



TaxNewsFlash

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KPMG report: New law (H.R. 6201) provides paid FMLA and sick leave (COVID-19)

The “Families First Coronavirus Response Act” (the “Act”)* provides for two new programs:

- The *Emergency Family and Medical Leave Expansion Act*
- The *Emergency Paid Sick Leave Act*

These two programs are effective no later than April 2, 2020 (15 days after the March 18, 2020 date of enactment).

While these provisions require certain employers to provide paid sick leave and paid extended FMLA (Family and Medical Leave Act), there is a corresponding tax credit against the employer’s portion of Social Security taxes. Any excess credit is refundable.

In this report, “section” refers to the Internal Revenue Code.

*H.R. 6201, 116th Cong., 2d Sess. (signed by the president on March 18, 2020).

Expanded Family and Medical Leave Expansion Act

The *Emergency Family and Medical Leave Expansion Act* amends the FMLA to create a new category of benefits available through December 31, 2020. These benefits generally apply in the case of a qualifying need related to the COVID-19 public health emergency.

A qualifying need related to the public health emergency exists when an eligible employee is “unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.” An eligible employee for this purpose is an employee who has been employed for at least 30 calendar days.

After an initial 10-day leave period (which may be unpaid), a qualifying employee generally is entitled to paid leave at not less than two-thirds of the employee’s regular rate of pay for the number of hours the

employee would otherwise be scheduled, or would normally be scheduled, to work. However, the Act provides that the paid leave requirement for an employee is limited to \$200 per day and \$10,000 in the aggregate.

For purposes of applying the new category of leave, the Act modifies the FMLA's employer threshold by using a "fewer than 500 employees" standard.* This paid leave provision appears to apply to all government employers, which is consistent with regular FMLA provisions. The Secretary of Labor is given authority to exclude certain health care providers and emergency responders as well as exempt small businesses with fewer than 50 employees in certain cases. In determining whether an employer has fewer than 500 employees, the FMLA rules apply.

*Whether related businesses' employees are aggregated for purposes of the "500 or more employees threshold" is determined under the FMLA "single integrated employer" test. See, 29 C.F.R. § 825.104

Multi-employers

Special rules apply in the case of employment under certain multi-employer bargaining agreements. Employers may fulfill their obligations under the extended FMLA leave provisions by making contributions to a multiemployer fund, plan or program based on the paid leave each of its employee is entitled to, so long as the fund, plan or program provides the expanded FMLA benefits to the employees.

The Emergency Paid Sick Leave Act

The Act requires certain employers to provide to employees up to 80 hours (or the equivalent for part-time employees) of paid sick time because the individual is unable to work due to a need for leave for **any** of the following COVID-19-related reasons:

1. The employee is subject to a federal, state, or local quarantine or isolation order relating to COVID-19;
2. A health care provider advised the employee to self-quarantine due to concerns relating to COVID-19;
3. The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
4. The employee is caring for an individual who is subject to an order described in the first category above, or has been advised by a health care provider as described in the second category above;
5. The employee is caring for a son or daughter of such employee if the school or place of care of the child is closed due to COVID-19 precautions; **or**
6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretaries of Treasury and Labor.

The required payment for sick leave is limited to: (1) \$511 per day, and \$5,110 in the aggregate in the case of the first three categories described above; or (2) \$200 per day and, \$2,000 in the aggregate for the other categories.

This sick leave is in addition to any regularly-provided annual sick leave.

The *Emergency Paid Sick Leave Act* provisions apply to "covered employers" as well as certain other entities that are engaged in commerce (including government) or an industry or activity affecting commerce. For this purpose, the Act generally defines a "covered employer" as including a person engaged in commerce or in any industry or activity affecting commerce that: (1) in the case of a private

entity or individual, employs fewer than 500 employees; and (2) in the case of a public agency (government) or other entity that is not a private entity or individual, employs one or more employees.

Special rules apply in the case of employment under certain multi-employer bargaining agreements. Similar to the FMLA provisions, the employer could pay into a multi-employer fund, plan or program which would provide the required benefit to the employees.

Further, the Secretary of Labor has the authority to exclude certain health care providers and emergency responders as well as exempt small businesses with fewer than 50 employees in certain cases.

Payroll tax credits

The Act also includes two payroll tax credits relating to the temporary required emergency paid sick leave provisions and FMLA.

Read an IRS release—[IR-2020-57](#) (March 20, 2020)—concerning implementation of the refundable payroll tax credits provided under the *Families First Coronavirus Response Act*.

Payroll tax credit for required paid sick leave

The Act provides an employer payroll tax credit equal to 100% of the qualified sick leave wages paid by the employer under the *Emergency Paid Sick Leave Act*, subject to certain limitations. The credit applies against the OASDI taxes (Old Age, Survivors, and Disability taxes, more commonly known as the employer portion of Social Security taxes) imposed by section 3111(a)—or the section 3221(a) “Tier 1” excise tax (relating to the Railroad Retirement Act). The tax credit applies for a period that begins no later than April 2, 2020, and ends December 31, 2020.

The tax credit is applied against 100% of qualified sick leave wages up to either \$511 or \$200 for each day an individual is paid qualified sick leave, depending upon the category in which the individual falls for purposes of determining the amount paid for sick leave. In addition, the total number of days taken into account in each calendar quarter cannot exceed 10 and is reduced by the number of days taken in preceding calendar quarters.

The amount of the credit for any calendar quarter generally may not exceed the tax imposed under section 3111* or section 3221(a) for such quarter. However, the Act provides the credit is refundable for amounts exceeding such tax liability.

