EMPLOYER TAX CREDITS UNDER THE FIRST FAMILIES CORONAVIRUS RESPONSE ACT

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On March 18, 2020 the Families First Coronavirus Response Act was signed into law. This law effectuates, among other changes, three new laws: The Emergency Family and Medical Leave Expansion Act (EFMLEA); the Emergency Paid Sick Leave Act (EPSLA); and Tax Credits for Paid Sick and Paid Family and Medical Leave.

I. THE EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT (EFMLEA)

This law amends the current Family and Medical Leave Act (FMLA), with significant changes as to covered employers and eligible employees.

A. When is the Law Effective?

The Emergency Paid Sick Leave Act imposes a new leave requirement on employers that is effective beginning on April 1, 2020.

B. What Employers are Covered?

Employers with fewer than 500 employees.

Provided that the Department of Labor exercises its authority to issue such regulations, employers with fewer than 50 employees may be exempt from the law, if the "imposition of such requirements would jeopardize the viability of the business as a going concern."

C. Which Employees are Eligible?

Employees who have been employed with a covered employer for at least 30 calendar days.

Eligible employees are entitled to leave if they meet the following criteria:

1. Qualifying Need Related to a Public Health Emergency: Employee who is unable to work (or telework) due to a need for leave to care for the employee's son or daughter under 18 years of age if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to public health emergency with respect to COVID-19 declared by Federal, State, or local authority. Employees must articulate the special circumstances that would require the employee to care for a child older than the age of 14

Exception: As initially issued, the U.S. Department of Labor ("DOL") regulations provided that employers of an employee who is a health care provider or emergency responder may elect to exclude such employees from eligibility for protected leave and paid leave under this amendment to FMLA.

The DOL made some critical revisions to its temporary Families First Coronavirus Response Act (FFCRA) paid leave regulation. These changes stem from an August 3, 2020, U.S. District Court for the Southern District of New York decision that found parts of the original paid sick and expanded family medical leave rule invalid.

The revisions to the temporary regulations went into effect on September 16, 2020, and businesses with less than 500 employees may now need to change some internal FFCRA paid leave internal procedures.

1. Revision of the Definition of Health Care Provider

   The FFCRA allows employers to opt-out of providing paid leave to "health care providers." The original rule included an expansive definition of a health care provider, which the District Court said left too many people exempt.

The new rule defines a "health care provider" as:

Employees who meet the definition of “health care provider” under the Family and Medical Leave Act regulations (aka “a doctor of medicine or osteopathy who is authorized to practice medicine or surgery”); and

People who are employed to provide diagnostic services, preventative services, treatment services, or other services that are integrated with and necessary to the provision of patient care, which, if not provided, would adversely impact patient care.

This definition is much narrower than the original, so any company that uses the "health care provider" exemption needs to check and make sure it still applies. Any company outside of the health care provider space can ignore this development.

2. Work Availability Standard

Initially, the rule only applied this work availability standard to three of the six FFCRA leave qualifying events. Then, the District Court struck the whole work availability standard down, which seemed to imply that furloughed people might be eligible for FFCRA leave. However, the new rule nixes it completely. Instead, it is explicit – to meet any of the six FFCRA leave qualifying standards, a person must be an active employee and cannot be furloughed or just have very few hours to work due to the pandemic economy.

On the off chance an employer is currently letting furloughed or reduced hour employees take FFCRA leave for hours that they would not usually be at work, they will have to stop (or not get reimbursed).

3. Intermittent Leave

The original rule allowed employees to take FFCRA leave on an intermittent basis as long as it did not pose a public health risk. However, the employer had to agree to it first, and both parties had to plan ahead of time about how it would work. This process allowed people to make arrangements with an employer to take paid leave intermittently to care for a child whose school was COVID-closed. It did not permit people to take leave to get a COVID test, go back to work while awaiting results, and then take leave again when they tested positive. But then, the District Court ruled that employers could not require people to ask permission first. Instead, businesses had to allow employees to take intermittent FFCRA leave on demand. It is unknown how many employers implemented the rule that no permission is needed. The new rule restores the original intermittent leave with permission requirement.

