

New Paid Sick and EFMLA Leave Provisions in the American Rescue Plan Act of 2021

By Amy L. Bess and Aaron A. Bauer

April 22, 2021

While the Families First Coronavirus Response Act (“FFCRA”) expired on December 31, 2020, a subsequent congressional amendment allowed employers to voluntarily provide emergency paid sick leave (“EPSL”) and expanded FMLA (“EFMLA”) leave, and to receive related incentive tax credits for providing that leave, until March 31, 2021. On March 11, 2021, President Joe Biden signed into law the American Rescue Plan Act of 2021 (the “Rescue Plan”), which, effective April 1, 2021, grants tax credits to employers with 500 or fewer employees who voluntarily elect to provide qualified employees with EPSL and EFMLA for COVID-19 related reasons, as described below. The Rescue Plan’s EPSL and EFMLA provisions are set to expire on September 30, 2021.

Rescue Plan EPSL

As of April 1, 2021, employers covered by the FFCRA have been able to claim tax credits for up to ten days (80 hours) of EPSL taken by an employee for the reasons stated below. These new credits are in addition to the credits for ten days of EPSL that were originally provided under the FFCRA and its subsequent extension. Under the Rescue Plan, an employer that claimed tax credits under the FFCRA for employees who exhausted their ten days of EPSL before April 1, 2021 can now allow those same employees to take ten additional days of EPSL, and correspondingly, will be eligible to receive an additional ten days’ worth of related tax credits.

Rescue Plan EFMLA Leave

The Rescue Plan also allows covered employers to claim tax credits for EFMLA leave taken by eligible employees between April 1, 2021 and September 30, 2021¹. It appears that an employee is limited to twelve (12) weeks of EFMLA leave for the entirety of the FFCRA and Rescue Plan period, i.e., April 1, 2020 through September 30, 2021. But now, pursuant to the Rescue Plan, the per-employee tax credit available for that leave has been increased from \$10,000 to \$12,000 in the aggregate. Further, under the Rescue Plan, EFMLA leave may be used by an employee not only to care for a child whose school, daycare or child care is unavailable due to COVID-19 (which was the case under the FFCRA), but also for the same reasons an employee may take EPSL, as stated below.

Qualifying Reasons for EPSL or EFMLA Leave under the Rescue Plan

Under the Rescue Plan, employees may take paid EPSL leave (subject to caps of \$511/day or \$200/day, depending on the reason for leave) or EFMLA leave (subject to a cap of \$200/day) for the following reasons:

- The employee is obtaining the COVID-19 vaccine
- The employee is recovering from an illness, injury or condition related to the COVID-19 vaccine
- The employee is seeking or awaiting the results of a diagnostic test for, or a medical diagnosis of, COVID-19 if the employee has been exposed, or the employee’s employer has requested such test or diagnosis
- The employee is subject to a federal, state or local quarantine or isolation order related to COVID-19
- The employee has been advised by a health care provider to self-quarantine due to COVID-19

¹Employees are eligible for EFMLA leave if they have been employed for at least 30 calendar days by the employer.

- The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis
- The employee is caring for an individual who is subject to a quarantine or isolation order due to COVID-19
- The employee is caring for his or her son or daughter if the child's school or place of care has been closed or is unavailable due to COVID-19
- The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretaries of Treasury and Labor

Employer Requirements

Unlike the FFCRA, the Rescue Plan does not require employers to provide EPSL or EFMLA leave to employees. However, covered employers who choose to allow employees to use such leave (and thus receive the related tax credits) must make it available to all employees who qualify. This means that employers cannot limit their employees' eligibility for EPSL or EFMLA leave based on seniority, pay level, or full-time status, for example.

The Rescue Plan is unclear about whether employers must elect to provide both EPSL and EFMLA leave to receive the tax credits. The Department of Labor will likely release guidance or regulations addressing this issue. However, it is clear that employers cannot prevent employees from taking the maximum allowable EPSL or EFMLA leave provided by the Rescue Plan or restrict usage of the leave to specific months. Such "picking and choosing" may cause the employer to lose tax credit eligibility.

If you have any questions regarding the topics discussed in this article, please contact **Amy L. Bess** at +1 (202) 312 3361, **Aaron A. Bauer** at +1 (312) 609 7726 or any Vedder Price attorney with whom you have worked.

vedderprice.com