
Coates' Canons Blog: The American Rescue Plan Act: Employers Who Voluntarily Extend FFCRA Leave May Be Eligible for Substantial Employment Tax Credits

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Local government employers are now eligible for credits against the social security and Medicare tax payments that they must make, if they voluntarily extend Emergency Paid Sick Leave (EPSL) and Emergency Family and Medical Leave (EFMLA leave) through September 30, 2021. Through most of 2020, governmental employers had to make the same special wage payments for EPSL and EMFLA leave as private employers, but private employers got a tax credit for those payments and governmental employers did not. Now, the American Rescue Plan Act, signed into law on March 11, 2021, appears to allow local government employers to receive credit against FICA taxes for wages paid when employees take EPSL and EMFLA leave.

Background

EPSL and EFMLA leave were part of the federal Families First Coronavirus Response Act (FFCRA), enacted in March 2020. The EPSL Act (EPSLA) required employers to provide paid sick leave to employees who had been advised to self-isolate or self-quarantine, were seeking a diagnosis of COVID-19 symptoms, or were caring for someone under isolation or quarantine or for children whose normal caregivers are unavailable due to COVID-19. The Emergency Family and Medical Leave Expansion Act (EFMLA) provided an expansion of the job-protection benefits under the Family and Medical Leave Act (FMLA) to include time off needed to care for a child whose school or place of care had been closed due to COVID-19 and mandated that this new type of FMLA leave be paid (unlike traditional FMLA leave). A special provision of the FFCRA, Division G, provided payroll tax relief for the leave pay required under the Act. Both EPSL and EFMLA leave expired on December 31, 2020. For a discussion of the original FFCRA, see here.

As the FFCRA was expiring, a second federal act, the Consolidated Appropriations Act, was signed into law on December 27, 2020. It let the leave requirements of the FFCRA expire. But it allowed employers *to choose* to continue to be bound by the FFCRA's leave requirements through March 31, 2021. (The employer social security contribution exemption was not extended for employers continuing EPSL and EFMLA leave. It ended on December 31, 2020). Private employers who chose to continue offering FFCRA leave were eligible to claim tax credits for FFCRA leave payments through March 31, 2021, but public employers remained ineligible for tax credits. For a discussion of the Appropriations Act's FFCRA extension provisions, see here.

Now comes the third federal statute—the American Rescue Plan Act (the ARPA)—and it appears to provide that governmental employers who extend EPSL and EMFLA leave through September 30, 2021, will, at last, be eligible for the tax credits.

FFCRA Leave and Tax Credits under the American Rescue Plan Act

The ARPA does not directly amend the EPSLA or the EFMLA, nor does it amend the original Family and Medical Leave Act, into which the EFMLA has been incorporated. Instead, it amends the Internal Revenue Code (IRC). *Sections 9641, 9642 and 9643 of the ARPA amend the IRC* by adding three new sections to Chapter 21 of the IRC:

- section 3131 “Credit for paid sick leave,”
- section 3132 “Payroll credit for paid family leave,” and
- section 3133 “Special rule related to tax on employers.”

These sections spell out how employers may apply the wages paid for EPSL and EFMLA leave as a credit against their

employer contributions for social security tax (OASDI) and Medicare tax (collectively, “FICA taxes” or “FICA contributions”). These ARPA sections direct the IRS to determine whether wages are qualified to be applied as credits by seeing whether they were paid in accordance with the EPSLA and the EFMLA as *these IRC sections direct the IRS to interpret them*. This has the practical effect of amending the terms of the original EPSLA and EFMLA without actually amending them or reauthorizing them. This is also what makes it voluntary for employers to continue offering EPSL and EFMLA leave. If an employer wants the tax credits, it must offer EPSL and EFMLA leave under the terms set forth in the ARPA, which are, again, slightly different than the EPSL and EFMLA leave requirements of the original FFCRA. If it doesn’t comply with those terms, the employer won’t be eligible for the tax credits. It will simply be offering an EPSL-like and EFMLA-like benefit to its employees. Or if it chooses, it may decide to offer no additional COVID-19 related leave benefits at all.

Are Local Government Employers Eligible for Employment Tax Credits This Time Around?

Yes, it appears that local government employers are eligible for social security and Medicare tax credits this time around, but it takes some close reading to reach that conclusion.

The original FFCRA was very clear that all public employers, including local government employers, were ineligible for the tax credits (although it allowed government employers to claim an exemption from making the employer contribution for SSDI on wages paid for FFCRA leave). Sections 7001 and 7003 of the original FFCRA expressly said that “this credit shall not apply to the Government of the United States, the government of any State or political subdivision thereof, or any agency or instrumentality of any of the foregoing.”