When the need for leave is foreseeable, the employee must provide the employer with notice as is practicable.

D. What Benefits are Granted?

12 weeks of protected leave. The first ten days of leave are unpaid, but the employee may elect to substitute any accrued vacation, personal, medical, or sick leave concurrent with this FMLA leave. After 10 days, the employer must provide paid leave to the employee at a rate of two-thirds of the employee's regular rate of pay, based on the number of hours the employee would otherwise normally be scheduled to work – up to $200 per day and $10,000 in the aggregate. The normally scheduled hours for variable hour employees shall consist of the hours worked and hours taken as leave for the six-month period ending on the date when employee took the leave.

Restoration of Position. The employee must be restored to their position or equivalent position unless the employer employs fewer than 25 employees and the following conditions are met:

(a) the employee takes leave based on a qualifying need related to a public health emergency;

(b) the position held by the employee when the leave commenced does not exist due to economic conditions or other changes in operating conditions of the employer that affect employment and are caused by a public health emergency during the leave;

(c) the employer makes reasonable efforts to restore the employee to a position equivalent to the position the employee held when leave commenced, with equivalent employment benefits, pay, and other terms and condition of employment; and

(d) if the reasonable efforts fail, the employer makes reasonable efforts during the "contact period" to contact the employee if an equivalent position becomes available. The contact period is the one-year period beginning on the earlier of the date on which the qualifying need related to a public health emergency concludes; or the date that is 12 weeks after the date on which the employee's leave based on a qualifying need related to a public health emergency commenced.

These benefits will only be provided through December 31, 2020, unless otherwise extended by law.

E. How Does this Law Interplay with Current Employer Policies?

Employees may use any paid personal, sick, or medical leave during the first two weeks of unpaid leave.

The protections from retaliation against using FMLA leave similarly apply to employees requesting or using leave under EMFLEA.

II. EMERGENCY PAID SICK LEAVE ACT (EPSLA)

A. When is the Law Effective?

The EPSLA is effective as of April 1, 2020.

B. What Employers are Covered?

Private employers with fewer than 500 employees and which are engaged in commerce or any industry or activity affecting commerce.

Public agencies (or other non-private entities or individuals) that employ 1 or more employees and which are engaged in commerce or any industry or activity affecting commerce. Public agencies (per 29 USC 203(x)) and the Government Accountability Office and the Library of Congress are specifically listed as covered employers.

Provided that the Department of Labor exercises its authority to issue such regulations, employers with fewer than 50 employees may be exempt from the law, if the "imposition of such requirements would jeopardize the viability of the business as a going concern."

Notably, covered employers include "any person acting directly or indirectly in the interest of an employer in relation to an employee" and "any successor in interest of an employer."

C. Which Employees are Eligible?

Full-time and part-time employees, regardless of how long they have worked for employer.

Employees unable to work (or telework) due to a need for leave because:

1. Federal, State, or local quarantine or isolation order related to coronavirus;

2. Employee has been advised by a health care provider (as defined by the FMLA) to self-quarantine due to concerns related to coronavirus;
3. Employee is experiencing symptoms of coronavirus and seeking a medical diagnosis;
4. Employee is caring for an individual who is subject to an order of quarantine as described in the first and second reasons above;
5. Employee is caring for employee's son or daughter (as defined by FMLA), whose school or place of care has been closed, or the childcare provider is unavailable, due to coronavirus precautions; or
6. Employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of Treasury and Secretary of Labor).

Exception: Employer of an employee who is a health care provider or emergency responder may elect to exclude such employees from eligibility for paid leave under this law.

D. What Benefits are Granted?

Full-time employees: Paid sick time for 80 hours.

Part-time employees: Paid sick time for the average number of hours that the employee works over a two-week period. For variable hour employees, this number is equal to the average number of hours that the employee was scheduled per day over the six-month period ending on the date on which the employee takes the paid sick leave, including any hours which the employee took any leave or if the employee did not work over such six-month period, the reasonable expectation of the employee at the time of hiring of the average hours per day that the employee would be scheduled to work.

