



Webinar

Employer Leave Obligations Related to COVID-19



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- **The law in this area is changing rapidly. Some rules and governmental proclamations are still evolving.** These materials contain general information only and may not reflect current legal developments or updates.

FFCRA Leave Basics

- April 1, 2020, Congress passed the Family First Coronavirus Relief Act (FFCRA)
- FFCRA had many different provisions, including two paid leave provisions:
 - Emergency Paid Sick Leave (EPSL)
 - Expanded/Emergency FMLA (EFMLA)
- The FFCRA leaves apply to employers with fewer than 500 employees (measured at time employee requests leave)
- Emergency Paid Sick Leave (EPSL) provides 2/3 compensation to full compensation (up to specified limits) for up to 80 hours of leave if the employee is unable to work or telework due to a qualifying reason
 - Employees immediately eligible for EPSL (no minimum work requirements)
- Expanded FMLA (EFMLA) provides up to 12 weeks of leave for employee whose child's school or daycare is closed or regular care provider unavailable due to COVID 19
 - First 2 weeks unpaid; remaining 10 weeks paid at 2/3 regular rate (up to specified limits; total of \$10,000)
 - Employee had to be employed for 30 days before eligible for EFMLA
- Federal tax credits available to employer to cover cost of FFCRA leave

FFCRA Leave Becomes Optional

- FFCRA leave provisions became OPTIONAL after 12/31/20 under the **Consolidated Appropriations Act** (signed December 27, 2020)
 - Between January 1 – March 31, 2021 employers could provide FFCRA leave on a **voluntary** basis and receive the federal tax credits to cover the cost of the leave
 - Employees were not entitled to additional leave under the CAA, but employer could permit employees to use remaining FFCRA leave for qualifying reasons and take the federal tax credit
- Under the **American Rescue Plan Act** (ARPA , signed March 11th), employers may continue to offer FFCRA leave on voluntary basis and receive federal tax credits to cover the cost.
 - Tax credits under ARPA apply to FFCRA leave provided between April 1-September 30, 2021
 - There are some important changes that employers need to be aware of under ARPA

Six Qualifying Reasons for EPSL Leave and One Qualifying Reason for EFMLA (#5)

1

Employee is subject to a gvt. quarantine or isolation order related to COVID19, including shelter in place orders

2

Employee is advised by health care provider to self-quarantine due to COVID19 concerns

3

Employee is experiencing symptoms of COVID 19 AND is seeking medical diagnosis

4

Employee is caring for an individual who is 1) subject to quarantine/isolation order/shelter in place order; or 2) has been advised by HCP to self quarantine due to concerns related to COVID 19

5

Employee needs to care for son or daughter because school or place of care is closed, or the childcare provider is unavailable due to COVID 19-related reasons

6

Employee is experiencing other conditions similar to COVID-19, as identified by the Secretary of Health and Human Services (to date, no other conditions identified or authorized for coverage under FFCRA).

ARPA Brings Changes

- Beginning April 1, 2021, all six reasons will remain viable covered uses for EPSL.
- **In addition, all six reasons will also constitute a qualifying reason to take leave under EFMLA (dramatically expanding use of EFMLA).**
- **Additionally, reason #3, had been expanded to include:**
 - Leave where the employee is seeking or awaiting results of a diagnostic test for, or a medical diagnosis of, COVID-19 and was either exposed to COVID-19 or the employer requested such test or diagnosis; or
 - Leave to obtain a COVID-19 immunization or to recover from any injury, disability, illness, or condition related to such immunization.

Additional Changes Under ARPA

- Initial period of unpaid leave under EFMLA is eliminated:
 - Starting April 1, 2021, the entire 12-week period of EFMLA is paid leave; overall amount of pay employees can receive increases from \$10,000 to \$12,000
 - The actual pay rate and daily pay cap for both EPSL and EFMLA remain unchanged.

- A new bucket of up to 80 hours of EPSL is available for employees to use between April 1, 2021 and September 30, 2021.
 - New bucket of leave is in addition to the EPSL leave that had been previously available to employees.
 - Any prior EPSL leave that an employee has remaining as of March 31, 2021 will not carry over.
 - If employee exhausted original allotment of EPSL leave before March 31st, any additional leave employer provided before April 1, 2021 does not qualify for the new tax credits.

Additional Changes Under ARPA, cont.

