

Law & Policy Group

GRIST



Tax credits for emergency paid leave available through September

By Katharine Marshall and Cheryl Hughes
May 24, 2021; revised Aug. 10, 2021

In this article

[FFCRA emergency paid leave overview](#) | [Changes required for ARPA extended tax credits](#) | [Employer considerations](#) | [Related resources](#)

The American Rescue Plan Act (ARPA) ([Pub. L. No. 117-2](#)) extended and enhanced the federal tax credits available to certain employers voluntarily providing emergency paid sick and family leave from April 1, 2021, through Sept. 30, 2021. Along with expanding the availability of the credits to state and local governments, the ARPA expands the leave provisions to allow paid time off for COVID-19 testing and vaccinations. This GRIST recaps detailed [IRS FAQs](#) on how the credits work and other changes made by the ARPA. Congress could expand the credits again later this year. *Updates to this GRIST reflect a revised IRS [FAQ](#) clarifying that the tax credits cover qualified wages paid while an employee is accompanying a family member to receive a COVID-19 vaccine or caring for a family member with vaccine side effects.*

FFCRA emergency paid leave overview

The Families First Coronavirus Response Act (FFCRA) ([Pub. L. No. 116-127](#)), as amended by the Coronavirus Aid, Relief and Economic Security (CARES) Act ([Pub. L. No. 116-136](#)), established a paid leave mandate for private employers with fewer than 500 employees and most government employers. From April 1 through Dec. 31, 2020, the law required covered employers to provide two weeks of paid sick leave and 12 weeks of partially paid, expanded Family and Medical Leave Act (FMLA) leave to employees affected by the COVID-19 pandemic.

Although Congress allowed the leave mandate to expire, the Consolidated Appropriations Act of 2021 (CAA) ([Pub. L. No. 116-260](#)) made some minor adjustments and extended the tax credits through the first quarter of 2021 to employers voluntarily providing FFCRA paid leave to employees who had not exhausted their entitlement in 2020. The ARPA has expanded and extended the tax credits through this September for certain employers voluntarily providing COVID-19 emergency paid leave.

Although FFCRA paid emergency leave is no longer mandatory, the law's provisions remain conditions for receiving the tax credit, so a brief overview of those requirements is presented below. (For detailed coverage, see [DOL and IRS issue guidance on COVID-19 emergency paid leave](#), Jan. 15, 2021.)

Paid sick leave

The FFCRA required up to 80 hours of paid sick leave in a two-week period for full-time employees — and up to the average hours worked in a typical two-week period for part-time employees — unable to work or telework for the following COVID-19 reasons:

1. A federal, state, or local quarantine or isolation order
2. A self-quarantine recommendation from a healthcare provider
3. COVID-19 symptoms needing a medical diagnosis
4. The need to care for an individual subject to #1 or #2 above
5. The need to care for a son or daughter whose school or child care facility closed for COVID-19-related reasons
6. Any other “substantially similar conditions” specified by the Department of Health and Human Services (HHS)

FMLA expansion

The FFCRA amended the FMLA to provide 12 weeks of job-protected, partially paid emergency leave to employees unable to work or telework because their son’s or daughter’s school or child care closed due to a COVID-19-related public health emergency. The first two weeks of leave were unpaid, after which the employer had to pay at least two-thirds of an employee’s regular pay rate for the length of the COVID-19-related FMLA leave.

The FFCRA’s 12 weeks of COVID-19 family leave was not in addition to the FMLA’s standard entitlement of 12 weeks’ leave in a 12-month period. Accordingly, the amount of emergency family leave available was offset by any FMLA leave already taken in the applicable 12- month period. Any emergency COVID-19 FMLA leave taken likewise counted against an employee’s total 12-week FMLA entitlement.

Covered employers

The emergency paid leave provisions applied to most government employers of any size and private-sector employers with fewer than 500 employees. A limited hardship exception was available for small businesses with fewer than 50 employees.

Rate of pay

To calculate pay during emergency leave, employers had to use the greater of (i) an employee’s regular pay rate, (ii) the federal minimum wage, or (iii) the applicable state or local minimum wage. Sick leave for an employee’s COVID-19-related illness, quarantine or isolation had to be paid at 100% (subject to a cap), while paid leave to care for a family member was only two-thirds (also subject to a cap) of the applicable pay rate or minimum wage.

Daily and aggregate paid leave caps. The FFCRA placed the following limits on the amount of pay for different types of emergency leave:

- **Paid sick leave for an employee’s own COVID-19-related illness, quarantine or isolation:** \$511 per day and \$5,110 total over the eligible two-week period

- **Paid sick leave to care for a family member experiencing of COVID-19 illness, quarantine or isolation or for a child during a virus-related school or child care closure:** \$200 per day and \$2,000 total over the eligible two-week period.
- **Expanded FMLA leave:** \$200 per day and \$10,000 total over the 10-week period

Changes required for ARPA extended tax credits

Under the ARPA, tax credits are available for qualifying wages (including eligible health plan expenses) for voluntarily provided paid leave from April 1, 2021, through Sept 30, 2021. In the private sector, the tax credits are still limited to employers with fewer than 500 employees. However, the credits now are also available to 501(a) and 501(c)(1) tax-exempt entities, including certain entities established by the federal government, as well as certain state and local government employers.

