

# Mandatory COVID-19 Benefits Under Families First Coronavirus Response Act Have Ended, Now What?

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January 13, 2021

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In March 2020, when Congress passed the Families First Coronavirus Response Act (FFCRA) with a sunset date of December 31, 2020, few anticipated the COVID-19 pandemic would be ongoing into 2021. Several similar state and local laws also sunset at the end of 2020. But the pandemic has not slowed, and requests for COVID-19-related leave (along with the corresponding tax credits) continue.

### Here's What We Know

The new stimulus bill (Consolidated Appropriations Act, 2021) passed on December 27 did not extend the FFCRA obligations. Employers who were covered under the FFCRA are no longer obligated to provide their employees leave.

However, while the new law does not mandate an employer continue to provide COVID-19-related paid sick and paid family leave beyond December 31, 2020, it allows employers who were covered under the FFCRA to *voluntarily* decide to provide "qualified" paid sick leave or paid family leave wages to their employees and continue to receive a tax credit for such wages until March 31, 2021.

### What are Qualified Wages?

To receive tax credits, any wages an employer pays to an employee must satisfy the requirements that would have applied if the Emergency Paid Sick Leave Act (EPSLA) or the Emergency Family Medical Leave Expansion Act (EFMLEA) remained in effect with respect to the leave for which the employer seeks to take the tax credit. Such requirements include limits on leave amounts, use for specified reasons only, caps on pay, as well as non-discrimination provisions. The new stimulus bill did not provide employees a new leave entitlement. Thus, if a full-time employee exhausted their 80-hour entitlement to EPSL or 10-week paid family leave entitlement under the EFMLEA in 2020, the employer would not be entitled to a tax credit on any additional COVID-19-related leave time provided to that employee.

### Department of Labor (DOL) Guidance on the Issue

On December 31, 2020, the DOL updated its [FFCRA FAQs](#) to address the voluntary benefits. The DOL made clear that employers are not required to provide employees with FFCRA leave after December 31, 2020, but if they voluntarily chose to provide paid sick leave or paid family leave to employees, they could receive tax credits for such payments until March 31, 2021.

As for FFCRA enforcement, the DOL noted that the DOL's Wage and Hour Division will continue to enforce the FFCRA for leave taken or requested during the effective period of April 1, 2020, through December 31, 2020, for any complaints made within the statute of limitations. The statute of limitations for claims under the FFCRA is two years from the date of the alleged violation (or three years in cases involving alleged willful violations) and there is a private right of action.

## Still Waiting on Guidance From IRS

While the DOL has issued limited FAQs, IRS guidance is not yet available. The IRS has stated it intends to update its FAQs to address an employer's eligibility to receive tax credits under the new stimulus bill.

In the absence of further guidance from the DOL or IRS, it appears an employer has some latitude in structuring a voluntary COVID-19 paid sick and family leave program. For example, it appears an employer may provide paid leave for any sick or family reason initially permitted under the FFCRA and receive a tax credit for the corresponding wages paid, as long as the original FFCRA requirements related to that leave are satisfied. It does not appear that an employer must provide leave for every reason originally specified under the FFCRA to receive the tax credit. Similarly, it appears permissible for an employer to unilaterally decide when to offer paid sick leave or paid family leave and receive the tax credit. For example, an employer may choose to allow an employee whose leave was initially approved in 2020 to continue in 2021, but not approve new leaves. Alternatively, an employer may choose to provide paid family leave when business circumstances allow, but deny paid family leave when staffing issues exist. While likely permissible, any such policy should be carefully crafted to avoid potential discrimination claims.

## What About State and Local COVID-19-Related Leave Laws?

While some states and localities had COVID-19 leave laws that also had a sunset clause of December 31, 2020, others (such as New York and Pittsburgh) remain in effect. Therefore, employers must keep in mind continuing obligations under state and local laws to provide COVID-19-related paid time off. Some of these state and local laws are specifically targeted at COVID-19-related absences, while other state and local paid sick leave laws are broad enough to cover COVID-19-related absences and other absences.

Jackson Lewis attorneys are closely monitoring updates and guidance in this area and are available to assist employers in preparing policies and procedures related to COVID-19 paid time off.

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