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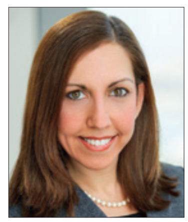
# Update on Pandemic Leave and Unemployment Benefits



By **David E. Schwartz**

And **Risa M. Salins**

The notorious year 2020 has come to a close, yet the COVID-19 pandemic is far from over. The paid sick leave and expanded family and medical leave requirements under the Families First Coronavirus Response Act (FFCRA) expired on Dec. 31, 2020. The Consolidated Appropriations Act of 2021 (CAA) does not extend employees' entitlement to FFCRA leave into 2021, but offers employers tax credits for FFCRA leave voluntarily provided to employees until March 31, 2021. The CAA also reauthorized payment of pandemic-related unemployment insurance benefits, and created a new Mixed Earner Unemployment Compensation program, in each case through March 14, 2021.

In the meantime, on Jan. 14, 2021, President Biden announced his American Rescue Plan, which calls for Congress to enact legislation that would extend and expand FFCRA leave. President Biden's plan, subject to Congressional approval, also would extend and increase pandemic-related unemployment benefits through at least September 2021.

> Providing employees with flexibility to take leave encourages employees to stay home when they are sick and avoid the risk of spreading the virus to others in their workplace.

This month's column discusses the current state of COVID-19-related FFCRA leave and federal unemployment insurance benefits, including recent U.S. Department of Labor guidance in these areas, as well as potential changes anticipated under President Biden's administration.

## COVID-19 Leave

The FFCRA, enacted on March 18, 2020, generally required employers with fewer than 500 employees (subject to certain exemptions for employers with less than 50 employees) to provide their employees with paid sick leave or expanded family and medical leave for reasons related to COVID-19. The FFCRA provided two weeks (up to 80 hours) of paid sick leave to any employee unable to work because (1) the employee was quarantined and/or experiencing COVID-19 symptoms and seeking a medical diagnosis, or (2) the employee needed to care for an individual subject to quarantine, or a child whose school or child care provider closed or was unavailable for reasons related to COVID-19. The FFCRA also provided employees employed for at least 30 calendar days with up to an additional 10 weeks of paid expanded family and medical leave (at two-thirds the employee's regular rate of pay) when unable to work due

DAVID E. SCHWARTZ *is a partner at the firm of Skadden, Arps, Slate, Meagher & Flom.* RISA M. SALINS *is a counsel at the firm.* CRYSTAL D. BARNES, *an associate at the firm, assisted in the preparation of this article.*

to a need to care for a child whose school or child care provider was closed or unavailable for reasons related to COVID-19.

The FFCRA's paid leave requirements expired on Dec. 31, 2020, meaning employers no longer are legally required to provide such leave. Any extension of such leave requirements would require an amendment to the statute by Congress, but no amendment has been enacted to date.

On Dec. 31, 2020, the U.S. Department of Labor's Wage and Hour Division (WHD) issued guidance explaining that, although the FFCRA expired, the CAA extended employer tax credits for paid FFCRA leave voluntarily provided to employees until March 31, 2021, incentivizing employers to provide such leave voluntarily. See U.S. Dep't of Labor, Wage & Hour Div., *Families First Coronavirus Response Act: Question 104.*

**Changes to Unemployment Benefits Under CAA**

| Unemployment Benefit | CARES Act | CAA |
|---|---|---|
| **Federal Pandemic Unemployment Compensation (FPUC)**<br>Supplemental amount added to existing unemployment benefits | Additional $600/week<br>Expired July 31, 2020 | Additional $300/week<br>Expires March 14, 2021 |
| **Pandemic Unemployment Assistance (PUA)**<br>PUA covers individuals who otherwise are not eligible for unemployment benefits (such as self-employed workers, gig workers and independent contractors) | Up to 39 weeks<br>Expired Dec. 31, 2020 | Up to 50 weeks<br>Extended to March 14, 2021 |
| **Pandemic Emergency Unemployment Compensation benefits (PEUC)**<br>Additional weeks of unemployment benefits (after using the regularly allotted 26 weeks) | additional 13 weeks<br>Expired Dec. 31, 2020 | additional 24 weeks<br>Extended to March 14, 2021 |
| **Mixed Earner Unemployment Compensation (MEUC)**<br>MEUC covers individuals who received at least $5,000 of self-employment income in the most recent taxable year. | N/A | $100/week<br>Expires March 13, 2021, or March 14, 2021 depending how the state calculates a "week" for unemployment benefits |

Employers may choose to continue voluntarily offering FFCRA leave for a number of reasons. Providing employees with flexibility to take leave encourages employees to stay home when they are sick and avoid the risk of spreading the virus to others in their workplace. Without paid leave, employees are more likely to go to work sick or knowingly exposed. Additionally, leave prevents a business from being forced to close if the workplace has rampant cases of COVID-19 exposure or infection and/or related negative publicity.

