

LEGAL UPDATES

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IRS Issues Press Release Regarding Tax Credit and Related Issues on Families First Coronavirus Response Act

The joint press release on March 20, 2020 from the IRS and the DOL foreshadows several important pieces of guidance that the agencies intend to release this week. The following summarizes what the agencies intend to include in their guidance.

Key points

Tax credits are available for sick and child-care qualifying leave payments.

Eligible employer tax credits will fully reimburse employers for all qualifying sick and child-care leave payments mandated under the Families First Coronavirus Response Act by reducing payroll taxes owed to the IRS.

Eligible employers will be entitled to an additional credit for the cost of maintaining health insurance coverage.

Employers will be able to file for accelerated payments to refund employers for qualifying leave payments in excess of federal payroll taxes owed.

Small businesses will be eligible for an exemption to the mandated sick and leave payments if they demonstrate that payment of child-care leave under the Act threatens the viability of their business.

Enforcement actions will be delayed by thirty days for employers that act reasonably and in good faith to comply with the Act.

The IRS press release is inconsistent with the Act in some respects, so we expect further clarification.

Large employers should remember that Code section 45S provides a tax credit for paid FMLA leave.

According to the IRS press release dated March 20, 2020, small and medium-sized employers that provide sick and child-care leave under the Families First Coronavirus Response Act (Act) will be fully reimbursed through tax credits and, in certain cases, refunds for the amount of leave paid to their employees. As of now, the tax credit applies to payments for sick and child-care qualifying leave payments provided by employers between April 2, 2020 and December 31, 2020. Eligible employers are defined as businesses and tax-exempt organizations with fewer than 500 employees that are required to provide emergency paid sick leave and emergency paid family and medical leave under the Act.

Emergency paid sick leave refundable sick leave tax credit

The tax credit for payment of qualifying paid sick leave under the Act is determined as follows:

Employees are eligible for two weeks of paid sick leave at 100% of “employee’s pay” if the employee is unable to work because of a COVID-19 quarantine or a self-quarantine, or has COVID-19 symptoms and is seeking a medical diagnosis. Eligible employers are provided a refundable sick leave tax credit for sick leave payments at the employee’s “regular rate of pay” up to a maximum amount of \$511/day and \$5,110 in the aggregate, for a total of 10 days.

Employees are eligible for two weeks of paid sick leave at 2/3 of the “employee’s pay” if the employee is caring for an individual who is subject to quarantine, caring for a child whose school is closed or child-care provider is unavailable for reasons related to COVID-19. Eligible employers may claim a refundable tax credit of 2/3 of the employee’s “regular rate of pay” up to a maximum amount of \$200/day and \$2000 in the aggregate for up to 10 days.

In addition, eligible employers are entitled to an additional tax credit based on the cost of maintaining health insurance coverage for eligible employees during the leave period.

Expanded paid family and medical leave refundable child-care tax credit

The tax credit for payment of qualifying child-care leave under the Act is determined as follows:

Employees of eligible employers may receive up to an *additional* 10 weeks of expanded paid family and medical leave at 2/3 of the “employee’s pay” if the employees are unable to work due to a need to care for a child whose school is closed or whose child care provider is unavailable for reasons related

to COVID-19. In addition to the sick leave credit, eligible employers are entitled to a refundable child-care tax credit for the payment of expanded paid family and medical leave equal to 2/3 of the employee's "regular pay," up to a maximum amount of \$200/day or \$10,000 in the aggregate.

An additional tax credit is available to employers for the cost of maintaining the health insurance coverage for eligible employees during the leave period.

Retention of payroll taxes to pay for leave

According to the IRS, eligible employers that pay qualifying sick and/or child-care leave will be able to retain an amount of federal payroll taxes equal to the amount of qualifying sick and child-care leave payments rather than depositing the federal payroll taxes with their quarterly payroll tax returns to the IRS. Per the IRS release, the payroll taxes available for retention are 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 that the amount of payroll taxes retained is insufficient to cover qualifying sick and child-care leave payments made by an employer, an employer will be able to file a request for an accelerated payment from the IRS, which the IRS expects to process within 2 weeks or less.

Under the examples provided in the announcement, the amount of qualifying leave credit is deducted from the amount of payroll taxes withheld and payable to the IRS.

Small business exemption

Small businesses of fewer than 50 employees will be eligible for an exemption from the emergency paid child-care leave mandates of the Act if compliance with the "leave requirements relating to school closing and child-care unavailability" would "jeopardize the viability of an employer's business as a going concern." The Department of Labor is expected to provide emergency guidance and rulemaking to articulate requirements related to the small business exemption.

Non-enforcement period

The Department of Labor intends to issue a "temporary non-enforcement policy" during which it intends to focus on compliance assistance for a thirty-day period. Enforcement actions will not be brought so long as the employer has acted reasonably and in good faith to comply with the Act. This could be a critical development for employers struggling to understand the parameters of the new law.

Large employers

As stated above, employers with more than 500 employees are not required to provide mandated sick or leave payments. However, to the extent such employers do provide paid leave under the FMLA, Internal Revenue Code Section 45S provides a tax credit for employers who provide paid family and medical leave to their employees. Eligible employers may claim the credit, which is equal to a percentage of wages they pay to qualifying employees while they are on family and medical leave. Employers must have a written policy in place that satisfies certain conditions to take advantage of this credit.

Contact us

The IRS indicated that additional guidance will be coming this week. We will continue to keep you apprised of the new developments as the Treasury Department, the IRS and the Department of Labor issue guidelines on coronavirus-paid leave and tax credits for businesses. We expect further clarification on these issues as there are some unanswered questions. If you have questions, please contact Joe Glynias, David Eckhardt, Craig Kovarik or your Husch Blackwell attorney.

Tracey Oakes O'Brien is a contributing author of this content.

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.