

SUPPLEMENTAL MEMORANDUM

From: Hartzog Conger Cason LLP
To: Oklahoma Agents Alliance, LLC
Date: March 25, 2020
Re: Additional Guidance from the Department of Labor and the Internal Revenue Service in response to the Families First Coronavirus Response Act; IRS Announces People First Initiative

Since Congress passed the Families First Coronavirus Response Act (the “FFCRA” or the “Act”) on March 19, 2020, the Department of Labor (“DOL”) and the Internal Revenue Service (“IRS”) have issued additional guidance to supplement and clarify certain aspects of the Act.¹ Our purpose in this memorandum is to communicate relevant new guidance and clarification to the Act provided by these recent DOL and IRS announcements. **As with all legislative and regulatory action surrounding the COVID-19 outbreak, the status of the following information is subject to change. We recommend you consult with counsel prior to taking action based on this memorandum.**

APPLICATION OF FFCRA

The FFCRA’s paid leave provisions are effective on April 1, 2020, and will apply to leave taken between April 1, 2020 and December 31, 2020. The FFCRA’s rules are not retroactive.

EMPLOYER NOTICE REQUIREMENTS

All covered employers (i.e., public and private sector employers with fewer than 500 employees—this include small business owners) are required under federal law to post a notice provided by the DOL regarding employee paid leave entitlements under the Act. They must be placed in a conspicuous place on the employer’s premises where they are easily visible to all employees. This requirement can also be satisfied by emailing or direct mailing this notice to employees, or posting this notice on an employee internal or external website. This notice does not need to be shared with recently laid-off employees or job applicants.

PAYROLL TAX CREDITS

Recent IRS guidance indicates the payroll tax credit may be a more useful tool for employers than it may have appeared when the FFCRA was enacted.

Retention of Payroll Taxes. Employers who pay paid sick leave under the Emergency Paid Sick Leave Act or expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act are permitted to retain amounts of payroll taxes that would ordinarily be deposited with the IRS, rather than depositing the payroll taxes with the IRS. The payroll taxes that may be retained by the employer include 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.

¹ These resources, from which this supplemental memorandum has been prepared, have been provided below.

Expedited Tax Credit. Further, if an employer's qualifying paid sick and family leave under the FFCRA exceeds the amount of payroll taxes the employer would have ordinarily deposited, the employer will be able to file a request for an accelerated tax credit for the remaining amount. The IRS expects to process these requests in two weeks or less. The IRS will announce additional details of this expedited tax credit procedure this week.

Examples.

- If Employer pays \$5,000 in qualified employee sick or family leave and is required to deposit \$8,000 in payroll taxes with the IRS, the Employer can use \$5,000 of the \$8,000 to make qualified sick and family leave payments. Employer would then only be required to deposit \$3,000 with the IRS on the next regular deposit date.
- If Employer pays \$10,000 in qualifying employee sick or family leave and is required to deposit \$8,000 in payroll taxes with the IRS, Employer can use all \$8,000 to make qualified leave payments. Employer can then file an accelerated credit for the remaining \$2,000.

SMALL BUSINESS EXEMPTION

While the FFCRA states that employers with fewer than 50 employees may be eligible for an exemption from the FFCRA's sick and family leave requirements, the DOL must first issue regulations regarding the exemption procedure. The DOL announced it will issue these regulations in "April 2020."

While details about the exemption are not yet known, the regulations are going to provide exemptions "on the basis of simple and clear criteria that make it available in circumstances involving jeopardy to the viability to the employer's business as a going concern." Our firm will be monitoring the DOL and will promptly communicate with you when the DOL regulations have been issued.

**ENFORCEMENT OF THE ACT
(AND PERIOD OF NON-ENFORCEMENT)**

The DOL has provided guidance regarding enforcement of the FFCRA. First, employers who violate the first two weeks' expanded family and medical leave or unlawful termination provisions of the FFCRA will be subject to penalties and enforcement under Sections 16 and 17 of the Fair Labor Standards Act.² Employers who violate the emergency family medical leave provisions will be subject to enforcement under the Family and Medical Leave Act ("FMLA").

² This is in reference to the Emergency Paid Sick Leave Act, which requires employers with fewer than 500 employees to provide emergency paid sick leave to any employee who cannot work or telework due to a need for leave because the employee is: (1) subject to a federal, state, or local quarantine or isolation order related to COVID-19; (2) advised by a health care provider to self-quarantine due to concerns related to COVID-19; (3) experiencing symptoms of COVID-19 and seeking a medical diagnosis; (4) caring for an individual who is subject to an order as described in (1) above or has been advised as described in (2) above; (5) caring for a son or daughter if the child's school or place of care has been closed or the child care provider is unavailable due to COVID-19 precautions; and/or (6) experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

The DOL will observe a 30-day period of non-enforcement after the Act takes effect, so long as the employer acts reasonably and in good faith to comply with the Act. “Good faith” exists when violations are remedied and the employee is made whole as soon as practicable by the employer; the violations are not willful; and the DOL receives written commitment from the employer to comply with the FFCRA in the future.

EXTENSION OF TAX FILING DEADLINE

The Treasury Department and the IRS have announced the federal income tax filing due date is automatically extended from April 15, 2020 to July 15, 2020. Taxpayers may also defer their federal income tax payments until July 15, 2020. This extension is automatic and does not require the filing of any additional forms. The IRS urges taxpayers who are due a refund to file as soon as possible—most tax refunds are still being issued within 21 days.

