

How Does the American Rescue Plan Change FFCRA Paid Leave Options, and Should Employers Pass on This Benefit to Their Employees?

Article By:

Lilian Doan Davis

Mary Kathryn Curry

Employer obligations to provide paid sick and family leave under the Families First Coronavirus Response Act (FFCRA) ended on December 31, 2020. On December 27, 2020, President Trump signed the Consolidated Appropriations Act of 2021 (CAA), extending the payroll tax credits available to employers who **voluntarily** decided to continue to provide FFCRA-type leave through March 31, 2021. Last week, President Biden signed the American Rescue Plan Act of 2021 (Rescue Plan). Among other things, the Rescue Plan extends the availability of the payroll tax credits to employers through September 30, 2021. Additionally, for those employers who opt to continue to provide FFCRA-type leave, the Rescue Plan makes several significant changes to how the FFCRA is to be implemented with regard to both Paid Sick Leave (two weeks/up to 80 hours of paid leave) and Emergency Family and Medical Leave (originally up to 10 weeks of paid Family and Medical Leave).

Changes to Paid Sick Leave

The Rescue Plan resets the 10-day/80-hour limit for Paid Sick Leave starting April 1, 2021. This means, if employees have previously exhausted their entitlement to Paid Sick Leave under the FFCRA, they now have another 10-days/80-hours for use.

The Rescue Plan also adds three additional qualifying reasons for Paid Sick Leave. These include:

- Obtaining a COVID-19 vaccine;
- Recovering from any illness or condition related to the COVID-19 vaccine; or
- Seeking or awaiting the results of a COVID-19 diagnosis or test if either the employee has been exposed to COVID-19 or the employer requested the test or diagnosis.

Changes to Emergency Family and Medical Leave

A major change is the Rescue Plan's elimination of the requirement that the first two weeks of Emergency Family and Medical Leave (EFML) be unpaid. Now, if an employee qualifies for EFML, they are eligible for a full 12 weeks of paid leave (assuming they have not previously used any EFML or other leave under the Family and Medical Leave Act (FMLA)). Consistently, the Revenue Plan increases the total cap for EFML from \$10,000 to \$12,000.

Another important change is the expansion of qualifying reasons to use EFML. Currently, employees can only use EFML if they need time off to care for a child whose school or daycare is closed due to COVID-19 related reasons. Under the Rescue Plan, however, EFML can be used for any of the qualifying reasons found under Paid Sick Leave. This means, if an employee qualifies for Paid Sick Leave and needs leave beyond the 10-day entitlement for Paid Sick Leave, the employee could take up to an additional 12 weeks of EFML (assuming they have not previously used any EFML or time off under the FMLA). In practical terms, after April 1, 2021, an employee could potentially take up to a total of 14 weeks of paid FFCRA leave.

Finally, the Rescue Plan contains non-discrimination language for both Paid Sick Leave and EFML. The penalties come in the form of losing the tax credit option. If an employer opts to voluntarily provide FFCRA leave and discriminates with respect to leave: (1) in favor of highly compensated employees; (2) in favor of full-time employees; or (3) on the basis of employment tenure, the employer will not be able to obtain tax credits for any leave paid under the FFCRA framework.

With this new benefit comes a big question for employers – ***whether to extend these FFCRA credits to employees?*** It is worth considering, given the benefit of providing paid time off to encourage employees to get vaccinated and to ensure the safety and health of their workforce by supporting COVID-related absences due to exposure and illness. (And being able to do so without such a financial hit to the business is a big plus).

What employers must be prepared for, however, is being ready to provide potentially 14 weeks of leave to employees. At this time, it is not clear whether employers can pick and choose what types of paid leave they will provide under the FFCRA; for example, some employers may want to offer the two weeks of Paid Sick Leave but not offer the 12-weeks of EFML. We know that failure to comply with any requirement of the Emergency Family and Medical Leave Expansion Act or the Emergency Paid Sick Leave Act disqualifies the employer from obtaining tax credits for leave paid under either Act. When that rule is coupled with the non-discrimination language, it appears an employer could arguably choose to provide Paid Sick Leave or Emergency Family and Medical Leave, or both. But in doing so, employers need to understand that they must follow the entirety of the provisions related to each leave option. This means, while employers can choose to provide only one type of leave, employers **cannot** change the rules; they cannot pick and choose the qualifying reasons for leave, or make other changes to how the leave should be applied.

The Rescue Plan's provisions related to the FFCRA become effective April 1, 2021. We anticipate the Department of Labor and/or Internal Revenue Service will issue additional guidance or FAQs to assist employers with some of these open questions, and we will continue to provide updates as we learn more.

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