The FFCRA is Expiring on December 31, 2020. Now What?

The Families First Coronavirus Response Act ("FFCRA"), which provided for partially-paid leave to employees unable to work for specific COVID-19-related reasons,[1] is set to end on December 31, 2020. While Congress has extended the tax credits through March 31, 2021, for any covered employer who voluntarily provides paid leave under the FFCRA, the leave itself is no longer mandated. Further, for public employers, this offers no relief because public employers were ineligible for the tax credit. For all employers, this leads to the question of, "now what?"

Regardless of how an employer will be responding to the end of the FFCRA, it is important to communicate the plan with employees, and employers are encouraged to notify employees as soon as possible, particularly those who are currently on an approved FFCRA leave of absence.

AB 1867

On September 9, 2020, Governor Newsom signed AB 1867, immediately expanding paid sick leave protections that were not covered by the FFCRA. AB 1867 applies to private employers with more than 500 employees nationwide and private and public employers who employ healthcare providers or emergency responders (if those employers exempted healthcare providers or emergency responders from FFCRA leave). However, AB 1867 also expires on December 31, 2020 even though it would have been automatically extended had the FFCRA been extended.

FMLA/CFRA

Employers are still required to comply with their obligations under the Family Medical Leave Act ("FMLA") and the California Family Rights Act ("CFRA"), which allows eligible employees to take up to 12 workweeks of unpaid leave due to the employee's own serious health condition or because the employee is caring for an eligible family member with a serious health condition. Under the FMLA, covered family members include the employee's spouse, child (minor or dependent adult), and parent. However, effective January 1, 2021, the CFRA will be expanded to include the following as covered family members: the employee's spouse, registered domestic partner, child (of any age), child of a domestic partner, sibling, grandparent, or

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Employers are also reminded that any employee who used EFMLA resulted in their FMLA entitlement being reduced, but it did not result in a reduction of their CFRA entitlement. California employers will need to pay close attention for purposes of leave entitlement and designation because the overlap between the two laws is quite different now.

Any request for leave occurring after December 31, 2020, should be handled as a request for FMLA/CFRA leave. Further, employers will be required to evaluate whether an employee previously on FFCRA leave that will expire has an FMLA/CFRA qualifying reason to an FMLA/CFRA protected leave of absence effective January 1, 2021.[2]

Healthy Workplaces, Healthy Families Act

Eligible employees would also be entitled to take paid sick leave under the Healthy Workplaces, Healthy Families Act (HWHF) for the diagnosis, care, or treatment of a health condition of the employee or the employee's spouse, registered domestic partner, child, parent, grandparent, grandchild, and sibling.[3]

Local Sick Leave Ordinances

Employers should confirm whether their city or county adopted a "regular" sick leave ordinance or a COVID-19 supplemental sick leave ordinance.

California Paid Family Leave

If an employer participates in the California State Disability Insurance program, an employee may be eligible for up to eight weeks of paid family leave ("PFL") to care for a seriously ill family member, which includes the employee's spouse, registered domestic partner, child, parent, grandparent, grandchild, and sibling. Despite its misleading name, PFL is not a leave of absence, but rather a wage replacement program administered by the Employment Development Department.

California State Disability Insurance

If an employer participates in the California State Disability Insurance ("SDI") program, an employee who is unable to work because they are infected or suspect they are infected with COVID-19 can file a claim for State Disability, which is a wage replacement program administered by the Employment Development Department. SDI does not require the employer to give an employee a leave of absence, but rather provides for partial wage replacement during a qualifying leave of absence.

Existing Employer Paid or Unpaid Leave

Employees would also be entitled to take paid leave in accordance with their existing employer policies. Employers should evaluate current eligibility standards for existing paid leaves and determine if they will temporarily offer any additional qualifying reasons (such as allowing employees to use sick leave for childcare/school-related absences) or temporarily relaxing any policy standards. If employers are going to change existing leave policies, notice should be given to labor organizations. Further, employers should issue any such changes pursuant to a policy that has a clear ending date.

COVID-Specific Leaves of Absence

While not obligated to do so, some employers are opting to voluntarily adopt employer-provided COVID-related leaves of absence. Employers who wish to do this may offer paid, partially-paid, or unpaid leave, and may offer it for all or some of the same reasons as the FFCRA (or may offer it for additional COVID-related reasons). As an alternative, employers may also consider only continuing already-approved FFCRA leaves of absence under the same terms as the FFCRA, but not granting any new leaves of absence in 2021.

Employers should consider including provisions such as an automatic ending if state or federal law provides for leave for COVID-related reasons, and a statement that, to the extent possible, any such leave would be counted against entitlements to leaves mandated in the future by state or federal law. Further, if it is for an FMLA/CFRA qualifying reason, employer-provided COVID leave should run concurrently with FMLA/CFRA leave.

Any such leave would be subject to bargaining with labor organizations, and should be part of a written policy.

Telecommuting, Reduced Schedules, and Flexible Schedules

Employers may also wish to revisit their telecommuting policies and any policies on flexible schedules to determine if any revisions are advisable in light of the expiration of the FFCRA. Employers may also wish to consider whether they have any existing policies, or wish to adopt temporary policies, that would permit an employee to work a reduced schedule. In some situations, this may help find a balance between employees and employers.

Labor Obligations

Employers will also want to review any collective bargaining agreements or side letters that have addressed the FFCRA or similar issues. Employer decisions to extend new leave benefits above the level set forth in state and federal law impact mandatory subjects of

bargaining. The employer should at a minimum notice the impacted employee organization of its intention to do so before implementing such policies that extend these benefits to represented employees.

[1] As a reminder, the FFCRA has two major provisions: the Emergency Paid Sick Leave Act ("EPSL") and the Emergency Family and Medical Leave Expansion Act ("EFMLA"). The EPSL requires private employers with fewer than 500 employees and most public employers to provide paid (or partially-paid) sick leave of up to 80 hours, or 10 days, to employees who need to take leave for certain coronavirus-related reasons. Employees may be eligible for an additional 10 weeks of leave paid at two-thirds of their regular wages under the EFMLA to care for a child whose school or place of care is closed or whose child care provider is unavailable because of COVID-19.

[2] Employers should remember that there is a dispute between the federal Department of Labor ("DOL") and the Ninth Circuit Court of Appeals over whether an employee can decline FMLA leave when the employee is absent for an FMLA-qualifying reason. In March and September of 2019, the DOL issued opinion letters declaring that an employer may not delay designating leave as FMLA leave, even when the employee prefers it or when it was agreed to as part of a collective bargaining agreement. However, in 2014, the Ninth Circuit in *Escriba v. Foster Poultry Farms*, held that an employee can decline FMLA leave and used their accrued paid leave instead, despite the fact that the underlying reason for leave qualified for FMLA (the employee could opt to use FMLA at a later time, as long as they met the eligibility requirements). In its March 2019 opinion letter, the DOL strongly disagreed with the Ninth Circuit, but the decision still stands. Employers should discuss this with legal counsel before making decisions in this area.

[3] With certain exceptions, employees who work in California for 30 or more days within a year are eligible for sick leave under the Healthy Workplaces, Healthy Families Act.