

CLIENT ALERTS

It's a new year and a new FFCRA: Understanding the options and obligations under the FFCRA in 2021

1.7.2021

10, 9, 8, 7, 6, 5, 4, 3, 2, 1 – Happy New Year!! When the clock struck midnight on December 31st, the Families First Coronavirus Response Act (FFCRA), including the benefits provided under the Emergency Paid Sick Leave Act (“EPSLA”) and the Emergency FMLA Expansion Act (“EFMLEA”), automatically expired.

However, under the new federal stimulus bill passed in late December 2020, employers were afforded the option to continue to receive a tax credit for paid leave provided under the FFCRA until March 31, 2021. Although in theory this sounds simple, employers are still left with many questions. This Client Alert is intended to address some of those FAQs.

Q. Can I still provide the FFCRA in 2021?

A. There is no longer any requirement to provide paid leave under the FFCRA. However, if your company was previously covered by the FFCRA (meaning your organization had less than 500 employees), you can continue to receive tax credits for any paid leave voluntarily provided under the FFCRA through March 31, 2021.

If an employer chooses to voluntarily provide FFCRA leave between January 1, 2021, and March 31, 2021, and seek the tax credits, then it must keep accurate records and comply with limits on paid leave imposed by the FFCRA.

Q. What is the amount of the tax credits available to employers?

A. Employers will follow the same limits provided by the original FFCRA. Specifically, depending on the reason for the leave, the EPSLA provides for 80 hours based upon the employee's regular rate of pay (capped at \$511 per day) or 2/3 of the regular rate of pay (capped at \$200 per day). The EFMLEA provides for twelve

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weeks of leave under the EFMLEA with the first two weeks being unpaid and the remaining 10 weeks being paid on the rate of 2/3 of regular rate.

An employer can always agree to provide additional compensation in excess of the 2/3 of the regular rate but will not be entitled to a tax credit for any monies above 2/3 of the regular rate.

Q. Is the employee entitled to a new bank of 80 hours under the Emergency Paid Sick Leave portion under the FFCRA?

A. No, this does not reset the clock. If the employee already exhausted their EPSL time, that employee is not eligible for additional time (and the company will not be entitled to a tax credit if it pays for additional time).

Q. Is the employee entitled to a new bank of leave time under the EMLEA portion under the FFCRA?

A. Likewise, additional time is not allowed under the EFMLEA if a rolling 12-month period is used and the employee already used the 12 weeks of leave. However, if your company uses a calendar year for determining FMLA entitlement, then an employee may be entitled to additional time under the FMLA but not necessarily paid time off under the EMFLEA if the 12-week allotment has been exhausted.

Q. Can a company agree to provide time under the EPLSA portion but not the EFMLEA portion?

A. Yes, continuation of benefits under the Act is permissible and employers may choose to only provide coverage under the EEPLSA, the EFMLEA or both.

Q. What happens if our company does not choose to continue to provide the FFCRA?

A. Employers that do not take advantage of the tax benefits under the FFCRA will revert to the Company's current leave policies in determining whether time off will be provided on a paid or unpaid basis. In so doing, employers must be certain to comply with the Michigan Paid Medical Leave Act which requires covered employers to provide 40 hours of paid leave to eligible employees, or follow other applicable state law.

Q. How does our organization decide whether the FFCRA should be provided?

A. There is no one-size-fits-all answer to this question. Instead, your company should evaluate its ability to properly staff operations, its telework capabilities, COVID-19 exposure risks, the feasibility as to administration, and all of the others things considered when the FFCRA leave was mandated.

Q. Since the provision of FFCRA time off is permissive, can I provide the FFCRA benefits to only a portion of my workforce?

A. Providing the leave to only a segment of the workforce or on an ad hoc basis may lead to claims of discrimination if it perceived that the provision is based upon gender, familial status, age, disability or any other protected class. And there may be other considerations such as complying with company

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policies or a collective bargaining agreement.

Q. Is there any current guidance issued by any governmental agency regarding the provision of FFCRA under the new federal stimulus act?

A. On December 31, 2020, the U.S. Department of Labor's Wage and Hour Division issued additional guidance to provide information to workers and employers about protections and relief offered by the FFCRA. The new guidance, in the form of Frequently Asked Questions addresses whether workers who did not use their leave entitlement under the FFCRA in 2020 may use such leave after December 31, 2020.

The FAQ also explains how WHD will maintain its enforcement authority over employers' leave responsibilities while the FFCRA's paid leave requirements were in effect, even after these leave entitlements have expired.

This Alert is intended to provide general information regarding frequently asked questions. These are complex issues of employment law as well as raises significant tax issues. You should consult your Butzel attorney as to how these issues impact your specific company.

Rebecca Davies

313.225.7028

davies@butzel.com