



COVID LEGISLATION – KEY EMPLOYER CONSIDERATIONS

ROPES & GRAY

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Families First Coronavirus Response Act: Expanded Leave

- **Expanded FMLA Leave.** Employees of companies with fewer than 500 employees can take up to 12 weeks of leave (two weeks unpaid and the remainder paid) if they are unable to work or telework due to care for a child whose school or place of care has been closed due to COVID-19.
 - If an employee qualifies for such leave, the first two weeks will be unpaid (though the employee may elect, but can't be required, to use other accrued paid leave during this period, including the emergency paid sick leave described later).
 - Remainder of the leave will be paid at no less than 2/3 of the employee's regular rate of pay, based on the number of hours the employee was scheduled to work, up to a maximum of \$200 per day or \$10,000 in the aggregate.

Families First Coronavirus Response Act: Expanded Leave

- **Paid Sick Leave.** Employees are entitled to two weeks of paid sick leave if they are not able to work (or telework) due to quarantine, diagnosis or care for individuals quarantined for COVID-19, or due to caring for a child because their school or place of care is closed due to COVID-19. Such sick leave is in addition to existing paid time off entitlements offered by the employer.
 - The amount of paid sick leave will be as follows: (i) for full-time employees, 80 hours or (ii) for part-time employees, the average number of hours the employee works over a two-week period. Leave is paid at the regular rate of pay (up to a maximum of \$511 per day or \$5,110 in the aggregate) or, if caring for another individual, at 2/3 the regular rate of pay (up to a maximum of \$200 per day or \$2,000 in the aggregate).

Families First Coronavirus Response Act: Expanded Leave

- **Tax Credit Provisions.** Employers will receive a refundable tax credit for amounts paid under the new leave provisions, subject to the same caps as apply to the leave.
 - Credits can be applied against any payroll tax deposit obligations (including amounts attributable to employee withholdings).
 - If credits exceed taxes due for any calendar quarter, excess will be treated as a refundable overpayment.
- **Duration.** Expanded leave in place through December 31, 2020.

CARES Act: Payroll Retention Tax Credits

- **Eligibility.** Applies to company if operations fully or partially suspended by a governmental authority due to COVID-19 or 50% reduction in revenues as compared to same calendar quarter in the prior year.
 - If a company is in the >50% drop category, it may utilize credits during that quarter and subsequent quarters until revenues recover to at least 80% of the same quarter's revenues for the prior year.
- **What Kind of Credit.** Refundable tax credit for each calendar quarter for 50% of “Qualified Wages” paid to employees, applied against any payroll tax deposit obligations (including amounts attributable to employee withholdings) – any excess is treated as a refundable overpayment.
 - Only applies to wages paid after March 12, 2020 and before January 1, 2021.

CARES Act: Payroll Retention Tax Credits

- **Qualified Wages.** Includes social security wages and qualified health plan expenses allocable to such wages.
 - More than 100 employees: Wages paid to an employee who is on payroll but unable to provide services as a result of either (i) the employer's operations being fully or partially suspended by governmental authority due to COVID-19 or (ii) the employer's gross receipts declining as described above.
 - Less than 100 employees: All wages paid to employees whether or not business has been fully or partially shut down.
- **Cap on Qualified Wages (and Credit).** Qualified wages for any employee for all calendar quarters capped at \$10,000 in the aggregate - therefore, the amount of credit is capped at \$5,000 per employee.

CARES Act: Payroll Tax Deferral

- **Deferral.** Can defer payment of employer social security payroll taxes from March 28, 2020 to January 1, 2021.
 - Applies to “payments” during the above period - currently interpreted to mean deposits due after March 28, even if services were performed before March 28.
 - Guidance may alter that interpretation.
- **Timing.** Deferred amount paid 50% on December 31, 2021 and 50% on December 31, 2022.
- **Interaction with Tax Credits.** Expecting further guidance on interaction with the tax credits previously discussed (guidance issued to date is consistent with position that taxpayers are entitled to full credits as advance refunds and may separately defer employer social security contributions, but does not explicitly address the question).

CARES Act: Unemployment Insurance

- **Overview.** Provides for payments to “Covered Individuals” who would not normally be eligible for or who have exhausted regular unemployment compensation and who are unable to work as a direct result of the COVID-19 public health emergency. Also provides for increased and extended payments to individuals who have otherwise qualified for regular unemployment compensation.
- **Who Qualifies as a Covered Individual?** New unemployment benefits will be available to any individual (including a self-employed individual) who is not eligible for or who has exhausted regular unemployment compensation and whose employment is adversely impacted by COVID-19, other than individuals able to telework or who are receiving paid leave. In order to be considered a “Covered Individual” the individual must self-certify that he or she is otherwise able to work but is unable to do so for reasons related to the impacts that COVID-19 has had on such individual, their family, their place of work, and their ability to leave the home.
- **Time Period for New Assistance.** Benefits available to Covered Individuals cover weeks of unemployment from January 27, 2020 to December 31, 2020 that are directly attributable to COVID-19.

CARES Act: Unemployment Insurance

- **Limitation on Duration of New Assistance.** Up to 39 weeks of benefits for Covered Individuals, including any weeks for which such individual received regular unemployment compensation.
- **Amount of New Assistance and Increased Assistance.** Covered Individuals are eligible to receive the amount that would have been payable under the unemployment compensation law of their state of employment, plus an additional \$600 payment per week. Individuals who have otherwise qualified for regular unemployment compensation are also entitled to receive the additional \$600 payment per week. In each case, the additional \$600 weekly payment is available from the date that the applicable state enters into an agreement with the federal government until July 31, 2020 (i.e., four months maximum) and is not subject to proration where the individual is partially unemployed.
- **Extended Benefits Period.** Additional 13 weeks of unemployment benefits through December 31, 2020 available to any individuals that remain unemployed after regular unemployment compensation (which typically lasts up to 26 weeks) is no longer available.

CARES Act: Headcount Considerations

- **Which headcount choices might allow an employer to defer payroll taxes and take payroll retention tax credits?**
 - If employer retains employees and continues to pay based on full week.
 - If employer retains employees but pays based on reduced hours.
 - If employer furloughs employees and continues to pay for health insurance.
- **Wh headcount choices might allow an employee to obtain unemployment benefits?**
 - If employer retains employees but pays based on reduced hours (depending on state and total wages paid, in relation to applicable cap under state law).
 - If employer furloughs employees and continues to pay for health insurance.
 - If employer lays off employees without health insurance.