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FFCRA Opt-In Expanded Under American Rescue Plan Act of 2021

Legal Alert

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With the passage of The American Rescue Plan Act of 2021 (ARP), employers with fewer than 500 employees now have the option of continuing pandemic-related paid leave for eligible employees and seeking reimbursement for the paid leave expenses through payroll tax credits.

As a reminder, the Families First Coronavirus Response Act (FFCRA), passed in 2020, required employers with fewer than 500 employees to provide certain paid leave benefits in response to the pandemic. FFRCA provided paid leave to eligible employees who could not work due to, among other things, (i) COVID symptoms, quarantine due to COVID exposure or a positive test result, and diagnosis; (ii) caring for a qualifying family member who contracted COVID or needed COVID-related care; and (iii) parents of children whose place of care was closed due to COVID precautions. It also authorized corresponding payroll tax credits employers could use to offset the costs of the paid leave.

The mandate for FFCRA leave expired on December 31, 2020, but Congress, through the 2021 Consolidated Appropriations Act, extended those payroll tax credits for covered employers who voluntarily extended FFCRA benefits to eligible employees through March 31, 2021. Now, the ARP has further extended these payroll tax credits for covered employers who voluntarily offer FFCRA leave to eligible employees and it also expanded the scope of coverage under the FFCRA. The payroll tax credits are now available for employer-paid qualifying FFCRA leave through September 30, 2021. In addition, key provisions of ARP expand the payroll tax credits for employers with fewer than 500 employees who provide FFCRA paid leave to also include:

- Employees getting vaccines;
- Employees recovering from any injury, disability, illness, or condition related to such immunization;
- Employees seeking or awaiting the results of a COVID-19 test when the employee has been exposed to COVID-19 or the employer requested the test;
- Employees who previously exhausted FFCRA leave and have another qualifying reason for leave (these employees are eligible for up to an additional ten day of leave beginning April 1, 2021); and
- Employees using emergency family leave for any reason set forth the FFCRA (not just because a childs school or place of care was closed).

Employers should note, the ARP also increases the amount of emergency family leave pay for which an employer may claim a tax credit from $10,000 to $12,000 per employee. While paid leave remains optional, employers who opt to offer it should apply it consistently throughout the organization. To ensure it is applied fairly, the ARP also introduced new non-discrimination requirements. These new non-discrimination rules bar employers from receiving tax credit if they offer leave in a way that favors highly compensated employees, full-time employees, or employees with greater tenure.

Employers who are considering opting in to offering FFCRA leave should consult with counsel to understand employee eligibility, caps on the duration and pay rates, and the mechanics of claiming the payroll tax credit. Optional paid leave that does not meet the requirements of FFCRA leave will not be eligible for the ARPs expanded tax credit. Additionally, to be eligible for a payroll tax credit, the paid leave must be in addition to leave already available to employees under employer benefit plans, e.g., vacation, sick time, or other paid time off.

For more information on how the FFCRA applies to your organization, or for any other questions related to the FFCRA and ARP, please contact Adam E. Gersh, shareholder in Flaster Greenbergs Labor & Employment Practice, or Stephen M. Greenberg, shareholder in Flaster Greenbergs Tax Practice, for more information. Alternatively, you may contact any member of Flaster Greenbergs Employment or Tax Practices.