

EMPLOYERS SHOULD THINK TWICE BEFORE DENYING VIRUS-RELATED LEAVE REQUESTS AS COVID-19 LAWSUITS INCREASE

Insights
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While there may be light at the end of the tunnel, employers are facing lingering reminders of COVID-19 even as the pandemic subsides – including an increasing amount of litigation about how some have addressed virus-related leave requests. A number of lawsuits have already been filed alleging that employees were not provided leave under the Families First Coronavirus Response Act (FFCRA) or were retaliated against for requesting FFCRA leave. These cases highlight the need for employers — particularly those opting to extend FFCRA leave to employees — to continue to carefully follow their obligations under the law to help prevent and defend against potential litigation.

Employer Obligations Under the FFCRA

Under the Families First Coronavirus Response Act (FFCRA), certain employers were required to provide eligible employees with emergency paid sick leave (EPSL) and expanded family medical leave (EFMLA) for specific COVID-19-related reasons. In exchange, those employers would be eligible for refundable tax credits for the cost of providing employees with the FFCRA leave. Generally, the FFCRA provides for two weeks (up to 80 hours) of paid sick leave where an eligible employee is unable to work due to one of the qualifying reasons for leave, and up to an additional 10 weeks of paid expanded family and medical leave for an eligible employee whose is unable to work due to a bona fide need for leave to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19.

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Employers Can Voluntarily Extend FFCRA Leave Through September 30

While the FFCRA originally expired on December 31, 2020, [Congress initially extended the tax credit](#) for employers who voluntarily chose to continue providing paid leave through March 31, 2021. Now, the [American Rescue Plan Act of 2021](#) further extends [the tax credit for those employers who voluntarily provide leave through September 31, 2021](#). This Act also provides [additional qualifying reasons for paid leave](#), of which employers need to be aware.

COVID-19 Lawsuits Related to FFCRA Leave Requests

A few recently filed cases illustrate the types of lawsuits employers may face. One example is *Garcia v. Home Expressions, Inc.*, which was filed in New Jersey in February 2021. Cenia Garcia worked as a logistics coordinator and administrative assistant for her employer for approximately two years before the COVID-19 pandemic hit. She alleges that she initially worked remotely, but her employer eventually asked her to return to the office five days per week. At the time, Garcia's three school-aged children were still attending school virtually, so she requested EFMLA leave. According to her Complaint, her employer first allowed her to continue working remotely, but then required her to report to the office two days per week and refused to pay her for days she did not report to work in-person. Garcia also alleges that she was not provided with an explanation of the FFCRA benefits and was subsequently terminated after seeking leave. Garcia's lawsuit alleges violation of the FFCRA and seeks compensatory and punitive damages in addition to reinstatement. In *Aguilar v. National Center for Advocacy and Recovery, Inc.*, another lawsuit filed in New Jersey in February 2021, Barbara Aguilar alleged that she worked for her employer for seven years before she was terminated for requesting FFCRA leave. She alleges she requested intermittent leave to care for her minor child because her child's school and summer camp were not allowing in-person attendance. In response to her request, Aguilar claims her job duties were taken away and she was fired after her employer inquired as to the status of her daughter's school. Aguilar asserts claims under the FFCRA and New Jersey state law and seeks damages and reinstatement.

Similarly, in *Peace v. Curtis Resort Spa, Inc.*, filed in federal court the Northern District of Georgia, Lauren Peace alleges

that her employer told her to “make it work” when she could not find child care for her young daughter due to the COVID-19 pandemic. When she requested FFCRA leave, she claims she was fired. Peace, like the plaintiffs in the other two cases, asserted claims for violation of the FFCRA. According to Peace, she was entitled to take up to 12 weeks of leave, but that when she asked for it, her employer fired her instead. Peace is seeking damages, including lost wages and benefits and reinstatement to her former position. These cases all share common features and tell a cautionary tale.

What Should Employers Do?

Even though the FFCRA initially expired on December 30, 2020, the Act provides for a private cause of action. The statute of limitations for claims under the FFCRA is two years from the date of the alleged violation (or three years for willful violations) so you may not be out of the woods even if you decided not to continue to provide FFCRA leave in 2021.

You could also find your organization the subject of a Department of Labor (DOL) investigation regarding your provision of leave under the FFCRA. The DOL observed a temporary period of non-enforcement for the first 30 days after the FFCRA took effect, so long as employers acted reasonably and in good faith to comply with the new law. “Good faith” exists when violations were remedied, and the employee was made whole as soon as practicable, the violations were not willful, and the employer agrees to future compliance with the FFCRA. However, employers found to be in violation could be subject to penalties and enforcement under either the Fair Labor Standards Act, the Family and Medical Leave Act, or both.

With the **voluntary option** for employers to extend the FFCRA leave to employees through September 30, 2021 under the American Rescue Plan, you should ensure you follow your obligations under the law related to employee eligibility and entitlement to FFCRA leave or risk possible litigation if you choose to continue providing FFCRA leave. The American Rescue Plan also adds non-discrimination rules that would deny tax credits to employers that discriminate against certain categories of employees when determining availability of the paid leave. That means that employers that decided to provide FFCRA leave should do so uniformly to reduce the risk of potential claims. The American Rescue Plan also provides for 10 additional days of

FFCRA paid sick leave beginning April 1, 2021 for those employers who opt to provide it. For those choosing to continue to provide EFMLA leave, all 12 weeks are paid, and employees can now take EFMLA leave for any of the reasons that an employee would qualify for EPSL (and not just for reasons related to school or child care closures).

You should consult with counsel to determine the application of the FFCRA, the American Rescue Plan, and state and local paid leave laws. While they have not done so yet, the DOL and IRS may provide additional guidance related to those employers who opt to voluntarily continue to offer leave under the American Rescue Plan. If you opt to continue providing such leave, you should review and update your leave request forms and documentation as necessary to reflect these recent changes to the law. New leave laws could also be on the horizon under the Biden Administration and you should continue to monitor potential changes to federal leave laws in 2021 and beyond.

Conclusion

We will keep you updated on any further developments in this or similar cases filed elsewhere the country. For further information about COVID-19-related litigation being filed across the country, you can visit our [COVID-19 Employment Litigation Tracker](#). Our [COVID-19 Employment Litigation and Class & Collective Actions section](#) also has a listing of our litigation-related alerts and team members handling these types of cases.

Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information. For further information, contact your Fisher Phillips attorney. You can also review our [FP BEYOND THE CURVE: Post-Pandemic Back-To-Business FAQs For Employers](#) and our [FP Resource Center For Employers](#).