- The ARPA contains a non-discrimination provision.
 - Employer may not discriminate as to which employees will be eligible for the voluntary leave. For example, employers may not claim tax credits for leave if they discriminate in favor of highly compensated employees or full-time employees or based on length of service.
- Other FFCRA rules remain unchanged.
 - For wages to qualify for the new tax credits, employers should operate as though FFCRA rules still apply. This includes threshold questions such as which employers are covered, employee eligibility rules, documentation rules, etc.
- Unclear whether the EFMLA bucket of leave resets as of April 1, 2021. Guidance from DOL has been requested
- Because leave is optional, employer has flexibility (e.g. can offer EPSL but not EFMLA)

Managing Optional FFCRA/ARPA Leave

- Since leave is voluntary, employer may choose to offer one type of leave but not the other
 - *Example* – employer allows employees to use EPSL leave (and takes the tax credit), but does not permit the use of EFMLA for the FFCRA reasons (or vice versa)
 - NOTE: Employer may still be obligated to provide “regular” FMLA leave to an employee for a traditional FMLA qualifying reason
- Employer must be consistent in allowing (or not allowing) leave to avoid discrimination claims and must comply with the new ARPA non-discrimination provision
- If employer intends to take the tax credit to cover the cost of any optional FFCRA leave provided, the same rules apply – IRS documentation requirements, qualifying reasons for leave, etc.

FMLA Leave

- FMLA provides up to 12 weeks unpaid, job protected leave, with continued health benefits for certain qualifying events (29 CFR Part 825)
- Applies to employers with **50 or more employees**
- Employee with a qualifying event may be eligible for FMLA if he/she:
 - has worked for the employer for at least 12 months (not necessarily consecutive months),
 - has worked at least 1250 hours during the 12-month period immediately preceding leave, and
 - is employed within 75 miles of worksite with 50 other employees
- **Qualifying events include:**
 - **Employee's own serious health condition**
 - **Care for serious health condition of immediate family member**
- **Employee who has COVID, a reaction to COVID vaccine, or caring for family member with such issues may have leave coverage under traditional FMLA (as a “serious health condition”)**

State Leave Provisions

- Many states, counties and cities have their own leave provisions that may provide coverage to employees who need to be out of the workplace for COVID-19 related reasons (such as employee's own illness, vaccine reaction, or caring for ill family members).
- **At least 13 states and Washington D.C. provide paid sick leave**
 - AZ, CA, CO, CT, MD, MA, ME, NV, NJ, OR, RI, VT, WA
 - <https://www.ncsl.org/research/labor-and-employment/paid-sick-leave.aspx>
- **Some states have expanded their paid sick leave provisions in response to COVID-19 to provide more generous/expanded benefits**
 - CO, NY, NC
 - California: Many cities have expanded COVID related leave benefits:
<https://www.natlawreview.com/article/california-covid-19-supplemental-paid-sick-leave-2021>
- Washington State: employers need to consider Paid Family and Medical Leave (PFML) and the Washington Family Care Act provisions as well

Washington State Paid Family and Medical Leave (PFML)

- State funded insurance program that provides partial wage replacement for eligible Washington employees who need to be out of the workplace for a qualifying medical or family need (RCW 50A.05-.50)
- Application for PFML is **EMPLOYEE INITIATED**. The employer cannot require an employee to apply for PFML benefits, and cannot require an employee to use one type of benefit before another
 - i.e., cannot require employee to use all state benefits before using employer-provided benefits, or vice versa
- Employee who is impacted by COVID 19 (or is caring for a family member with COVID 19) may be eligible for leave and benefits under WPFML as a “serious health condition”

Other WA Leave Options

- **Washington Family Care Act: RCW 49.12.265**
 - Employee may use any earned paid leave benefit offered by the employer to provide care or supervision to a child under age 18, or to care for a qualified family member with a serious health condition.
 - May include PTO, vacation, personal holidays, sick leave, some disability plans
 - Family members include spouse, children, parents, grandparents, in-laws

- **Washington Paid Sick Leave: RCW 49.46 et seq.; WAC 296-128**
 - Employee earns 1 hour of paid leave for every 40 hours worked;
 - Employee may use this paid leave for their own illness or to care for family member

Recommended Resources



- **EEOC Guidance related to vaccinations:**
<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (Section K)
- **Job Accommodation Network (COVID-19):**
<https://askjan.org/topics/COVID-19.cfm>

Thank
You!



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