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Paid COVID-19 Leave Extended on a voluntary Basis Through March 31

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Since April 1, employers with fewer than 500 employees have been required to grant paid leave to their employees for a variety of COVID-related reasons. The two paid-leave provisions in the Families First Coronavirus Response Act (FFCRA) (1) created a paid sick-leave benefit for the first time at the federal level, the Emergency Paid Sick Leave Act (EPSLA), and (2) amended the FMLA to allow for paid leave in the narrow instance of school and child care facility closures due to COVID, the Emergency Family and Medical Leave Expansion Act (EFMLEA). Pursuant to the EPSLA, full-time employees could receive up to 80 hours of paid leave, with certain pay caps depending upon the reason for the leave. Likewise, under the EFMLEA, an employee dealing with a school closing or unavailability of child care, could receive partial pay for up to 10 weeks. Once employers fronted these payments to employees, they could seek reimbursement from the federal government in the form of tax credits or refunds. With what was probably misplaced, well-intended optimism, the paid-leave acts were scheduled to "sunset" on December 31, 2020. There has been much speculation these last several weeks, as the pandemic continued to rage, whether Congress would extend the FFCRA paid leaves.

Recently, in the much-ballyhooed Stimulus Bill, Congress ended the speculation. Buried in that 5,000+ page bill were five pages of legislation that allows employers to voluntarily give these paid leaves through March 31, 2021. The mandate to provide the leave, however, will end on December 31.

If an employer voluntarily provides paid leave to employees after December 31, as if the EPSLA and/or the EFMLEA were still in effect, then the federal government will provide tax credits/refunds to the employer just as it has done these last nine months. If an employer wants to take advantage of this continued federal subsidy of paid leaves, then it should keep the following points in mind:

- The 80-hour and 10-week leave banks created for eligible employees under the EPSLA and the EFMLEA have not been refreshed. Thus, if an employee has already exhausted his or her leave bank in 2020, then the employer cannot get federal subsidies for leave taken by the employee in the first quarter of 2021. Likewise, if the employee has exhausted the leave at a prior employer, then he or she does not get further leave rights at the second employer.
- An employer should still insist on documentation from the employee supporting the need for

leave. If audited by the IRS, the employer will need to establish that it followed all of the requirements of the EPSLA and EFMLEA, as if those two laws were still in effect. Thus, an employer should not get sloppy in going beyond the eligibility requirements of the law; nor should the employer pay above the caps with an expectation of reimbursement.

- Although perhaps not advisable for other reasons, an employer may pick and choose which employees or classes of employees will be entitled to the leave in the first quarter of 2021. Unlike the last nine months, a covered employer may decide that granting an employee paid leave in the first quarter is a hardship. That is, an employer may decide on a case-by-case basis whether to provide leave. Of course, employers and employees may continue to use vacation, sick, and PTO leave for COVID-related absences.

- If an employer has claimed tax credits for an employee’s leave, then it must follow the reinstatement-to-employment rules of the two acts.

- The tax credits/refunds are available for leaves taken through March 31; accordingly, if an employer pays in arrears, then it can claim tax credits for wages paid in April for work performed in March.

LOOKING AHEAD: The United States has long been criticized for not offering paid leave at the federal level. With the first crack in the wall being the FFCRA, there is speculation that the Biden Administration will push for legislation that would make permanent federal paid leaves of absence. It is too early to guess at whether or when that leave will come, or what employers would be covered. Nevertheless, the March 31 date could now serve as a deadline for yet another extension of paid leave related to COVID. Alternatively, going forward the FFCRA may have created a blueprint by which covered employers will front paid leave and then recover the funds on the back end from the federal government.

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