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New Life to the FFCRA: Understanding the Options and Obligations under the FFCRA After the Passage of the American Rescue Plan Act of 2021

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The Families First Coronavirus Response Act (FFCRA) was initially set to expire on December 31, 2020. However, as discussed in Butzel Long's prior Client Alert, employers were afforded the option to continue to receive tax credit for paid leave provided under the FFCRA until March 31, 2021. This extension was provided under the Consolidated Appropriations Act of 2021 and now appears to be the first of possibly many voluntary extensions of the FFCRA.

The American Rescue Plan Act of 2021, signed by President Biden on March 11, 2021, once again gave covered employers the right to voluntarily decide whether to continue to provide "qualified" leave, including the benefits provided under the Emergency Paid Sick Leave Act ("EPSLA") and the emergency FMLA Expansion Act ("EFMLEA"), and continue to receive a tax credit for such wages until September 30, 2021.

Unlike the prior extension under the Consolidated Appropriations Act of 2021, the most recent extension effects some of the substantive rights. Given these changes, 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 after March 31, 2021?

A. There are no longer any mandatory requirements 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 September 30, 2021.

If an employer chooses to voluntarily provide FFCRA leave until September 30, 2021 and seek the tax credits, then it

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must keep accurate records and comply with limits on paid leave imposed by the FFCRA.

Q. Have the reasons for the leave expanded?

A. Yes, in addition to the permissible uses afforded under the Emergency Paid Sick Leave Act and emergency FMLA Expansion Act, American Rescue Plan has expanded the reasons for leave to also include an employee who is:

1. Obtaining a COVID-19 immunization,
2. Recovering from an injury, disability, illness or condition related to COVID-19 immunization, or
3. Seeking or awaiting the results of a COVID-19 test or diagnosis because either the employee has been exposed to COVID or the employer requested the test or diagnosis.

Additionally, the statutory language of the American Rescue Plan expands the qualifying reasons to take EFMLEA to now include reasons previously only allowed under the EPSLA. EFMLEA qualifying reasons will include: (1) instances where an employee is subject to a quarantine or isolation order, (2) where an employee was told to self-quarantine by a healthcare provider due to COVID-19, (3) where an employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis, (4) where an employee is caring for an individual who is subject to a quarantine or isolation order or has been advised to self-quarantine, and (5) where an employee's son or daughter's school or place of child care is closed due to COVID-19. Prior to the effective date of April 1, 2021, we anticipate further clarification on this area by the DOL and recommend that you consult with your Butzel employment attorney before expanding the permissible reasons for EFMLEA.

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

A. Yes, unlike the voluntary extension under the Consolidated Appropriations Act, the American Rescue Plan Act does provide additional time. Beginning April 1, 2021, an employer is entitled to receive a tax credit for up to an additional ten days of EPSL even if the employee previously exhausted their EPSL time.

Q. If the employer did not voluntarily provide FFCRA under the Consolidated Appropriations Act of 2021, can it begin providing an extension until September 30, 2021 under the American Rescue Plan Act of 2021?

A. Yes, for employers who did not voluntarily provide leave from January 1, 2021 to March 31, 2021 the American Rescue Plan provides the opportunity for tax credits to continue for qualifying wages paid from April 1, 2021 to September 30, 2021.

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

A. Employers will follow the same limits provided by the original FFCRA if leave is taken under the Emergency Paid Sick Leave Act. Specifically, depending on the reason for the leave, the EPSLA

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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 emergency FMLA Expansion Act, however, has changed in two significant respects. First, unlike the original FFCRA, the first two weeks of the twelve-week available leave under the EMFLEA do not have to be unpaid. Second, the caps under the EFMLEA have increased from \$10,000 to \$12,000. Other than these two changes, employees are still entitled to be compensated at 2/3 of regular rate with a \$200 daily cap.

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

Moreover, FFCRA tax credits cannot be "double dipped" for those in the Paycheck Protection Program.

Q. Can a company agree to provide time under the EPSL 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 EPSL, 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 provide 40 hours of paid leave to eligible employees, or other applicable state law. Michigan employers should also be aware of the provisions of the COVID-19 Employment Rights Act preventing unlawful discharge of employees in certain situations as addressed in our prior Client Alert.

Q. Since the provision of FFCRA time off is permissive, can I provide the FFCRA benefits for 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. In addition, under the American Rescue Plan, there is a non-discrimination requirement prohibiting an employer from discriminating in favor of highly compensated employees (as defined in Section 414(q) of the IRS Code), full-time employees, or employees on the basis of employment tenure.

Employers also need to recognize other considerations such as complying with company policies or a collective bargaining agreement.

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

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

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

A. Additional guidance from both the U.S. Department of Labor's Wage and Hour Division and the IRS is expected in the near future.

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.

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