

Viewpoint: Questions Employers Are Asking Now that FFCRA Leave Is Voluntary

Leave-taking under the Families First Coronavirus Response Act raises new issues

By Jeff Nowak
January 13, 2021



As we turn the page to a new year, employers covered by the [Families First Coronavirus Response Act](#) (FFCRA) face a host of questions now that FFCRA [is purely voluntary](#).

For instance, employers are navigating questions such as: Should an employer voluntarily provide FFCRA leave to eligible employees now that leave is no longer mandatory? Is an employer allowed to provide emergency paid sick leave but not paid Family and Medical Leave Act (FMLA) leave? (Or visa versa?) And does the employee receive a whole new bucket of paid leave for use in 2021?

So many questions, and I know you're looking for answers. Below, I've taken a stab at my take on some the common questions you've posed to me.

Two Key Presumptions

When tackling FFCRA in 2021, keep in mind two critical principles:

1. FFCRA has always provided for a *maximum* of 2 weeks/80 hours of **emergency paid sick leave (EPSL)** and a maximum of 12 weeks of **emergency paid FMLA (EFML)** between April 1, 2020 and March 31, 2021. No more.

2. As of Jan. 1, 2021, FFCRA effectively has become a tax credit statute. Its substantive provisions no longer are enforceable.

With these principles in mind, let me tackle a few of the common FFCRA questions posed to me:

Q. Does an employee receive a new bank of EPSL or EFML in 2021?

A. Remember Principle #1 above. There is no magical new bank of time as of January 1, 2021. The FFCRA makes clear that an eligible employee received a maximum allotment of 2 weeks/80 hours of EPSL and 12 weeks of EFML, and they earned nothing more when the calendar turned to 2021.

Let's break this down with some examples:

EPSL

If an employee used one week of EPSL on or after April 1, 2020, the employee has one additional week of EPSL to take in 2021. However, if the employee used the entire allotment of 2 weeks/80 hours in 2020, an employer cannot provide the employee additional EPSL in 2021 *if* they want to take the tax credit.

EFML

This same concept generally applies to EFML but let me add a caveat. To take EFML in 2021, my read is that you must have classic FMLA leave available.

Why is that? Keep in mind that, under the FFCRA regulations, an employee could not take EFML in 2020 if they did not have any classic FMLA time available. [29 CFR 826.70\(b\)](#) It seems to me that the same holds true in 2021 as well.

Let me give you two examples:

- Employer uses a calendar year for its 12-month FMLA leave period. Let's assume the employee uses 8 continuous weeks of EFML in 2020. As of Jan. 1, 2021, the employee would earn back another 12 weeks of FMLA leave, so he could use the balance of 4 weeks of EFML that he did not use in 2020.
- Employer uses a rolling FMLA year. Employee uses 6 continuous weeks of EFML beginning April 1, 2020 and then takes 6 weeks of classic FMLA beginning on June 1, 2020. FMLA will not roll back on until April 1, 2021, but he's still sitting here right now with 6 weeks of EFML that he did not use in 2020. To be consistent with [Section 826.70\(b\)](#) that I referenced above, he cannot take EFML

because he does not earn back any FMLA time until April 1, 2021. If he had not used 6 weeks of classic FMLA in June 2020, six weeks of EFML would be available to him to use prior to March 31, 2021.

Let me be clear—I'm giving you my best take as I read together the FFCRA and the December amendments, and I recognize there may be a difference of opinion on this point. Here's hoping we receive some guidance from DOL *pronto* so we can administer EFML with appropriate agency guidance in 2021.

Q. As of January 1, 2021, should an Employer Count EFML leave (caring for a child whose school or daycare is closed) against classic FMLA?

A. Keep in mind Principle #2 above. Because FFCRA is effectively a tax credit statute as of January 1, 2021, the substantive portions of the Act no longer apply, and we cannot draw down classic FMLA by EFML provided in 2021.

Q. May an employer voluntarily offer EPSL, but not EFML, or visa versa?

A. Arguably, yes. The FFCRA contained two different acts: EFML (Division C of the FFCRA) and EPSL (Division E of the FFCRA). Division G of the FFCRA discusses tax credits for both EPSL and EFML (among other things). The December 2020 amendments added sections relating to the tax credit, but EFML and EPSL still remain two separate sections. As a result, we can make a pretty strong argument that an employer has the discretion of providing only EPSL and not EFML, or visa versa, in 2021.

Q. Can an Employer tweak any of the provisions under FFCRA and still obtain the tax credit?

A. Wouldn't it be nice if you could pick and choose your favorite parts of FFCRA and still get the tax credit? Sadly, that's not how it works. Of course, you have the freedom to tweak the conditions of FFCRA leave, but if you do, you can't take the tax credit.

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