

EMPLOYER CONSIDERATIONS FOR DETERMINING WHETHER TO CONTINUE PROVIDING FFCRA LEAVE AFTER LAW'S EXPIRATION

Insights
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After much heated negotiation in passing Stimulus 2.0, [Congress reached a compromise on employee COVID-19 leave](#), allowing the leave requirements of the Families First Coronavirus Response Act (FFCRA) to expire on December 31, 2020, but continuing tax credits through March 31, 2021 for employers who choose to voluntarily provide paid leave after that date. Now that employers with fewer than 500 employees are no longer *obligated* to provide FFCRA leave, many are left wondering whether they *should* continue to provide leave for their employees who are impacted by COVID-19. This article aims to provide an overview of the state of the law and provide employers with the pros and cons of continuing to provide FFCRA leave to make the best decision for their workplace.

Stimulus 2.0

Because Stimulus 2.0 does not extend the leave requirements of the FFCRA, employers are no longer required to provide Emergency Paid Sick Leave (EPSL) or Emergency Family and Medical Leave (EFMLA) after December 31, 2020. Additionally, Stimulus 2.0 does not provide any additional leave entitlement for employees who have exhausted their FFCRA leave entitlement (up to 80 hours of EPSL and up to 12 weeks of EFMLA). If employers used all of the leave by December 31, the limits did not reset January 1.

The final legislation simply extended the refundable employer payroll tax credit for both EPSL and EFMLA until March 31, 2021, subject to the applicable caps. Therefore,

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you may choose to voluntarily continue to provide FFCRA leave, in whole or in part, until the end of March.

DOL Guidance

In response to “the critical need for American workers and employers to understand this relief program as they deal with the effects of this crisis on the workplace,” as expressed by Department of Labor (DOL) Wage and Hour Division Administrator Cheryl Stanton, [the agency issued guidance on December 31](#) to provide clarity on the issues raised by the expiration of the FFCRA.

The DOL confirmed that the obligation to provide FFCRA leave applies only from April 1, 2020, through Dec. 31, 2020, and that change to extend the requirement to provide leave under the FFCRA would require an amendment to the law by Congress, which has not occurred. Likewise, the DOL affirmed the continued availability of refundable employer payroll tax credit for FFCRA leave through March 31.

Additionally, the DOL cautioned that, despite the FFCRA’s expiration, employers must still pay any FFCRA leave wages owed to employees who used FFCRA leave between April 1, 2020 and December 31, 2020. With that backdrop, employers are now quickly weighing the pros and cons of extending leave as COVID-19 numbers spike to an all-time high, employees are returning to work after the holidays, and some schools are going back to virtual learning.

Pros Of Continuing To Provide Leave

There are several significant reasons why you should consider extending FFCRA leave into 2021.

The Need Remains

The FFCRA was passed, in part, to respond to the issues caused by the significant numbers of employees who were unable to work or telework due to COVID-19. These issues did not resolve with the ringing in of the new year. In fact, COVID-19 numbers are on the rise and showing no sign of slowing. As a result, the need for FFCRA leave is as substantial as when it passed in March 2020.

Leave Slows The Spread

One of the primary purposes of the FFCRA was slowing the spread of COVID-19. By providing paid leave for employees

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who have been diagnosed with COVID-19, have been exposed to COVID-19, or are experiencing symptoms, employees are encouraged to stay home when sick and avoid the risk of spreading the virus to others in their workplace. Without paid leave, employees are more likely come to work sick or knowingly exposed because they either have no employer-provided paid leave, or they simply do not want to use all of their paid leave when they are ill, preferring to save their paid time off for vacation.

As a result, if you do not continue to offer the leave, you run the risk of employees who should be in quarantine reporting to work and potentially infecting their coworkers or customers, potentially leading to a super-spreader event. The disruption, including having a significant number of employees out of work or being required to shut down the workplace entirely, far exceed any potential adverse impact of eligible employees using up to two weeks of EPSL.

There Is No Significant Financial Loss

While you will initially have to foot the bill and provide the out-of-pocket costs for employee wages while on leave, the wages paid are not a *loss*, per se, because Stimulus 2.0 provides for continued tax credits. If administered correctly, the financial impact should be a wash, excepting any costs and effort expended in administering the leave. Overall, considering the risks of employees reporting to work sick, the cost of providing and administering leave are miniscule compared to the cost of being forced to close your doors as a result of your workplace being riddled with COVID-19 exposure or infection, loss of business, negative publicity and more.

Issues With Providing Continued Leave

There are several concerns you should recognize, however, before you decide to extend FFCRA past the December 31 expiration date.

Tax Credits Not Guaranteed

Ultimately it is up to the IRS whether your FFCRA wage payments qualify for the tax credit. This was true in 2020, and not just unique to employers who extend the leave into 2021. In order to receive the credit, employers must be diligent in ensuring they meet [IRS requirements](#). If an employer fails to properly administer leave or is unable to

substantiate their qualification for the tax credit, they may be left footing the bill.

Time Spent Administering The Leave Balanced Against Employee Usage

In order to obtain the tax credit, you must be diligent in satisfying numerous administrative requirements: confirming that your employees who use FFCRA leave actually qualify, ensuring wages don't exceed the statutory caps or limits, tracking the leave, maintaining documentation, and meeting other [IRS requirements](#). For small employers, this may be additional work they do not want to take on in the new year, particularly if only a few employees did not use the leave entitlement by December 31. Small employers should consider how many employees may be left to qualify for the leave before March 31.

Potential For Discrimination Claims

Employers who choose to continue to provide FFCRA leave should have a clear and consistent plan. You could draw some lines to limit the leave to certain classes of employees, such as only for non-exempt employees. Or you may choose only to offer up to two weeks of EPSL and not up to 12 weeks of EFMLA. Whatever route you take, you should develop it in an objective fashion, clearly articulate your plan, and ensure it is consistently followed. Arbitrarily picking and choosing who can receive the leave could pose a risk for a discrimination claim on the basis of race, age, sex, etc.

Work Disruption

Employees using any form of paid leave for an extended period of time have the potential to cause a business disruption to your operations. Considering EPSL and EFMLA may be taken for up to two weeks and 12 weeks, respectively, there is the potential that such extended leaves may result in significant disruption, depending on the employee's role and the business circumstances. Given that the two weeks of sick leave is largely designed to slow and curb the spread of COVID-19, you may decide to only offer the emergency sick leave versus the full 12 weeks of EFMLA for childcare and school closures.

What Employers Should Do Next

You need to quickly weigh and determine the benefits and burdens of continuing to provide paid leave created under the FFCRA, and timely communicate the decision to your employees. On balance, for employers that still have a number of employees who could have a qualifying need for leave before March 31, the pro of curbing the spread of the virus by providing at least the emergency paid sick leave is strong.

You should also pay close attention to developments in Congress in the new term. There has already been discussion of a larger stimulus package after President-elect Biden is inaugurated. Under the new administration, paid leave may extend or even expand. You should also stay abreast of state and local paid leave laws that may afford time away from work for COVID-19 related reasons.

We will continue to monitor further developments and provide updates, so make sure you are subscribed to [Fisher Phillips' alert system](#) to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney or visit our [COVID-19 Resource Center For Employers](#).

This Legal Alert provides an overview of a specific development. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.