



WHITEPAPER

EMPLOYER PAID **COVID-RELATED** LEAVE TAX CREDITS

THE FFCRA IN 2021

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FMLA Manager

The paid leave *mandate* under the Families First Coronavirus Response Act (FFCRA) was effective only from April 1 through December 31, 2020. The law was designed to address situations in which employees were not going to work for various COVID-19-related reasons such as parenting demands due to school/daycare closures, quarantine or stay-at-home orders, or as a preventive measure regarding the disease. The FFCRA helped employees and employers respond to this need for additional leave and helped stem the spread of the virus.

After December 31, 2020, employers were no longer required to provide the paid FFCRA leave, but under the Consolidated Appropriations Act of 2021, employers could voluntarily continue to do so until March 31, 2021, and receive the tax credits for the leave. That deadline was extended to September 30, 2021 by the American Rescue Plan Act (ARPA), which generally turned the law into a tax benefit.

The information provided here depicts the provisions of the FFCRA for those employers who wish to continue providing the paid leave.

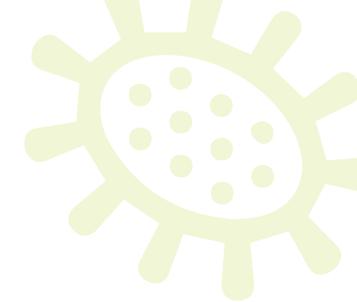
INTRODUCTION TO THE FFCRA

The FFCRA contained two employee leave provisions, emergency paid sick leave (EPSL) and expanded family and medical leave (EFML). In general, employers may provide their employees with leave for specified reasons related to COVID-19 and be reimbursed dollar-for-dollar for that leave through a refundable tax credit.

The two provisions (EPSL and EFML) are somewhat intertwined, but also need to be viewed independently.

EPSL

The emergency paid sick leave (EPSL) provisions allow employees to take up to 10 days of leave for certain qualifying reasons.



EMPLOYEE ELIGIBILITY: For the 10 days (80 hours or two weeks) of EPSL, all employees are eligible. They need not have worked for your company for any amount of time or worked any number of hours or work at any particular location — as long as it's in the U.S.

QUALIFYING REASONS FOR LEAVE: Employees may take the 10 days of EPSL and employers may obtain a refund if the employees are unable to work or telework due to a need for leave because they:

1. Are subject to a federal, state, or local quarantine or isolation order related to COVID-19;
2. Have been advised by a health care provider to self-quarantine related to COVID-19;
3. Are experiencing COVID-19 symptoms and are seeking a medical diagnosis;
4. Are seeking or awaiting the results of a COVID test or medical diagnosis, if they have been exposed or the employer has requested the test or diagnosis;
5. Are obtaining a COVID vaccination;
6. Are recovering from an injury, disability, illness, or condition related to the vaccination;
7. Are caring for an individual subject to a quarantine or isolation order or medically advised to self-quarantine;
8. Are caring for a child whose school or place of care is closed (or childcare provider is unavailable) for reasons related to COVID-19; or
9. Are accompanying an individual to obtain a COVID-19 vaccine or caring for an individual who is recovering from conditions related to obtaining the vaccine.

The term “individual” means an immediate family member, someone who regularly resides in the employee’s home, or a similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person. The term does not include persons with whom the employee has no personal relationship.



A NEW BATCH OF 10 DAYS

As of April 1, 2021, employees may receive a new batch of 10 days of EPSL to use through September 30, 2021, regardless of whether they used some or all of the 10 days before April 1, 2021. An employee could have used all 10 days of EPSL before April 1, 2021. As of April 1, he or she would have 10 more days of EPSL available.

Employees do not, however, carryover any EPSL not taken before April 1. If, for example, Joe Employee used only five days of EPSL before April 1, he would be entitled to only 10 more days of EPSL as of April 1. He would not be entitled to add the five days of EPSL he did not use before April 1 to the new batch of 10 days he may take after April 1.

