December 22, 2020

Congress Gifts HR an Optional Extension on FFCRA Benefits

On December 22, 2020, the Congress passed the Consolidated Appropriations Act, 2021 (CAA2021), which provides for an optional extension of FFCRA benefits – yes, "optional". The bill has been sent to the President for signature – it is unclear as of this morning whether that will occur.

The FFCRA required all employers with fewer than 500 employees and all governmental employers to provide emergency paid sick leave (EPSL) and expanded family and medical leave (FMLAX) to their employees to address certain COVID-19 related situations. Non-governmental employers could obtain a tax credit against the payroll costs of providing the leave. The leave right was set to expire as of December 31, 2020.

CAA2021 provides that employers subject to the law can continue to provide this leave and receive the tax credit through leave provided through March 31, 2021. ***Employers do not have to do this.*** There are some considerations that employers should factor in when making the decision:

- The law does not expand the leave provision – e.g., if the employee exhausted their entitlement to EPSL in 2020, it appears the employer will not be able to get a tax credit for the particular employee for additional leave in 2021.

- The tax credit is conditioned upon providing leave on substantially the same terms as were provided under the FFCRA.

- CAA2021 does not address how to handle FMLA conflicts. For example, if the employee was not able to use 12 weeks of FMLAX between April 1, 2020 and December 31, 2020, because the employee used FMLA for another purpose (assume the birth of a child), can the employer provide the employee paid

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FMLAX and take a tax credit in 2021? As written, the CAA2021 suggests that may be the case.

- CAA2021 addresses the tax provisions for EPSL and FMLAX separately. Therefore, it appears that an employer could opt in to providing one paid leave right, but not the other. DOL and IRS guidance on this point will be helpful.

- It is unclear whether the employer which opts in must provide the leave rights through March 31, 2021. Could the employer change its mind midway through the term and still receive a tax credit? Presumably this is possible, but employers should also consider whether such action creates a discrimination claim – it does not appear it would be interference or retaliation under CAA2021, but might trigger other discrimination claims under disability laws, possible FMLA claims, or even OSHA challenges.

Employers will also want to consider the state law interaction with the paid leave extension under CAA2021. Several states have created comparable leave rights. If an employer is obligated under a state law, then it may be advantageous to opt in to the CAA2021 extension.

As we experienced in the Spring of 2020, Congress's solution raises both questions and answers and the issues created by the CAA2021 will require employers to be nimble and to keep on eye on updates.

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