

US COVID-19: UNDER THE AMERICAN RESCUE PLAN, PROVIDING FFCRA LEAVE REMAINS VOLUNTARY

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The American Rescue Plan (“ARP”), signed into law by President Biden on March 11, 2021, does not place any new paid leave *requirements* on private employers who were previously covered by the Families First Coronavirus Response Act (“FFCRA”). However, as they have been able to do through the first quarter of 2021, such employers may *voluntarily* continue to provide Paid Sick Leave (“PSL”) and Emergency Family and Medical Leave Act (“EFMLA”) leave as set forth in the FFCRA and receive certain payroll tax credits for such wages.

In addition, the ARP expands various aspects of the FFCRA:

EXPANSION OF PSL:

- Employees can be given a new 10-day allotment of PSL for use from April 1, 2021 through September 30, 2021, even if they exhausted their PSL days during 2020 or used PSL with the employer’s permission during the period January 1 – March 31, 2021.
- PSL can be used for additional reasons (subject to the FFCRA requirement that the employee be unable to work due to the qualifying reason), specifically:
 - for leave needed when the employee is seeking or awaiting the results of a diagnostic test for, or a medical diagnosis of, COVID 19, where such employee has been exposed to COVID-19 or the employer has requested such test or diagnosis;
 - for leave needed when the employee is obtaining immunization related COVID-19; and/or
 - for leave needed when the employee is recovering from any injury, disability, illness, or condition related to COVID-19 immunization.

EXPANSION OF EFMLA:

- The first ten days of EFMLA does not need to be unpaid (or paid through Paid Sick Leave or other paid leave provided under the employer’s policies), but instead can be paid (up to \$200/day).

- Paid EFMLA is now capped at \$12,000 in the aggregate per employee, instead of \$10,000.
- Paid EFMLA can now be used for all of the same reasons as PSL, i.e.:
 - for leave needed when an employee is subject to a quarantine or isolation order;
 - for leave needed where an employee was told to self-quarantine by a healthcare provider due to COVID-19;
 - for leave needed when the employee is seeking or awaiting the results of a diagnostic test for, or a medical diagnosis of, COVID 19, where such employee has been exposed to COVID-19 or the employer has requested such test or diagnosis;
 - for leave needed when the employee is obtaining immunization related COVID-19;
 - for leave needed when the employee is recovering from any injury, disability, illness, or condition related to COVID-19 immunization;
 - for leave needed 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/or
 - for leave needed where an employee's son or daughter's school or place of child care is closed due to COVID-19.

Importantly, under the ARP, employers will not be given tax credits for PSL wages or EFMLA wages if they discriminate in favor of highly compensated employees, full-time employees, or on the basis of employment tenure with respect to the availability of using such leave during April – September 2021.

Additional guidance from the federal Department of Labor and/or the IRS is expected in the coming weeks.

BCLP has assembled a COVID-19 HR and Labor & Employment taskforce to assist clients with labor and employment issues across various jurisdictions. You can contact the taskforce at: COVID-19HRLabour&EmploymentIssues@bclplaw.com.

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