INTERMITTENT LEAVE: Employees may take EPSL intermittently from their *usual worksite* if you agree to it and only for certain reasons. Employees may not take the EPSL intermittently from the regular worksite if they are taking it because they:

- Are subject to a federal, state, or local quarantine or isolation order related to COVID-19;
- Have been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- Are experiencing symptoms of COVID-19 and seeking a medical diagnosis; or
- Are caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.

In other words, if the employee has been exposed, they should stay away from the workplace. This limitation is to help curb the spread of the virus in the workplace. The goal is to keep the virus out of the workplace.

This intermittent leave is to be taken in full-day increments. Unless an employee is teleworking, once her or she begins taking EPSL for one or more of these qualifying reasons, the employee must continue to take EPSL each day until he or she either:

- Uses the full amount of EPSL or
- No longer have a qualifying reason for taking EPSL.

This limit is imposed because if an employee is sick or possibly sick with COVID-19, or caring for an individual who is sick or possibly sick with COVID-19, the intent of FFCRA is to provide such EPSL as necessary to keep the employee from spreading the virus to others at work.



The **J. J. Keller® FMLA Manager** allows HR administrators to easily schedule intermittent leave while accurately keeping track of remaining leave time balances for each employee.

TAKE A FREE TRIAL

In contrast, you may agree to intermittent EPSL because employees are taking the leave to care for their child whose school or place of care is closed, or whose childcare provider is unavailable, because of COVID-19 related reasons. If, for example, an employee's child is at home because of childcare issues due to COVID-19, the employee could take EPSL on Tuesdays and Thursdays to care for her child, but work at your normal worksite on Mondays, Wednesdays, and Fridays.

Employees may, however, take EPSL or EFML intermittently while *working at home* for any reason, but only if you allow the intermittent leave and employees are unable to work their normal schedule due to qualifying reasons.

PART-TIME EMPLOYEES: Full-time employees may take a total of up to 10 days of EPSL, and part-time employees may take the number of hours of leave that the employee works on average over a two-week period.

If a part-time employee doesn't have a normal weekly schedule, the number of hours of EPSL to which the employee may take is calculated as follows:

- If the part-time employee has been employed for at least six months, the employee may take up to the number of hours of EPSL equal to 14 times the average number of hours that the employee was scheduled to work each calendar day over the six-month period ending on the date on which the employee takes EPSL, including any hours for which the employee took leave of any type.
- If the part-time employee has been employed for fewer than six months, the employee may take up to the number of hours of EPSL equal to 14 times the number of hours the employee agreed to at the time of hiring that the employee would work, on average, each calendar day. If there is no such agreement, the employee may take up to the number of hours of EPSL equal to 14 times the average number of hours per calendar day that the employee was scheduled to work over the entire period of employment, including hours for which the employee took leave of any type.



You can access a full library of federal and state requirements in easy-to-understand terms with the **J. J. Keller® FMLA Manager**. This allows your business to ensure it's complying with FFCRA and other regulations related to family and medical leave.

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PAY: How much pay an employee receives during the two weeks of EPSL will depend upon the reason for the leave. Employees may be paid as follows:

- 10 days of EPSL at the employee's *regular rate of pay* (100 percent, up to \$511 daily and \$5,110 total) where the employee is unable to work because the employee:
 - o Is quarantined or isolated per a federal, state, or local government order;
 - o Is advised by a health care provider to self-quarantine;
 - o Is experiencing COVID-19 symptoms and seeking a medical diagnosis;
 - o Is obtaining a COVID vaccination;
 - o Is recovering from an injury, disability, illness, or condition related to the vaccination; or
 - o Is seeking or awaiting the results of a COVID test or medical diagnosis, if they have been exposed or the employer has requested the test or diagnosis.
- 10 days of EPSL at *two-thirds the employee's regular rate of pay* (up to \$200 daily and \$2,000 total) because the employee is unable to work the employee:
 - o Is caring for an individual subject to quarantine per a federal, state, or local government order,
 - o Medically advised to self-quarantine, or
 - o Is experiencing a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of the Treasury and Labor, including accompanying someone to get a vaccine.

