

LEGAL UPDATES

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The Complex Interplay Between FFCRA and the CARES Act

Today, the Families First Coronavirus Response Act (FFCRA) goes into effect, requiring employers with under 500 employees to provide emergency sick time and family leave pay to employees who cannot work or telework due to a documented need related to COVID-19. Employers who do so are eligible for a fully equivalent tax credit or refund equal to the required sick leave paid, dollar for dollar. At the same time, under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, businesses may be eligible for tax credits, deferred tax payments, and/or loans through the Paycheck Protection Program (PPP).

After a thorough risk-benefit and financial analysis, companies are confronted with a dizzying array of options which include retaining workers despite their not doing any (or less) work (with the risk of having to cover FFCRA leaves), furloughing workers with pay, laying workers off to seek unemployment, applying for small business loans, or a combination of these options. Employers must use extreme caution, however, to avoid shooting themselves in the foot in an effort to do right by their employees. New IRS and DOL guidance reveals there is a critical and complex interplay between the FFCRA and the CARES Act.

Both the Department of Labor and the Internal Revenue Service recently issued FAQs that should be studied:

Department of Labor's FFCRA FAQ

Internal Revenue Service's FFCRA Tax Credits FAQ

Internal Revenue Service's Employee Retention Credit FAQ

Noteworthy points are summarized below, some of which provide helpful guidance and others that raise more questions:

In general, IRS guidance suggests that businesses may not “double” (or triple!) dip into the various forms of relief under FFCRA or CARES.

Employers must be careful to “carve out” any leave payments made under the FFCRA from the wages they count for credits under the Employee Retention Credit.

The Employee Retention Credit encourages companies to keep employees on their payroll by providing a fully refundable tax credit for employers equal to up to 50 percent of qualified wages paid not exceeding \$10,000. FFCRA sick or family leave wages paid entitle an employer to a refundable tax credit dollar for dollar the amounts paid. The IRS guidance makes clear that the same wages cannot be counted for both credits.

The Employee Retention Credit rules are further complicated because the credit available for employers with more than 100 employees is limited to wages paid to furloughed employees. If the employer averaged 100 or fewer full-time employees in 2019, qualified wages are the wages paid to any employee, whether furloughed or not.

A company may not receive the Employee Retention Credit if the company obtains a Small Business Interruption Loan under the PPP.

It is unclear whether this limitation applies only when an employer seeks multiple forms of relief simultaneously, or applies to forms of relief sought consecutively.

As an example, if an employer seeks an Employee Retention Credit with respect to qualified wages paid in April and determines in May to obtain a PPP loan, would the employer be required to disgorge the prior Employee Retention Credit? Further guidance is needed.

Employers may receive both FFCRA tax credits attributable to mandatory sick pay and family medical leave and a Small Business Interruption Loan under the PPP (IRS FAQ 19).

Employee Retention Credits apply to wages paid from March 12, 2020 to December 31, 2020, whereas FFCRA credits apply to leave payments made from April 1, 2020 to December 31, 2020.

Written documentation of an employee’s eligibility for FFCRA leave must be detailed and is necessary in order to claim the tax credit.

IRS guidance states that in order to obtain the credit, the employer must retain documentation that includes, among other things, the name and relation of an individual for whom the employee is caring, the name of the school, place of care, or care provider that is unavailable due to COVID-19, as well as the employee's representation that no other person will provide care for the child during the period for which the employee is receiving family medical leave.

The employee must also provide a statement documentation of "special circumstances" requiring the employee to provide care for a child older than age fourteen (14) during daylight hours.

The DOL defers to IRS requirements to determine the sufficiency of FFCRA leave documentation.

Thus, insofar as an employer is justified in denying a leave request for failure to provide adequate documentation, it seems an employee that fails to bring documentary support for "special circumstances" for a child over 14 may be denied FFCRA leave. Further guidance is needed, but caution is in order. Employers must be careful not to take arbitrary and inconsistent positions on what constitutes a "special" circumstance, which may be viewed as pretextual or discriminatory.

Documentation must also show how the employer determined the amount of qualified sick and family leave wages paid to employees that are eligible for the credit, including "records of work, telework and qualified sick leave and qualified family leave."

Presently, the Department of Labor has issued new temporary regulations concerning the FFCRA. These are being studied and updates will be provided very soon.

Contact us

If you have additional questions regarding how the COVID-19 pandemic is impacting labor and employment law and regulations, please contact your Husch Blackwell attorney.

COVID-19 resource

Husch Blackwell has launched a COVID-19 response team providing insight to businesses as they address challenges related to the coronavirus outbreak. The page contains programming and content to assist clients and other interested parties across multiple areas of operations, including labor and employment, retailing, and supply chain management, among others.