

REVISED ALERT: IRS and Other Federal Agencies Provide New Guidance on Paid Leave Tax Credits

Alert

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The U.S. Treasury Department, Internal Revenue Service (IRS) and the U.S. Department of Labor (DOL) collectively, the “agencies,” issued a [press release](#) Friday, March 20 updating employers required to provide paid leave to employees under the [Families First Coronavirus Response Act](#), signed into law by President Trump on March 18, 2020. The update pertained to two new refundable tax credits created by the Act which are designed to reimburse employers for costs associated with the provision of the required paid leave.

Under the Act, eligible employers (generally businesses and tax-exempt organizations with fewer than 500 employees) are required to provide paid leave to employees in a variety of circumstances, including:

- Two weeks (up to 80 hours) of paid sick leave to employees who are unable to work because the employee is quarantined, and/or experiencing COVID-19 symptoms, and seeking a medical diagnosis; during such leave the employee will receive 100% of the employee’s pay
- Two weeks (up to 80 hours) of paid sick leave to employees who are unable to work because of a need to care for an individual subject to quarantine or to care for a child whose school is closed (or whose child care provider is unavailable) for reasons related to COVID-19; during such leave the employee will receive two-thirds of the employee’s pay
- In certain circumstances, employees who are unable to work because of a need to care for a child whose school is closed or whose child care provider is unavailable may receive up to an additional 10 weeks of paid leave at two-thirds of the employee’s pay.

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The Act, however, exempts businesses with fewer than 50 employees from providing paid leave to employees who are unable to work because of a need to care for a child whose school has closed or whose child care provider is unavailable, if providing such paid leave would jeopardize the ability of the business to continue. In Friday's press release, the agencies announced that DOL will provide emergency guidance articulating the conditions under which this exemption is available to small employers.

In order to help eligible employers cover the cost of providing paid leave between April 2, 2020, and December 31, 2020, the Act creates two new refundable tax credits: (i) the paid sick leave credit and (ii) the paid child care leave credit. *Section 7001(g) of the Act provides that the tax credits will only be available with respect to wages paid with respect to a period beginning on date selected by the Secretary of Treasury (or the Secretary's delegate) that falls between March 18, 2020, and April 2, 2020. As of March 24, such a date has yet to be identified. The press release indicated that information would be provided on the IRS website the week of March 23, 2020 on the process for claiming a credit. Employers should note that the DOL has provided guidance that the new leave requirements apply effective April 1, 2020. Employers wishing to take advantage of the tax credits with respect to paid leave provided before April 2, 2020, should seek guidance from their Stinson attorney.

PAID SICK LEAVE CREDIT

The press release states that with respect to an employee who is receiving paid sick leave because the employee is quarantined or experiencing COVID-19 symptoms and seeking a diagnosis, an eligible employer may receive a refundable paid sick leave credit at the employee's regular rate of pay, up to \$511 per day, for a maximum of 10 days (i.e., the total tax credit is capped at \$5,110 per employee).

For employees on paid leave because the employee is caring for an individual who is quarantined or caring for a child whose school is closed (or whose child care providers is unavailable), the eligible employer may claim a credit for two-thirds of the employee's regular pay, up to \$200 per day, for a maximum of 10 days (i.e., the total tax credit is capped at \$2,000 per employee). Eligible employers are also entitled to an additional tax credit based on the cost to maintain health insurance coverage for an employee on paid leave. The press release does not state if the amount of this tax credit is capped.

PAID CHILD CARE LEAVE CREDIT

In addition to the paid sick leave credit, eligible employers may receive a refundable paid child care leave credit with respect to an employee who is unable to work because of a need to care for a child whose school is closed or whose child care provider is unavailable due to coronavirus. This credit is equal to two-thirds of the employee's regular pay, up to \$200 per day, for a maximum of 10 weeks (i.e., the total tax credit is capped at \$10,000 per employee). Eligible employers are also entitled to an additional tax credit based on the cost to maintain health insurance coverage for an employee on paid leave.

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CLAIMING THE TAX CREDITS

Eligible employers may claim the paid sick leave credit and the paid child care leave credit by offsetting the amount of the tax credit to which the employer is entitled against its federal payroll tax liabilities. For example, if an eligible employer is entitled to \$5,000 worth of paid leave tax credits and is otherwise required to deposit \$8,000 of payroll taxes with the IRS, the employer may retain the \$5,000 worth of tax credits and only deposit the remaining \$3,000 of payroll taxes on its next regular deposit date.

In circumstances where the amount of an eligible employer's tax credits exceeds the employer's payroll tax deposits, the employer will be able to file a request for an accelerated payment of the refundable tax credit from the IRS. The IRS stated in the press release that it expects to process requests for an accelerated payment in less than two weeks. Additional guidance on this point will be released in the near future.

The press release states that the payroll taxes from which an eligible employer may retain paid sick leave or paid child care leave tax credits include withheld federal income taxes, the employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes with respect to all employees. Further guidance on retention of tax credits from these amounts is also forthcoming.

NON-ENFORCEMENT PERIOD

DOL announced in the press released that it will be issuing a temporary non-enforcement policy that provides eligible employers with time to come into compliance with the Act. During the 30-day period covered by the non-enforcement policy, DOL will not bring an enforcement action against any employer for a violation of the Act so long as the employer has a made a good faith effort to comply with the Act. Instead of enforcement actions, DOL will be focused on compliance assistance during the 30-day period.

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