The refundable payroll tax credits are now claimed each calendar quarter against the employer's portion of the Medicare hospital insurance tax. Before April 1, 2021, the credit counted against the employer's share of the Social Security or railroad retirement payroll tax.

To receive the tax credits, covered employers must comply with all of the FFCRA's original requirements, as well as a few new ARPA requirements, as described below.

Expanded leave

To qualify for tax credits, a covered employer must provide a new allocation of sick leave to all covered employees. Beginning April 1, 2021, eligible employers must provide 80 hours of sick leave in a two-week period for full-time employees and up to the average hours worked in a typical two-week period for part-time employees. Unused FFCRA sick leave prior to April 1 is forfeited, as will happen to any leave time remaining after Sept. 30, 2021 (unless the credits are extended again). Employers presumably could continue to make the unused emergency leave available rather than forfeit it, but they won't receive tax credits to offset the cost of that leave.

Additional uses for emergency leave. The ARPA expanded the permitted uses of emergency paid sick leave to include time off for COVID testing, vaccines and vaccine recovery, along with the reasons set out in the FFCRA. Covered employees now can use emergency paid sick leave to:

- Seek or await the results of a COVID-19 diagnosis
- Obtain a COVID-19 immunization
- Recover from any injury, disability, illness or condition related to a COVID-19 immunization

An updated [FAQ](#) issued July 29 clarifies that employees also can use emergency leave to accompany a family member to get vaccinated and to care for a family member with vaccine-related symptoms. As a reminder, family members include anyone regularly living in the employee's home or whose relationship with the employee creates an expectation that the employee would care for that person and immediate family members.

The ARPA also changes the expanded FMLA provisions to include all of the same reasons that emergency sick leave is available — i.e., not just school or child care closings. Covered employees now can use expanded FMLA leave for any of the reasons allowed for in the original [emergency paid sick leave](#), including to care for a family

member subject to quarantine or isolation, plus the ARPA's additional uses. In addition, the law now requires partial wage replacement during the first two weeks of expanded FMLA leave (the first two weeks were unpaid under the FFCRA).

Increased cap on paid emergency FMLA leave wages

The ARPA increased the original aggregate cap of \$10,000 per employee for paid emergency FMLA leave — and the related tax credits — to \$12,000. This cap applies to qualifying paid leave wages paid from April 1, 2021, through Sept. 30, 2021. This cap appears to be unaffected by any payments to an employee for qualified emergency family leave taken from April 1, 2020, March 31, 2021.

The 100% of actual pay rate and \$511 daily cap on paid emergency sick leave for an employee's own COVID-19-related needs remain unchanged. The 2/3 pay rate and \$200 daily cap on paid emergency leave to care for a family member with COVID-19-related needs likewise remain the same.

Nondiscrimination requirement

Employers cannot discriminate in offering qualifying leave to employees and must make it available to all eligible employees. The ARPA prohibits covered employers from discriminating on the basis of employee tenure or in favor of highly compensated or full-time employees when providing the emergency paid leave. Any covered employer that discriminates will not be eligible for tax credits.

Employer considerations

Paid FFCRA leave remains voluntary — and has been since Jan. 1, 2021. However, eligible employers may find the corresponding tax credits helpful, as employees' COVID-19-related absences continue and various state and local COVID-19 paid leave requirements persist. Employers should note that the prior FFCRA rules on covered private employers, employee eligibility, information, documentation and the like remain unchanged. Those rules still apply to employers seeking the tax credits. Employers considering voluntarily providing the emergency paid leave to access the tax credits should consider consulting with employment and tax counsel.

Related resources

Non-Mercer resources

- [FAQs on ARPA tax credits for COVID-19 paid leave](#) (IRS, July 29, 2021)
- [Fact Sheet 2021-09](#), Tax credits for employers providing paid leave to employees who take time off for COVID-19 vaccinations (IRS, updated May 11, 2021)
- [Payroll tax credit for COVID-19 sick and family leave](#) (Congressional Research Service, April 1, 2021)
- [Pub. L. No. 117-2](#), the ARPA (Congress, March, 11, 2021)
- [Pub. L. No. 116-260](#), the Consolidated Appropriations Act, 2021 (Congress, Dec. 27, 2020)
- [Notice 2020-54](#) (IRS, July 8, 2020)

- [Corrections to temporary final rule](#), Paid leave under the FFCRA (Federal Register, April 10, 2020)
- [Temporary final rule](#), Paid leave under the FFCRA (DOL, April 6, 2020)
- [Pub. L. No. 116-136](#), the CARES Act (Congress, March 27, 2020)
- [Pub. L. No. 116-127](#), the FFCRA (Congress, March 14, 2020)

Mercer Law & Policy resources

- [States, cities tackle COVID-19 paid leave](#) (May 24, 2021)
- [Tracking federal COVID-19 laws affecting employee benefits, jobs](#) (March 30, 2021)
- [DOL and IRS issue guidance on COVID-19 emergency paid leave](#) (Jan. 15, 2021)
- [CARES Act boost telehealth, makes other health, paid leave changes](#) (March 27, 2020)
- [Virus aid legislation includes cost-sharing curbs, new leave rights](#) (March 18, 2020)

Other Mercer resources

- [Navigating coronavirus](#) (regularly updated)

Note: Mercer is not engaged in the practice of law, accounting or medicine. Any commentary in this article does not constitute and is not a substitute for legal, tax or medical advice. Readers of this article should consult a legal, tax or medical expert for advice on those matters.