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COVID-19 Paid Leave in 2021: The Impact of New Federal Relief Bill on Employers

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"The future ain't what it used to be." – Yogi Berra

Governing can be a fickle affair.

The Families First Coronavirus Response Act of 2020 ("FFCRA"), the first paid-leave of absence law to be enacted on a nationwide level, became law in April and it's already gone, having expired as planned on December 31. The FFCRA mandated that employers with fewer than 500 employees, and certain governmental employers, provide emergency paid "sick leave" and paid expanded "family and medical leave" to eligible employees. The scourge of COVID-19, despite remarkably quick development of promising vaccines, continues unabated, leading many to believe that the FFCRA might have been extended to keep its modest paid-leave benefits in place a while longer. That did not occur. The federal government, however, hasn't abandoned the subject entirely: on December 27, 2020, President Donald Trump signed into law the "Consolidated Appropriations Act, 2021" (the "Relief Bill"), a small portion of which pertains to the FFCRA's paid-leave requirements. The Relief Bill allows employers, *on a voluntary basis*, to continue to provide such leave through March 31, 2021, in exchange for a payroll tax credit. What does this mean for employers?

1. FFCRA Leave Requirements Expired on December 31, 2020.

The emergency paid "sick leave" and expanded "family and medical leave" requirements of the FFCRA are no longer mandated as of December 31, 2020. (Employers, however, can still be sued for violating these provisions while they were in effect.) This means that, unless new (and at this point unexpected) legislation is passed, an employee is not entitled to FFCRA-leave after December 31, 2020, for COVID-19-related reasons.

With the end of the COVID-19 pandemic not yet in sight, most employers confront the same questions that they did before the enactment of the FFCRA (and, for that matter, after it took effect and after an employee's entitlement to FFCRA-leave had been exhausted). How should an employer handle an employee's request for leave when he or she has been diagnosed with COVID-19 or needs to stay home to care for a child whose school or childcare provider is not available due to the pandemic? We have previously addressed some of these topics, such as intermittent leave policies and teleworking. Employers may choose to modify paid and/or unpaid leave policies. Moreover, some states may impose applicable requirements, such as paid sick leave laws. Finally, employers may *choose* to provide paid leave and seek further FFCRA tax credits, which we address next.

2. Employers Can Take FFCRA Tax Credits Through March 31, 2021.

Although FFCRA leave is no longer required, the Relief Bill allows employers another calendar quarter of paid leave tax credits. Section 286 of the Relief Bill ("Extension of Credits for Paid Sick and Family Leave") amends certain provisions of the FFCRA to allow employers to take a payroll tax credit for providing emergency paid "sick leave" and paid expended "family and medical leave" into the first quarter of 2021 for two purposes: (1) to recover costs of providing required FFCRA leave in 2020, and (2) to *voluntarily* provide paid emergency "sick leave" and emergency "family and medical leave" through March 31, 2021. In other words: (1) if an employee took FFCRA-required leave in 2020, then the employer can take the appropriate tax credits in 2021; and (2) if an employer elects, voluntarily, to provide paid leave to an employee for an FFCRA-qualifying reason in Q1 of 2021, then it can take payroll tax credits for providing such paid leave.

As discussed above, voluntarily providing FFCRA paid leave may be a good option for employers seeking to help employees through difficult circumstances caused by COVID-19, as the pandemic shows no signs of subsiding yet. To seek such payroll tax credits, however, employers must acquaint themselves with the rules regarding FFCRA leave eligibility and keep accurate records.

3. Employers Should Ensure Accurate Recordkeeping of COVID-19 Related Leave.

If an employer chooses to voluntarily provide FFCRA leave between January 1, 2021, and March 31, 2021, and seek the tax credits, then it must keep accurate records and comply with limits on paid leave imposed by the FFCRA. The FFCRA provides specific limitations on paid leave (simply stated: up to 80 hours of emergency paid "sick leave" and up to twelve (12) weeks of paid emergency "family and medical leave"). Such limits apply to the available payroll tax credits. In other words, if an employee exhausted FFCRA paid leave in 2020, then there is no new "bank" of FFCRA paid leave for 2021, even if employers choose, voluntarily, to provide such leave. Employers must understand the amount of paid leave for which they can seek tax credits. Paid leave for which employers may not seek such credits should be separately tracked and administered in accordance with the employer's leave policies.

Finally, employers must consider the impact of **FFCRA**-leave that they provided last year on entitlements to the **Family and Medical Leave Act** ("FMLA") leave that may be available this year. Expanded "family and medical leave" under the FFCRA applied to all employers with under 500 employees and for specific FFCRA-qualifying reasons and counted against an employee's regular **FMLA** entitlement. As an example, an employee taking 4 weeks of expanded family and medical leave in 2020 in accordance with the FFCRA to care for a child engaged in virtual learning (as opposed to being at school) would have up to 8 weeks of *unpaid* FMLA leave remaining (if eligible) for leave corresponding with a serious health condition or another FMLA-qualifying purpose. The amount of leave eligibility also depends on which 12-month period the employer uses for the purpose of measuring the availability of FMLA-leave during a 12-month period (*i.e.*, calendar year, fiscal year, a 12-month period measured forward from use of FMLA leave, or a rolling 12-month period measured backward from use of FMLA leave).

The pandemic will end, but it's certainly not over yet. In the meantime, the expanded tax credits provided by the Relief Bill in 2021 may at least help employers and employees navigate another unsettling quarter of COVID-19.

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