Emergency EPSL is to be paid only up to 80 hours over a two-week period. An employee, for example, who is scheduled to work 50 hours a week, may take 50 hours of EPSL in the first week and 30 hours of EPSL in the second week. In any event, the total number of hours EPSL is capped at 80.

EXPANDED FMLA LEAVE

Eligible employees may take up to 12 weeks of expanded family and medical leave (EFML).



Employees get a new batch of 10 days of EPSL as of April 1, 2021

EMPLOYEE ELIGIBILITY: In order to take the 12 weeks of EFML, employees need to have worked for your company for at least 30 calendar days. This is very different than the usual 12 months of worked for the usual reasons for FMLA leave. Employees also need not have worked the 1,250 hours in the 12 months before leave is to begin or work at a location with at least 50 company employees within 75 miles.

Employees are considered to have been employed by you for at least 30 calendar days if you had the employees on your payroll for the 30 calendar days immediately prior to the day the leave would begin. If, for example, Emma Employee wants to begin leave on July 1, 2021, she would need to have been on your payroll as of June 2, 2021.

Similar to the original FMLA, if you have temporary employees that you subsequently hire as regular employees, you are to count any days those employees previously worked as temporary employees toward this 30-day eligibility period.

QUALIFYING REASONS FOR LEAVE: Eligible employees are entitled to EFML for the same reasons available for EPSL, but may take 12 weeks of leave if they are caring for their child whose school or place of care is closed or the childcare provider is unavailable due to COVID-19 related reasons (basically reason #5).

If, for example, Joe Employee needs to stay home because of parental demands caused by COVID-19-related school closures, he would be entitled to a total of up to 12 weeks of expanded leave at 2/3 pay.

FFCRA leave is not available to employees if the school or childcare provider is closed for events such as summer vacation, holidays, or any other reason that is not related to COVID-19.

INTERMITTENT LEAVE: You may agree to allow an employee to take the EFML for childcare issues on an intermittent basis. This is true whether the employee is working at the original worksite or is teleworking.

You may agree to allow an employee to take intermittent leave in any increments. If, for example, you agree on a 90-minute increment, Emma Employee could telework from 1:00 PM to 2:30 PM, take leave from 2:30 PM to 4:00 PM, and then return to teleworking.



PAY: The 12 weeks of EFML for childcare reasons is to be paid at 2/3 the employee's wages. For each day of leave, employees receive compensation based on the number of hours they would otherwise be normally scheduled to work.

Employees may elect to use, or you may require that them to use, EFML concurrently with any leave offered under your company policies, such as vacation or personal leave or paid time off that would be available for the employees, to take to care for their child.

You may calculate the employee pay as follows:

- If the employee has a work schedule that varies to such an extent that you are unable to determine the number of hours the employee would have worked on the day for which leave is taken and has been employed for at least six months, the average number of hours the employee was scheduled to work each workday, over the six-month period ending on the date on which the employee first takes EFML, including hours for which the employee took leave of any type; or
- If the employee has a work schedule that varies to such an extent that you are unable to determine the number of hours the employee would have worked on the day for which leave is taken and the employee has been employed for fewer than six months, the average number of hours the employee and you agreed at the time of hiring that the employee would work each workday. If there is no such agreement, the scheduled number of hours is equal to the average number of hours per workday that the employee was scheduled to work over the entire period of employment, including hours for which the employee took leave of any type.

As an alternative, the amount of pay for EFML may be computed in hourly increments instead a full day. For each hour of EFML taken after the first two weeks, you must pay the employee two-thirds of the his or her average regular rate.

The 12 weeks of EFML leave for childcare is paid at 2/3 employee pay. Since the ARPA increased this from 10 weeks to 12 weeks, the ARPA also increased the cap on the aggregate paid leave from \$10,000 to \$12,000. Therefore, you may now take an additional \$2,000 in payroll tax credits per employee for qualifying EFML.



