

OBSERVATIONS

Families First Coronavirus Response Act

April 14, 2020

On March 18, 2020 President Trump signed the Families First Coronavirus Response Act (the "FFCRA" or "Families First Act") which has provisions that became effective April 1, 2020 and applies to leave taken through December 31, 2020. The FFCRA provides Amendments to the Family and Medical Leave Act of 1993 and the Public Health Emergency Leave.

This Act affects any business under 500 employees so it should be reviewed and understood by owners of small businesses. In general, the FFCRA requires paid sick leave for employees of small business but also provides the employers with various tax credits to pay for part of all of this leave.

This Act provides different provisions from the Coronavirus Aid, Relief and Economic Security (CARES) Act; however the two acts do have various components that interrelate. This blog will discuss aspects of the FFCRA and its relationship to the CARES Act, specifically the Paycheck Protection Plan (PPP) loans.

Please be aware that the FFCRA and CARES Act and our interpretations are subject to any administrative interpretation issued by the Small Business Administration. New guidance is regularly issued and may alter our current understanding.

What are the requirements of the FFCRA?

Under the FFCRA, employers with fewer than 500 employees are generally required to provide paid family leave and paid sick leave to employees who are unable to work (or telework) and who meet specified conditions related to COVID-19.

What is the employer required to provide to the employee?

Generally, employers covered under the Act must provide employees:

- Up to two weeks (80 hours) of paid sick leave based on their regular rate of pay (or if higher, the applicable state or Federal minimum wage), paid at:
 - 100% of regular pay, up to \$511 daily and \$5,110 total, if the employee:
 1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19; or

- 2. has been advised by a health care provider to self-quarantine related to COVID-19; or
- 3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
- 66 2/3% of regular pay up to \$200 daily and \$2,000 total because the employee is
 - 4. caring for an individual subject to an order described in 1. above or self-quarantine as described in 2. above; or
 - 5. caring for his or her child (under the age of 18) whose school or place of care is closed (or child care provider is unavailable) due to COVID-19 related reasons; or
 - 6. is experiencing any other substantially similar condition specified by the U.S. Department of Health and Human Services.
- Up to 10 weeks of paid family and medical leave paid at 2/3 for qualifying reason 5. above for up to \$200 daily and \$12,000 total. This would be in addition to the two weeks of sick time listed above.

Are part time or temporary employees included?

Yes - part-time employees are eligible for a two-week equivalent. Part-time employees are entitled to the “number of hours equal to the number of hours that such employee works, on average, over a 2-week period.” For employees with variable work schedules, the determination of hours to be paid is based on the average hours the employee was scheduled per day over the six-month period ending on the date on which the employee takes such leave, including hours for which the employee took leave of any type. If the employee does not have six-months of work history with the employer, hours are based on “the reasonable expectation of the employee at the time of hiring of the average number of hours per day that the employee would normally be scheduled to work.”.

Entities must offer Emergency Paid Sick Leave under the Act to all employees, regardless of how long they have been employed by the employer.

Are any businesses exempt from the FFCRA?

A small business is exempt from certain paid sick leave and expanded family and medical leave requirements if providing an employee such leave would jeopardize the viability of the business as a going concern. This means a small business is exempt from mandated paid sick leave or expanded family and medical leave requirements only if the:

- employer employs fewer than 50 employees;
- leave is requested because the child’s school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons; and
- an authorized officer of the business has determined that at least one of the following three conditions is satisfied.
 - The provision of paid sick leave or expanded family and medical leave would result in the small business’s expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;

- The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
- There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

What is included in the paid leave for determining compensation?

Paid leave hours are to be paid at the Regular Rate of Pay in accordance with the Fair Labor Standards Act (FLSA), which generally includes all wages and other forms of compensation, such as nondiscretionary bonuses, unless specifically excluded (29 U.S.C. 207(e)).

What Tax Credits are available?

Generally there are 3 credits and/or deferral options available to employers

- Dollar for Dollar Credit
- Payroll Tax Deferral Credit
- Employee Retention Credit

What is the dollar for dollar credit?

The FFCRA provides small and midsize employers refundable tax credits that reimburse them, dollar-for-dollar, for the cost of providing paid sick and family leave wages to their employees for leave related to COVID-19.[<https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs#basic>].

The Eligible Employer is entitled to a fully refundable tax credit equal to the required paid family and medical leave (qualified family leave wages). This tax credit also includes the Eligible Employer's share of Medicare tax imposed on those wages and its cost of maintaining health insurance coverage for the employee during the family leave period (qualified health plan expenses). The Eligible Employer is not subject to the employer portion of social security tax imposed on those wages. <https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs>

The credit is allowed against the taxes imposed on employers by section 3111(a) of the Internal Revenue Code (the "Code") (the Old-Age, Survivors, and Disability Insurance tax (social security tax)) and section 3221(a) of the Code (the Railroad Retirement Tax Act Tier 1 rate) on all wages and compensation paid to all employees. If the amount of the credit exceeds the employer portion of these federal employment taxes, then the excess is treated as an overpayment and refunded to the employer under sections 6402(a) or 6413(a) of the Code.

When and How can the dollar for dollar credit be claimed?

Eligible Employers that pay qualified leave wages will be able to retain an amount of all federal employment taxes equal to the amount of the qualified leave wages paid, plus the allocable qualified health plan expenses and the amount of the employer's share of Medicare tax imposed on those wages, rather than depositing them with the IRS. The federal employment taxes that are available for retention by Eligible Employers include federal income taxes withheld from employees, the employees' share of social security and Medicare taxes, and the employer's share of social security and Medicare taxes with respect to all employees. <https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs>

Eligible Employers will claim the credits on their federal employment tax returns (e.g., Form 941, Employer's Quarterly Federal Tax Return), but they can benefit more quickly from the credits by reducing their federal employment tax deposits.

