leave and up to ten weeks of paid emergency family and medical leave for certain COVID-19-related reasons to public sector employees and employees of private employers with fewer than 500 employees.

However, when drafting the legislation, Congress mandated the FFCRA's paid leave benefits to expire on December 31, 2020 unless Congress authorized an extension. While Congress debated a variety of proposals in its second COVID-19 relief package in late 2020, it did not extend new FFCRA paid leave benefits into 2021.

Therefore, as of January 1, 2021, the FFCRA's mandatory paid leave entitlements are no longer in effect.

The bill passed by the House and Senate on December 21, 2020, however, does extend the FFCRA's tax credit provisions for private sector employers. It is not entirely clear what the extension of the tax credits means. Based on the bill's language, it appears that employers may voluntarily (but are not required to) extend the deadline for employees to use their remaining FFCRA benefits until March 31, 2021. If a private sector employer chooses to let employees use remaining FFCRA leave benefits, the employer may be entitled to a tax credit for those payments. Therefore, at this time, it appears employers may only take a tax credit for any "leftover" FFCRA time employees did not use in 2020 and does not create any new banks of FFCRA leave. This extension is voluntary and employers may decide to end employees' ability to take FFCRA leave on December 31, 2020, even if the employee had FFCRA leave remaining. Like the original FFCRA tax credits, these extended tax credits are not available for public sector employers.

For those closely following the law over the past several months, the FFCRA departs us in the same way it arrived: abruptly and leaving several unanswered questions. Below, Boardman Clark's Labor & Employment team answers common questions about the expiration of the FFCRA.

Does this mean employers are no longer required to provide employees paid time off for COVID-19

related reasons?

Correct. The FFCRA required employers to provide paid leave to employees who could not work or telework because they became ill, had to get tested, or had to quarantine because of COVID-19, among other reasons. The FFCRA also provided paid leave to employees who could not work or telework because their child's school or daycare was closed due to COVID-19.

Now that the FFCRA will expire, employers are no longer required to provide these types of paid leave to employees as of January 1, 2021 under federal or Wisconsin law. Employers may still, however, voluntarily provide paid or unpaid leave to employees through their workplace policies. Employers are encouraged to examine their leave policies in light of this development and consider what changes, if any, they may want to make in 2021 to assist employees who may need to take leave due to COVID-19. Employers should also examine what continuing paid leave obligations, if any, may exist under other local or state laws.

Am I still required to provide any unpaid time off for COVID-19 related reasons under other laws?

In some cases, yes. The Family Medical Leave Act (FMLA) and state and federal disability laws, including the Americans with Disabilities Act (ADA), remain in effect and may entitle employees to some amount of unpaid time off if the employee or an employee's immediate family member becomes seriously ill due to COVID-19 or if the employee requires a reasonable accommodation due to their own disability. If an employee states they cannot report to work or telework for reasons relating to COVID-19, the employer should consult with legal counsel to determine what obligations may exist under the ADA, the FMLA, or applicable state laws.

However, the FMLA and disability laws do not require employers to provide unpaid time off for employees with childcare obligations created by ongoing school or daycare closures due to COVID-19. While the federal and Wisconsin FMLA allow employees to take unpaid leave to care for a child with a serious health condition, the Department of Labor (DOL) has long established that employees may not use FMLA leave for general childcare reasons.

Given that many schools and childcare centers may continue to be closed on a permanent or periodic basis in 2021, employers may wish to reexamine their company paid and unpaid leave policies in 2021 to accommodate employees' continued need for flexible work hours and teleworking arrangements due to childcare obligations.

After the FFCRA expires, what should I do if an employee contracts or is exposed to COVID-19?

To promote safety and minimize potential legal claims, employers should strongly consider allowing employees to take either unpaid or paid time off to seek medical advice, get tested, and quarantine if the employee believes they were exposed to COVID-19. To protect the health and safety of all employees, customers, and vendors in the workplace, employers should require employees to report to the employer if they recently contracted or were potentially exposed to COVID-19. Employers should not permit any employee to enter the workplace if the employee has symptoms of COVID-19 or was recently exposed to COVID-19. If any employee is awaiting COVID-19 test results, they should not be allowed to physically report to the worksite until after they have received their results.

If an employee contracts or is exposed to COVID-19, employers should follow the latest public health guidance before allowing the employee to return to the workplace. Employers are permitted to require the employee to take a period of leave (or work remotely) and provide written documentation, where practical, from the employee's healthcare provider stating they are fit to return to work prior to allowing them to physically return to the workplace.

If private sector employers voluntarily provide qualifying FFCRA paid leave benefits to employees in 2021, they may be entitled to a tax credit for payments made from January 1, 2021 through March 31, 2021.

What should I tell my employees about the FFCRA's expiration?

Many employees may not realize that the FFCRA will expire on December 31, 2020 and may be expecting to use FFCRA paid leave benefits in 2021. Employers should clearly communicate this change to employees as soon as possible so employees have time to plan accordingly.

