

IRS Issues Strict Rules and Documentation Requirements for Required Paid Leave Credit, Launches Employee Retention Credit

Article

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Yesterday the IRS took two actions which have an immediate impact on employers regarding what documentation they must keep in order to get a refundable tax credit for their employees' paid leave under the Families First Coronavirus Response Act (FFCRA), and how businesses may qualify for a tax credit of up to \$10,000 for regular wages paid to employees during the COVID-19 crisis.

PAID LEAVE CREDIT

The Paid Leave Credit is available to business and tax-exempt organizations with fewer than 500 employees who are required under FFCRA to pay "qualified sick leave wages" or "qualified family leave wages." Credit is also available for employer-paid qualified health care expenses.

There are two components to the credit, namely Sick Leave and Family Leave. In both cases, the employee must file a request for leave with the employer.

Overview of Paid Sick Leave Credit and Paid Family Leave Credit

The EPSLA requires eligible employers to provide employees with paid sick leave if the employee meets certain qualifying conditions. Please see our article, *President Trump Signs Relief Package for Employers: Families First Coronavirus Response Act*, which discusses that criteria in detail.

An eligible employer is entitled to a fully refundable tax credit equal to the required paid sick leave.

The criteria for an employee to receive paid Family Leave is also discussed in our article, *President Trump Signs Relief Package for Employers: Families First Coronavirus Response Act*, in detail.

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What's New?

On March 31, the IRS published detailed rules which limit the number of caretakers for paid leave, and outline what an employer must do to claim the credits.

First and foremost, the process for requesting either sick leave or family leave must begin with a **written request for leave** from the employee that includes:

- The employee's name;
- The date(s) for which leave is requested;
- Details of the COVID- 19 related reason the employee is requesting leave and written supporting documentation;
- A statement that the employee is unable to work (including telework).

If the leave request is based on a quarantine order or self-quarantine advice, the statement from the employee should include the name of the governmental entity ordering quarantine or the name of the health care professional advising self-quarantine, and, if the person subject to quarantine or advised to self-quarantine is not the employee, that person's name and relation to the employee.

In the case of a leave request based on a school closing or child care provider unavailability, the statement from the employee should include:

- the name and age of the child (or children) to be cared for,
- the name of the school that has closed or place of care that is unavailable, and
- a representation that no other person will be providing care for the child during the period for which the employee is receiving family medical leave, and
- with respect to the employee's inability to work or telework because of a need to provide care for a child older than fourteen during daylight hours, a statement that special circumstances exist requiring the employee to provide care.

In other words, absent special circumstances, the credit will not be available for leave taken to care for a child older than fourteen during daylight hours, and will be available if the employee is the only person providing care during the time for which leave is being paid. This means that in the case of two teleworking parents there will have to be careful coordination of child care AND written documentation of their schedule in order for their employers to receive the credit.

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Presumably, there is nothing to prevent two parents from splitting the home-schooling or childcare duties, with each parent taking the leave intermittently. For instance, one parent could take care of the children on Mondays, Wednesdays, and Fridays, while the other parent could take care of them on Tuesdays and Thursdays. The key is that both parents cannot receive paid leave for school- or childcare related closures *simultaneously*.

Record Keeping Requirements

In addition to the information received from the employee, employers should maintain **for a minimum of four years** the following information:

- Documentation to show how the employer determined the amount of qualified sick and family leave wages paid to employees that are eligible for the credit, including records of work, telework and qualified sick leave and qualified family leave.
- Documentation to show how the employer determined the amount of qualified health plan expenses that the employer allocated to wages.
- Copies of any completed Forms 7200, Advance of Employer Credits Due To COVID-19, that the employer submitted to the IRS.
- Copies of the completed Forms 941, Employer's Quarterly Federal Tax Return, that the employer submitted to the IRS (or, for employers that use third party payers to meet their employment tax obligations, records of information provided to the third party payer regarding the employer's entitlement to the credit claimed on Form 941).

The IRS announcement and FAQs may be found [here](#).

IRS LAUNCHES EMPLOYER RETENTION CREDIT

On March 31, the IRS also launched the Employee Retention Credit, designed to encourage businesses to keep employees on their payroll. The refundable tax credit is 50% of up to \$10,000 in wages paid by an eligible employer whose business has been financially impacted by COVID-19.

The credit is available to all employers regardless of size, including tax-exempt organizations. The only exceptions are state and local governments and their instrumentalities and small businesses who take small business loans.

To be eligible, an employer must fall into one of two categories:

- The employer's business is fully or partially suspended by government order due to COVID-19 during the calendar quarter.
- The employer's gross receipts are below 50% of the comparable quarter in 2019. Once the employer's gross receipts go above 80% of a comparable quarter in 2019, they no longer qualify after the end of that quarter.

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These measures are calculated each calendar quarter.

The amount of the credit is 50% of “Qualifying Wages” paid up to \$10,000 in total. Wages paid after March 12, 2020, and before Jan. 1, 2021, are eligible for the credit. Wages taken into account are not limited to cash payments, but also include a portion of the cost of employer provided health care.

“Qualifying wages” are based on the average number of a business’s employees in 2019.

Employers with less than 100 employees: If the employer had 100 or fewer employees on average in 2019, the credit is based on wages paid to all employees, regardless if they worked or not. If the employees worked full time and were paid for full time work, the employer still receives the credit.

Employers with more than 100 employees: If the employer had more than 100 employees on average in 2019, then the credit is allowed only for wages paid to employees who did not work during the calendar quarter.

Employers can be immediately reimbursed for the credit by reducing their required payroll tax deposits that have been withheld from employees’ wages by the amount of the credit. This should be reported on Form 941 beginning with the second quarter of 2020. If the employer’s employment tax deposits are not sufficient to cover the credit, the employer may receive an advance payment from the IRS by submitting form 7200.

The IRS announcement and FAQs may be found [here](#).

The Department of Labor released new regulations this afternoon addressing Paid Leave Under the Families First Coronavirus Response Act (FFCRA), including considerations relative to various quarantine or isolation orders. We are currently reviewing these new regulations and will issue guidance soon.

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