Uncertain about employee pay for EFML, or another complex topic? **FMLA Manager** offers direct access to J. J. Keller's in-house team of HR experts with over 500 years of combined experience. Ask your toughest questions and receive reliable answers, typically within one business day.

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You may also compute this amount for each employee by adding all compensation that is part of the regular rate over the above period and dividing that sum by all hours actually worked in the same period.

If employees are paid with commissions, tips, or piece rates, these wages are incorporated into the above calculation.

OVERTIME

When calculating pay due to employees, include overtime hours; you must pay an employee for hours the employee would have been normally scheduled to work even if that is more than 40 hours in a week. You need not, however, include a premium (e.g., double-time) for overtime hours for either the EPSL or the EFML.

DISCRIMINATION PROHIBITED

Under the ARPA, you may not receive the tax if you discriminate in terms of employee eligibility for the paid FFCRA leave in favor of:

- Certain highly compensated employees (as defined by Section 414(q) of the Internal Revenue Code),
- Full-time employees, or
- Employees on the basis of employment tenure – those with seniority.

If you have been providing FFCRA paid leave to employees in a discriminatory manner related to any of these qualifying reasons in the past, make sure that you do not so going forward as of April 1, 2021.

NOTICES/FORMS

EMPLOYEE NOTICE: You may require employees to follow reasonable notice procedures, and employees should provide notice as soon as practicable, with some considerations, as the notice may be required only after the first workday the employee takes FFCRA leave. If an employee fails to give proper notice, you should inform him or her of the failure and provide an opportunity to give you any required documentation before denying the leave.

Because the FFCRA is voluntary, you are not required to display an FFCRA poster.



RESPONDING TO A LEAVE REQUEST: You are not required to provide an eligibility/rights & responsibilities notice or a designation notice. If, however, you have established practices for providing individual employees with specific notices compliant with the usual FMLA, you may apply your existing practices to FFCRA leave users.

The U.S. Department of Labor did not create any new eligibility/rights and responsibilities notice or designation notice, nor did it create a new certification form.

You should inform employees whether the leave is covered by the EPSL or the EFML.

LEAVE DOCUMENTATION: You should request documentation in support of the reasons for the leave, as it may be needed to obtain the tax credits.

An employee should provide you with documentation, prior to taking FFCRA leave, that he or she is unable to work or telework due to a qualifying reason. The documentation should contain the following information:

- Employee's name;
- Date(s) for which leave is requested;
- Qualifying reason for the leave; and
- Oral or written statement that the employee is unable to work because of the qualified reason for leave.

To take EPSL because the employee is under a quarantine or isolation order, the employee should also provide the name of the government entity that issued the quarantine or isolation order.

To take EPSL because the employee was advised by a healthcare provider to self-quarantine, the employee should also provide the name of the healthcare provider.



These documents may include a copy of the federal, state, or local quarantine or isolation order related to COVID-19; or written documentation by a health care provider advising the employee to self-quarantine due to concerns related to COVID-19.

To take EPSL to care for an individual who is under a quarantine or isolation order or who has been advised to self-quarantine, the employee should also provide either:

- The name of the government entity that issued the quarantine or isolation order to which the individual being care for is subject; or
- The name of the healthcare provider who advised the individual being cared for to self-quarantine.

To take EPSL or EFML because the employee is unable to work or telework due to a need to care for a child whose school or place of care is closed and no other suitable person is available to care for the child, the employee should also provide:

- The name of the child being cared for;
- The name of the school, place of care, or childcare provider that has closed or become unavailable; and
- A representation that no other suitable person will be caring for the child during the period for which the employee takes EPSL or EFML.
- If the child is older than 14, a statement that special circumstances exist requiring the employee to provide care.