Paid sick leave will be paid at the following rates and caps, depending upon the reason for using the leave:

- If using the leave for reasons (1) – (3):
    - Rate: The highest rate of the following: the employee's regular rate of pay; minimum wage under FLSA; or minimum wage under State or local law in which employee is employed.
    - Cap: Up to $511 per day and $5,110 in the aggregate.
- If using the leave for reasons (4) – (6):
    - Rate: Two-thirds of the amount otherwise paid for reasons (1) – (3)
    - Cap: Up to $200 per day and $2,000 in the aggregate.

Paid sick leave is effective for the employee's next scheduled work shift immediately following the termination of need for paid sick time. Paid sick leave does not carry over form one year to the next.

Employees using paid sick leave must not be required by the employer to find a replacement employee to cover the hours for which that employee is using paid sick time.

These benefits will only be provided through December 31, 2020, unless otherwise extended by law.

E. How Does this Law Interplay with Current Employer Policies?

Employers may not require an employee to use other paid leave before the employee uses paid sick time under this new law. Employers are not required to pay out any unused paid sick time to an employee, upon termination, resignation, retirement, or other separation from employment.

After the first day (or portion of a day) in which an employee receives paid sick leave, employers may require employees to follow reasonable notice procedures to continue receiving paid sick leave.

Employers must post a notice in their workplace, as prepared and approved by the Secretary of Labor, and which shall be available no later than 7 days after enactment of the law.

The protections from discrimination and retaliation similarly apply to employees, in that employers may not discharge, discipline, or discriminate against an employee who takes leave under the new law, has filed a complaint or started a proceeding related to the law, or testified in any such proceeding.

This law specifically states that it does not diminish the rights or benefits of an employee under other Federal, State, or local law, a collective bargaining agreement, or an existing employer policy.

F. What Are the Penalties for Violations?

Violation of this new law by failure to pay paid sick leave to an eligible employee will be considered as an employer's failure to pay minimum wages in violation of the Fair Labor Standards Act ("FLSA"). Penalties under the FLSA may include payment of unpaid wages under the act, and for willful violations – double damages of amounts that should have been paid to employees and were not, fines, and imprisonment. See Sections 16 and 17 of the Fair Labor Standards Act.

An employer who unlawfully terminates an employee will also be considered to be in violation of the FLSA and will be subject to the penalties in Sections 16 and 17 of the FLSA.

G. Tax Credits for Paid Sick and Paid Family and Medical Leave are Administered by the Social Security Administration.

H. Which Employers May Receive the Tax Credit?

All employers, except for the Government of the United States, the government of any state or political subdivision, or any agency or

instrumentality of the foregoing. This includes self-employed individuals, with some subtle nuances as to how the credit is calculated and limited.

I. What Benefits are Granted?

Credits for qualified sick leave wages, which will be recovered by employers as a tax credit against taxes imposed by 3111(a) (social security disability insurance – 6.2% of wages) or 3221(a) (excise tax equal to social security disability tax and 3111(b)) of the Internal Revenue Code for each calendar quarter.

100% of the qualified sick and family leave wages paid by the employer in that calendar quarter under the Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Act.

These credits are limited, however, to the following caps:

Emergency Paid Sick Leave Act

$200 per individual ($511 for paid sick leave under the first three reasons of EPSLA), per day;

An aggregate of 10 days of paid sick leave under EPSLA per employee; and

Emergency Family and Medical Leave Expansion Act

$200 per individual paid under the EFMLEA, per day;

$10,000 in the aggregate, with respect to all calendar quarters; and

Any credit in excess of the above limitations shall be treated as a credit, and thereby overpayment, with a refund due.

Additionally, employers will receive a credit in the amount of the employer's qualified health plan expenses, as are properly allocable to the qualified sick

and family leave wages for which credit is allowed. Qualified health plan expenses means the amounts incurred to maintain a health plan, but only to the extent such amounts are excluded from the gross income of employees. Unless the Secretary of the Treasury prescribes some other manner, the allocation should be made by taking the pro rata cost among covered employees and pro-rated period of paid sick leave taken.

Employers can elect not to seek credits otherwise permitted under this law.

Credits are only available on wages paid through December 31, 2020.