If there are insufficient federal employment taxes to cover the amount of the credits, an Eligible Employer may request an advance payment of the credits from the IRS by submitting a Form 7200, Advance Payment of Employer Credits Due to COVID-19.

The IRS expects to begin processing these requests during April 2020.

Do I need to coordinate with my payroll processing company to get the credit?

Mostly likely yes, payroll companies are creating special wage tracking codes to track sick leave pay under the FFCRA. If your payroll is not doing this or if you are processing your payroll internally, you should take steps to specially trace FFCRA paid vacation.

What is the 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. 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.

<https://www.irs.gov/newsroom/faqs-employee-retention-credit-under-the-cares-act>
Also see our Blog CARES Act – Business Tax Provisions 5 for more details

What is the tax deferral option?

The CARES Act delays the timing of required federal tax deposits for certain employer payroll taxes and self-employment taxes incurred between March 27, 2020 and December 31, 2020. See our Blog CARES Act – Business Tax Provisions 5 for more details.

Is the Paid Sick Leave Taxable?

Covered sick and family leave payments under the Act are taxable wages for income and employment tax purposes, except that such wages are exempt from Employer Social Security taxes. Such payments are subject to Medicare taxes, but the tax credit is increased by the amount of employer Medicare taxes (i.e., 1.45%) paid on such wages.

How is the company's current sick/vacation leave policy affected?

Paid sick leave under the EPSLA is in addition to your employee's (including Federal Employees') other leave entitlements. You may not require your employee to use accrued paid vacation, personal, medical, or sick leave before the paid sick leave. You also may not require your employee to use such existing leave concurrently with the paid sick leave under the EPSLA. But if you and your employee agree, your employee may use preexisting leave entitlements to supplement the amount he or she receives from paid sick leave, up to the employee's normal earnings. Note, however, that you are not entitled to a tax credit for any paid sick leave that is not required to be paid or exceeds the limits set forth under the EPSLA. You are free to amend your own policies to the extent consistent with applicable law.

<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

Does the PPP cover paid sick leave and can I use PPP funds for FFCRA sick leave?

The PPP covers payroll costs, which include employee benefits such as costs for parental, family, medical, or sick leave.

However, it is worth noting that the CARES Act expressly excludes qualified sick and family leave wages for which a credit is allowed under sections 7001 and 7003 of the Families First Coronavirus Response Act (FFCRA) (Public Law 116–127). This is the dollar for dollar payroll tax credit for employers that may be done either as a reduction of payroll taxes or as a credit on the quarterly 941 Employer Payroll Forms. [<https://home.treasury.gov/system/files/136/PPP--Fact-Sheet.pdf>]

Given PPP loan funds cannot be used for FFCRA paid leave, it is VERY important that the tracking of the paid sick leave funds be segregation from the funds obtained by a PPP Loan

Can the Employee Retention Credit be used when we also get a PPP Loan?

Generally, an employer obtaining a PPP Loan will not receive, or at least be limited, the employee retention credit available to an employer.

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. [<https://www.irs.gov/newsroom/faqs-employee-retention-credit-under-the-cares-act>]

Do employers have the right to return to work if taking paid sick leave or expanded family and medical leave under the Emergency Paid Sick Leave Act or the Emergency Family and Medical Leave Expansion Act?

Generally, yes. In light of Congressional direction to interpret requirements among the Acts consistently, WHD clarifies that the Acts require employers to provide the same (or a nearly equivalent) job to an employee who returns to work following leave. [<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions#43>]

If I am a private sector employer and have 500 or more employees, do the Acts apply to me?

No. Private sector employers are only required to comply with the Acts if they have fewer than 500 employees.

Are entities with common ownership considered separate entities?

Potentially if two entities are an integrated employer under the FMLA, then employees of all entities making up the integrated employer will be counted in determining employer coverage for purposes of paid sick leave under the Emergency Paid Sick Leave Act and expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act. [<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>]

Are the paid sick leave and expanded family and medical leave requirements retroactive?

No. [<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions#13>]

Can an employee get Sick Pay, vacation pay and file for unemployment at the same time ?

Mostly likely not, but that will depend on the state unemployment guidelines
<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions#29>

Can an employee get Sick pay if they are furloughed/laid off or have reduced hours?

No. If your employer furloughs you because it does not have enough work or business for you, you are not entitled to then take paid sick leave or expanded family and medical leave. However, you may be eligible for unemployment insurance benefits.
[<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions#26-28>]

Are there other requirements that business should know of?

The FFCRA contains numerous other provisions that may affect small businesses, however we have noted the following that would affect most if not all of them

- The law includes a mandatory posting that communicates these rights to all employees.
[https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf]
- Employers are prohibited from requiring workers to find a replacement to cover their hours during time off, and from discharging or discriminating against workers for requesting paid sick leave or filing a complaint against the employer.
- There are documentation requirements needed from the employee and then from the employer. Employers should be sure they are familiar with the requirements in order to properly document the sick pay and make themselves eligible for any credits. Failure to do so could result in costs that are not reimbursed.
- Being able to telework from home may limit or eliminate paid sick leave
- Significant other information including FAQs is available at
<https://www.dol.gov/agencies/whd/pandemic/>