

## The American Rescue Plan Keeps the FFCRA Voluntary but Expands Paid Leave

April 2, 2021

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On March 11, 2021, President Biden signed [H.R. 1319](#), the American Rescue Plan Act of 2021 (“Act”), into law. Among other things, the \$1.9 trillion stimulus package extends and enhances the Families First Coronavirus Response Act (“FFCRA”) tax credits for employers that opt to provide FFCRA paid leave benefits, expands the reasons for which eligible employees may qualify for emergency paid sick leave (“EPSL”), and grants additional paid sick and emergency paid family and medical leave (“EPFML”) time. However, the EPSL and the EPFML benefits remain *voluntary* programs. A covered employer—if it so chooses—may continue the benefits for eligible employees until September 30, 2021, under the terms discussed below, or it can decide not to do so.

### Paid Leave Benefits Under the Original FFCRA

#### *EPSL*

As we previously [reported](#), the FFCRA ([H.R. 6201](#)), which expired on December 31, 2020, but was extended by the Consolidated Appropriations Act of 2021 on a voluntary basis through March 31, 2021, generally required “covered employers” (i.e., private employers with fewer than 500 employees, and all public employers) to provide up to 80 hours of EPSL at (i) the employee’s regular rate of pay, up to a maximum of \$511 per day and \$5,110 in the aggregate, where the employee was unable to work because the employee had been quarantined (pursuant to a federal, state, or local government order or on the advice of a health care provider) and/or experienced COVID-19 symptoms and was seeking a medical diagnosis, or (ii) two-thirds the employee’s regular rate of pay, up to a maximum of \$200 per day and \$2,000 in the aggregate, where the employee was unable to work due to a bona fide need to care for an individual subject to quarantine (pursuant to a federal, state, or local government order or on the advice of a health care provider), or was caring for a child (under 18 years of age) whose school or care provider was closed or unavailable for reasons related to COVID-19, or the employee was experiencing any other “substantially similar condition” as specified by the Secretary of Health and Human Services in consultation with the Secretary of the

Treasury and the Secretary of Labor. To be eligible for EPSL, the employee must have been unable to work onsite or remotely.

### *EPFML*

The now-expired FFCRA also provided up to two weeks of job-protected but unpaid EPFML followed by an additional 10 weeks of paid EPFML benefits at two-thirds the employee's regular rate of pay, up to a maximum of \$200 per day (or \$10,000 in the aggregate), where the employee was employed by a covered employer for at least 30 days and was unable to work or telework because of a bona fide need to care for a child whose school or child care provider was closed or unavailable due to the COVID-19 pandemic.

### *Tax Credit*

The FFCRA also granted covered employers a tax credit equal to 100 percent of the amount paid to employees for EPSL and/or EPFML benefits. The tax credits were applied against the employer's total portion of Social Security taxes for the period (along with certain health plan expenses), and were refundable to the extent the credits exceeded the total Social Security taxes (and allowable health plan costs) the employer owed. The Internal Revenue Service ("IRS") permitted employers simply to retain the amount of the credit due them instead of paying the money into the IRS and waiting for a refund.

### **Extension of Tax Credits for Voluntary Paid Leave Benefits**

Under the Act, employers that *voluntarily* choose to continue providing FFCRA leave benefits through September 30, 2021, are entitled to quarterly tax credits as described below, provided that the employer complies with each of the following new requirements:

- Employers must provide EPFML for all of the covered reasons under the EPSL, not just for care of a child whose school is closed. However, there is still a cap at \$200/day for EPFML.
- Employers must make available EPSL and EPFML benefits for the following *additional* reasons:
  - To obtain vaccination related to COVID-19;
  - To recover from any injury or illness suffered as a result of receiving the vaccine; or
  - To seek or await the results of a COVID-19-related diagnostic test or medical diagnosis, provided the employee has been exposed to COVID-

19 or the employer has requested that the employee obtain a diagnostic test or medical diagnosis.<sup>1</sup>

- As of April 1, 2021, employers must allow eligible employees to take up to 80 hours of EPSL *regardless* of whether any EPSL was previously taken. (Under the prior extension of the FFCRA, employees could use only the sick and family leave benefits that were still available to them, if any, under the original FFCRA.) This essentially resets an employee's EPSL balance.
- Employers must provide the first 10 days of EPFML as paid leave (the FFCRA had provided for only unpaid leave during the initial 10-day period but allowed employees to substitute accrued leave or EPSL for that unpaid leave time). Thus, employers must provide up to a maximum of \$12,000 of EPFML benefits per employee (adding the 10 additional days at \$200/day to the original 10-week benefit).
- Employers now must provide up to a maximum of \$12,000 of EPFML benefits per employee. However, employers also are entitled to tax credits of that amount. (The maximum under the original FFCRA was \$10,000 per employee.)
- Employees who use both EPSL and EPFML must be allowed to take up to 14 weeks of total paid leave (two weeks of EPSL and 12 weeks of EPFML).<sup>2</sup>
  - In practice, the first two weeks would be paid at a cap of either \$511/day or \$200/day depending on the reason for the leave.<sup>3</sup> The next 12 weeks would be paid at a cap of \$200/day, regardless of the reason for leave.
- In addition to complying with the anti-discrimination provisions under the FFCRA, employers must not favor highly compensated or full-time employees or discriminate on the basis of tenure with respect to the grant or denial of EPSL or EPFML. Employers that violate this provision of the Act will jeopardize their entitlement to the tax credits.

### **Note: COBRA Subsidies**

Among the many employment-related provisions of the Act is one that requires employers to provide, on a tax-free basis, a subsidy to involuntarily terminated employees and their qualified beneficiaries to pay 100 percent of the COBRA continuation premium for group health plan coverage. Please see our [blog post](#) for more information.

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<sup>1</sup> Leave for these reasons under the EPSL is paid at the employee's regular rate of pay, up to a maximum of \$511 per day.

<sup>2</sup> Federal workers must receive up to 15 weeks of EPSL and EPFML benefits.

<sup>3</sup> See section titled *EPSL* above.

## What Employers Should Do Now

- Covered employers should determine whether providing EPSL and EPFML benefits until September 30, 2021, is a smart decision for their company by assessing the potential impact on their business, the needs of their workforce, and the severity of the pandemic in their area(s) of operation.
- Employers that choose to continue (or start) offering EPSL and EPFML benefits should update their FFCRA leave forms and related policies to ensure compliance with the new requirements imposed by the Act, including expanded uses of EPSL and payment for EPFML.
- Employers covered by relevant federal, state, and/or local leave laws, including any recently enacted emergency leave laws, should evaluate how, if at all, those laws interact with paid leave benefits provided under the Act.
  - Of particular note is whether any EPFML taken to care for a child whose school or place of care is closed, or whose child care provider is unavailable, due to COVID-19-related reasons reduces an employee's existing Family and Medical Leave Act ("FMLA") entitlement for the applicable FMLA year. While the Act extends the tax credit program, it does not explicitly incorporate the now-expired rule under the FFCRA that any amount of EPFML runs concurrently with an employee's allotment of FMLA leave. Accordingly, employers should consult with counsel about the risks of providing EPFML and review practices and procedures for implementation of such benefits.
- Finally, employers should continue to monitor developments (and Epstein Becker Green's [Coronavirus Resource Center](#)) with respect to any new regulations, guidance, or other matters related to the Act.

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