

# Employee Benefit Plan Review

## Ask the Experts

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### ADDITIONAL LEAVE UNDER THE FFCRA FOR EMPLOYEE WHO HAS PREVIOUSLY TAKEN FMLA LEAVE

**Q** My company has around 200 employees, and we have a parental leave policy under which we offer full-time employees 12 weeks of fully paid parental leave. The 12 weeks of paid parental leave runs concurrently with leave taken under the federal Family and Medical Leave Act (“FMLA”). One of our employees recently gave birth to a child and we expected her to return from parental leave in a few weeks. The employee has reached out to us and said that she will not be able to return to work at the end of her 12 weeks of FMLA/parental leave because the daycare centers in her area are closed due to COVID-19. She has no suitable alternative childcare. She said that she believes she is entitled to an additional 12 weeks of leave under the Families First Coronavirus Response Act (“FFCRA”) for this reason. Is she correct?

**A** Your employee is probably not correct that she is entitled to an additional 12 weeks of leave under the FFCRA, although she may be entitled to an additional two weeks of leave under the FFCRA. The FFCRA went into effect on April 1, 2020 and, as of the date this column is published, will remain in effect through December 31, 2020. The FFCRA generally applies to private employers with fewer than 500 employees, which means that it likely applies to your company. The FFCRA

provides eligible employees with two types of leave for certain reasons related to COVID-19, including an employee’s need to care for a child whose school or other place of care has been closed, or whose regular childcare provider is unavailable, for reasons related to COVID-19, when no other suitable person is available to care for the child (the “Childcare Reason”). An employee does not qualify for FFCRA leave for the Childcare Reason unless, but for the need to care for the child, the employee would be able to perform work for the employer (either at the normal workplace or by telework).

If an employee does qualify for FFCRA leave for the Childcare Reason, the employee may be eligible for two different types of FFCRA leave. The first type of FFCRA leave is the Emergency Paid Sick Leave Act (“EPSLA”), which provides for up to two weeks of paid or partially paid sick leave for qualifying reasons including the Childcare Reason. The second type of FFCRA leave is under the Emergency Family and Medical Leave Expansion Act (“EFMLEA”), which provides eligible employees with the right to take FMLA leave for up to 12 weeks (up to 10 of which may be paid or partially paid) for the Childcare Reason. Note that, under both the EPSLA and EFMLEA, leave for the Childcare Reason is paid at two-thirds of the employee’s regular rate of pay, up to \$200 per workday and \$12,000 in the aggregate (\$2,000 in the aggregate under the EPSLA and \$10,000 in the aggregate under the

EFMLEA). The costs of FFCRA leave are funded by the federal government and reimbursed to employers in the form of tax credits, up to these statutory amounts. Employers are not required to pay employees in excess of the FFCRA's requirements for such leave time. Although employers are free to provide paid leave in excess of the FFCRA requirements, federal tax credits are not provided for any amounts paid to employees in excess of the FFCRA's statutory limits.

An eligible employee who qualifies for leave for the Childcare Reason may be eligible to take leave under both the EPSLA and the EFMLEA, in which case the benefits provided by the EPSLA run concurrently with those provided under the EFMLEA. So, if an employee is eligible for 12 weeks of FFCRA leave for the Childcare Reason, the first two weeks of leave may be paid under the EPSLA (and will run concurrently with the first two unpaid weeks of EFMLEA leave), and up to ten subsequent weeks of leave may be paid under the EFMLEA. Note, however, that any time period of EFMLEA leave counts towards the 12 workweeks of FMLA leave to which the employee is entitled for any qualifying reason in a 12-month period under the employer's FMLA policy. If an eligible employee has already taken some FMLA leave during the applicable 12-month period, the eligible employee may take up to the remaining portion of the 12 weeks of leave for the Childcare Reason under the EFMLEA.

However, if an eligible employee has already taken the full 12 weeks of FMLA leave during the applicable 12-month period, the employee may not take EFMLEA leave, because the entire 12 weeks of FMLA leave (including EFMLEA leave) has already been exhausted. In contrast, an eligible employee who has already exhausted his or her 12-week FMLA leave entitlement is not precluded from taking paid sick leave under the EPSLA. In this case, it appears

that your employee may have already taken (or, by the end of her 12-week parental leave, will have taken) the full 12 weeks of FMLA leave in the applicable 12-month period. If that is the case, then she will not be entitled to any additional leave under the EFMLEA. However, if she qualifies for leave for the Childcare Reason, she will be eligible for up to two weeks of additional leave under the EPSLA (if she has not taken EPSLA leave).

### DEADLINE FOR EXTENDING CLAIMS APPEAL

**Q** The recordkeeper for our company's pension plan handles claims and claims appeals under our pension plan. Our recordkeeper notified us last month that the normal deadlines for appealing claims decisions have been extended because of COVID-19 and that participants will now have additional time to make initial claims and appeal claims that have been denied. Our recordkeeper was not able to tell us how long the extension will last. What is the new deadline for appealing claims under our company's pension plan and how long will the deadline be extended?

**A** In response to the COVID-19 National Emergency, the Department of Labor ("DOL") has extended the deadline for participants to submit claims and appeal adverse claims decisions under employee benefit plans, including tax-qualified pension plans. The deadline for filing or appealing claims under employee benefit plans subject to the claims procedure requirements under Section 503 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"); has been extended or "tolled" during the period beginning March 1, 2020 and ending 60 days after the COVID-19 National Emergency is declared to have ended (the "Outbreak Period"). As of the date that this column is published, the COVID-19 National Emergency

has not yet been declared to have ended. As a result, the last day of the Outbreak Period is not yet known.

Once the COVID-19 National Emergency has been declared to have ended, the Outbreak Period will end 60 days after the day the COVID-19 National Emergency is declared to have ended. In the case of appealing a claim for pension benefits, the deadline for appealing a denial of a claim for pension benefits would end on the 60th day after the end of the Outbreak Period.

For example, assume that a participant in your company's pension plan made a claim for benefits that was denied. Assume that the participant received notice of the denied claim on July 15, 2020. The normal deadline for the participant (or his or her representative) to appeal the denied claim would be September 13, 2020 (60 days after receipt of the notice of claims denial). However, due to the COVID-19 National Emergency, the deadline for the participant to appeal the denied claim is tolled or suspended during the Outbreak Period. Assume, that the COVID-19 National Emergency is declared to be ended on August 31, 2020. In that case, the last day of the Outbreak Period would be October 30, 2020. The participant in your company's pension plan would then have 60 days after October 30, 2020 (until December 29, 2020) to file an appeal.

Note that DOL and other government agencies have extended a number of other plan-related deadlines, including COBRA elections and premium payments.<sup>1</sup> 🌐

### NOTE

1. For more information, please see <https://www.federalregister.gov/documents/2020/05/04/2020-09399/extension-of-certain-timeframes-for-employee-benefit-plans-participants-and-beneficiaries-affected>.

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