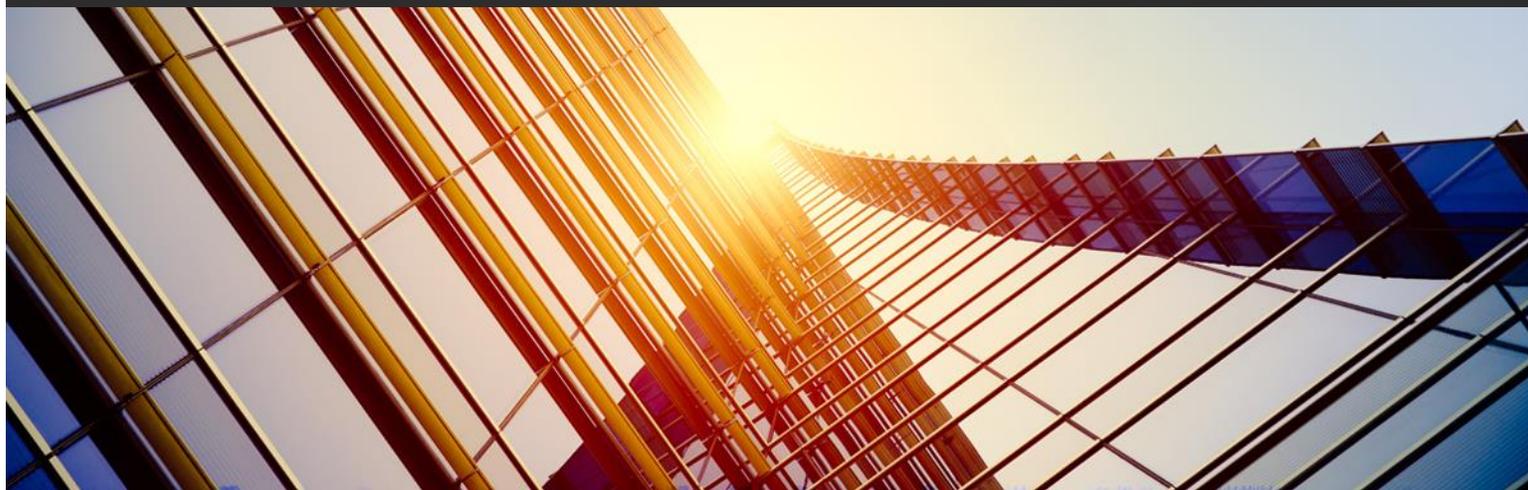


**Alert | Health Emergency Preparedness Task Force:
Business Continuity Amid COVID-19**



December 2020

FFCRA Leaves Sunset, But Employer Obligations and Considerations Continue

As the dust settles on the tumultuous journey of the final 2020 COVID-19 relief package, it is now clear that as employers with fewer than 500 employees move into 2021, they will no longer be *legally required* to provide employees with leaves of absence under the two leave laws Congress passed last March as part of the Families First Coronavirus Response Act (FFCRA). Since April 1, both of these laws, the Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family and Medical Leave Expansion Act (EFMLEA) have provided employees with paid and job-protected leaves of absence for qualifying COVID-19-related reasons, while providing employers with the ability to receive tax credits against the costs of these benefits. Both were enacted with Dec. 31, 2020, sunset provisions. Although Congress could still conceivably do so in later legislation, it has not extended FFCRA's leave entitlements into 2021. This does not, however, end the story for employers who have been obligated in 2020 to provide FFCRA leave.

No More Federal Leave Requirement, but Voluntary Option to Extend Through March 31, 2021

As of Jan. 1, 2021, employers no longer have any legal duty under either the EPSLA or the EFMLEA to provide FFCRA leave to employees. The Consolidated Appropriations Act, 2021 (H.R. 133) has, however, extended the right of covered employers to voluntarily provide such leave through March 31, 2021, and continue to take tax credits for doing so. Accordingly, although no longer required by law to do so, covered employers may voluntarily decide to allow their eligible employees to ask for and receive leave benefits under either or both the EPSLA or the EFMLEA and take the available tax credits. Notably, despite the tax

credit extension, there has been no increase in the amount of leave allowed to any employee, there have been no changes to the eligibility requirements, and employers remain subject to the same record-keeping requirements to justify the taking of any tax credit. Nevertheless, for any employer wishing to continue to extend FFCRA leave benefits to its employees, and prepared to continue administering and keeping required records establishing eligibility for and correct payment of those benefits, there is the option to continue for the first calendar quarter of 2021.