J. How Does this Law Interplay with Other Employer Obligations?

The amount of credit received by the employer shall be considered gross income of the employer in the taxable year, and wages taken into account in determining the credit allowed shall not count toward a credit under section 45S of the Code.

Any wages required to be paid under the EPSLA or EFMLEA shall not be considered wages for purpose of 3111(a) or compensation for purposes of 3221(a) of the Internal Revenue Code.

K. Employee Retention Credit

The Employee Retention Credit is a fully refundable tax credit for employers equal to 50 percent of qualified wages (including allocable qualified health plan expenses) that Eligible Employers pay their employees. This Employee Retention Credit applies to qualified wages paid after March 12, 2020, and before January 1, 2021. The maximum amount of qualified wages taken into account with respect to each employee for all calendar quarters is $10,000, so that the maximum credit for an Eligible Employer for qualified wages paid to any employee is $5,000.

L. Employers Eligible for the Retention Credit

Eligible Employers for the purposes of the Employee Retention Credit are those that carry on a trade or business during calendar year 2020, including a tax-exempt organization, that either:

Fully or partially suspends operation during any calendar quarter in 2020 due to orders from an appropriate governmental authority limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to COVID-19; or

Experiences a significant decline in gross receipts during the calendar quarter.

Note: Governmental employers are not Eligible Employers for the Employee Retention Credit. Also, Self-employed individuals are not eligible for this credit for their self-employment services or earnings.

M. When is the Operation of a Trade or Business Partially Suspended for the Purposes of the Employee Retention Credit?

The operation of a trade or business may be partially suspended if an appropriate governmental authority imposes restrictions upon the business operations by limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to COVID-19 such that the operation can still continue to operate but not at its normal capacity.

Example: The governor issues an executive order closing all restaurants, bars, and similar establishments in the state in order to reduce the spread of COVID-19. However, the executive order allows those establishments to continue food or beverage sales to the public on a carry-out, drive-through, or delivery basis. This results in a partial suspension of the operations of the trade or business due to an order of an appropriate governmental authority with respect to any restaurants, bars, and similar establishments

in the state that provided full sit-down service, a dining room, or other on-site eating facilities for customers prior to the executive order.

N. What is a “Significant Decline in Gross Receipts”?

A significant decline in gross receipts begins with the first quarter in which an employer’s gross receipts for a calendar quarter in 2020 are less than 50 percent of its gross receipts for the same calendar quarter in 2019. The significant decline in gross receipts ends with the first calendar quarter that follows the first calendar quarter for which the employer’s 2020 gross receipts for the quarter are greater than 80 percent of its gross receipts for the same calendar quarter during 2019.

Example: An employer’s gross receipts were $100,000, $190,000, and $230,000 in the first, second, and third calendar quarters of 2020, respectively. Its gross receipts were $210,000, $230,000, and $250,000 in the first, second, and third calendar quarters of 2019, respectively. Thus, the employer’s 2020 first, second, and third quarter gross receipts were approximately 48%, 83%, and 92% of its 2019 first, second, and third quarter gross receipts, respectively. Accordingly, the employer had a significant decline in gross receipts commencing on the first day of the first calendar quarter of 2020 (the calendar quarter in which gross receipts were less than 50% of the same quarter in 2019) and ending on the first day of the third calendar quarter of 2020 (the quarter following the quarter for which the gross receipts were more than 80% of the same quarter in 2019). Thus, the employer is entitled to a retention credit with respect to the first and second calendar quarters.

O. How is the Maximum Amount of the Employee Retention Credit Available to Eligible Employers Determined?

The credit equals 50 percent of the qualified wages (including qualified health plan expenses) that an Eligible Employer pays in a calendar quarter.

The maximum amount of qualified wages taken into account with respect to each employee for all calendar quarters is $10,000, so that the maximum credit for qualified wages paid to any employee is $5,000.

Example 1: Eligible Employer pays $10,000 in qualified wages to Employee A in Q2 2020. The Employee Retention Credit available to the Eligible Employer for the qualified wages paid to Employee A is $5,000.

Example 2: Eligible Employer pays Employee B $8,000 in qualified wages in Q2 2020 and $8,000 in qualified wages in Q3 2020. The credit available to the Eligible Employer for the qualified wages paid to Employee B is equal to $4,000 in Q2 and $1,000 in Q3 due to the overall limit of $10,000 on qualified wages per employee for all calendar quarters.

