

What If FFCRA Expires at the End of the Year?

By Allen Smith, J.D. | December 17, 2020 | SHRM



Unless Congress acts, the Families First Coronavirus Response Act (FFCRA) paid-leave requirements will expire at the end of the year. But even if they expire, organizations that have generous paid-leave policies and those in states that have paid-leave laws will continue to grant time off to employees who have COVID-19 or whose children's schools or child care providers are closed.

The U.S. House of Representatives included an extension of FFCRA leave in the Health and Economic Recovery Omnibus Emergency Solutions Act, which was approved by the House in May, but was never considered by the Senate. Under the House's language, the extension would not merely extend but also expand the FFCRA leave provisions. For example, the House bill would make FFCRA leave apply to all private-sector employers, rather than solely those with fewer than 500 employees, as is currently the case, among other changes.

Throughout congressional negotiations on COVID-19 relief proposals, SHRM has advocated for a number of workplace priorities, including leave, noting that any extension of the FFCRA leave provisions should continue to provide assistance for employers and employees and avoid any new employer mandates.

"Most states may be waiting to see what the federal government will do" before expanding their laws further, said Chelsea Mesa, an attorney with Seyfarth in Los Angeles. "It's possible states and local jurisdictions will expand their own laws past Jan. 1 or expand them to cover more employers if the FFCRA is not extended. It's unfortunately very unclear."

Nonetheless, Rob Duston, an attorney with Saul Ewing Arnstein & Lehr in Washington, D.C., predicted that Congress will extend the deadlines for both types of FFCRA leave. "If this does not occur before Dec. 31, it could be made retroactive," he said. "The new administration is going to be strongly supportive of this type of leave."

FFCRA Provisions

The FFCRA has two major provisions: the Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family and Medical Leave Expansion Act (EFMLEA). Under the EPSLA, private employers with fewer than 500 employees and some public employers must pay sick leave of up to 80 hours, or roughly 10 days, to employees who need to take leave for certain coronavirus-related reasons.

Employees may be eligible for an additional 10 weeks of family leave paid at two-thirds of their regular wages under the EFMLEA to care for a child whose school or place of care is closed or whose child care provider is unavailable because of COVID-19. The FFCRA does not have requirements for private-sector employers with 500 or more employees.

FMLA

If FFCRA leave obligations expire at the end of the year, employers should treat employees' FFCRA requests in January as requests for unpaid Family and Medical Leave Act (FMLA) time off, said Carrie Hoffman, an attorney with Foley & Lardner in Dallas. Employees would have the ability to substitute available employer-paid leave, she noted.

The Department of Labor informs employees in FFCRA guidance, "If you take some, but not all 12, workweeks of your expanded family and medical leave by Dec. 31, 2020, you may take the remaining portion of FMLA leave for a serious medical condition, as long as the total time taken does not exceed 12 workweeks in the 12-month period. Please note that expanded family and medical leave is available only until Dec. 31, 2020; after that, you may only take FMLA leave."

State and Local Laws

"Employers should always be cognizant that there could be leave laws at the state and local level that may apply even when the FMLA and the FFCRA does not," said Greg Abrams, an attorney with Faegre Drinker in Chicago.

California has a supplemental COVID-19 paid-sick-leave law that may apply depending on the sector and size of the business, Hoffman noted. California's law applies to employers with 500 or more

employees, in addition to certain food-sector workers, health care workers and emergency responders. While California's law is also set to expire on Dec. 31, the law will be extended if the FFCRA is.

Under California's supplemental COVID-19 paid-sick-leave law, if the law expires while a worker is on protected the leave, the employee must be allowed to finish taking the leave, according to Baker McKenzie attorneys. The same isn't true under the FFCRA.

Adam Kemper, an attorney with Greenspoon Marder in Ft. Lauderdale, Fla., said, "As of now, there is no requirement to extend leave under the FFCRA into 2021." But, he added, "employers should not rush back employees who are ill or who may be a risk for spreading the COVID-19 virus to others, even if it costs the company some money out of pocket."

Gus Sandstrom, an attorney with Blank Rome in Philadelphia, said that if the FFCRA expires, employers need to communicate this to employees so they aren't surprised. "Employers should also advise employees as to their options for continued leave, paid or unpaid, beginning Jan. 1," he said.

New York state has enacted legislation to provide mandatory leave—called quarantine leave—and certain paid benefits for employees affected by a quarantine order, noted Howard Lavin, an attorney with Stroock in New York City. "Importantly, New York state quarantine leave does not sunset after Dec. 31," he said.

He added that many states and cities now require that employers provide paid sick leave. Employees in New York state will be eligible to use paid sick leave on Jan. 1, 2021.

Generous Employer Policies

Many companies have existing paid time off or separate sick leave and vacation that exceeds the requirements of the FFCRA and state and local laws, Lavin said. "Employers should incentivize sick employees to stay home and quarantine," he said.

Most companies also have been flexible with working parents, particularly for those with children whose schools have switched from in-person to remote learning, he said. According to SHRM research, the majority of employers are handling child care accommodation requests on a case-by-case basis (59 percent) and plan to continue to respond to those specific needs with flexible strategies.

"The best way to ensure that work gets done during the pandemic is to regularly speak to employees who have challenges, including working parents, to listen to their concerns, and to provide support and flexibility—whenever possible," Lavin stated. "I certainly anticipate this continuing, whether or not there is an extension of the FFCRA."