

# Update: What you need to know about pandemic leave policies in 2021

Pandemic leave policies are a hot topic in 2021 after many of the Families First Coronavirus Relief Act's (FFCRA) federal mandatory provisions expired at the end of 2020. The FFCRA – the first comprehensive federal paid leave law – set the floor for COVID-19 leave. Its sunset doesn't mean, however, that employers are off the hook. Instead, they have to deal with a patchwork of leave laws – some specific to COVID and some not.

Some state and municipal leave acts still require employers to offer paid COVID-related leave in 2021. And some of your employees are still going to need time off for COVID-related reasons. Many employees are still working remotely. Others are on altered schedules. Working parents still confront childcare challenges, and vaccines are rolling out more slowly than predicted.

Like most crises, the pandemic has taught employers some lessons. One is that employees have grown accustomed to higher pay and more benefits. A year ago, the term 'essential worker' was not in our lexicon. Going to work as infections raged earned workers hero status. Many hourly workers went from invisible to deeply appreciated by customers who sought to minimize infection risk. Bonuses were the order of the day. Paid leave evolved from a rare benefit to mandatory expenditure. And employees quickly came to expect that paid leave would become an entitlement. That's the case even in states or cities that don't mandate paid leave for COVID-related or other reasons.

Before you make changes to existing leave policies, consider the legal implications. Every policy change carries the risk of liability. It's especially important to make sure your new pandemic leave policies don't discriminate or favor one group over another. Have counsel review and sign off on any leave policy changes to determine if they contain any legal landmines.



## **Current federal law on pandemic leave**

The year-end stimulus package Congress approved extended employer tax credits to pay for paid leave to March 31, 2021. However, employee entitlements to paid leave were not. The total amount of paid leave allowed under the FFCRA did not increase. This means only employees who have not used their leave are eligible with a few exceptions. That is, if an employer wishes to take the tax credit, it may approve leave. However, it can only take the credit for providing leave to employees who had not used leave before December 31.

The FFCRA created two new types of leave, Emergency Paid Sick Leave (EPSL) and Emergency Family and Medical Leave (EFML). EPSL is capped at 80 hours for full-time workers.

### **Workers are eligible to take the leave at full pay when the employee:**

1. Is subject to a federal, state, or local quarantine or isolation order related to COVID-19.
2. Has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
3. Is experiencing symptoms of COVID-19 and seeking a medical diagnosis.

### **Employees may take leave at two-thirds of their regular pay when the employee is:**

1. Caring for an individual (note, not just family members) who is subject to a quarantine order or under health care provider advice to self-quarantine.
2. Caring for his or her child if the school or the child's place of care has been closed, or the childcare provider is unavailable due to COVID-19 precautions.
3. Experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

Employers may take a tax credit against payroll tax payments to cover leave payments. This voluntary paid leave is only available to employees who did not use it in 2020. Employers may voluntarily offer paid leave to those who have exhausted their entitlement. However, they cannot take the tax credit to pay for it.

Similarly, the new law did not extend EFML limits. However, the FFCRA limited EFML to 12 weeks (10 paid) per FMLA year. Employees who enter a new FMLA year (i.e. when using the calendar year) receive a new 12-week entitlement. Under these circumstances, employers could use the tax credit to offset paid leave until March 31, 2021.

DOL says it will continue to take complaints about FFCRA leave requested or taken by December 31, 2020. Workers have two years from the alleged violation to file a complaint.

## **State laws on pandemic leave policies**

Three states and the District of Columbia (DC) enacted COVID-specific leave laws. Nine states and DC have issued COVID-specific guidance regarding existing paid leave laws that could impact your leave policies.

### **Colorado**

Colorado's Health Emergency Leave with Pay (HELP) rules cover employers in the hospitality, food, healthcare, and education industries. HELP requires employers to provide employees experiencing flu-like symptoms paid leave over four calendar days to obtain COVID testing. Employees who are under order to isolate are also covered. Eligibility for paid leave ends once the employee receives a negative test result. Employees are only entitled to pay for time they would have normally worked during the four-calendar day period. In cases where employees have unused paid leave, employers do not have to provide additional paid leave. However, employers must pay workers who have exhausted their existing paid leave.

### **New York**

New York state required paid leave for employees facing mandatory quarantine or precautionary quarantine in 2020. Under a new leave law that took effect January 1:

- Employers with 4 or fewer employees and a net income of less than \$1 million must provide up to 5 days of unpaid sick leave per year;
- Employers with 4 or fewer employees and a net income greater than \$1 million and employers with 5-99 employees must provide up to 5 days of paid sick leave per year; and
- Employers with 100 or more employees must provide up to 7 days of paid sick leave per year.

### **Maine**

Effective January 1, 2021, Maine employees will earn one hour of paid leave for every 40 hours worked. Employees may use this leave for any reason, not just sick leave. The law applies to all employers with 10 or more employees.

### **DC**

Washington DC expanded its Accrued Sick and Safe Leave Act ("ASSLA") to include 80 hours of leave for all reasons listed in the FFCRA. ASSLA's definition of family is broader than the FFCRA's so more employees may qualify. DC's expansion covers employers with 50-499 employees excluding healthcare employers. The leave is in addition to FFCRA or regular ASSLA leave. Employers may require employees to exhaust all other paid leave before taking the emergency ASSLA leave.

### **California Cities**

Companies in Los Angeles, San Francisco, and San Jose may have to adjust their leave policies to accommodate locally implemented COVID-related paid leave laws.

The **Los Angeles** ordinance requires large employers (500 or more employees in the city or 2000 or more nationally) to provide two weeks of pay to workers under quarantine or with COVID-related childcare responsibilities. Pay is capped at \$511 per day up to a \$5,110 total. Numerous businesses are exempted from the law. Consult with counsel to see if it applies to your company. The ordinance expires two weeks after the end of the public health emergency.

**San Francisco's** Public Health Emergency Leave Ordinance substantially echoes the FFCRA's reasons for leave. It applies to businesses with 500 or more employees. Covered full-time employees may take 80 hours of leave. Part-time employees get two weeks of pay based on the average hours they worked from 9/25/19 to 2/25/20. The leave is in addition to any other paid leave under the FFCRA, California paid leave, or San Francisco's regular paid leave law. The law is in effect until the public health emergency ends.

**San Jose** had no paid sick leave ordinance prior to the pandemic. The city adopted one that required employers not covered by the FFCRA to provide FFCRA benefits. That ordinance was set to expire at the end of 2020 but was extended to June 30, 2021.

### **Not sure? Ask**

As the pandemic rages on, cities, states, and the federal government will try to calibrate responses. Employers should consult with counsel to determine which paid leave laws apply to each of their locations. The situation is fluid. Don't get blindsided by a lawsuit on a law you didn't even know existed.

**Additional Resource:** Paid leave isn't the only issue that'll be a hot topic in 2021. Get caught up on other [workers' rights issues](#) that should keep an eye on.