An employer may not receive the Employee Retention Credit if the employer receives a PPP loan that is authorized under the CARES Act. An Eligible Employer that receives a PPP loan, regardless of the date of the loan, cannot claim the Employee Retention Credit unless it is repaid by May 18, 2020.

P. What are “Qualified Wages”?

Qualified wages are wages (as defined in section 3121(a) of the Internal Revenue Code (the “Code”)) and compensation (as defined in section 3231(e) of the Code) paid by an Eligible Employer to employees after March 12, 2020, and before January 1, 2021. Qualified wages include the Eligible Employer’s qualified health plan expenses that are properly allocable to the wages.

The definition of qualified wages depends, in part, on the average number of full-time employees (as defined in section 4980H of the Code) employed by the Eligible Employer during 2019.

If the Eligible Employer averaged more than 100 full-time employees in 2019, qualified wages are the wages paid to an employee for time that the **employee is not providing services** due to either (1) a full or partial suspension of operations by order of a governmental authority due to COVID-19, or (2) a significant decline in gross receipts. For these employers, qualified wages taken into account for an employee may not exceed what the employee would have been paid for working an equivalent duration during the 30 days immediately preceding the period of economic hardship.

If the Eligible Employer averaged 100 or fewer full-time employees in 2019, qualified wages are the wages paid to **any employee** during any period of economic hardship described in Examples (1) and (2) above.

Q. Is an Employer Required to Pay Qualified Wages to its Employees Under the CARES Act?

No. The CARES Act does not require employers to pay qualified wages. In addition, Eligible Employers may elect to not claim the credit for the Employee Retention Credit. The FFCRA does require certain employers to pay sick or family leave wages to employees who are unable to work or telework due to a COVID-19 circumstance. These employers may be entitled to a refundable tax credit for those wages paid, although the employers may elect not to claim the credit.

R. Against What Employment Taxes Does the Employee Retention Credit Apply?

The credit is allowed against the employer portion of social security taxes under section 3111(a) of the Internal Revenue Code (the "Code"), and the portion of taxes imposed on railroad employers under section 3221(a) of the Railroad Retirement Tax Act (RRTA) that corresponds to the social security taxes under section 3111(a) of the Code.

S. What Makes the Credit “Fully Refundable”?

The credits are fully refundable because the Eligible Employer may get a refund if the amount of the credit is more than certain federal employment taxes the Eligible Employer owes. That is, if for any calendar quarter the amount of the credit the Eligible Employer is entitled to exceeds the employer portion of the social security tax on all wages (or on all compensation for employers subject to RRTA) paid to all employees, then the excess is treated as an overpayment and refunded to the employer under sections 6402(a) and 6413(a) of the Code. Consistent with its treatment as an overpayment, the excess will be applied to offset any remaining tax liability on the employment tax return and the amount of any remaining excess will be reflected as an overpayment on the return. Like other overpayments of federal taxes, the overpayment will be subject to offset under section 6402(a) of the Code prior to being refunded to the employer.

Example: Eligible Employer pays $10,000 in qualified wages to Employee A in Q2 2020. The Employee Retention Credit available to the Eligible Employer for the qualified wages paid to Employee A is $5,000. This amount may be applied against the employer share of social security taxes that the Eligible Employer is liable for with respect to all employee wages paid in Q2 2020. Any excess over the employer’s share of social security taxes is treated as an overpayment and refunded to the Eligible Employer after offsetting other tax liabilities on the employment tax return and subject to any other offsets under section 6402(a) of the Code.

T. How Does an Eligible Employer Claim the Refundable Tax Credit for Qualified Wages?

Eligible Employers will report their total qualified wages and the related credits for each calendar quarter on their federal employment tax returns, usually Form 941, Employer's Quarterly Federal Tax Return. Form 941 is

used to report income and social security and Medicare taxes withheld by the employer from employee wages, as well as the employer's portion of social security and Medicare tax.

