

THE DEEP DIVE

Exclusive Compliance Insights from MZQ Consulting

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DEEP DIVE: PAID LEAVE RELATED TO COVID-19

Over the course of the COVID-19 pandemic, Congress has passed three bills that provide or enhance existing federal leave laws. These include the Families First Coronavirus Response Act (FFCRA), the Coronavirus Aid, Relief, and Economic Security Act (CARES), and the American Rescue Plan Act of 2021 (ARPA). These special leave provisions are intended to both help minimize the economic burden employees face and keep as many citizens as possible safe during the pandemic. Unfortunately, employers are now left with a patchwork of somewhat confusing rules. We need to review the leave provisions of each Act to understand where things currently stand.


Under the FFCRA...

The FFCRA granted two types of leave: Emergency Paid Sick Leave (EPSL) and Emergency Family Medical Leave. Emergency Paid Sick Leave covered employers with fewer than 500 employees and mandated that those employers provide employees unable to work or telework due to reasons related to COVID-19 with two weeks of paid sick leave in 2020.

The sick leave required by FFCRA needed to be granted in addition to any sick leave the employer already provided. The leave did not carry over to 2021. Employers could not force anyone to take this leave instead of other accrued leave, so qualified individuals likely used this paid sick leave first.

Under these rules, any employee quarantined, self-isolated, or seeking care and diagnosis for COVID-19 was entitled to be reimbursed 100% of their pay for up to 80 hours of service, subject to a \$511 per day (\$5,110 aggregate) maximum. For all other circumstances (including to care for a family member under quarantine or a child due to a school closure), 2/3 of pay was reimbursable up to \$200 per day (\$2,000 aggregate). Part-time employees were also eligible for emergency paid sick leave, with the applicable limits prorated based on the individual's regularly scheduled hours. To facilitate this program, subject employers paid the special leave directly to employees, and were then reimbursed through a 100% refundable tax credit.

The FFCRA also expanded the Family Medical Leave Act (FMLA) for employers with fewer than 500 employees by adding a new qualifying event for any employee who had been employed for at least 30 days. Specifically, this new FMLA provision applied to any employee who could not work or telework due to a need to care for a child(ren) under age 18 who could not attend school or childcare due to coronavirus-related closures. In addition to providing 12 weeks of protected FMLA leave for these individuals, the law also provided for a portion of that leave to be paid. Under the FFCRA rules, the first ten days of leave could be unpaid, or an



employee could use other accrued leave during that period. As a matter of practice, employees were generally paid for this time under the paid sick leave provisions discussed above. After the first ten days, the rules provided for paid FMLA leave at a rate equal to 2/3 of the employee's regular rate of pay, up to a maximum benefit of \$200 per day (\$10,000 in aggregate leave payments). These expenditures were reimbursable in the same manner as emergency sick leave—through refundable payroll tax credits.

Under the CARES Act...

The mandatory paid leave provisions of FFCRA technically expired on December 31, 2020, but the CARES Act provided employers with the choice of allowing FFCRA-like paid sick leave through March 31, 2021. The passage of ARPA, which is discussed in the next section, further extended employer tax credit reimbursements for FFCRA-like paid leave through September 30, 2021. The key difference between FFCRA and the CARES Act for this purpose is that paid leave under the FFCRA was mandatory, whereas providing federally-financed paid leave under the CARES Act is **optional** to employers.

And Now Under ARPA...

There are some important points to be aware of if an employer chooses to offer this leave now:

1. Employers had the option to restart the clock on April 1, 2021, relative to Emergency Paid Sick Leave. If an employer elects to adopt this rule, even if an employee used FFCRA paid leave before April 1, 2021, the employee is entitled to use up to ten days of paid sick leave again beginning April 1, 2021. This leave will still be reimbursable to employers through tax credits. The maximum daily reimbursement if the employee is quarantined, self-isolated, or seeking care and diagnosis for COVID-19 during the EPSL period is generally the lesser of: (a) the employee's rate of pay, or (b) \$511/day.
2. If a leave is to care for another individual (including someone in quarantine or a child unable to attend school), the maximum daily benefit remains the lesser of: (a) 2/3 of the employee's rate of pay, or (b) \$200/day. These same maximums apply in all scenarios for the emergency FMLA leave.
3. Employers may claim a tax credit for providing up to twelve weeks of paid emergency FMLA leave. The leave is available once per year consistent with the FMLA rules. The previously applicable two-week unpaid waiting period has been removed from this provision—so the maximum reimbursement is now \$12,000.
4. Practically, employers wishing to maximize the paid leave benefit will want to apply ten days of EPSL first relative to the events that qualify for 100% reimbursement before moving to the emergency FMLA program.

Additional Qualifying Reasons for Leave

Before to April 1, 2021, an employee could only qualify for FFCRA paid leave based on the six reasons below:

1. Employee was subject to a quarantine or isolation order related to COVID-19.
2. Employee was advised to self-quarantine by a health care provider.
3. Employee was experiencing COVID-19 symptoms and obtaining a diagnosis.
4. Employee was taking care of an individual subject to quarantine or self-quarantining.
5. Employee was caring for a child whose school or place of care was closed because of COVID-19.
6. Employee was experiencing any other substantially similar condition specified by Health and Human Services.

Effective April 1, 2021, employers may provide FFCRA-like paid leave for three more reasons:

1. Employee awaiting results of a diagnostic test or diagnosis of COVID-19 after being exposed to COVID-19 or at the request of their employer.
2. Employee is obtaining a COVID-19 vaccination.
3. Employee is recovering from an injury, disability, or illness related to a COVID-19 vaccine.

An employer who decides to provide paid leave should be aware that there are new non-discrimination rules regarding this leave. The rules indicate that employers may not discriminate in favor of highly compensated employees, in favor of full-time employees, or based on tenure with the employer. The safest course of action is to apply these rules in a uniform and non-discriminatory manner. Tax credits are not available to employers who discriminate.

MZQ Consulting will continue to monitor developments and provide any relevant updates as additional information is released.

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