If an employer adopts new or different paid or unpaid leave policies in 2021 to help "make up" for the lack of FFCRA benefits or plans to allow employees to use any leftover FFCRA time in 2021, employers should clearly inform employees of those new policies in writing and ensure employees have a complete understanding of what types of employer-provided paid or unpaid leave will be available (or may not be available) in 2021 due to COVID-19.

What happens to employees who did not use all of their paid leave FFCRA benefits in 2020? Do those unused benefits expire, or do they carry over into 2021?

FFCRA benefits were "use it or lose it." The DOL made it clear that FFCRA paid leave benefits were only available to employees from April 1, 2020 through December 31, 2020. Employees who did not use any or all of their FFCRA benefits are not entitled to carry over any unused FFCRA paid leave time into 2021. Similarly, employers are not required to pay out employees for any unused FFCRA leave. The FFCRA's tax credit extension permits private sector employers to voluntarily allow employees to carry over unused FFCRA leave in 2021, but private sector employers are not required to do so.

In Wisconsin, employers in general are not required to allow unused employer-provided leave to carry over and, if proper written policies are in place, are not required to pay out unused leave to employees. Employers drafting or revising leave policies for 2021 should be clear regarding whether unused employer-provided COVID-19 leave given to employees in 2020 or 2021 will carry over or be paid out to employees.

What about the FFCRA tax credits? How does the FFCRA tax credit extension work?

To help employers afford the increased expenses created by the FFCRA's mandatory paid leave provisions, Congress authorized private sector employers to claim a tax credit for any FFCRA paid leave payments made to employees in 2020. These tax credits were unavailable for public sector employers.

There are many ambiguities surrounding the tax credit extension that may need to be clarified by the DOL or IRS. For the time being, it appears Congress is allowing private sector employers the choice to extend the deadline for employees to use their existing banks of FFCRA paid leave benefits through March 31, 2021. Because Congress chose to let the FFCRA expire on December 31, 2020 and did not explicitly authorize any new FFCRA leave benefits in 2021, the tax credit extension does not "restart" an employee's bank of two weeks of paid sick leave or ten weeks of paid emergency family and medical leave in 2021. If an employer decides to allow an extension, employees may only use whatever FFCRA leave they had remaining at the end of 2020. Employers who voluntarily allow employees to use their remaining FFCRA leave "leftover" from 2020 may receive a tax credit for such payments. Employers will not receive a tax credit for any leftover FFCRA payments made after March 31, 2021.

For example, if an employee previously used their two weeks of FFCRA paid sick leave in 2020, they will have no FFCRA paid sick leave left to use in 2021 and employer would not necessarily be entitled to a tax credit for additional voluntary paid leave benefits paid to the employee. On the other hand, if an employee had four weeks remaining of FFCRA paid emergency family and medical leave at the end of 2020, the employer could allow the employee to use those remaining four weeks of paid leave until March 31, 2021 and take a tax credit for those payments.

If private sector employers voluntarily allow an employee to take previously unused FFCRA leave through March 31, 2021, employees must still qualify for either paid sick leave or paid emergency family and medical leave under the circumstances defined under the FFCRA and provide the employer with the appropriate documentation outlined by the IRS.

It is the employer's choice whether to extend the deadline to use benefits. If an employer chooses to, they may decide to end employees' ability to take FFCRA paid leave on December 31, 2020. In that case, any unused FFCRA benefits simply expire and employers are not required to pay out an employee for those unused benefits. If an employer decides to let unused FFCRA benefits expire and instead adopt new or different paid leave policies of its own design, the employer should not expect to receive a tax credit for those payments. Employers changing or creating different paid leave programs are encouraged to consult with their tax professions to see what other credits may or may not be available for employee paid leave benefits in 2021.

Boardman Clark will continue to track developments of the FFCRA's tax credit extension and provide any future clarifications from the IRS or DOL.

Is the FFCRA gone forever? Or will it come back sometime in 2021?

The federal government has the ability to restore the FFCRA's paid leave provisions in 2021, but it is unknown at this time whether it will exercise that power. Because Congress mandated the FFCRA to sunset at the end of 2020, it will likely take explicit legislative action by Congress to create new FFCRA paid leave benefits in 2021. Executive action by President-elect Biden or an administrative rule by the DOL is unlikely to be sufficient to restore FFCRA leave.

Currently, there are no legislative activities to suggest Congress will create new FFCRA paid leave benefits in the near future. Throughout Congress' negotiations of the second COVID-19 relief bill in late 2020, there was no explicit inclusion of an FFCRA leave expansion in any of the proposed bills. However, Congress could authorize the FFCRA's extension in future legislation if it desires to do so.

If Congress does create new FFCRA paid leave benefits at some point in 2021, it is unclear at this time whether such an extension would be retroactive and apply to earlier periods of 2021 when the FFCRA was not in effect. Congress could also make substantive changes to the FFCRA that change the amount or type of leave employees are entitled to. Boardman Clark's Labor & Employment team will continue to provide updates as they occur.

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