In anticipation of receiving the credits, Eligible Employers can fund qualified wages by accessing federal employment taxes, including withheld taxes, that are required to be deposited with the IRS or by requesting an advance of the credit from the IRS.

U. Can an Eligible Employer Paying Qualified Wages Fund its Payments of Qualified Wages Before Receiving the Credits by Reducing its Federal Employment Tax Deposits?

Yes. An Eligible Employer may fund the qualified wages by accessing federal employment taxes, including those that the Eligible Employer already withheld, that are set aside for deposit with the IRS, for other wage payments made during the same quarter as the qualified wages.

That is, an Eligible Employer that pays qualified wages to its employees in a calendar quarter before it is required to deposit federal employment taxes with the IRS for that quarter may reduce the amount of federal employment taxes it deposits for that quarter by half of the amount of the qualified wages paid in that calendar quarter. The Eligible Employer must account for the reduction in deposits on the Form 941, Employer's Quarterly Federal Tax Return, for the quarter.

Example: An Eligible Employer paid $10,000 in qualified wages (including qualified health plan expenses) and is therefore entitled to a $5,000 credit, and is otherwise required to deposit $8,000 in federal employment taxes, including taxes withheld from all of its employees, for wage payments made during the same quarter as the $10,000 in qualified wages. The Eligible Employer has no paid sick or family leave credits under the FFCRA. The Eligible Employer may keep up to $5,000 of the $8,000 of taxes the Eligible

Employer was going to deposit, and it will not owe a penalty for keeping the $5,000. The Eligible Employer is required to deposit only the remaining $3,000 on its required deposit date. The Eligible Employer will later account for the $5,000 it retained when it files Form 941, Employer's Quarterly Federal Tax Return, for the quarter.

V. How can an Eligible Employer that is paying qualified wages fund the payment of these wages if the Eligible Employer does not have sufficient federal employment taxes set aside for deposit to cover those payments? Can the employer get an advance of the credits?

Yes. Because quarterly returns are not filed until after qualified wages are paid, some Eligible Employers may not have sufficient federal employment taxes set aside for deposit to the IRS to fund their qualified wages. Accordingly, the IRS has established a procedure for obtaining an advance of the refundable credits.

The Eligible Employer should first reduce its remaining federal employment tax deposits for wages paid in the same calendar quarter by the maximum allowable amount. If the anticipated credit for the qualified wages exceeds the remaining federal employment tax deposits for that quarter, the Eligible Employer can file a Form 7200, Advance Payment of Employer Credits Due to COVID-19, to claim an advance refund for the full amount of the anticipated credit for which it did not have sufficient federal employment tax deposits.

If an Eligible Employer fully reduces its required deposits of federal employment taxes otherwise due on wages paid in the same calendar quarter to its employees in anticipation of receiving the credits, and it has not paid qualified wages in excess of this amount, it should not file the Form 7200. If it files the Form 7200, it will need to reconcile this advance credit and its deposits with the qualified wages on Form 941 (or other applicable

federal employment tax return such as Form 944 or Form CT-1), and it may have an underpayment of federal employment taxes for the quarter.

Example: An Eligible Employer paid $20,000 in qualified wages, and is therefore entitled to a credit of $10,000, and is otherwise required to deposit $8,000 in federal employment taxes, including taxes withheld from all of its employees, on wage payments made during the same calendar quarter. The Eligible Employer has no paid sick or family leave credits under the FFCRA. The Eligible Employer can keep the entire $8,000 of taxes that the Eligible Employer was otherwise required to deposit without penalties as a portion of the credits it is otherwise entitled to claim on the Form 941. The Eligible Employer may file a request for an advance credit for the remaining $2,000 by completing Form 7200.

W. May an Eligible Employer Receive Both the Tax Credits for the Qualified Leave Wages Under the FFCRA and the Employee Retention Credit Under the CARES Act?

Yes, but not for the same wages. The amount of qualified wages for which an Eligible Employer may claim the Employee Retention Credit does not include the amount of qualified sick and family leave wages for which the employer received tax credits under the FFCRA.

X May an Eligible Employer Receive Both the Employee Retention Credit and a Small Business Interruption Loan Under the Paycheck Protection Program that is Authorized Under the CARES Act?

