

LEGAL UPDATES

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Funny You Should Ask: FAQs Regarding Paid Leave Under the American Rescue Plan Act

As previously discussed, the American Rescue Plan Act was passed and signed into law by President Biden on March 11, 2021. The Act extends and expands payroll tax credits until September 30, 2021, for employers who voluntarily provide paid sick and family leave under the Families First Coronavirus Response Act (FFCRA). As more employers consider whether to provide this paid leave, and, therefore, be eligible for the payroll tax credits, additional questions have arisen. We have listed FAQs below and will continue to update this article with answers and best practices as we receive new information and guidance.

Please note: This information is intended to provide only general information based upon our current interpretation of the Act. No federal agency, including the Department of Labor (DOL), has issued guidance on this legislative action as of the date of this publication. We will continue to look for additional guidance and update this article as more information becomes available. If you have questions about specific matters, please contact us.

1. Are we required to offer both emergency paid sick leave and emergency family medical leave, or can we offer one over the other to our employees?

The Act provides payroll tax credits to employers who *voluntarily* provide paid leave. Because of the voluntary nature of the Act, there are differing interpretations of the legislation. Some believe employers can offer either paid sick leave or paid family leave, or both. Based on our interpretation, the best practice at this time is for an employer to offer both types of paid leave to ensure compliance with the text of the legislation and be eligible for the payroll

tax credit. However, we anticipate and expect the DOL will provide additional guidance on this issue.

2. If our company voluntarily decides to offer emergency paid sick leave until September 30, 2021, are we required to reset the 80 available hours each employee can take?

Yes. If an employer voluntarily provides additional paid leave under the Act, employers must “reset” a new allotment of hours to each employee. Specifically, the employer must offer an additional 80 hours per full-time employee, an equivalent of 10 days. Any paid leave provided in 2020 cannot be counted toward the new allotment.

3. As an employer, are we required to offer the full 80 hours per every employee, or can we provide fewer hours?

Because of the voluntary nature of the Act, there are differing interpretations. While there is no guidance on this issue, we believe it is a best practice for an employer to provide the full 80 hours to every full-time employee in order to comply with the text of the legislation and be eligible for the payroll tax credits. Part-time employees are eligible for a pro-rated amount of leave based on the average number of hours worked within a two-week period. While we do not recommend reducing the number of hours offered to full-time employees, if your company does choose to make that business decision, appropriate notice should be provided to employees well in advance of implementing the plan. Again, we anticipate the DOL may provide additional guidance on this issue.

4. If our company voluntarily opts-in and provides emergency paid sick and family leave to our employees, are we permitted to opt-out before September 30, 2021?

Again, there is no guidance on this issue. In fact, the DOL never addressed this question in response to the Consolidated Appropriations Act, which initially extended the FFCRA paid sick and family leave provisions on a voluntary basis from January 1 to March 31, 2021. Due to the voluntary nature of the legislation, there are differing interpretations. Based on our interpretation, the best practice at this time is to offer the full amount of leave. Specifically, if an employer decides to opt-in and provide paid leave, the employer should offer leave from April 1 to September 30, 2021, to ensure compliance with the Act and qualify for the available tax credits. Again, we anticipate the DOL may provide additional guidance on this issue.

5. Under the Act, what are reasons an employee can qualify for paid sick leave and family medical leave?

The Act broadens the COVID-19-related paid leave reasons to include three new qualifying reasons under FFCRA: (a) getting tested or awaiting test results or medical diagnosis for COVID-19; (b) getting the vaccine; or (c) recovering from an illness or medical condition associated with getting the

vaccine. These expanded reasons are included in both the emergency paid sick leave and emergency paid family medical leave. However, the payroll tax credit varies depending on the leave. *See Question 8.*

6. The Act expands the qualifying reasons an employee may take emergency paid leave to include receiving the COVID-19 vaccine and related complications due to receiving the vaccine. Can these additional qualifying reasons be retroactively applied?

The Act does not directly address whether these additional qualifying reasons can be retroactively applied. However, from our interpretation of the legislation, these new qualifying reasons are not retroactive. Thus, the additional qualifying reasons begin on April 1, 2021. As always, we will continue to monitor whether the DOL issues guidance in response to the federal legislation.

7. Is there a new labor law poster that includes the latest changes to the FFCRA?

No. There is not a new labor law poster at this time. If the DOL releases an updated poster, we will post the link in this article.

8. If employers offer emergency paid sick and family leave, what is the available payroll tax credit employers can receive?

It depends on the leave offered. For emergency family medical leave, employers can receive a tax credit for up to 12 weeks of paid family leave. The total cap for family leave increased to \$12,000 per employee. The available credit per employee is limited to two thirds of the employee's regular rate of pay, up to a maximum of \$200 per day.

For emergency paid sick leave, pay calculations depend on the nature of the absence. Paid sick leave tax credits are based on an employee's regular rate of pay and are capped at either \$511 or \$200 per day. The \$511 cap applies for any of the expanded reasons described in the Act, which includes immunization, testing and related vaccine complications. This cap further includes absences due to quarantine and experiencing COVID-19 symptoms. For any other reason, the employer can receive two thirds of the employee's regular rate of pay, up to a maximum of \$200 per day.

9. If our company opts-in and provides paid leave to our employees, could our employees take up to 14 weeks of paid FFCRA leave under the Act?

Yes. In practical terms, an employee could potentially take up to a total of 14 weeks of paid leave under the Act. For example, the employee could qualify for paid sick leave and thus be entitled to 10 days of paid sick leave. If the employee needs additional leave, the employee could take an additional 12 weeks of paid emergency family and medical leave. Again, the payroll tax credit varies depending on the leave. *See Question 8.*

10. If our company opts-in and provides paid leave to our employees, what should our company do to effectively manage and oversee the leave until September 30, 2021?

We recommend that employers provide immediate notice to their employees. Employers should also update their leave forms. Please reach out to us below or to your Husch Blackwell attorney for further assistance.

Contact us

If you have any questions about your obligations regarding the Act or require further assistance in updating your forms or policies, contact Julianne Story, Barbara Grandjean, Courtney Steelman, Michaeli Hennessy or your Husch Blackwell attorney.

Your comprehensive COVID-19 legal resource

Since the pandemic's onset, Husch Blackwell has continually monitored state-by-state orders regarding capacity, masking, vaccines, and more. We regularly address your FAQs and provide you with easy-to-use COVID-19 tools about returning to work and navigating federal programs. Contact our industry-specific legal teams or your Husch Blackwell attorney to plan through and beyond the pandemic.