

CORONAVIRUS INFORMATION & UPDATES

July 17, 2020

Published Guidance on Implementation of Families First Coronavirus Response Act

Update: On July 15, the Internal Revenue Service announced in news release [IR-2020-158](#) that taxpayers who have experienced delays with the process of [Form 7200, Advance Payment of Employer Credits Due To COVID-19](#) will receive letters. If the IRS rejected taxpayer's Form 7200 or made a change to the requested amount of advance payment due to a computation error, the taxpayer will receive [letter 6312](#) explaining the reason for rejection or list the new payment amount if the old amount was due to a computation error. The taxpayer will receive [letter 6313](#) if the IRS needs written verification of the taxpayer's current mailing address in order for the IRS to process the taxpayer's Form 7200.

Update: On July 8, the Internal Revenue Service issued [Notice 2020-54](#) as guidance for employers regarding the requirement to report amounts of qualified sick and family leave wages paid to employees under the Families First Coronavirus Response Act. Under Notice 2020-54, employers will be required to report payment to employees either on Box 14 of Form W-2, or in a separate statement. The notice also provides employers with language to use on Form W-2 or in the statement to employees. This reporting requirement is imposed to assist employees who are self-employed to properly claim their qualified sick and family leave equivalent credits.

On Friday, March 20, 2020, the Treasury Department, Internal Revenue Service, and the Department of Labor issued primary guidance on the [Families First Coronavirus Response Act](#) (the Act) (commonly referred to as Phase 2) in [Notice IR-2020-57](#) (the Notice). Please see alert for discussion of two new important tax details provided in the Notice regarding the Act's employer tax credits, and for additional discussion of the Act, generally. The two new important tax details are (1) that employers can be "paid" by retaining certain funds otherwise due to the government (including income tax withholding from ALL employees), and (2) that rebate requests will be processed by IRS within two weeks or less.

SUMMARY

The Act created refundable tax credits for eligible employers providing paid sick and child care leave to eligible employees as otherwise required by the Act. In addition, eligible employers are entitled to an additional tax credit for costs to maintain health insurance coverage for eligible employees during the leave periods.

Eligible employers are businesses and tax-exempt organizations with fewer than 500 employees that are required to implement paid sick leave and paid family and medical leave under the Act (described in more detail below). Similar tax credit amounts are available to self-employed individuals unable to work as a result of certain circumstances.

The Notice provides two key areas of guidance. The first **new** important tax detail: An employer can be effectively "paid" this tax credit with respect to any employee by retaining funds from **three (3)** sources with respect to **all** employees (and not just the employee corresponding to the tax credit for which the employer is being paid):

1. withheld federal **income** taxes,
2. employee share of Social Security and Medicare payroll taxes, and

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3. employer share of Social Security and Medicare payroll taxes.

Example: An eligible employer pays \$10,000 in sick leave, and is required to deposit \$8,000 in the aggregate in withheld income taxes and Social Security and Medicare payroll taxes with respect to ALL employees. That employer could use the entire \$8,000 of taxes in order to make the qualified leave payments (requiring \$0 to be paid to IRS for withheld income taxes and Social Security and Medical payroll taxes). The employer could also request from the IRS an accelerated payment for the remaining \$2,000.

The second **new** important tax detail: The IRS expects to process such a request for accelerated payments (see Example above) in two weeks or less. The details of this new, expedited procedure will be announced next week.

THE DETAILS

BACKGROUND

The Act required that certain employers provide employees (1) paid sick leave for self-care and for care for others, and (2) expanded paid child care leave, in each case for COVID-19-related reasons.

The Act created corresponding tax credits for employers affected by the Act in the form of (1) refundable paid sick leave tax credit (see below) and (2) the paid child care leave credit (see below).

