

Date: March 23, 2020

On March 18, 2020 President Trump signed Families First Coronavirus Response Act (Note: The leave provisions will go into effect on April 2, 2020). Thereafter, on March 20 2020, IRS published IRS 2020-57 which highlights the key points from the U.S. Treasury Department, Internal Revenue Service (IRS), and the U.S. Department of Labor (Labor) announcement that small and midsize employers can begin taking advantage of two new refundable payroll tax credits, designed to immediately and fully reimburse them, dollar-for-dollar, for the cost of providing Coronavirus-related leave to their employees.

Information regarding the process to receive an advance payment credit will be released next week. Currently, there is no guidance provided as to the mechanics/implementation of this credit for employers.

PART 1 - Emergency Family and Medical Leave Expansion Act:

Who Is Covered? The law covers employers with fewer than 500 employees

Eligibility: This leave benefit covers employees who have been working for at least 30 calendar days

Rate of Pay

Pay rates are provided as follows:

- (i) After 10 days, employees are paid at two-thirds (2/3rd) of their regular rate
- (ii) Employees may use accrued personal or sick leave during the first 10 days
- (iii) Payments made to employees for this type of leave are capped at \$200 per day and \$10,000 in the aggregate

Tax Credits

Each quarter, employers subject to the requirement are entitled to a fully refundable tax credit equal to 100% of the qualified paid Family and Medical Leave Act (FMLA) wages paid by the employer

Exemptions

- (i) Employers of employees who are healthcare providers or emergency responders may elect to exclude such employees from eligibility for paid leave. (The law doesn't define the terms, "healthcare provider" and "emergency responder")
- (ii) The U.S. Department of Labor (DOL) is empowered to exempt small businesses with fewer than 50 employees in certain circumstances

Effective Date

The provisions will go into effect on April 2, 2020, and will expire on December 31, 2020

PART 2 - Emergency Paid Sick Leave Act

Who Is Covered? The paid sick leave provisions apply to employers with fewer than 500 employees

Eligibility: All employees, regardless of length of employment are eligible for the leave

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Rate of Pay

- (i) Employers must compensate employees for any paid sick time they take at the higher of: (i) their regular rate of pay, (ii) the federal minimum wage, or (iii) the local minimum wage
- (ii) Payments are capped at \$511 per day and \$5,110 in the aggregate.
- (iii) Employees absent to care for a sick family member or a child unable to attend school are compensated at two-thirds (2/3rd) of the rate they would otherwise receive, capped at \$200 per day and \$2,000 in the aggregate.

Employers with Existing Leave Policies:

- (i) The paid sick leave allotment provided for in the emergency legislation is in addition to whatever sick leave is already offered by employers (including subject to state or local requirements);
- (ii) An employer may not require an employee to use other paid leave provided by the employer to the employee before the employee uses the paid sick time under the act;
- (iii) Nothing prohibits employers from changing their leave programs after the law goes into effect

Tax Credits: Each quarter, employers subject to the requirement are entitled to a fully refundable tax credit equal to 100% of the qualified paid sick leave wages paid by the employer

Effective Date

The provisions will go into effect on April 2, 2020, and will expire on December 31, 2020

Key Takeaways of Part 2:

1. Paid Sick Leave for Workers For COVID-19 related reasons, employees receive up to 80 hours of paid sick leave and expanded paid child care leave when employees' children's schools are closed or child care providers are unavailable
2. Complete Coverage: (i) Health insurance costs are also included in the credit; (ii) Employers face no payroll tax liability; (iii) Self-employed individuals receive an equivalent credit
3. Employers receive 100% reimbursement for paid leave pursuant to the Act
4. Fast Funds: (i) An immediate dollar-for-dollar tax offset against payroll taxes will be provided; (ii) Where a refund is owed, the IRS will send the refund as quickly as possible
5. 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
6. 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

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7. If there are not sufficient payroll taxes to cover the cost of qualified sick and child care leave paid, employers will be able file a request for an accelerated payment from the IRS. The IRS expects to process these requests in two weeks or less (as noted earlier, the details of this new, expedited procedure will be announced next week)

Example 1: 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.

Example 2: 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.

Small Business Exemption: Small businesses with fewer than 50 employees will be eligible for an exemption from the leave requirements relating to school closings or child care unavailability where the requirements would jeopardize the ability of the business to continue. The exemption will be available on the basis of simple and clear criteria that make it available in circumstances involving jeopardy to the viability of an employer's business as a going concern. Labor will provide emergency guidance and rulemaking to clearly articulate this standard.

Non-Enforcement Period: Labor will be issuing a temporary non-enforcement policy that provides a period of time for employers to come into compliance with the Act. Under this policy, Labor will not bring an enforcement action against any employer for violations of the Act so long as the employer has acted reasonably and in good faith to comply with the Act. Labor will instead focus on compliance assistance during the 30-day period.

Other Key Factors: The law prevents an employer from requiring an employee to immediately use personal, vacation, or sick time if they do not go into work due to COVID-19 concerns. Those concerns include feeling ill due to possible exposure to the virus or caring for someone who may have been exposed.

It is important to note that under the new law employees are entitled to 80 hours of sick leave pay if they have to care for someone who has been diagnosed with COVID-19 or if they have been. Employers cannot require employees to use vacation days, paid time off, personal days, or paid sick leave until the 80 hours of sick leave pay have been used.

Source: IRS and US Department of Treasury

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