



Published: March 27, 2020

Initial Guidance on Payroll Tax Credits under the Families First Coronavirus Response Act

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On March 20, 2020, the Internal Revenue Service, Department of Treasury and Department of Labor announced that employers with less than 500 employees will be able to take advantage of two new refundable payroll tax credits which were created to immediately and fully reimburse them, dollar-for-dollar, for the cost of providing COVID-19 leave to their employees. These tax credits are provided under the Families First Coronavirus Response Act (“FFCRA”), signed by President Trump on March 18, 2020. The intent behind these tax credits is to enable employers to keep their workers on their payrolls and ensure they are not forced to choose between their paychecks and the public health measures necessary to combat the virus.

Briefly, the guidance provides:

- Employers will receive 100% reimbursement for paid leave;
- The credit includes health insurance costs;
- There will be no payroll tax liability for employers;
- Self-employed individuals are entitled to an equivalent credit; and
- Reimbursement will be quick and easy to obtain.

Eligible Employers

Eligible employers under the FFCRA are businesses and tax-exempt organizations with less than 500 employees that are required to provide emergency paid sick leave and emergency paid family and medical leave under the FFCRA. They will be able to claim these tax credits based on qualifying leave they provide to employees between April 1, 2020 and December 31, 2020. Credits are also available to self-employed individuals based on similar circumstances.

Paid Sick Leave Credit

Where an employee is unable to work or telework because the employee is quarantined, and/or where the employee is experiencing COVID-19 symptoms and seeking a medical diagnosis, eligible employers may receive a refundable sick leave credit for sick leave at the employee's regular rate of pay, up to \$511 per day and \$5,110 in total, for a total of 10 days.

For an employee who is unable to work or telework (1) because of the need to care for an individual subject to quarantine, (2) in order to care for a child whose school is closed or childcare provider is unavailable for reasons related to COVID-19, and/or (3) because the employee is experiencing substantially similar conditions as specified by the Department of Health and Human Services, eligible employers may claim a credit for two-thirds of the employee's regular rate of pay, up to \$200 per day and \$2,000 in total, for up to 10 days. It is important to note that eligible employers are also entitled to an additional tax credit determined based on costs to maintain health insurance coverage for the eligible employee during the leave period.

Child Care Leave Credit

Eligible employers are also able to receive a refundable child care leave credit for an employee who has been employed at least 30 days and is unable to work or telework due to a need to care for a child whose school is closed, or child care provider is unavailable for reasons related to COVID-19. The credit shall be equal to two-thirds of the employee's regular pay, capped at \$200 per day and \$10,000 in total. Up to 10 weeks of qualifying leave can be counted towards the child care leave credit. Eligible employers are also entitled to an additional tax credit determined based on costs to maintain health insurance coverage for the eligible employee during the leave period.

Payment Process

In general, when employers pay their employees, they must withhold federal income taxes and the employees' share of Social Security and Medicare taxes from their employee's paychecks. Employers have to deposit these federal taxes, together with their share of Social Security and Medicare taxes, with the IRS and file quarterly payroll tax returns with the IRS.

Eligible employers who pay qualifying sick or child care leave will be able to retain an amount of the payroll taxes equal to the amount of qualifying sick and child care leave that they paid, rather than deposit them with the IRS. The payroll taxes that are available for retention include withheld federal income taxes, the employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes with respect to all employees. In the event there are not enough payroll taxes to cover the cost of qualified sick and child care leave paid, employers will be able to file a request for an accelerated payment from the IRS. The IRS expects to process these requests in two weeks or less. Further details regarding this process are expected soon.

Examples:

- If an eligible employer paid \$5,000 in sick leave and is otherwise required to deposit \$8,000 in payroll taxes, including taxes withheld from all its employees, the employer could use up to \$5,000 of the \$8,000 of taxes it was going to deposit for making qualified leave payments. The employer would only be required under the law to deposit the remaining \$3,000 on its next regular deposit date.
- If an eligible employer paid \$10,000 in sick leave and was required to deposit \$8,000 in taxes, the employer could use the entire \$8,000 of taxes in order to make qualified leave payments and file a request for an accelerated credit for the remaining \$2,000.

Equivalent child care leave and sick leave credit amounts are available to self-employed individuals under similar circumstances. These credits will be claimed on their income tax return and will reduce estimated tax payments.

Exemption for Small Businesses

Businesses with under 50 employees may be exempt from the leave requirements relating to school closings or childcare unavailability due to COVID-19 where the requirements would jeopardize the ability of the business to continue, as indicated in the FFCRA. This relief will be available based on simple and clear criteria that make it available in circumstance involving jeopardy to the viability of an employer's business as a going concern. Emergency guidance and rulemaking will be released by the Department of Labor with details on this exemption.

Enforcement

The Department of Labor will be issuing a temporary non-enforcement policy that provides a period of time for employers to come into compliance with FFCRA. Under this policy, enforcement action will not be brought against any employer for FCCRA so long as the employer has acted reasonably and in good faith to comply with the FFCRA. The Department will focus on compliance assistance during the 30-day period.

Employer Action

Employers should be on the lookout for formal regulations from the IRS and Department of Labor with respect to this recent guidance and should discuss these new tax credits with payroll and tax advisors.

We are monitoring developments on the tax credits and will continue to keep you updated.