

Small Business Update:
How The New Legislation Affects
Employers with Under 50 Employees

March 23, 2020



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The latest from Treasury, IRS and US DOL

- Two new **refundable payroll tax credits** to immediately and fully reimburse small businesses for the cost of Coronavirus-related leave to employees, as mandated by the Families First Coronavirus Response Act (Act) signed by the President on March 18.
- We will review the Act later in the presentation, but in brief:
 - **Two weeks of paid sick leave**
 - **12 weeks of paid emergency FMLA for employees affected by school closure** (first two weeks unpaid; remaining 10 paid at 2/3 of regular rate)



Key Takeaways

- Employers receive 100% reimbursement for paid leave pursuant to the Act
 - Health insurance costs are also included in the credit
 - Employers face no payroll tax liability
 - Self-employed individuals receive an equivalent credit
- Reimbursement will be “quick and easy to obtain”
 - Immediate dollar for dollar tax offset against payroll taxes will be provided
 - Where a refund is owed, the IRS will send the refund as quickly as possible



In a nutshell...

- Businesses would **retain and access funds that they would otherwise pay to the IRS in payroll taxes.**
- If those amounts are not sufficient to cover the cost of paid leave, employers can seek an expedited advance from the IRS by submitting a streamlined claim form that will be released this week.
- These credits are available to all employers affected by the Act (<500 employees) for Act-mandated leave provided between April 2 and December 31, 2020.



Small Business Protection

- Employers with fewer than 50 employees are **eligible for an exemption from the requirements to provide leave to care for a child whose school is closed or for whom childcare is unavailable.**
- Both the Paid Sick Leave and Emergency FMLA Leave mandated in the Act have school closure-related childcare as an eligible reason to take the leave
- Childcare is the **ONLY** reason someone can take the Emergency FMLA Leave (The original House bill included illness or quarantine. The Senate removed those reasons.)



FFCRA: Paid Sick Leave

Two weeks (up to 80 hours) of paid sick leave

- **100% of pay**: where the employee is unable to work due to quarantine and/or experiencing COVID-19 symptoms and seeking a medical diagnosis.
- **2/3 of pay**: where an employee is unable to work because of a need to care for an individual subject to quarantine, to care for a child whose school is closed or childcare provider is unavailable, and/or the employee is experiencing substantially similar symptoms

*Employees in the latter category may also be eligible for EFMLA (10 weeks paid at 2/3 of pay)



Paid Sick Leave Credit

- **100% Pay**: eligible employers may receive a refundable sick leave credit for sick leave at the employee's regular rate of pay, up to \$511 per day and \$5,110 in the aggregate, for a total of 10 days.
- **2/3 Pay**: eligible employers may claim a 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 are entitled to an additional tax credit determined based on costs to maintain health insurance coverage for the eligible employee during the leave period.



FFCRA: Emergency FMLA

*In addition to two weeks of paid sick leave, employees who are unable to work because of a need to care for a child are eligible for 10 weeks of **paid emergency FMLA leave**, at 2/3 their pay rate.*

- This supersedes existing FMLA and only applies to children who are home as a direct result of Covid-19 school or childcare closures.



Emergency FMLA Credit

- Employers may receive a refundable childcare leave credit equal to 2/3 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 childcare leave credit.

*Eligible employers are entitled to an additional tax credit determined based on costs to maintain health insurance coverage for the eligible employee during the leave period.



Prompt Payment for the Cost of Providing Leave

- When employers pay their employees, they are required to withhold from their employees' paychecks federal income taxes and the employees' share of Social Security and Medicare taxes. The employers then are required to deposit these federal taxes, along with their share of Social Security and Medicare taxes, with the IRS and file quarterly payroll tax returns (Form 941 series) with the IRS.
- Under guidance that will be released this week, **eligible employers who pay qualifying sick or childcare leave will be able to retain an amount of the payroll taxes equal to the amount of qualifying sick and childcare leave that they paid, rather than deposit them with the IRS.**



Payment continued

- 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.**
- If there are not sufficient payroll taxes to cover the cost of qualified sick and childcare 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. The details of this new, expedited procedure will be announced this week.



Here's how this would work

- 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.
- 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.
- Equivalent childcare leave and sick leave credit amounts are available to self-employed individuals under similar circumstances. These credits will be claimed on their income tax return and will reduce estimated tax payments.



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 childcare 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.



Now what for small businesses...

- We wait for guidance on how this will be administered procedurally
 - Credits and reimbursements for leave
 - Exemption from childcare leave
- At this time, we do not have guidance on how a small business could apply for exemption from the Paid Sick Leave portion of the FFCRA



Unemployment benefits

- Employees are eligible if they are terminated or temporarily laid off due to lack of work. They do NOT have to be terminated to apply.
- Benefits continuation is up to you and will not affect their ability to receive unemployment.
- Your unemployment tax rate will not adversely be affected if your employees apply for unemployment because they've been laid off due to the coronavirus.



How much will they receive?

- We do not know. Each applicant will be reviewed on a case by case basis.
- The FFCRA also provides for federal relief to states to administer and provide unemployment, and the individual state employment commissions will be receiving guidance on these funds this week.
- Find your state(s)' employment commission [by following this link](#) (careeronestop.org)



Small business loans

- Small businesses in certain states can apply for Economic Injury Disaster Loans from the U.S. Small Business Administration
 - Working capital loans of up to \$2 million
 - Visit [THIS SITE](#) to learn more (sba.gov).
 - A detailed list of states and contiguous counties among states in which these loans are permitted can be found [ON THIS SITE](#).



Altering pay rates

- Non-exempt employees – only paid for hours worked
 - If a non-exempt employee reports to work only to be sent home, pay him for their time at work and also travel to and from work.
 - A reduction in hourly *wage* may require a certain amount of notice based on state law and cannot occur mid-pay period.
- Exempt employees – those who earn salary
 - You can implement a pay cut, for certain employees or departments, but check for unintentional discrimination and document your criteria.
 - If you reduce an exempt employee's salary to less than \$684/week (\$35,568/year) or the higher state minimum if one exists, then that employee becomes a non-exempt employee and her hours must be tracked.

*It is legal to reclassify exempt employees as non-exempt but can't be done retroactively, mid-pay period, or in violation of any state notification rules.



Final thoughts

- Some states, like New York, are announcing their own paid leave policies, which would supersede the federal policy.
- Still waiting on guidance on this portion of the Act:

The revised FFCRA allows the Secretary of Labor to exempt small business with fewer than 50 employees when the imposition of the requirements would jeopardize the viability of the business as a going concern, as well as to preclude lawsuits against small employers by employees.



Still waiting model notice from Labor

NOTICE

SEC. 5103.

(a) **IN GENERAL.**—Each employer shall post and keep posted, in conspicuous places on the premises of the employer where notices to employees are customarily posted, a notice, to be prepared or approved by the Secretary of Labor, of the requirements described in this Act.

(b) **MODEL NOTICE.**—Not later than 7 days after the date of enactment of this Act, the Secretary of Labor shall make publicly available a model of a notice that meets the requirements of subsection (a).



We will pass on more information
as we have it.

Thank you!

