

IRS and DOL Issue COVID-19 Related Tax Credit Guidance

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On March 20, 2020, [the Internal Revenue Service \(IRS\) and the U.S. Department of Labor \(DOL\) jointly issued guidance](#) regarding the tax credits available to certain small employers who are required to provide new types of paid leave to employees under the Families First Coronavirus Response Act (Act), enacted on March 18, 2020. Under the Act, certain employers must provide expanded paid leave under the Family and Medical Leave Act (FMLA) and paid sick leave to employees in circumstances related to the COVID-19 emergency. Both new paid leave requirements are effective as of April 1, 2020, and are scheduled to expire on December 31, 2020. For more information about the new paid leave requirements, see our [Employee Benefits Questions and Answers Related to COVID-19 alert](#).

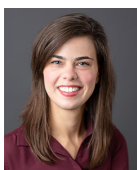
This alert provides answers to questions covered employers may have about obtaining the tax credits associated with the new paid leave requirements, based on the March 20, 2020 IRS and DOL guidance.

Because the Act also provides that any required emergency paid sick and expanded FMLA leave is not wages for FICA purposes, governmental employers who provide voluntary Social Security coverage (or to the extent Social Security coverage is mandatory for certain employees) will be relieved of withholding FICA and paying the employer portion of FICA for any required emergency leave payments. However, the refundable tax credits described in the Q&A's below are not available for governmental employers, regardless of workforce size.

Question 1: Which employers are eligible for the immediate cash flow relief in the form of employment tax credits?

Answer 1: The IRS and DOL guidance provides that small and mid-size employers can immediately begin taking advantage of two new refundable payroll tax credits that are intended to reimburse them dollar-for-dollar for the cost of providing required COVID-19-related leave to their employees.

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The payroll tax credit applies to all businesses and tax-exempt organizations, but *not* governmental employers, with fewer than 500 employees that are required under the Act to provide emergency paid sick leave, and emergency paid family and medical leave when employees' children's schools are closed or paid child care providers are unavailable.

Question 2: How will employers be able to receive the immediate dollar-for-dollar offsets for costs of required paid leave?

Answer 2: An immediate dollar-for-dollar tax offset against payroll taxes that would otherwise be due is provided for under the Act. Self-employed individuals will receive an equivalent tax credit.

Employers are required to withhold from their employees' paychecks federal income taxes and the employees' share of Social Security and Medicare taxes and to report and pay such federal taxes, along with the employer's share of Social Security and Medicare taxes, to the IRS using quarterly payroll tax returns (Form 941 series). Under guidance that the IRS will issue the week of March 23, 2020, eligible employers who pay qualifying sick or child care leave will be able to offset the amount of their payroll taxes equal to the amount of qualifying sick and child care leave that they paid to employees, rather than pay those payroll tax amounts to the IRS as would normally be required.

The payroll taxes that a qualifying employer may offset dollar-for-dollar and not pay to the IRS 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. It is anticipated that the guidance to be issued by the IRS the week of March 23, 2020 will provide more detail about any reporting requirements that will be imposed in order to claim the tax credit. Given how the tax credit is calculated (see below), it is likely that employers will need to keep accurate records of the type of paid leave being provided to each employee during the relevant payroll tax reporting period.

Question 3: What costs can an employer offset against payroll taxes?

Answer 3:

Tax Credit for Paid Sick Leave

For paid sick leave provided to an employee who is unable to work as a result of a Coronavirus quarantine or isolation order, or because of self-quarantine upon the advice of a health care provider, or if the employee has Coronavirus symptoms and is seeking a medical diagnosis, eligible employers may receive a refundable sick leave tax credit for sick leave paid to the employee at the employee's regular rate of pay, up to \$511 per day and \$5,110 in the aggregate, for a maximum of 10 days.

For paid sick leave provided to an employee who is unable to work due to caring for someone with Coronavirus, or caring for a child because the child's school or child care facility is closed, or the paid child care provider is unavailable due to the Coronavirus, eligible employers may claim a tax credit for two-thirds of the employee's regular rate of pay, up to \$200 per day and \$2,000 in the aggregate, for up to 10 days.

Eligible employers also are entitled to an additional tax credit determined based on costs the employer incurs to maintain health insurance coverage for employees while they are on paid sick leave to the extent those amounts are excludable from employees' gross income under Internal Revenue Code section 106(a).

Tax Credit for Child Care Leave.

In addition to the sick leave credit described above, for an employee who is unable to work because of a need to care for a child whose school or child care facility is closed or whose paid child care provider is unavailable due to the Coronavirus, eligible employers may receive a refundable child care leave tax credit. This tax credit is equal to two-thirds of the employee's regular pay, capped at \$200 per day or \$10,000 in the aggregate. Up to 10 weeks of qualifying leave can be counted towards the child care leave tax credit.

Eligible employers are entitled to an additional tax credit determined based on costs the employer incurs to maintain health insurance coverage for employees while they are on such child care leave, to the extent those amounts are excludable from employees' gross income under Internal Revenue Code section 106(a).

Please note that to the extent an employer claims a tax credit with respect to paid family and medical leave provided to employees under Internal Revenue Code section 45S, this tax credit is not available.

Question 4: What if an employer is paying out more in COVID-19-required leave than its payroll tax liability?

Answer 4: The employer can immediately file for a refund on forms that the IRS expects to issue the week of March 23, 2020, and the IRS will process the refund as quickly as possible. The IRS indicated in the announcement that it expects to process these refunds within two weeks under a new, expedited procedure, the details of which will be announced when the refund forms are issued.

Question 5: How long can an employer claim these tax credits?

Answer 5: Eligible employers will be able to claim these credits based on qualifying leave they provide between April 1, 2020 and December 31, 2020. Equivalent tax credits are available to self-employed individuals based on similar circumstances. The DOL has clarified that the paid leave provisions are not retroactive, so no tax credit can be claimed with respect to leave provided prior to April 1, 2020

Question 6: How can an employer with fewer than 50 employees obtain an exemption from the requirement to provide the expanded child care leave under the Act due to the cost threatening the viability of the business?

Answer 6: Under the Act, the DOL is authorized to exempt small businesses with fewer than 50 employees from leave requirements relating to school closings or child care unavailability, when the requirements would jeopardize the ability of the business to continue. The DOL stated in its announcement that the exemption will be available on the basis of simple and clear criteria that would make the exemption available in circumstances involving jeopardy to the viability of an employer's business as a going concern. The DOL indicated that it will provide emergency guidance and rulemaking to clearly articulate this standard but did not provide an estimated time for this guidance. However, the DOL also said that it 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, the DOL 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. The DOL will instead focus on compliance assistance during the first 30-day period.

Note: Regulatory changes are occurring rapidly and we will make every effort to keep our clients informed of new developments occurring in this area as they occur. Please feel free to reach out to your contact at Hanson Bridgett with more specific questions about COVID-19 issues. Updates will be posted on [our COVID-19 Resource Center](#).