IRS PEOPLE FIRST INITIATIVE

The IRS announced the IRS People First Initiative, a “sweeping series of steps” to assist taxpayer relief. The effort’s projected start date will be April 1 and is expected to run through July 15, 2020. The initiative is intended to provide immediate relief to tax payers and the IRS is “temporarily adjusting [its] processes to help people and businesses” during the Coronavirus outbreak.

Some of the programs will include:

Existing Installment Agreements. For taxpayers who are under existing Installment Agreements, payments due between April 1 and July 15, 2020 are suspended. If taxpayers are unable to comply with certain terms of an Installment Payment Agreement, they may suspend payments during this period. However, interest will accrue during this period. Taxpayers will still be able to enter into Installment Agreements during this time if necessary.

Offers in Compromise. The IRS will take the following steps to assist taxpayers with various stages of the OIC process:

- *Pending OIC Applications.* The IRS will allow taxpayers until July 15 to provide requested additional information to support a pending OIC. The IRS will not close any OIC before July 15 without the taxpayer’s consent.
- *OIC Payments.* Taxpayers can choose to suspend all payments on accepted OICs until July 15, 2020. Interest will accrue on unpaid balances.
- *Delinquent Return Filings.* The IRS will not default an OIC for taxpayers who are delinquent in filing their tax returns for the tax year 2018. However, taxpayers should file any delinquent 2018 return (and their 2019 return) on or before July 15, 2020.
- *New OIC Applications.* The IRS may continue to work with taxpayers whose tax liability exceeds their net worth. See IRS.gov for details.

Field Collection Activities; Private Debt Collection. The IRS will suspend liens and levies (including seizures of a personal residence) during this period. However, field revenue officers may still pursue high-income non-filers during this period and “perform similar activities where warranted.” Further, the IRS not forward delinquent accounts to private collection agencies during this period.

Automated Liens and Levies. New automatic liens and levies will be suspended during this period.

Audits. The IRS will generally not start new field, office, and correspondence examinations. However, the IRS may start new examinations if it is necessary to preserve the applicable statutes of limitations. In-person meetings will be suspended, but IRS examiners will continue examinations remotely, when possible.

Statute of Limitations. The IRS will continue to take all steps that are necessary to preserve applicable statutes of limitations. Taxpayers should cooperate with the IRS to extend such statutes, and the IRS will issue Notices of Deficiency or other actions to protect the government’s interest. If a statutory period is not set to expire during 2020, the IRS is unlikely to pursue an action until at least July 15, 2020.

Prepared as of March 25, 2020 by:

HARTZOG CONGER CASON LLP
201 Robert S. Kerr Avenue, Suite 1600
Oklahoma City, Oklahoma 73102
405-235-7000

TOM R. RUSSELL
mfurlong@hartzoglaw.com

MICHAEL A. FURLONG
mfurlong@hartzoglaw.com

R. WIL NORTON
wnorton@hartzoglaw.com

ADDITIONAL RESOURCES

The DOL and IRS have issued the following announcements and guidance:

Internal Revenue Service. *IRS unveils new People First Initiative; COVID-19 effort temporarily adjusts, suspends key compliance program.* IR 2020-59, March 25, 2020.

<https://www.irs.gov/newsroom/irs-unveils-new-people-first-initiative-covid-19-effort-temporarily-adjusts-suspends-key-compliance-program>.

U.S. Department of Labor, Wage and Hour Division. *Families First Coronavirus Response Act Notice – Frequently Asked Questions.* <https://www.dol.gov/agencies/whd/pandemic/ffcra-poster-questions>.

U.S. Department of Labor. *U.S. Department of Labor Publishes Guidance Explaining Paid Sick Leave and Expanded Family and Medical Leave Under the Families First Coronavirus Response Act.* News Release, 20-512-NAT, March 24, 2020.

<https://www.dol.gov/newsroom/releases/whd/whd20200324>.

Internal Revenue Service. *Tax Day now July 15: Treasury, IRS extend filing deadline and federal tax payments regardless of amount owed.* IR-2020-58, March 21, 2020.

<https://www.irs.gov/newsroom/tax-day-now-july-15-treasury-irs-extend-filing-deadline-and-federal-tax-payments-regardless-of-amount-owed>.

Internal Revenue Service. *Treasury, IRS and Labor announce plan to implement Coronavirus-related paid leave for workers and tax credits for small and midsize businesses to swiftly recover the cost of providing Coronavirus-related leave.* IR-2020-57, March 20, 2020.

<https://www.irs.gov/newsroom/treasury-irs-and-labor-announce-plan-to-implement-coronavirus-related-paid-leave-for-workers-and-tax-credits-for-small-and-midsize-businesses-to-swiftly-recover-the-cost-of-providing-coronavirus>.

U.S. Department of Labor. *U.S. Department of the Treasury, IRS and the U.S. Department of Labor announce plan to implement Coronavirus-related paid leave for workers and tax credits for small and midsize businesses to swiftly recover the cost of providing Coronavirus-related leave.* News Release 20-505-NAT, March 20, 2020.

<https://www.dol.gov/newsroom/releases/osec/osec20200320>.

U.S. Department of Labor, Wage and Hour Division. *Families First Coronavirus Response Act: Employer Expanded Family and Medical Leave Requirements.*

https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave#_ftnref7.

U.S. Department of Labor, Wage and Hour Division. *Families First Coronavirus Response Act: Employee Paid Leave Rights.* <https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave>.

U.S. Department of Labor, Wage and Hour Division. *Families First Coronavirus Response Act: Questions and Answers.* <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.