



Insights: Alerts

No April Fools Here: April 1 Brings New Changes to Voluntarily Provided FFCRA Leave Allotments

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Please note: The below information may require updating, including additional clarification, as the COVID-19 pandemic continues to develop. Please monitor our main [COVID-19 Resource Center page](#) and/or your email for updates.

As we have written about [extensively](#), the Families First Coronavirus Response Act (“FFCRA”) passed in early 2020 created two paid leave entitlements that required certain employers to provide paid leave to covered employees between April 1 and December 31, 2020, for reasons specified in the Act. Those two leave entitlements – Emergency Paid Sick Leave (“EPSLA”) and Emergency Family and Medical Leave (“EFMLA”) – stopped being mandatory for covered employers (those with fewer than 500 employees) on December 31, 2020. However, the Consolidated Appropriations Act of 2021 (“CAA”), allowed that employers could still voluntarily provide EPSLA and EFMLA leave from January 1 to March 31, 2021. Employers who opted to continue providing the leave created by FFCRA remained eligible to claim the 100% refundable tax credit to offset the costs of providing employees with this paid leave.

Although the passage of the CAA did not make a lot of changes to the structure of the EPSLA and EFMLA leave provisions (other than making them voluntary), the same cannot be said of the recently passed American Rescue Plan Act of 2021 (“ARPA”). As has been true with almost all things COVID-19, the ARPA brings a number of changes to the COVID-19 related paid leave provisions that employers should be aware of. Additionally, there are components of the ARPA that will impact employee benefits. Our Alert on the impact on employee benefits can be found [here](#).

What is Staying the Same Under the ARPA Amendments to FFCRA?

From April 1 through September 30, 2021, employers providing the voluntary COVID-19 related paid leave should familiarize themselves with some new entitlements and update their administration of the leave to take into account the changes made by the ARPA. The good news is that not everything FFCRA-leave related is changing.

Indeed, there are a number of other details that remain consistent under the ARPA with past FFCRA-leave practices, including:

- **most importantly, providing this leave remains voluntary for covered employers;**

- covered employers are still those with fewer than 500 employees;
- employees must still meet particular eligibility requirements in order for employers to claim the tax credits;
- two different types of leave are available for employees under the Act – EPSLA and EFMLA; and,
- covered employers who voluntarily provide eligible employees with the paid leave provisions (in compliance with the requirements established by the mandatory FFCRA legislation) remain eligible to claim the 100% refundable tax credits from the IRS to offset the cost of such leave. However, employers who offer additional leave – over and above what is allotted in the FFCRA legislation and subsequent amendments – are not eligible to claim refundable tax credits for any additional leave they provide.

What Changes Can Employers Expect to FFCRA Leave Under the ARPA Amendments?

- **Completely new qualifying reasons to take FFCRA leave have been added.** Historically, the qualifying reasons for an employee to take EPSLA leave were limited to the employee: (1) being subject to a Federal, State, or local quarantine or isolation order related to COVID-19; (2) having been advised by a health care provider to self-quarantine due to concerns related to COVID-19; (3) experiencing symptoms of COVID-19 and are seeking medical diagnosis; (4) caring for an individual subject to a Federal, State, or local quarantine or isolation order related to COVID-19 or an individual who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; (5) providing care to the employee's child whose school or place of care was closed/whose child care provider is unavailable due to COVID-19 related reasons; or, (6) experiencing any other substantially similar condition as specified by the Secretary of Health and Human Services. However, as of April 1, 2021, employees will now be eligible to take leave for three additional covered reasons:
 - *attending a COVID-19 vaccination appointment;*
 - *recovering from injuries, disabilities, illnesses, or conditions related to receiving a COVID-19 vaccination; and/or,*
 - *for seeking a COVID-19 test or diagnosis or waiting for the results of such a test if the employer requested the test or the employee was exposed to COVID-19.*
- **The pool of available leave under the EPSLA is restocked to 80 hours.** Beginning April 1, 2021, the pool of available EPSLA leave for eligible employees is restocked up to 80 hours. Employees who exhausted their previously allotted 80 hours of EPSLA leave between April 2, 2020 and March 31, 2021 (under both the mandatory leave period between April 1 and December 31, 2020, and the voluntary leave period between January 1 and March 31, 2021), will be eligible for a new bank of available hours (assuming their employer is voluntarily providing them such leave). An employee's eligibility to use this new allotment of up to 80 hours requires the employer's ongoing voluntary participation in providing EPSLA leave.
- **EFMLA leave is no longer limited only to employees who are providing childcare for children whose school or place of care is closed for COVID-19 related reasons.** Previously, the only covered reason that an employee could take EFMLA leave was to care for the employee's child whose school or place of care was closed/whose child care provider is unavailable due to COVID-19 related reasons. However, based on the FFCRA amendments included in the ARPA, **all** of the covered reasons that an employee may take EPSLA leave (including the three new reasons discussed above) are now covered reasons for an employee to take EFMLA leave.