1) PAID SICK LEAVE TAX CREDIT

Payment to Employee for Self-Care: Employees of eligible employers can received up to two weeks (80 hours) of paid sick leave at 100% of the employee's pay (up to \$511 per day) where the employee is unable to work because the employee is:

- quarantined, and/or
- experiencing COVID-19 symptoms and seeking a medical diagnosis.

Tax Credit to Employer: For employees who meets the qualifications above, eligible employers receive a refundable sick leave tax credit for amounts paid to employees:

- up to \$511 per day,
- for a total of 10 days (so \$5,110 in the aggregate).

Payment to Employee for Care for Others: Employees of eligible employers can received two weeks (up to 80 hours) of paid sick leave at 2/3 of the employee's pay (up to \$200 per day) where the employee is unable to work because the employee is:

- caring for someone with COVID-19,
- caring for a child because the child's school or child care facility is closed,
- caring for a child because the child care provider is unavailable due to COVID-19, and/or

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- 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).

Tax Credit to Employer: For employees who meets the qualifications above, eligible employers receive a refundable child care leave tax credit for amounts paid to employees:

- up to \$200 per day,
- for a total of ten (10) days (so \$2,000 in the aggregate).

In addition, for both types of sick leaves (payment for self-care or care for others), eligible employers are entitled to an additional tax credit determined for costs to maintain health insurance coverage for eligible employees during the leave period; this additional tax credit is subject to the same caps described above. Employers will face no payroll tax liability for paid sick leave provided to employees (*i.e.*, no FICA tax due on sick leave paid to employees as required by the Act).

(2) PAID CHILD CARE LEAVE TAX CREDIT

Payment to Employee for Care for Others: **In addition**, employees of eligible employers can receive an additional ten (10) weeks of paid child care leave at 2/3 the employee's pay (up to \$200 per day) where the employee is unable to work because the employee is:

- caring for a child whose school or child care facility is closed or
- caring for a child whose child care provider is unavailable due to COVID-19.

Note that employers are obligated to provide an aggregate of twelve (12) weeks leave, but the first two weeks are unpaid. Typically, the first two (2) weeks (or ten (10) days) will be covered by the Paid Sick Leave provisions under the Act, resulting in eligible employees being entitled to receive up to twelve (12) total weeks of paid leave.

Tax Credit to Employer: For employees who meets the qualifications above, eligible employers receive a refundable child care leave tax credit for amounts paid to employees:

- up to \$200 per day,
- for a total of ten (10) weeks (\$10,000 in the aggregate).

In addition, eligible employers are entitled to an additional tax credit determined based on costs to maintain health insurance coverage for the eligible employees during the leave period; this additional tax credit cannot be received simultaneously with paid sick leave tax credits for a given eligible employee, and is subject to the same caps described above. Employers will face no payroll tax liability for paid child care leave provided to employees (*i.e.*, no FICA tax due on sick leave paid to employees as required by the Act).

Method of (Prompt) Payment of Tax Credit to Employer

The Notice materially expands and accelerates employer's access to funding for the mandatory sick and family leave pay under the Act. The Notice allows for the payroll tax credit that an eligible employer is to receive to be "paid" to the

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employer by the employer retaining up to the amount of such credit from any of the following three sources with respect to **all** employees (and not just the employee corresponding to the tax credit the employer is being paid):

1. withheld federal income taxes,
2. employee share of Social Security and Medicare taxes, and
3. employer share of Social Security and Medicare taxes.

Small Business Exception

Small businesses with fewer than fifty (50) employees are eligible for an exemption from leave requirements related to school closures and child care unavailability, but only where the requirements would jeopardize the ability of the small business to continue. The Notice promises “simple and clear criteria,” and explains that the U.S. Department of Labor will provide this via emergency guidance and rulemaking.

Non-Enforcement Period

The U.S. Department of Labor will be issuing a temporary non-enforcement policy that will provide a period of time for employers to comply with the Act. In the initial 30-day period, the U.S. Department of Labor will focus on compliance assistance.