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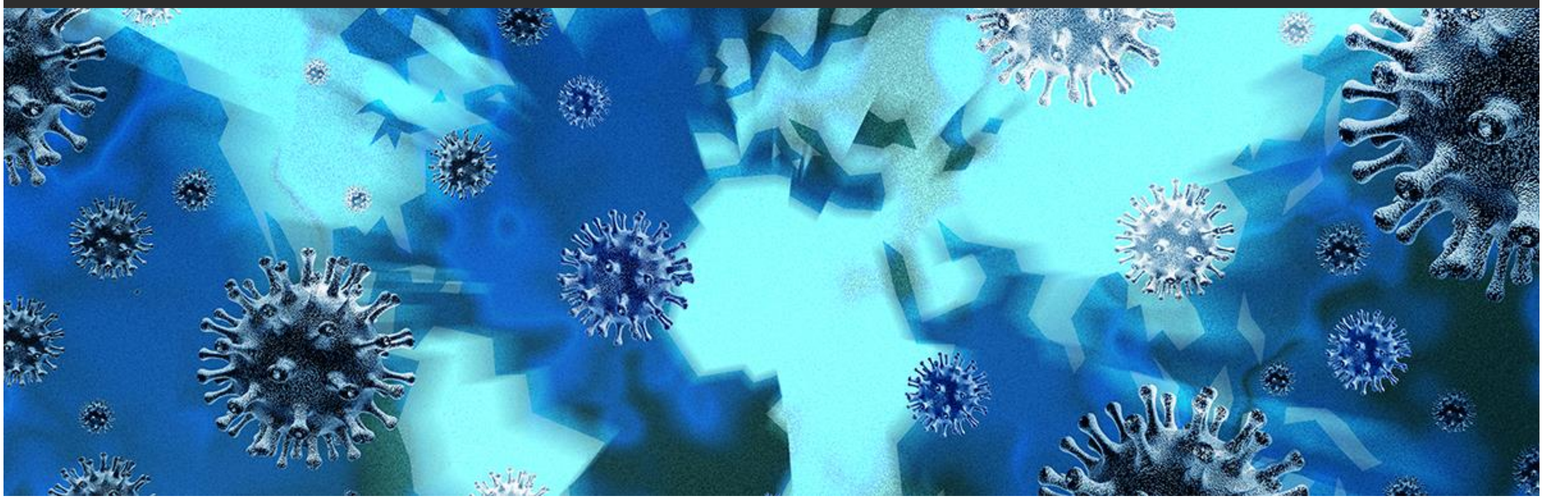
Alert | Health Emergency Preparedness Task Force: Coronavirus Disease 2019



March 25, 2020

Tax Credit for Emergency Sick Leave and Family Leave Paid by Employers Under the Families First Coronavirus Response Act

The Families First Coronavirus Response Act (FFCRA), which has been signed into law, requires companies that employ less than 500 employees to pay 80 hours of sick leave and up to 12 weeks of family leave for employees who are required to stay home because of six specific Coronavirus Disease 2019 (COVID-19)-related reasons. This March 20 GT Alert details a company's requirements to pay the emergency sick leave and family leave to employees. The FFCRA also provides a 100% tax credit to a company for these sick and family leave payments to employees, so that there should be no net cost in making these payments.

Credit for Paid Sick Leave

The tax credit allowed for the 80 hours of required paid sick leave depends on the reason the employee is out of work.

The maximum credit is $511 per day for an employee who is out of work because:

- The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
- The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;

- The employee is experiencing symptoms of COVID-19 and seeking medical diagnosis.

The maximum credit is $200 per day for an employee who is out of work because:

- The employee is caring for an individual who is subject to a federal, state, or local quarantine order, or an individual who has been advised to self-quarantine due to concerns related to COVID-19;
- The employee is caring for the employee's son or daughter, if the child's school or child care facility has been closed, or the child's care provider is unavailable due to COVID-19 precautions; or
- The employee is experiencing any other substantially similar condition specified by Health and Human Services in consultation with the Department of the Treasury and the Department of Labor.

An employer may choose to pay a greater amount of sick leave than required under FFCRA, but it will not be allowed a tax credit for the excess. Furthermore, an employer would not be entitled to a credit if it voluntarily pays amounts to its employees who do not satisfy any of the criteria listed above.

