New FFCRA Leave Starts April 1, 2021

By Alicia J. Samolis and Michael A. Gamboli

As most employers know, the Families First Coronavirus Response Act (FFCRA) went into effect in April of 2020 and required employers with less than 500 employees to provide certain forms of paid COVID-related leave to eligible employees. Specifically, the FFCRA provided for 80 hours of emergency paid sick leave (EPSL) to be used by employees who were unable to work or telework due to specific COVID-related reasons and 12 weeks of emergency family and medical leave (EFMLA) to be used to care for the employee's child because the child's school or daycare was closed or unavailable due to the pandemic. FFCRA leave was fully or partially paid depending upon the circumstances and, in all cases, the employer was eligible to be reimbursed for the entire cost of the leave through a dollar-for-dollar payroll tax credit.

The FFCRA's mandatory leave requirements expired on December 31, 2020, but the stimulus package passed by Congress in late December of 2020 provided that employers could voluntarily allow employees to use the remainder of their allotted EPSL or EFMLA for qualifying reasons through March 31, 2021. If the employer allowed the continued use of this leave, the employer would likewise be entitled to the same tax credit as provided under the FFCRA.

The recently passed America Rescue Plan of 2021 (ARPA) expands the scope of both the EPSL and EFMLA to allow employers to voluntarily provide additional leave from April 1, 2021 through September 30, 2021. The new FFCRA leave under the ARPA is not mandatory.

Highlights of the ARPA expansion include the following:

New FFCRA timeframe. From April 1, 2021 through September 30, 2021 employers with less than 500 employees can continue to allow for EPSL and EFMLA qualifying leave and receive reimbursement for the expenses for such leave through a dollar-for-dollar payroll tax credit.

New EPSL and EFMLA bank. The EPSL bank of 80 hours and EFMLA bank of 12 weeks of leave resets on April 1, 2021. In other words, the initial leave provided by the FFCRA ends on March 31 and, starting on April 1, 2021, employers may voluntarily provide a new bank of up to 80 hours of EPSL and 12 weeks of EFMLA, for which the tax credit will apply as long as the leave is taken by September 30, 2021 and other rules are followed.

Expanded reasons for EPSL leave. The existing reasons for which EPSL can be used continue and the ARPA expands this list to also include leave to get a COVID-19 vaccine, to recover from adverse reactions to the vaccine, and while awaiting the results of a COVID diagnosis or test after having close contact with a person with COVID-19 or at the employer's request. All of the new EPSL reasons for leave are subject to the higher cap of 100% of salary ($511 per day).

Expanded reasons and paid time under EFMLA. Prior to April 1, EFMLA is only available when needed because a child's school or daycare is closed. Starting April 1st, the ARPA expands the EFMLA to allow for use for any and all of the qualifying reasons for which EPSL leave may be used. Further, under the pre-April 1st EFMLA, the first two weeks of leave are unpaid. This provision has been eliminated by the ARPA so that the entire 12 weeks of EFMLA is paid. The EFMLA rate of pay continues to be two-thirds of the employee's regular rate, up to $200 per day (regardless of the reason for the leave) but because the number of weeks of paid leave is increased from 10 to 12, the FFCRA maximum tax credit of $10,000 per employee has been increased by ARPA to $12,000.

Non-discrimination mandate. Although providing leave under the ARPA expansion is purely voluntary, this is not akin to a benefit that employers can fully choose to provide only to certain employees. Rather, the ARPA mandates that employers are not able to claim the tax credit if there is any discrimination in favor of highly compensated employees (as defined in Section 414(q) of the Internal Revenue Code), full-time employees, or those with longer tenure with the employer. It appears that the non-discrimination test applies separately to EPSL and EFMLA. So, for example, being disqualified from taking the tax credit for EFMLA leave (due to it being provided in a discriminatory manner) may not disqualify the employer from taking the tax credit for EPSL (as long as it was provided in a non-discriminatory manner).

Despite the limitation, the decision to offer FFCRA leave still does not have to be made on an all-or-nothing basis. For example, employers may want to exclude eligibility for FFCRA leave for employees on performance improvement plans or only offer FFCRA leave for testing or vaccine purposes. However, given the risk of loss of the tax credits unless the leave is universally offered, some employers may decide not to offer the leave to anyone.

Questions? The Department of Labor (DOL) has been charged with issuing guidance to clear up any open issues and we anticipate that the DOL will do so by updating its existing FFCRA Q&A guidance found at https://www.dol.gov/agencies/whd/pandemic/ffcra-questions or by implementing regulations specific to the FFCRA expansion. Employers are encouraged to contact their employment counsel with questions.

The Employment & Labor Practice Group at Partridge Snow & Hahn is available to answer your questions about the FFCRA expansion included in the ARPA.

Details and updates regarding the FFCRA were covered in our prior Client Alerts on this subject:
• *Families First Coronavirus Response Act*, March 2020,
• *FFCRA Update – One Federal Court Strikes Down Portions of the DOL's Final Rule Implementing The FFCRA*, August 2020,
• *New FFCRA Rule Published September 16, 2020*, September 2020, and
• *The End of Mandatory COVID-19 Related Leave (For Now)*, January 2021.

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