

Mandatory COVID Leave Expires, but Tax Credits for Providing COVID Leave are Extended

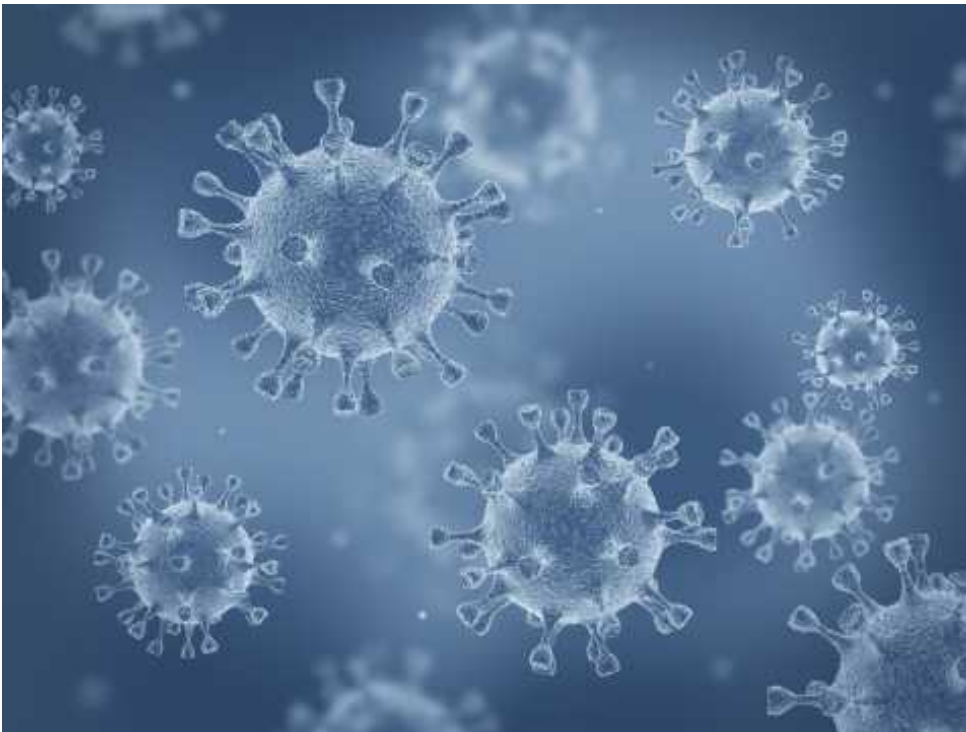


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Starting Jan. 1, 2021, employers subject to the Families First Coronavirus Response Act (FFCRA) are no longer required to provide employees with COVID-related paid leave, but they may do so in some situations and still receive tax credits for doing so.

The FFCRA, which required that employers provide emergency paid sick leave for COVID-related reasons and emergency paid family leave to employees due to school closures, expires on Dec. 31, 2020. These requirements were not extended as part of the stimulus package passed by Congress on Dec. 21, 2020 and signed into law by the president on Dec. 27, 2020. However, the tax credits to reimburse private employers for paid leave they provide to employees, originally set to expire on Dec. 31, were extended through March 31, 2021. (Public employers are not eligible for these tax credits.)

The way in which the tax credits were extended means that private employers subject to the FFCRA have some decisions to make.

DECISION 1: [EMERGENCY PAID SICK LEAVE](#)

With respect to emergency paid sick leave, employers have two fairly straightforward options:

Through March 31, 2021, allow employees who did not use the full two weeks of leave (up to a maximum of 80 hours for

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full-time employees) by Dec. 31, 2020 to take any remaining leave (subject to the terms and conditions for taking such leave under the FFCRA) and receive the tax credits for paying such leave. The key here is to understand that there are no new hours of leave for employees starting Jan. 1. This is only an option to provide what had not been used; or

Stop providing any emergency paid sick leave to employees because the FFCRA expired Dec. 31, 2020.

While the options available for handling emergency paid sick leave in the new year are straightforward, deciding which option is best and carrying out that decision correctly and consistently can be difficult. Among the issues employers need to carefully consider are these:

When and how tax credits are claimed;

Compliance with documentation and recordkeeping requirements;

Risks associated with voluntarily providing leave beyond Dec. 31;

How to present and communicate the decision to employees;

How offering (or not offering) the leave will impact employee decisions to come to work while ill or potentially exposed to COVID; and

Whether to offer additional or different paid or unpaid leave regardless of the availability of tax credits.

DECISION 2: [EMERGENCY PAID FAMILY LEAVE](#)

With respect to the emergency paid family leave, the situation is much more complex. Determining how the extended tax credits provision interacts with the Family and Medical Leave Act of 1993, which the FFCRA amended to create the emergency paid leave, becomes complicated quickly. This is primarily because the provisions extending the tax credits are ambiguous on a few key questions that are important for employers trying to understand how providing emergency paid family leave in 2021 will interplay with their own FMLA and other leave policies that often reset Jan. 1. Thus, in addition to the same considerations that apply for employers deciding how to handle emergency paid sick leave, employers also need to account for issues particular to the FMLA and emergency paid family leave:

The employer's existing FMLA policies;

The amount of FMLA leave available to employees beginning on Jan. 1;

The potential for extended employee absences (up to 12 weeks);

How much emergency paid family leave employees had previously used;

The potential intermittent use of the leave;

How offering (or not offering) the leave will impact employee retention and/or availability of employees to perform work; and

Interaction with other paid and unpaid leave policies

For assistance in making these decisions and structuring 2021 COVID leave policies, please contact a Brooks Pierce labor and employment attorney, linked below.

Brooks Pierce is dedicated to keeping our clients fully informed during the COVID-19 crisis. For more information, please visit our [COVID-19 Response Resources](#) page.