

HR Heads-up

PERIODIC UPDATES ON IMPORTANT HR LEGAL ISSUES

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FFCRA Update: Stimulus Bill Signed into Law Allows Employers to Voluntarily Extend Benefits

On December 27, 2020, President Trump signed the Consolidated Appropriations Act of 2021 (the Act) into law. The Act, commonly referred to as the second COVID-19 stimulus package, was passed by Congress on December 21, 2020. Our previous article discussing the Act and common questions on the FFCRA's expiration can be found [here](#).

While the Act made some changes to the Families First Coronavirus Response Act (FFCRA), it did not extend the mandatory paid leave portion of the FFCRA. Therefore, as of January 1, 2021, employers are no longer required to provide two weeks of mandatory Emergency Paid Sick Leave (EPSL) or twelve weeks of Emergency Family and Medical Leave (EFMLA), ten weeks of which are paid.

However, under the Act, private sector employers may voluntarily allow employees to use any EPSL or EFMLA benefits "leftover" from 2020 through March 31, 2021, and receive a tax credit for such leave payments. The Department of Labor (DOL) confirmed the Act extends employer tax credits for EPSL and EFMLA benefits voluntarily provided to employees until March 31, 2021 in new [guidance](#) issued on December 31, 2020. Because the Act only makes changes to the tax credit portions of the FFCRA, which are not available to public sector employers, as of January 1, 2021, public employers are free to implement their own leave policies related to COVID-19, including providing no additional leave at all.

At this time, the Act does NOT appear to provide tax credits for additional amounts of paid leave beyond the two weeks of EPSL and ten weeks of paid EFMLA (which counts towards an employee's cap of twelve weeks of unpaid, "regular" FMLA coverage in a year for employees who are also eligible for "regular" FMLA by an FMLA covered employer) provided by the FFCRA. If an employee already exhausted all of their EPSL or EFMLA in 2020, an employer will likely not receive a tax credit if they provide that employee with additional paid leave in 2021. In other words, the Act allows employers to take a tax credit for any "leftover" FFCRA time employees did not use in 2020 and does not create any new banks of EPSL or EFMLA leave for employees in 2021. Extending remaining FFCRA benefits is voluntary and employers may decide to end employees' ability to take FFCRA as of December 31, 2020, even if the employee had FFCRA leave remaining at the end of the year.

Based on the text of the Act, it appears employers may extend the timeline for employees to use either one or both types of remaining FFCRA benefits. For example, an employer may allow employees to use their remaining EPSL benefits through March 31, 2021, but not allow the use of any remaining EFMLA benefits.

If an employer allows employees to use remaining EPSL benefits but not remaining EMFLA benefits, the employer will still receive a tax credit for any remaining EPSL payments made to employees through March 31, 2021.

If an employer extends use of remaining EFMLA benefits, it appears that any EFMLA benefits used in 2021 will count against an employee's twelve weeks of unpaid, "regular" FMLA benefits and vice versa. Prior DOL FFCRA guidance clarified that employees may only take twelve total workweeks of FMLA-type leave during a twelve-month period, including EFMLA benefits. In other words, an employee's use of paid EFMLA runs concurrently with an employee's use of unpaid, "regular" FMLA. For employers who operate their federal FMLA on a calendar year system, an employee's new bank of twelve weeks of unpaid, "regular" FMLA on January 1, 2021 does not restart the employee's bank of EFMLA for tax credit purposes. For example, if an employee has five weeks of EFMLA remaining from 2020, the employee will have twelve total weeks of FMLA-type leave to use in 2021, five of which may be considered paid EFMLA leave if the employer chooses to let employees use remaining EFMLA benefits in 2021. Employers should also be aware that Wisconsin FMLA entitlements also restart on January 1st, and EFMLA leave for childcare obligations created by COVID-19 does not count against an employee's Wisconsin FMLA entitlement.

We know many employers have taken steps, or were considering steps, to provide some form of additional COVID-19 leave in 2021 in anticipation of the FFCRA not being extended. Employers may wish to review their policies and plans in light of this recent development.

The information provided in this article is based on our current understanding of the text of the Act and previous FFCRA guidance. However, the Act's extension of FFCRA tax credits left several unanswered questions that may require new or different guidance from the DOL or Internal Revenue Service. Additionally, the incoming Biden Administration might modify the previous FFCRA guidance. Boardman Clark's Labor and Employment Team will continue to monitor any legislative changes or new administrative guidance concerning the FFCRA and keep you informed of any significant developments.

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