

FMLA calendars are muddied by expiring COVID relief



FMLA calendar choices may be more complex for employers to make than ever before. With the Families First Coronavirus Response Act (FFCRA) set to expire, employers can't just roll back their leave policies to 2019. Calendar options under the Family and Medical Leave Act (FMLA) were devised long before COVID and the FFCRA. Lawmakers designed them to provide employers with flexibility when scheduling leave. Employers may choose:

- A calendar year;
- A leave year such as a fiscal year;
- A year mandated by state law;
- A year starting on the anniversary of the employee's date of hire; or
- A rolling period, starting on the date the employee first took FMLA leave.

Generally, employers make the choice of FMLA year once and are done. FMLA regulations allow employers to change their choice but may not do so with the intent of depriving an employee or employees of their FMLA rights. Changes in the FMLA calendar cannot deprive an employee of leave already earned. However, COVID has brought new considerations based on which time of FMLA calendar your organization uses. In addition, there are other laws and regulations that interact with FMLA and the expiring FFCRA.

Additional Resources: Refresh yourself on [FMLA and FFCRA basics](#)

Expect complications as we fall off the FFCRA cliff

The FFCRA expanded employer eligibility and the reasons for taking leave. The Act added two weeks of emergency paid sick leave (EPSL) for workers undergoing COVID testing or quarantine. It also temporarily allowed paid leave for workers with childcare responsibilities. EPSL and leave for childcare expire at the end of the year unless Congress extends them.

March 2020 Department of Labor (DOL) guidance explained how to integrate previous employer leave policies with FFCRA leave. All examples considered how the EPSL and Emergency FMLA interacted with employer leave policies prior to the FFCRA. However, the guidance is silent on how employers should proceed after the FFCRA expires.

Similarly, the guidance failed to address how FMLA calendar years affected FFCRA leave. The guidance appears to assume the period from April 1- December 31, 2020 falls within the same FMLA year for all employers. However, that may not be true for all employers. Some businesses may face lawsuits based on this miscalculation.



Using the Calendar Year for FMLA leave

Employees on a calendar year schedule will have a fresh set of FMLA leave available on January 1, 2021. That means 12 weeks of unpaid leave for:

- the birth, adoption or foster care of a child;
- caring for a child, spouse or parent with a serious health condition; or
- for the employee's own serious health condition.

Covered employees will also be eligible for 26-weeks of Military Caregiver leave.

Employees who had taken leave for childcare will not be eligible to continue that leave after January 1. Employees who were on the payroll for 30 days were eligible for paid leave under the FFCRA. Only employees who have been with the company for a year may take job-protected FMLA leave. Similarly, the FMLA covers employers with at least 50 employees within a 75-mile radius. The FFCRA covered smaller employers but allowed employers with fewer than 50 employees to opt-out under certain circumstances.

Fiscal or state-mandated FMLA calendar year

Employers on a fiscal or state-law-mandated year face a different challenge when setting leave schedules. Their FMLA year will begin under the FFCRA and end under the traditional FMLA. That means two sets of eligible employees, qualifying reasons for leave, and paid leave rules.

Consider a business that follows the federal fiscal year. Starting October 1, 2020 employees employed for at least 30 days were eligible for a full complement of FFCRA leave. As of January 1, 2021, FFCRA eligibility disappears. Employees taking childcare leave are no longer covered.

The March 2020 FFCRA guidance stated that employees could only use their remaining FMLA leave for emergency FMLA leave. For example, an employee who used six weeks of FMLA leave prior to April 1 only had six weeks of emergency FMLA leave left.

On the federal fiscal FMLA year, that same employee became eligible for twelve weeks of leave starting October 1. From October 1 to December 31, that employee could take either FFCRA or traditional FMLA leave.

Applying the same logic to the post FFCRA period we get this scenario. An employee used six weeks of leave for childcare in the last quarter of 2020. That employee would have six weeks of leave to use during the remainder of the FMLA year. The employee could only take leave in 2021 if:

- she had been employed with the company for one year; and
- the leave was for a traditional FMLA reason.

Again, the DOL has not addressed this issue and employers should consult with counsel before disapproving any leave.

Employee hire date FMLA year

All the same considerations involved in the fiscal or state-mandated year scenario apply the employee hire date FMLA year. However, here each employee operates on a unique schedule. Each employee would have entered the FFCRA period at a different point in their FMLA year. Similarly, they will all exit it the same way.

The Rolling FMLA calendar year

FMLA regulations permit employers to start each employee's FMLA year from the beginning of FMLA leave. Again, each employee will operate on a different year. This method is generally seen as advantageous to employers because it prevents piecing leave from two years together.

The FFCRA, however, raises some questions the DOL has not answered. Specifically, does taking EPSL trigger the beginning of an FMLA year? For example, say an employee lived in a locale previously under lockdown for two weeks. She took EPSL during that period and returned to work when the lockdown ended. If EPSL is treated the same as traditional FMLA leave, then her FMLA year began with the lockdown. Further, that two weeks counts against her 12-week entitlement.

Sticking with our scenario, assume this employee gets pregnant and is due in early 2021. She might argue her FMLA year should begin with her first day of maternity leave instead of her EPSL start date. If she is correct, she has twelve weeks of leave, not ten.

Alternatively, let's assume her quarantined started May 1, 2020. She begins her maternity leave April 3, 2021. If her FMLA year started May 1, 2020, the first four weeks of her maternity leave would fall within the 2020-2021 year. She could then take up to twelve weeks after May 1, 2021 because it is a new year. In this case, the EPSL

actually got her sixteen weeks of continuous maternity leave.

Again, this is all uncharted territory. Look for additional guidance from the DOL and consult with counsel on all FMLA leave decisions.

Interaction with other laws

Any discussion of FMLA leave must include employer options when leave is exhausted. Employers may not terminate employees following their FMLA without considering their rights under the Americans With Disabilities Act (ADA). The employer must determine whether the employee's condition is a disability under the ADA. This is not the same as the FMLA's serious health condition, but often they overlap. If the employee meets the ADA's definition of disabled, then the employer must analyze whether additional time off is a reasonable accommodation. The employer must document that analysis especially if it terminates the employee. The courts will want to see it. No document analysis equals ADA violation.

Armed Force members and their families have rights under the Uniformed Services Employment and Reemployment Act (USERRA). Employers must count time spent on active duty toward the calendar and hour requirements for coverage under the FMLA. Reservists who return, for example, after a six-month active tour of duty should be treated as if they had worked those six months for the company: They would be eligible for FMLA leave if that time put them over the 12-month, 1,250-hour requirement for eligibility.