This provision may, for example, be satisfied with a notice of closure or unavailability from a child's school, place of care, or child care provider, including a notice that may have been posted on a government, school, or day care website, published in a newspaper, or emailed to the employee from an employee or official of the school, place of care, or child care provider. You need not provide leave if materials sufficient to support the applicable tax credit have not been provided. You should document denials of leave.

You may also ask to see a COVID-vaccination record, but this would not be available before an employee takes time off to obtain the vaccine.

It would also be logical to request information from a health care provider giving a COVID-19 test or diagnosis under the new reason for leave when the employee is seeking or awaiting the results of a diagnostic test for, or a medical diagnosis of, COVID-19 and the employee has been exposed to COVID-19 or you have requested such test or diagnosis.

You must retain related documentation for at least four years. This documentation includes the following:

- Documentation to show how you determined the amount of FFCRA leave paid to employees who are eligible for the credit, including records of work, telework and FFCRA;
- Documentation to show how you determined the amount of qualified health plan expenses that you allocated to wages;
- Copies of any completed IRS Forms 7200 that you submitted to the IRS; and
- Copies of the completed IRS Forms 941 that you submitted to the IRS or, if you use third-party payers to meet your tax obligations, records of information provided to the third-party payer regarding your entitlement to the credit claimed on IRS Form 941.

TAX CREDITS

If you provide the paid leave to employees through September 30, 2021, you may take advantage of two refundable payroll tax credits, designed to immediately and fully reimburse you, dollar-for-dollar, for the cost of providing COVID-related leave to your employees.

When you pay your employees, you are required to withhold federal income taxes and their share of Social Security and Medicare taxes. You then are required to deposit these federal taxes, along with your share of Social Security and Medicare taxes, with the IRS and file quarterly payroll tax returns (Form 941 series) with the IRS.

If you pay qualifying sick or childcare leave, you may retain an amount of the payroll taxes equal to the amount of qualifying sick and childcare leave you paid, rather than deposit them with the IRS.



Establishing two new pay codes in your payroll system to track employee time for paid time off under the provisions can help to enable you to receive these tax credits.

The payroll taxes that are available for retention include withheld federal income taxes, the employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes with respect to all employees.

If there are not enough payroll taxes to cover the cost of qualified sick and childcare leave paid, you may file a request for an accelerated payment from the IRS. The IRS expects to process these requests in two weeks or less.

If, for example, you paid \$5,000 in EPSL and are otherwise required to deposit \$8,000 in payroll taxes, including taxes withheld from all your employees, you could use up to \$5,000 of the \$8,000 of taxes you were going to deposit for making qualified leave payments. You would only be required to deposit the remaining \$3,000 on your next regular deposit date.

If you paid \$10,000 in EPSL and were required to deposit \$8,000 in taxes, you could use the entire \$8,000 of taxes in order to make qualified leave payments and file a request for an accelerated credit for the remaining \$2,000.

RETURN TO WORK

Generally, you are to return employees to their positions after leave. Employees who are laid off, however, need not be restored. You should be able to show that the employee would not otherwise have been employed at the time reinstatement is requested.

Some employees may be afraid to return to the physical workplace due to the continuing risks of contracting the virus. Time off for such a reason, by itself, however, may not qualify for leave under the FFCRA. Employees may, however, be protected under other laws, such as the Americans with Disabilities Act, if they have conditions that put them at greater risk of complications should they become infected. Such leave may also fall under the classic FMLA.

If you have fewer than 25 employees, you need not restore an employee who took EFML due to childcare issues if the following conditions are met:

- The employee's position no longer exists due to economic or operating conditions that
 - o Affect employment and
 - o Are caused by a public health emergency (i.e., due to COVID-19-related reasons) during the period of the employee's leave;

- You made reasonable efforts to restore the employee to the same or an equivalent position; and
- If your reasonable efforts to restore the employee fail, you make reasonable efforts to contact the employee if an equivalent position becomes available. You are to make such efforts for one year beginning either on the date the leave related to COVID-19 reasons ends or the date 12 weeks after the employee's leave began, whichever is earlier.

