

American Rescue Plan: FFCRA Leave and Expansion of Pandemic Unemployment Assistance

The American Rescue Plan Act of 2021 ("ARPA"), signed by President Biden on March 11, 2021, once again gives covered employers the right to voluntarily decide to continue to provide qualified leave under the Emergency Paid Sick Leave Act ("EPSLA") and the emergency FMLA Expansion Act ("EFMLEA"), and continue to receive a tax credit for such paid leave taken by employees through September 30, 2021. Unlike the Consolidated Appropriations Act of 2021, which merely extended the tax credit available to employers who voluntarily provide such leave, the most recent extension also expands the types of leave and amounts of leave and pay that qualify for the tax credit. This alert highlights the most significant developments for employers relating to paid leave and tax credits.

Paid Leave FFCRA Tax Credit Extension

The Families First Coronavirus Response Act ("FFCRA") [passed in March 2020](#) required employers with fewer than 500 employees to provide COVID-19-related paid family leave and paid sick leave, and established corresponding tax credits. That mandate to provide FFCRA leave expired on December 31, 2020, but the Consolidated Appropriations Act of 2021 permitted covered employers to provide leave on a voluntary basis through March 31, 2021 and still qualify for tax credits.

ARPA extends the period during which tax credits are available to eligible employers (with fewer than 500 full time employees) that **voluntarily** provide paid sick and family leave **from April 1, 2021 through September 30, 2021** in an effort to encourage employers to provide the emergency paid sick leave ("EPSL") or paid expanded FMLA leave that were required by the FFCRA. Employers can still receive a 100% tax credit for qualified wages paid during leave provided for up to 10 days of paid sick leave, up to \$200 or \$511 per day (depending on the reason for leave).

Reset on Tax Credit Limits for EPSL

ARPA "resets the clock" with respect to the 10 days of emergency paid sick leave under the FFCRA. In other words, employers may voluntarily provide employees up to 80 hours of EPSL in the period from April 1, 2021 through September 2021, in addition to any EPSL provided earlier, and be eligible for the corresponding tax credit. Any days an employee took before April 1, 2021 will not count toward the cap on the tax credit.

Expanded Eligibility for Paid Leave

ARPA also expands the types of leave available under both the EPSL and the EFMLEA. Leave can now be taken: (1) when an employee is obtaining a COVID-19 vaccination; (2) when an employee is suffering or recovering from side effects related to the COVID-19 vaccination; and (3) when an employee is seeking or waiting the results of a COVID-19 test if the employee has either been exposed to COVID-19 or the employer has requested the COVID-19 test, in addition to the six reasons for leave set forth in the FFCRA.

Non-Discrimination Provision

Notably, ARPA adds a non-discrimination provision which disallows the tax credits for any employer who discriminates with respect to leave under both the EPSL and the EFMLEA: (1) in favor of highly compensated employees (as that term is defined in Section 414(q) of the Internal Revenue Code); (2) in favor of full-time employees; or (3) on the basis of employment tenure.

Changes to EFMLEA Pay

ARPA also increases the amount of EFMLEA leave that may be paid. Previously, the first two weeks of EFMLEA leave were unpaid. Under ARPA, employers may choose to make all 12 weeks of EFMLEA leave paid, and may qualify for tax credits for the entire 12 weeks. In addition, the caps for tax credits for voluntarily providing 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, the EFMLEA benefits have been expanded to [include all of the reasons an employee can take emergency paid sick leave](#). Under the original version of the FFCRA, EFMLEA was only available for school or childcare issues.

Unemployment Insurance

ARPA also extends the unemployment benefits [that were available under the March 2020 Coronavirus Aid, Relief, and Economic Security Act](#) (the "CARES Act") and the December 2020 Consolidated Appropriations Act, (both of which were set to expire after March 14, 2021) through September 6, 2021.

ARPA extends or strengthens the [following programs](#):

- **Federal Pandemic Unemployment Compensation ("FPUC")**: ARPA extends the FPUC program at \$300 per week through the week ending on or before September 6, 2021. This is the same supplemental benefit amount that was previously provided under the Consolidated Appropriations Act at the end of 2020.
- **Pandemic Emergency Unemployment Compensation ("PEUC")**: ARPA extends PEUC by providing for up to 53 weeks of additional unemployment benefits to eligible individuals who have exhausted the unemployment benefits available under state law. With the latest extension under ARPA, eligible recipients in many states can now receive up to 79 weeks of benefits. The end of the period of applicability for the PEUC program is extended, without interruption, to weeks of unemployment ending on or before September 6, 2021.
- **Pandemic Unemployment Assistance ("PUA")**: The end of the period of applicability for the PUA program is extended, without interruption, to weeks of unemployment ending on or before September 6, 2021. ARPA provides eligible individuals up to 79 weeks of PUA benefits, an extension from the 50 weeks of benefits provided previously under the Consolidated Appropriations Act (under the CARES Act, the duration of benefits was 39 weeks). The additional 29 weeks of benefits now provided under ARPA (increasing the duration from 50 to 79 weeks) may only be paid with respect to weeks of unemployment ending after March 14, 2021.

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In light of the extension of the available tax credits through September 2021, employers may wish to consider whether to continue – or to reimplement – policies that provide paid leave under the FFCRA. Employers should consider the state and local paid leave mandates already in effect where their employees work, the anticipated timeline for vaccinations, workforce morale, and other factors unique to their circumstances. If employers plan to restart or continue such leave, they may need to update their FFCRA leave forms and relevant policies. As before, the availability of unemployment insurance should be considered in connection with any decisions by employers to reduce hours, furlough, or lay off any portion of their workforce. Employers should consult with counsel to ensure they take the proper steps to document leave in order to claim tax credits. The DOL and IRS may also issue updated guidance to address the implementation of these provisions in the coming weeks.

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