If employers continue to provide FFCRA leave, they must be diligent in satisfying numerous administrative requirements in order to be eligible for the CAA tax credit, including confirming employees who take the leave actually qualify, ensuring wages do not exceed the statutory caps or limits, tracking the leave, maintaining documentation, and meeting other IRS requirements. Small employers may not want to take on these added tasks, particularly if only limited employees did not use their FFCRA leave entitlement by the end of 2020.

Employers that choose to provide FFCRA leave through March should be aware they likely will be unable to claim a tax credit for providing FFCRA paid sick leave to an employee in 2021 if that employee already took the allotted 80 hours of sick leave in 2020. Further, the tax credit for FFCRA paid expanded family and medical leave in 2021 will likely depend on how the employer calculates a twelve-month period under its FMLA policies and how much FMLA and expanded family and medical leave an employee has already taken during the 12-month period. Employers who voluntarily provide FFCRA leave should look out for guidance from the Department of Labor regarding the effect that previously provided leave will have on the calculation of the tax credit in 2021.

The WHD guidance also addressed how the Department would address leave taken pursuant to the FFCRA in 2020 that was not paid by an employer. The WHD will continue to enforce the FFCRA for leave taken or requested during the effective period of April 1 through Dec. 31, 2020. The statute of limitations for complaints regarding FFCRA leave is two years from the date of the alleged violation, or three years in cases involving alleged willful violations. See U.S. Dep't of Labor, Wage & Hour Div., *Families First Coronavirus Response Act: Question 105*.

Employers also should be mindful that, while FFCRA leave no longer is mandatory, many states and localities have passed and continue to develop their own paid leave laws related to the pandemic that have not expired. For example, under the New York COVID-19 Paid Leave Law, New York state continues to require employers to provide job-protected paid and unpaid sick leave (depending on the size of the employer) to certain employees who are subject to a mandatory or precautionary order of quarantine or isolation. Employees who exhaust such sick leave are eligible to apply for New York State paid family leave and disability benefits. Employees who used up FFCRA benefits in 2020 are not disqualified from these New York state benefits in 2021.

Employers are advised to communicate clearly to employees their practices regarding the continued provision of FFCRA leave to their workforce, as well as any other COVID-19 leave that is locally required or voluntarily being provided to their workforces.

## Unemployment Compensation

The Coronavirus Aid, Relief and Economic Security (CARES) Act provided new expanded unemployment insurance benefits for employees out of work for reasons related to the pandemic. The CAA signed into law on Dec. 27, 2020 reauthorized the payment of certain unemployment benefits which expired under the CARES Act, including Federal Pandemic Unemployment Compensation benefits which now will be in place through March 14, 2021 The CAA also created the new Mixed Earner Unemployment Compensation program which will be in place through March 14, 2021. The chart below summarizes these updates to unemployment benefits under the CAA:

## President Biden's Plan

Before his inauguration, President Biden outlined his proposed American Rescue Plan for combatting the impact of the coronavirus, which is subject to Congressional approval. President Biden's plan would require employers to offer FFCRA leave through Sept. 30, 2021 and extend the maximum duration of FFCRA leave to 14 weeks. In addition, it would require FFCRA leave to be available to employees of businesses with more than 500 employees, as well as to federal workers, who all were previously excluded, and also eliminate the exemptions that were available to employers with fewer than 50 employees. The plan also provides that the federal government would reimburse employers with fewer than 500 workers for the full cost of providing the leave.

Regarding unemployment insurance benefits, President Biden's plan would increase the FPUC amount from $300 to $400 per week as well as extend PUA, FPUC and PEUC (all currently set to expire in March) through September 2021. President Biden also directed the Department of Labor to consider clarifying that workers have a right to refuse employment that will jeopardize their health and still qualify for unemployment insurance.

Employers should stay current on developments under the Biden administration expected to expand relief to workers in light of the continued pandemic.