*The credit is further reduced to the extent payroll credits were allowed under section 51 for employment of qualified veterans or under section 41(h) regarding research expenditures.

Increased credit for health plan expense

The amount of the credit is increased by so much of the employer’s “qualified health plan expenses” as are properly allocable to the qualified sick leave wages for which the credit is allowed. For this purpose, qualified health plan expenses generally are amounts paid or incurred by the employer to provide and maintain a group health plan to the extent such amounts are excluded from employee gross income under section 106(a). Such amounts are to be allocated to qualified sick leave wages in such manner as the Secretary of Treasury (or delegate) may prescribe.

Special rules

Gross income of employers is increased by the amount of the credit. Further, any wages taken into account in determining the credit may not be taken into account for purposes of determining the credit under section 45S* (relating paid family and medical leave). This disallowed a double tax credit.

The credit does not apply to the government of the United States, any state, any subdivision of a state, or any agencies or instrumentalities of the foregoing.

Employers may also elect not to apply this new provision for any calendar quarter. The Secretary of the Treasury is responsible for the time and manner of such election.

Finally, the Act provides special rules for payments to possessions of the United States.

*The section 45S credit for paid FMLA leave was extended through December 31, 2020.

Treasury guidance

The Act provides that the Secretary of the Treasury is to provide regulations and guidance to carry out the purpose of the sick leave credit. Specifically the guidance is to provide information on:

- Preventing the avoidance of the purposes of this credit
- Minimizing compliance and record-keeping burdens
- Waving penalties for failure to deposit amounts in anticipation of the allowance of the credit allowed under these provisions
- How to recapture the benefit of credits

Credit for sick leave for certain self-employed individuals

The Act similarly allows an eligible self-employed individual a refundable credit against income taxes with respect to qualified sick leave equivalent amounts. To qualify, an individual generally must regularly carry on a trade or business within the meaning of section 1402 and must have met the criteria that would apply to receive paid leave pursuant to the *Emergency Paid Sick Leave Act* if the individual were an employee of an employer.

The individual is eligible for a credit of the lesser of 100% of average daily income capped at \$511 per day for leave covered in the first three (1-3) categories dealing with quarantine, self-quarantine or seeking a diagnosis. The individual is eligible for a credit of the lesser of \$200 or 67% of average daily income for leave related to taking care of another as specified in categories four-six (4-6).

If the individual is receiving wages or compensation by an employer required to pay emergency paid sick leave, the payments under this section are reduced to the extent that the sum of both amounts exceeds \$2,000 or \$5,110 depending upon the category of sick leave.

The Act requires the individual maintain documentation to establish they were a self-employed individual. The Treasury is to provide guidance on required documentation.

This provision expires on December 31, 2020.

Payroll tax credit for required paid family leave

Effective no later than April 2, 2020, and ending December 31, 2020, the Act provides an employer with a payroll tax credit for each calendar quarter generally equal to 100% of the qualified family leave wages paid by the employer to comply with the *Emergency Family and Medical Leave Expansion Act* with respect to such quarter as described above. The credit applies against the employer portion of OASDI taxes (Social Security tax) imposed by section 3111(a) or the tax imposed by section 3221(a).

The amount of wages taken into account for the credit for each individual cannot exceed \$200 for any day for which the individual is paid qualifying family leave wages. In aggregate, a maximum of \$10,000 in wages per employee for all calendar quarters is eligible for the credit.

The amount of the credit for any calendar quarter cannot exceed the tax imposed under section 3111 or section 3221(a) for such quarter. However, the credit is a refundable credit that allows employers a refund for credits that exceed payroll tax liability.

As with the qualified sick leave program, the amount of the credit for required paid family leave is increased by so much of the employer's qualified health plan expenses as are properly allocable to the qualified family leave wages for which the credit is allowed. The credit is subject to similar "denial of double benefit" rules as the credit for sick leave.

The credit does not apply to the government of the United States, any state, any subdivision of a state, or any agencies or instrumentalities of the foregoing.

Employers may elect not to apply this new provision for any calendar quarter. Further, the Treasury is directed to provide substantially similar guidance as that provided for in the sick leave credit provisions.

Credit for family leave for certain self-employed individuals

The Act provides an eligible self-employed individual a refundable credit against income taxes with respect to qualified family leave equivalent amounts. To qualify, an individual must regularly carry on a trade or business within the meaning of section 1402 and must have met the criteria that would entitle the individual to receive paid leave pursuant to the *Emergency Family and Medical Leave Expansion Act* if the individual were an employee of an employer. The credit is equal to the lesser of 67% of average daily self-employment income or \$200.

Wages under section 3111 or section 3221(a)

The Act provides that any wages required to be paid by reason of the *Emergency Paid Sick Leave Act* and the *Emergency Family and Medical Leave Expansion Act* are not considered wages for purposes of section 3111(a) or section 3221(a). Thus, leave payments are not subject to the employer portion of social security tax.

Offset of employer's Medicare tax

The Act provides that the credits for qualified sick leave and family leave are increased by the amount of tax imposed by section 3111(b) (employer portion of Medicare tax) on the qualified sick leave wages or qualified family leave wages for which the credits are allowed.

KPMG observation

The environment relative to COVID-19 is rapidly evolving. Employers need to consider whether the *Emergency Family and Medical Leave Expansion Act* and the *Emergency Paid Sick Leave Act* require any changes to existing arrangements and, if so, what credits and procedures may be available to offset such expenses. Swift implementation and management of these challenges is critical.

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