The $200 or $511 per day maximum tax credit includes sick pay paid to an employee, plus amounts paid by the employer to maintain group health plan benefits for the employee if such group health plan is tax-free to the employee (as most employer-provided health plans are).

The tax credit is applied to offset the employer's share of the social security component of its payroll taxes, and the tax credit is refundable. Because the tax credit is refundable, if the amount of the sick leave or family leave payments exceed the employer's social security portion of its payroll taxes, the excess will be refunded to the employer, so that the government will fund the entire amount of the sick leave. The legislation presents a timing problem in that the refund would generally not be paid until the quarterly payroll tax return is filed; however, the IRS has published Release IR-2020-57, which alleviates this timing problem.

This new IRS release states that instead of having to remit payroll taxes, including taxes withheld from its employees, that the employer may retain the payroll taxes to get the benefit of the tax credit, rather than having to deposit these taxes per the usual payroll tax deposit requirements. The release provides an example where an employer pays $5,000 in required sick leave payments, and is required to deposit $8,000 in payroll taxes, including the taxes withheld from its employees. In this case, the employer is allowed to use up to $5,000 of the $8,000 in taxes it was going to deposit for making the required sick leave payments. In other words, an employer will essentially be able to pocket the taxes it has withheld in order to claim the credit.

Furthermore, the IRS notice states that if the paid sick leave exceeds the amount of payroll taxes which an employer may retain to take the tax credit, that it will provide an accelerated refund procedure, so that the employer will not need to wait until the quarterly payroll tax return is filed to receive the refund. The notice states that the IRS will release a streamlined refund claim form the week of March 30.

The tax credit is only available for sick leave that an employer is required to pay under the FFCRA. The paid sick leave requirements for employers do not commence until April 1, 2020. This provision has the effect of not allowing any tax credit for sick leave benefits for periods prior to April 1 if an employee chooses to pay such benefits early. However, the Secretary of the Treasury has the authority to allow the tax credit for sick leave paid for a period prior to this April 1 start date. As of the writing of this alert, Secretary Mnuchin has not yet set an earlier starting date. Until Secretary Mnuchin announces an earlier start date, an employer should not count on receiving a tax credit for sick leave paid before the April 1 start date.

Although an employer is required to pay up to 80 hours of paid sick leave, the tax credit allowed to an employer is limited to 10 days of combined sick leave; accordingly, if an employer pays less than eight hours of sick leave per day for a full-time employee, the tax credit will not cover the total cost of the sick leave. For example, assume an employee works six hours per day, and the employer pays only six hours of sick leave over a period of 14 days to reach the 80-hour paid sick leave requirement. In such a case, the employer's tax credit would be limited to only 60 hours. Accordingly, in order to receive the maximum tax credit, an employer should pay eight hours of sick leave per day, rather than spreading it out over a period longer than 10 days.

The tax credit allowed to an employer is treated as income to the employer. This is to avoid a double tax benefit, because the employer is allowed to deduct the sick leave payments to its employees. By requiring the employer to include the tax credit in income, the total after-tax cost would be reflected as $0 rather than a net after-tax savings.

The amount of the credit would be reduced by any amount of debt the employer owes to any federal agency. This would include any tax debts owed to the IRS. As a result, if the employer owes any back taxes which have been assessed as a deficiency, the amount of the refund will be reduced by the amount owed.

Credit for Required Paid Family Leave

In addition to the 80 hours of paid sick leave, a company that employs less than 500 employees is also obligated to pay family leave to its employees for up to 12 weeks to employees who are out of work because they are caring for a child whose school or daycare provider is closed due to COVID-19.

An employer is allowed a credit of 100% of such family leave payments. The maximum credit amount for family leave payments required by FFCRA is $200 per day per employee, with a maximum of $10,000 per employee for all quarters.

Future Guidance

The quick passage of the FFCRA did not allow time for the typical process of providing staff analysis. As such, these tax credit issues will give rise to many questions, which will need to be answered by future guidance from the IRS.

For more information and updates on the developing situation, visit GT's Health Emergency Preparedness Task Force: Coronavirus Disease 2019.

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