No. An Eligible Employer may not receive the Employee Retention Credit if the Eligible Employer receives a Small Business Interruption Loan under the Paycheck Protection Program that is authorized under the CARES Act (“Paycheck Protection Loan”). An Eligible Employer that receives a paycheck protection loan should not claim Employee Retention Credits.

III. SPECIFIC PROVISIONS RELATED TO SELF-EMPLOYED INDIVIDUALS

A. Who is an Eligible Self-Employed Individual for Purposes of the Qualified Sick Leave Credit and the Qualified Family Leave Credit?

An eligible self-employed individual is defined as an individual who regularly carries on any trade or business within the meaning of section 1402 of the Code, and would be entitled to receive qualified sick leave wages or qualified family leave wages under the FFCRA if the individual were an employee of an Eligible Employer (other than himself or herself) that is subject to the requirements of the FFCRA.

Eligible self-employed individuals are allowed an income tax credit to offset their federal self-employment tax for any taxable year equal to their "qualified sick leave equivalent amount" or "qualified family leave equivalent amount."

B. How is the "Qualified Sick Leave Equivalent Amount" for an Eligible Self-Employed Individual Calculated?

For an eligible self-employed individual who is unable to work or telework because the individual:

1. Is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;

2. Has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or

3. Is experiencing symptoms of COVID-19 and seeking a medical diagnosis, the qualified sick leave equivalent amount is equal to the number of days during the taxable year that the individual cannot perform services in the applicable trade or business for one of the three above reasons, multiplied by the lesser of $511 or 100 percent

of the “average daily self-employment income” of the individual for the taxable year.

For an eligible self-employed individual who is unable to work or telework because the individual:

1. Is caring for an individual who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19, or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;

2. Is caring for a child if the child’s school or place of care has been closed, or child care provider is unavailable due to COVID-19 precautions; or

3. Is 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 qualified sick leave equivalent amount is equal to the number of days during the taxable year that the individual cannot perform services in the applicable trade or business for one of the three above reasons, multiplied by the lesser of $200 or 67 percent of the “average daily self-employment income” of the individual for the taxable year.

In either case, the maximum number of days a self-employed individual may take into account in determining the qualified sick leave equivalent amount is ten.

Note: The only days that may be taken into account in determining the qualified sick leave equivalent amount are days occurring during the period beginning on April 1, 2020, and ending on December 31, 2020.

C. How is the “Average Daily Self-Employment Income” for an Eligible Self-Employed Individual Calculated?

Average daily self-employment income is an amount equal to the net earnings from self-employment for the taxable year divided by 260. A taxpayer's net earnings from self-employment are based on the gross income that he or she derives from the taxpayer's trade or business minus ordinary and necessary trade or business expenses.

D. How is the "Qualified Family Leave Equivalent Amount" for an Eligible Self-Employed Individual Calculated?

The qualified family leave equivalent amount with respect to an eligible self-employed individual is an amount equal to the number of days (up to 50) during the taxable year that the self-employed individual cannot perform services for which that individual would be entitled to paid family leave (if the individual were employed by an Eligible Employer (other than himself or herself)), multiplied by the lesser of two amounts: (1) $200, or (2) 67 percent of the average daily self-employment income of the individual for the taxable year.

E. Can a Self-Employed Individual Receive Both Qualified Sick or Family Leave Wages and Qualified Sick or Family Leave Equivalent Amounts?

Yes, but the qualified sick or family leave equivalent amounts are offset by the qualified sick or family leave wages.

That is, if an eligible self-employed individual receives qualified sick leave wages as an employee of an Eligible Employer (other than himself or herself), that individual's qualified sick leave equivalent amount must be reduced (but not below zero) to the extent that the sum of the qualified sick leave equivalent amount and the qualified sick leave wages received exceeds:

- $5,110 in the case of any day any portion of which is paid sick time for when the individual:

1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;

2. has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or

3. is experiencing symptoms of COVID-19 and seeking a medical diagnosis.

- $2,000 in the case of any day any portion of which is paid sick time for when the individual:

    1. is caring for an individual who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19, or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;

    2. is caring for a child if the child's school or place of care has been closed, or child care provider is unavailable due to COVID-19 precautions; or

    3. is 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.