Continued Record-Keeping Obligations Regardless of the Option

The extension of the tax credit beyond the sunset of the FFCRA leave entitlements themselves underscores an issue to be considered by every employer once covered by the FFCRA, regardless of whether they decide to voluntarily continue to extend FFCRA leave benefits to eligible employees for the first quarter of 2021. That issue is whether adequate records have been kept justifying any tax credits that have been taken. FFCRA regulations have, from their inception, imposed on employers a four-year record-keeping obligation notwithstanding that the FFCRA leave rights themselves have always been set to sunset on the last day of 2020. This portends the possibility of regulatory audit through at least the end of 2024. Justifying tax credits requires employers to be able to prove through written records that, among other things:

- Individual employees had leave benefits available to them at the time(s) they were given.
- Employees' individual circumstances established eligibility for the FFCRA leave benefit requested and taken under one of the six qualifying reasons for leave under the EPSLA or for the COVID-19-related child care reason for leave under EFMLEA.
- FFCRA leave benefits were properly calculated for the correct periods of time at the employee's correct pay rate and in accordance with the correct level of benefit (i.e., at full pay or 2/3 of pay).

Given the substantial stresses and dizzying pace of change wrought by the pandemic on FFCRA-covered employers throughout 2020, even those who proactively established policies, procedures and systems aimed at gathering and keeping FFCRA-compliant records may have fallen short. Accordingly, regardless of any choice now made either to voluntarily extend FFCRA leave benefits into 2021 or to modify or dismantle such policies and processes, all employers that have been covered by FFCRA may be well-served by assessing the quality of their FFCRA records before institutional memories fade and sources of relevant information are lost.

State/Local COVID-19 Leave Laws May Still Apply

Finally, although FFCRA leaves may be gone for those employers who choose not to extend them, those employers with employees in state and local jurisdictions that have passed their own COVID-19 leave statutes and ordinances may remain obligated to provide COVID-19 leave in 2021 to at least those employees living or working in those places. In addition, it is possible, now that Congress has allowed FFCRA leave rights to sunset, that more state and local jurisdictions may pass their own COVID-19 leave laws. Among the current patchwork of state and local COVID-19 leave laws, there are currently various answers as well as ongoing legal developments aimed at answering, whether, to whom, and for how long COVID-19 leave rights will apply. As of the date of this GT Alert:

- Some paid COVID-19 leave legislation is set to expire either on Dec. 31 or at the same time that the FFCRA expires (e.g., California), but some legislatures have already begun extending into 2021 (e.g., City of Sacramento, CA; San Jose, CA; unincorporated areas in San Mateo County, CA).
- Some paid COVID-19 leave legislation is set to expire on Dec. 31 but can be extended as long as the legislature takes the necessary action to extend (e.g., unincorporated areas in Los Angeles County, CA; Oakland, CA).
- Some paid COVID-19 leave legislation has no set expiration date, but continuation is based on periodic reports as to the effectiveness of and continued need for the benefit (e.g., Long Beach, CA).
- Some paid COVID-19 leave legislation will expire when the jurisdiction's state of emergency ends (or a short period of time thereafter) (e.g., District of Columbia, Pittsburgh, PA)
- Some legislation includes an ongoing entitlement to paid leave in the event of any qualifying public health emergency (e.g., Colorado)

Conclusion

Even as Congress has determined that FFCRA leave entitlements will sunset, employer considerations around the need for COVID-19 leaves of absence, and how to best deal with employees who cannot work for COVID-19-related reasons, will surely continue well into 2021. So too will FFCRA record-keeping obligations continue through at least 2024. Every employer must assess and consider these issues and obligations, and whether and/or how they will affect their policies, practices, and employee relations strategies going forward, according to their own circumstances. As ever, and despite the end of FFCRA leave, employers must remain vigilant in 2021.

For more information and updates on the developing situation, visit [GT's Health Emergency Preparedness Task Force: Coronavirus Disease 2019](#) and [Business Continuity Amid COVID-19](#) page.

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