

Insights: Legal Alerts

The Future of FFCRA: 2021 Brings a Shift from Mandatory to Voluntary Leave through March

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After months of negotiations, on December 22, 2020, Congress overwhelmingly passed a bi-partisan COVID-19 relief package – the Consolidated Appropriations Act, 2021 (“CAA 2021”) – that includes approximately 900 billion dollars in various pandemic-related relief measures. President Trump signed the legislation on Sunday, December 27. While encompassing nearly 5600 pages of text, very little of the statute focuses on the closely-watched leave entitlements in the Families First Coronavirus Response Act (“FFCRA”) created by Congress earlier this year. These leave entitlements, which became effective on April 1, 2020, are still scheduled to expire on Thursday, December 31, 2020.

As we discussed at length in previous Legal Alerts (available [here](#)), the FFCRA created two separate paid leave provisions related to COVID-19 – the Emergency Paid Sick Leave Act (“EPSLA”) and the Emergency Family and Medical Leave Expansion Act (“EFMLEA”) – both of which created certain mandatory leave obligations for employers with fewer than 500 employees. Prior to passing the CAA 2021, whether Congress would extend these leave entitlements had remained unclear as the year-end sunset deadline approached, vaccines began receiving Emergency Use Authorizations, and COVID-19 infection numbers continued rising nationwide.

Despite the climbing COVID-19 infection rates, Congress did not extend the mandatory FFCRA leave obligations past the original statutory period, ending December 31, 2020. Based on the text of the CAA 2021, the mandatory requirement that employers with fewer than 500 employees provide EPSLA and/or EFMLEA leave is still set to expire this week. That said, although Congress is allowing one door to shut (mandatory FFCRA leave), it also opened a different window (voluntary FFCRA leave), which allows employers to provide the previously created FFCRA leave entitlements to covered and eligible employees on a completely voluntary basis. And, as a benefit for employers who chose to provide such FFCRA leave voluntarily, Congress has extended the refundable tax credits available to employers to recoup the costs of FFCRA leave through March 31, 2021.

To be clear, beginning January 1, 2021, employers previously covered by the FFCRA will no longer be required to provide the EPSLA leave or the EFMLEA leave under the FFCRA legislation to eligible employees for covered reasons. However, should a covered employer voluntarily provide FFCRA leave, the employer will still be able to claim the 100% refundable tax credit outlined in the original legislation. Although the DOL has yet to provide additional guidance on how employers should proceed if they continue to offer FFCRA leave under the voluntary framework, such leave will presumably follow the same guidelines established by the DOL in the applicable

FFCRA regulations and guidance (unless or until the DOL issues updated guidance in the New Year).

Notably, the applicable COVID-19 guidance from the [CDC](#) and [EEOC](#) (among other agencies) continues to apply, and employers are still required to reasonably accommodate employees entitled to such accommodations under the ADA, and are encouraged to adopt flexible leave policies for employees facing COVID-19 related issues, including those who may have been exposed to COVID, or who have tested positive. Available guidance suggests that flexible leave policies will help employers provide a safe workspace by preventing further spread amongst their workforce when one employee tests positive. Accordingly, all employers are still encouraged to follow available COVID-19 guidance, including social distancing measures and facial covering recommendations, stay abreast of CDC and other federal, state, and local guidance and requirements, and implement the applicable best practices for their industry and worksite to prevent the further spread of COVID-19.

As with all things COVID-19 related, we can expect continued updates and changes in the coming weeks and months. We will continue to monitor the situation and update as necessary.

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