Example: Assume that an eligible self-employed individual's qualified sick leave equivalent amount is $1,500, but the individual also works for an Eligible Employer and received qualified sick leave wages of $1,000 to care for the individual's child while school was closed due to COVID-19. The individual's qualified sick leave equivalent amount would be reduced by $500 [i.e., ($1,500 + $1,000) - $2,000], resulting in a credit for the qualified sick leave equivalent of $1,000 [i.e., $1,500 - $500].

If an eligible self-employed individual receives qualified family leave wages, the individual's qualified family leave equivalent amount must be reduced (but not below zero) to the extent that the sum of the qualified family leave equivalent amount and the qualified family leave wages received exceeds $10,000.

Example: Assume that an eligible self-employed individual's qualified family leave equivalent amount is $5,000, but the individual also works for an Eligible Employer and received qualified family leave wages of $9,000 to care for the individual's child while school was closed due to COVID-19. The individual's qualified family leave equivalent amount would be reduced by $4,000 [i.e., ($5,000 + $9,000) - $10,000], resulting in a credit for the qualified family leave equivalent of $1,000 [i.e., $5,000 - $4,000].

F. How Does a Self-Employed Individual Claim the Credits for Qualified Sick Leave Equivalent Amounts or Qualified Family Leave Equivalent Amounts?

The refundable credits are claimed on the self-employed individual's Form 1040, U.S. Individual Income Tax Return, tax return for the 2020 tax year.

G. How Can a Self-Employed Individual Fund His or Her Qualified Sick Leave Equivalent and Qualified Paid Family Leave Equivalent Amounts Before Filing His or Her Form 1040?

The self-employed individual may fund sick leave and family leave equivalents by taking into account the credit to which the individual is entitled and will claim on Form 1040, U.S. Individual Income Tax Return, in determining required estimated tax payments. This means that a self-employed individual can effectively reduce payments of estimated income taxes that the individual would otherwise be required to make if the individual was not entitled to the credit on the Form 1040.

IV. W-2 REPORTING FOR 2020

A. How Should Employers Report FFCRA Payments to the Employees?

IRS Notice 2020-54 states that qualified sick leave wages and qualified family leave wages related to the Families First Coronavirus Response Act should be reported on Form W-2 Box 14 for employees.

B. Is There Any Special Information that Needs to be Provided to Employees?

Employers must report to the employee the following type and amount of the wages that were paid, with each amount separately reported either in Box 14 of Form W-2 or on a separate statement:

Included in Box 14, if applicable, are amounts paid to you as qualified sick leave wages or qualified family leave wages under the Families First Coronavirus Response Act. Specifically, up to three types of paid qualified sick leave wages or qualified family leave wages are reported in Box 14:

> Sick leave wages subject to the $511 per day limit because of care you required;
>
> Sick leave wages subject to the $200 per day limit because of care you provided to another; and
>
> Emergency family leave wages.

If you have self-employment income in addition to wages paid by your employer, and you intend to claim any qualified sick leave or qualified family leave equivalent credits, you must report the qualified sick leave, or qualified family leave wages on Form 7202, Credits for Sick Leave and Family Leave for Certain Self-Employed Individuals, included with your income tax return and reduce (but not below zero) any qualified sick leave or qualified family leave equivalent credits by the amount of these qualified leave wages. If

you have self-employment income, you should refer to the instructions for your individual income tax return for more information.

V. FORM 7200 REPORTING FOR 2020

A. What is the Purpose of Form 7200?

Form 7200 allows employers to request an advance payment of their tax credits for the following:

Qualified sick leave

Family leave wages

Employee retention credit

B. Should I Use Form 7200?

Instead of filing Form 7200, Employers should first reduce their employment tax deposits to account for the credits. Employers can request the amount of the credit that exceeds the reduced deposits by filing Form 7200. Use Form 7200 to request an advance payment of the tax credits for qualified sick and qualified family leave wages and the employee retention credit that the employer will claim on the following federal forms.

Form 941, 941-PR, 941-SS

Form 943, 943-PR

Form 944, 944 (SP)

Form CT-1