The tax credit provisions of the ARPA are different. Both subsection (f)(5) of new IRC section 3131 (tax credits for EPSL) and subsection (f)(5) of new IRC section 3132 (tax credits for EFMLA leave) read:

CERTAIN GOVERNMENTAL EMPLOYERS.—No credit shall be allowed under this section to the Government of the United States or to any agency or instrumentality thereof. The preceding sentence shall not apply to any organization described in section 501(c)(1) and exempt from tax under section 501(a).

Neither sentence applies directly to cities and counties. They are not agencies or instrumentalities of the Government of the United States. They are political subdivisions of the state, created by the state legislature. So they are not excluded by the first sentence. Nor are they tax-exempt organizations within the meaning of IRC section 501. They are not, therefore, within the specific mention of organizations excluded by the sentence. So where are they? It appears that because cities and counties are not expressly excluded from receiving the EPSL and EFMLA leave tax credits, they may get them this time around. ***The author of this blog post, however, is an employment law faculty member, not a tax lawyer. Local governments should consult their city or county attorney, auditor or tax advisor before relying on tax credits as the basis for extending EPSL and EFMLA leave under the ARPA.***

Requirements for Voluntary EPSL under the ARPA

The FFCRA allowed ESPL to be taken for five reasons, namely when:

1. The employee was subject to a federal, state or local quarantine or isolation order related to COVID-19;
2. The employee was advised by their healthcare provider to self-quarantine because they were infected with or exposed to COVID-19 or because they were at high risk of complications from COVID-19;
3. The employee was showing symptoms of COVID-19 and was seeking but had not yet received a medical diagnosis;
4. The employee was caring for someone subject to a federal, state or local quarantine or isolation order related to COVID-19 or who was advised by their healthcare provider to self-quarantine for COVID-19 related reasons; or
5. The employee was caring for their son or daughter because the child’s school or childcare facility was closed or the childcare provider was no longer available because of a COVID-19 related reason (this last reason, of course, is similar to the qualifying reason for emergency FMLA leave).

These five reasons remain the same, except that Congress has expanded reason 3. It now reads in IRC section 3132 as follows:

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3. The employee is showing symptoms of COVID-19 and is seeking but has not yet received a medical diagnosis, *the employee is seeking or awaiting the results of a diagnostic test for, or a medical diagnosis of, COVID-19 and such employee has been exposed to COVID-19 or the employee's employer has requested such test or diagnosis, or the employee is obtaining immunization related to COVID-19 or recovering from any injury, disability, illness, or condition related to such immunization.* (addition noted in italics)

In other words, EPSL reason 3 now covers not only the time during which an employee is waiting for their doctor to diagnose them with COVID-19, but also:

- the time during which an employee is waiting for the results of a COVID test because the employee was exposed to COVID-19 or because the employer has asked the employee to get tested,
- the time spent getting vaccinated against COVID-19; and
- any time when the employee cannot work due to side effects from a COVID-19 vaccination.

In addition, the ARPA makes an additional 80 hours of EPSL available to each employee beginning on April 1, 2021, regardless of whether an employee used any EPSL during calendar year 2020. This is different from the original voluntary FFCRA extension provided for under the Appropriations Act, which did not allow employees who had exhausted their 80 hours of EPSL during 2020 to take additional leave.

Under the original EPSLA, the rate of pay for those employees taking leave under reasons 1, 2 or 3 was the employee's full regular rate of pay. The maximum amount an employer was required to pay each employee in these three categories was \$511 per day or \$5,110 in total.

The rate for leave taken for reasons 4 and 5 was two-thirds of the employee's regular rate of pay. The maximum amount an employer was required to pay for each employee in these two categories was \$200 per day or \$2,000 in total.

Because the ARPA does not amend or reauthorize the FFCRA, but instead amends the Internal Revenue Code, it does not set out minimum or maximum amounts that an employer must pay. Instead, it sets the rules for the tax credit. It provides that the amount of wages paid for EPSL that will count toward an employer's tax credit will not exceed \$511 per day for EPSL taken for reasons 1, 2 and 3 (including the new provisions in reason 3) or \$200 for leave taken for EPSL reasons 4 and 5. The ARPA does not provide for a maximum amount of wages per employee that may be applied in determining the tax credit because EPSL is limited to 10 days of leave per employee.

Requirements for Voluntary EFMLA Leave under the ARPA

The ARPA makes more substantial changes to the EFMLA. **Under the ARPA, employees may take EFMLA leave for any of the same reasons for which they could take EPSL under the FFCRA**, as well as for:

- the time during which an employee is waiting for the results of a COVID test because the employee was exposed to COVID-19 or because the employer has asked the employee to get tested,
- the time spent getting vaccinated against COVID-19; and
- any time when the employee cannot work due to side effects from a COVID-19 vaccination.