INTERSECTION WITH FMLA

You may have employees who are already on original FMLA, and they may continue on that leave for an FMLA-qualifying reason. If an employee (or a family member) has a serious health condition, including COVID-19, the employee could be entitled to original FMLA leave as usual.

The employee would be entitled to up to 12 weeks of FMLA leave for his or her own condition or to care for a family member. The employee would, however, need to meet the original eligibility criteria of working for at least 12 months, working 1,250 hours in the 12 months before leave is to begin, and working at a location with at least 50 company employees within 75 miles.

If an employee wants to stay home to avoid the risk contracting the disease, he or she may not have leave rights under the FFCRA, but may have leave rights under the classic FMLA; much would depend upon what the certification indicates.

In relation to an employee's own condition, unless the employee is subject to a quarantine or isolation order, has been advised to self-quarantine, is obtaining a vaccine, recovering from side effects of a vaccine, or is seeking or awaiting the results of a COVID test or diagnosis due to exposure or your request, such a reason would not qualify for the FFCRA leave.

All existing certification requirements under the original FMLA remain in effect if an employee is taking leave for one of the qualifying reasons under the original FMLA. If, for example, an employee is taking leave because a medical condition rises to the level of a serious health condition (including COVID-19), the employee must continue to provide medical certifications under the FMLA if required by you. Some healthcare facilities, however, may be too busy to provide medical certifications.



The **J. J. Keller® FMLA Manager** offers a variety of COVID-19 resources, including articles, whitepapers, and timely notifications of regulatory updates, to help you manage employee leave during the pandemic.

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Questions remain regarding whether leave taken for all FFCRA leave reasons, including the new reasons, may be counted against an employee's regular 12-week FMLA leave entitlement. It is still unclear if, for example, an employee took five days of EPSL to recover from the side effects of a COVID-19 vaccine, those five days be counted against the employee's 12 weeks of classic FMLA.

It is clear, however, that if an employee used 12 weeks of EFML because of a child's school closure under the FFCRA, the employee might not have more FMLA leave available in the 12-month leave year period.

Leave used before taking FFCRA leave can also have an effect. If you use the calendar year as the 12-month FMLA leave year and an employee took three weeks of leave in January 2021 for the employee's own serious health condition, the employee would have only nine weeks of FFCRA and FMLA leave available.

CONCLUSION

While only temporary and only voluntary, the FFCRA poses many challenges. Employees who can continue to work from home might not need to take the leave, and any time spent working is not FMLA leave or FFCRA leave, no matter where that work is performed.

You might consider continuing to provide the FFCRA, in part to help keep the virus out of the workplace, as employees are less likely to stay home if they are not paid to do so; and in part in case more changes are made relative FFCRA leave, or to leave (including paid leave) in general. This is particularly true if any changes are retroactive.

ABOUT THE AUTHOR

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Darlene is an Editor on the Human Resources Publishing Team and has been with J. J. Keller & Associates, Inc. since 1996. She specializes in employment law topics such as the Family and Medical Leave Act, the Americans with Disabilities Act, Forms I-9 and E-Verify, the Health Insurance Portability and Accountability Act, and the Uniformed Services Employment and Reemployment Rights Act.

With a creative writing background, she translates employment laws, regulations, case law, etc., into palatable information. She has had related articles published in various business magazines and has presented at various conferences.



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Developed by J. J. Keller's trusted team of in-house experts, FMLA Manager streamlines FMLA tracking while ensuring ongoing compliance with the latest federal and state FMLA requirements. You can also use it to:

- Schedule and track both continuous and intermittent leave
- Upload existing employee data in seconds
- Manage unique FMLA leave parameters across multiple locations
- Project available FMLA leave for specific employees
- Utilize a consolidated forms library
- Set notifications and reminders for certification requests, eligibility notices, and more
- Reference the most up-to-date federal and state FMLA regulations along with plain-English explanations
- Ask our subject-matter experts your toughest FMLA questions

Now comes outfitted with ready-to-use pandemic management resources!

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