- **Employers must comply with a new anti-discrimination obligation to claim the refundable tax credits, in addition to the existing no retaliation provisions.** Employers will not be given the refundable tax credits “for any calendar quarter” if the employer “discriminates in favor of highly compensated employees (within the meaning of section 414(q)), full-time employees, or employees on the basis of employment tenure with such employer.” Accordingly, although providing the leave allotments is voluntary, employers may not discriminate based on these enumerated characteristics or provide different access to the leave allotments based on these characteristics, otherwise they risk losing their refundable tax credits.
- **Certain caps on the amount of paid leave available to employees have increased from those set in the original FFCRA legislation.** The mandatory cap on EFMLA under previous legislation was \$10,000 total per employee (\$200 per day). Now, under the ARPA amendments, the new maximum is \$12,000 in total (still capped at \$200 per day). Also of note, whether an employee receives 100% wages per day of EPSLA leave (capped at \$511 per day), or 2/3 pay, is still dependent on the reason the employee takes the leave. Just as it was prior to the ARPA amendments, employees are able to receive 100% of their daily wages (up to the cap) for their own quarantine or treatment of their own health issue (reasons 1-3 above), but are only eligible for up to 2/3 of their pay for providing care for another individual, providing child care for covered reasons, or for a reason substantially similar (reasons 4-6 above). Each of the newly identified reasons an employee may take EPSLA leave under an employer's voluntary program (reasons 7-9 above) are eligible for 100% of the employees daily pay (subject to the caps).
- **Certain governmental employers are now eligible for the refundable tax credits.** Under previous legislation and regulations, government employers were not eligible to claim the refundable tax credits for providing FFCRA-covered leave. However, under the ARPA amendments, certain governmental employees and non-profits (501c3 entities) are now eligible for the tax credits.

What Don't We Know about the ARPA Amendments Impact on FFCRA Leave?

Additionally, there are a number of areas where the text of the ARPA amendments to the FFCRA legislation leave unanswered questions. Notably, where FFCRA leave was originally created as a mandatory leave entitlement, the ARPA amendments position the voluntary FFCRA leave as more of an available tax credit. This shift from a mandatory leave entitlement to a voluntary tax credit – and the scope of the voluntary nature of the leave – is responsible for much of the ambiguity. Specifically, areas of ambiguity based on the ARPA amendments include (but are not limited to):

- **Whether employers may voluntarily provide only one of the two leave entitlements created by FFCRA.** Although the FFCRA leave provisions are unquestionably voluntary under the ARPA amendments, the ARPA amendments do not clarify whether employers must provide all FFCRA leave or no FFCRA leave, or, in the alternative, whether employers would be entitled to provide only one or the other leave allotment on a voluntary basis.
- **Whether employers may set their own lower thresholds for the amount of FFCRA leave they will voluntarily provide.** Similarly, it remains unclear whether employers may set their own thresholds for the amount of FFCRA leave that they will voluntarily provide, or whether they must provide the full amount of paid leave established by FFCRA. We know under existing DOL regulations that employers may not claim

tax credits for additional leave or pay in excess of the allotments created by the legislation. It remains unclear, however, whether employers may voluntarily opt to provide only a portion of the provided leave.

- **Whether the pool of available EFMLA leave is restocked as of April 1.** The text of the ARPA amendments explicitly restocked the available EPSLA leave allotment to up to 80 additional hours as of April 1. However, the legislation is silent as to whether the available EFMLA leave is also restocked up to a maximum of 10 additional weeks (above and beyond the up to 80 hours created by the EPSLA).
- **What impact does framing the EFMLA leave as a tax credit have on its relationship with the traditional FMLA?** Relatedly, the ARPA updates have created some ambiguity as to whether employers should count leave voluntarily provided to employees under the EFMLA against the employees entitlement to up to 12 weeks of leave under their regular FMLA obligations. Previous DOL regulations were clear that employees were only entitled to a total of 12-weeks leave under the FMLA and EFMLA combined during the 12-month period that the employers used to calculate traditional FMLA leave. However, given the nature of the ARPA amendments, there is a viable argument that this guidance will change if the DOL takes the position that Congress intended to restock an employee's allotment of both EPSLA and EFMLA leave beginning April 1, 2021.

Conclusion

Employers opting to voluntarily comply with the FFCRA-created leave options should update their leave programs to account for the new changes under the ARPA amendments. Unfortunately, until we receive updated guidance from the DOL, it will remain difficult to ascertain the impact of certain ARPA amendments to the EPSLA and EFMLA leave allotments. We had hoped the DOL might provide additional guidance before April 1, but as of the time of posting, it has not. If and when the Department issues any new guidance, we will issue updates as warranted. In the interim, it remains great news for covered employers who voluntarily provide this leave to their eligible employees that the refundable tax credits will continue at 100% through at least September 30, 2021. Employers with additional questions should reach out to the team at Kilpatrick or contact their employment law counsel with specific questions. As with all things COVID-19 related, we will continue to monitor the situation and update as new information becomes available.

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