These new reasons are the same as the new reasons under EPSL.

In addition, the first 10 days of EFMLA leave may no longer be unpaid leave. Those days must be paid on the same basis as other days and weeks of EFMLA leave.

Under the original FFCRA, the maximum amount an employer could be required to pay for EFMLA leave per employee was \$200 per day or \$10,000 in total. As with EPSL, the ARPA expresses this in terms of qualifying for the tax credit. Under the ARPA, the amount of wages paid for EFMLA leave that will count toward an employer's tax credit will not exceed \$200 per employee per day or \$12,000 per employee in total.

The ARPA is silent about whether employees who took a full twelve weeks of EFMLA leave under the original FFCRA are entitled to an additional twelve weeks. As noted above, employers who decide to extend EPSL through September 30, 2021, will have to allow employees who used up their original 80-hour entitlement of EPSL to take an additional 80 hours

between April 1 and September 30. However, since EFMLA leave is, essentially, just another reason for which FMLA leave may be taken, the logical application of both the rules governing original EFMLA leave as modified by the ARPA and the rules governing traditional FMLA leads to the following conclusions:

1. Employees of employers who choose to extend EFMLA leave may take up to twelve weeks of EFMLA leave between April 1, 2021 and September 30, 2021.
2. Employees are still limited to a total of twelve weeks of FMLA leave within a 12-month period for all reasons, including EFMLA COVID-related leave, combined.
3. Employees who have already used up their FMLA allotment for the year are not entitled to EFMLA leave. If an employee's FMLA year has reset since the expiration of the FFCRA, the employee is entitled to a full twelve weeks of FMLA, including EFMLA, during the twelve months following the start of the new FMLA year.

Once an employer decides to offer EFMLA leave under the terms set forth in the ARPA, any interference with an employee's right to take EFMLA leave will forfeit the employer's right to a tax credit.

The ARPA Employment Tax Credits

For both EPSL and EFMLA leave, the ARPA authorizes "as a credit against applicable employment taxes for each calendar quarter an amount equal to 100 percent" of the qualified EPSL wages and the qualified EFMLA leave wages paid by an employer for that calendar quarter. See new 26 U.S.C. §§ 3131(a) and 3132(a). **For local government employers, no credit may be taken for any EPSL or EFMLA leave taken before April 1, 2021 (or after September 30, 2021).**

In addition to the tax credits for wages paid for EPSL or EFMLA leave, employers will also be able to receive credit for the portion of its qualified health plan expenses that can be allocated to wages paid for EPSL or EFMLA leave. The formula for determining that portion will be set by the Secretary of the Treasury. Employers should consult their attorneys, auditors, or other tax advisors for guidance on how much qualified health plan expense will count toward the tax credit.

What Other Alternatives Do Employers Have to Offering EPSL or EFMLA Leave?

Remember that employers are not required to extend EPSL or EFMLA leave. Indeed, employers can decide to offer no Covid-related leave benefit at all and may require employees to continue to use accrued paid sick leave, vacation leave or comp time if they need to take off for a COVID-19 related reason.

There is a public health downside to not offering any form of COVID-19 related leave, however. An employee who contracts COVID-19 or is exposed to it and has no ordinary accumulated sick or vacation leave left may feel that they have no choice but to come to work anyhow to keep being paid. The risk of this employee infecting others obviously goes up, although this may be less of a problem in workplaces where there is widespread vaccination.

Employers who wish to provide employees with incentives to be vaccinated and incentives to stay home when infected can adopt a time-limited policy of granting EPSL-like leave ("localCOVID leave") of their own design rather than choosing to be bound by the terms of EPSL and EFMLA as modified by the ARPA. The advantage of this option is that employers can add to or subtract from the reasons for taking from EPSL and EFMLA leave. For example, an employer could decide to offer local COVID leave only for employees who are infected with COVID-19 or have had direct exposure to someone infected with it (EPSL reasons 1 and 2). Or the local COVID leave could include persons needing time to get vaccinated during the workday. Or the leave might exclude caring for a family member with COVID-19 or caring for a child where the child's school or place of care is closed due to COVID-19. The downside, of course, is that if an employer adopts a COVID-leave policy of its own design, it will not be eligible for FICA tax credits.

Extending FFCRA benefits is a decision that should be made carefully and in consultation with the employer's governing board, attorney, and tax advisors.



Links

- www.congress.gov/bill/117th-congress/house-bill/1319/text#H1244AB78CAD747388E93B8B62ED0CD02
- www.congress.gov/116/plaws/publ127/PLAW-116publ127.pdf