

HRW CLIENT ALERT

March 31
2021

What Employers Need to Know About the FFCRA Extensions in the American Rescue Plan Act of 2021

The American Rescue Plan Act of 2021 (ARPA) was signed into law on March 11, 2021 and contains important changes and expansions related to the two paid leave options provided under the Families First Coronavirus Response Act (FFCRA) – Emergency Paid Sick Leave (EPSL) and Emergency Family and Medical Leave (E-FMLA). An employer’s legal obligation to provide EPSL and E-FMLA expired on December 31, 2020; however, employers have the option to *voluntarily* extend these benefits, and to take a tax credit for benefits provided, under certain conditions. It is important for employers to know what the new requirements are in case they choose to offer these options in the coming months.

What is the New Sunset Date for Offering Leave Under the Families First Coronavirus Response Act (FFCRA)?

The new expiration date for offering paid sick and paid family leave is September 30, 2021. Unless a new law is signed extending the expiration date, employees’ ability to take paid FFCRA leave for reasons related to COVID-19, if offered by their employers, will run out. Employers should note that employees may have a continued right to leave for certain COVID-19 related purposes under other federal and state laws and employer policies.

What are the Expanded Qualifying Reasons for Leave Under the ARPA?

In addition to the reasons articulated in the FFCRA, employees can now take Emergency Paid Sick Leave or Emergency Family Medical Leave for an employee to:

- receive a vaccination;
- recover from any injury, illness, or condition related to the vaccination; or
- to seek a medical diagnosis or test for COVID-19, either voluntarily or because the employer has requested such a test.

EPSL Clock Reset. As of April 1, 2021, the 10-day limit on how much emergency paid sick leave an employee can take resets. Thus, employees who reached the maximum paid sick time prior to April 1 can take an additional 10 days.

E-FMLA Expansion. ARPA significantly expands the reasons under FFCRA for which an employee

can take E-FMLA. Previously, employees could only take paid family leave to care for their child whose school or place of care is closed or whose childcare provider is unavailable due to COVID-19. As of April 1, 2021, tax credits are available to employers if an employee takes E-FMLA for any of the reasons set forth in the FFCRA, including all of the reasons qualifying for EPSL as well as the new reasons added by the ARPA.

Elimination of the E-FMLA Two-Week Waiting Period. The ARPA also eliminates the two-week waiting period in which employees would not be paid for taking E-FMLA. The maximum covered wages has also been increased to \$12,000 from \$10,000.

What Are All of the Qualifying Reasons for Using EPSL and E-FMLA?

As of April 1, employees can take EPSL and E-FMLA leave for the same qualifying reasons as follows:

1. When subject to a federal, state or local quarantine or isolation order related to COVID-19.
2. When advised by a healthcare provider to self-quarantine due to concerns related to COVID-19.
3. When experiencing COVID-19 symptoms and seeking a medical diagnosis.
4. When seeking or awaiting the results of a diagnostic test, or a medical diagnosis, due to exposure to COVID-19 or because the employer has requested the employee obtain the test or diagnosis.
5. When obtaining COVID-19 vaccination or recovering from any injury, disability, illness, or condition related to the vaccination.
6. When taking care of an individual who is (a) subject to a Federal, State, or local quarantine or isolation order; or (b) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
7. When caring for a child/children whose school or place of care is closed, or whose childcare provider is unavailable due to COVID-19.

How Are These Changes Applied in Practice?

- Since the ARPA expands E-FMLA to cover all reasons in the FFCRA, including the new reasons, the amount of leave an employee can take is now a total of 14 weeks. An employee can take up to ten days of EPSL and up to 12 weeks of E-FMLA.
- An employee is eligible for EPSL for reasons 1-5 at their regular rate of pay, up to \$511/day; and for reasons 6-7 at a limit of 2/3 their regular rate, capped at \$200/day.
- An employee remains eligible for E-FMLA at 2/3 their regular rate of pay, up to \$200 per day for all of the qualifying reasons.
- Employers and employees will want to exhaust EPSL first given its higher rate of pay and tax credit, except when taken to care for others (reasons 6 and 7).
- While the EPSL resets on April 1, the ARPA does not contain any provisions that reset paid family leave. Therefore, this type of leave will reset per individual employer FMLA benefit year clocks.

What is the Non-Discrimination Requirement?

ARPA now includes a 'Non-Discrimination Requirement' for granting both EPSL and E-FMLA. This provision prohibits employers from discriminating in favor of highly compensated employees, full time employees, and employees based on their tenure or seniority. The term "highly compensated employee" is defined the same as under Section 414(q)(1) of the Internal Revenue Code, and includes employees who was a 5% owner at any time during the year or preceding year or employees who had compensation in excess of \$130,000, adjusted for inflation from the statutory figure of \$80,000.

Employers cannot make EPSL or E-FFMLA available based on these categories. An employer who discriminates in favor of these categories in determining leave availability will not be entitled to the applicable tax credit. The ARPA does not expressly prohibit differing treatment based on other reasons (for example, whether the employee is an essential worker), but employers should proceed with caution, since voluntarily extending FFCRA leave benefits to certain workers, but not to others, could raise the specter of discrimination based on other protected categories (gender, race, etc.) or retaliation.

Are There Any Additional Provisions Employers Should Know About?

- The Employee Retention Credit end date has been extended to December 31, 2021.
- The ARPA also contains a 6-month COBRA subsidy provision where employers pay COBRA premiums and get reimbursed via a quarterly tax credit. More information on this provision can be found in the linked client alert: [New COVID Stimulus Package Contains 6-Month COBRA Subsidy: Employers Pay, Receive Tax Credit.](#)

For Questions/Compliance Assistance

If you have any questions about the new FFCRA changes and its potential impact on your business or organization, please contact:

- Kathleen Berney (kberney@hrwlawyers.com / 617-348-4335); or
- Any member of the [HRW Team](#) to discuss your particular situation.