

Employee Leave Provisions under CARES Act and FFCRA

On April 1, 2020, the Department of Labor (“DOL”) issued temporary regulations implementing the employee leave provisions under the Families First Coronavirus Response Act, Pub. L. 116-127 (“FFCRA”), as amended by the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116-136 (“CARES Act”).¹ Employers with fewer than 500 employees in the United States are required to provide paid sick leave and family and medical leave to employees who are unable to work, including by telework, for reasons related to COVID-19 and are eligible to claim a refundable tax credit for the cost of the required leave under the FFCRA. The CARES Act also provides a refundable tax credit for payments to employees who are not providing services that is available to employers (including employers that are not subject to the leave requirements under the FFCRA) impacted by COVID-19.

I. Paid Sick Leave and Family and Medical Leave

Under the FFCRA, employers with fewer than 500 employees generally must provide up to two weeks paid sick leave and up to twelve weeks family and medical leave (of which ten weeks must be paid) to their employees who are unable to work, including by telework, for specified reasons relating to COVID-19, subject to the daily and aggregate limits discussed below, and also must permit employees to continue coverage under the employer’s group health plan during the period of required leave.² Whether an employer has fewer than 500 employees for this purpose (1) is determined at the time the leave commences, (2) must consider all full-time, part-time and temporary employees of the employer (including all employees on leave or who are jointly employed with another employer), and (3) may count only those employees who are employed in the United States.

A. Paid Sick Leave

A covered employer generally must provide paid sick leave under the FFCRA to an employee who is unable to work in-person or remotely by telework due to the following reasons:

- (1) the employee is subject to a quarantine or isolation order issued by any federal, state, or local governmental authority, including an order to stay at home or shelter in place, relating to COVID-19;
- (2) the employee is advised by a health care provider to self-quarantine due to concerns related to COVID-19, based on the belief that the employee has, may have, or is vulnerable to COVID-19;
- (3) the employee is experiencing symptoms of COVID-19, including fever, dry cough, or shortness of breath, and is seeking a medical diagnosis for COVID-19;

¹ The DOL’s adopting release was published in the Federal Register on April 6, 2020. See Paid Leave Under the Families First Coronavirus Response Act, available at <https://www.govinfo.gov/content/pkg/FR-2020-04-06/pdf/2020-07237.pdf>.

² Employers subject to the leave requirements must post a notice to employees (at the employees’ worksite, electronically on an employee website, or by email or direct mail) of the employees’ rights under the FFCRA. The contents of the required notice are set forth in the model notice made available on the DOL’s website at <https://www.dol.gov/agencies/whd/ffcra>.

- (4) the employee is caring for an individual subject to a quarantine or isolation order or who is advised to self-quarantine, as described above;
- (5) the employee is caring for a son or daughter whose school or place of care has been closed or whose child care provider is unavailable due to COVID-19; or
- (6) the employee is experiencing another substantially -similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and Secretary of Labor.

The amount the employer must pay the employee during the period of the sick leave under the FFCRA depends on the reason for the leave. If the employee is subject to a quarantine or isolation order, is advised to self-quarantine, or is experiencing symptoms of COVID-19, then the employer must pay the leave based on the employee's regular rate of pay (or, if greater, the applicable federal, state, or local minimum wage) up to a maximum of \$511 per day (or \$5,110 in the aggregate). If the leave is for any other reason, the employer must pay the employee at two-thirds the employee's regular rate of pay (or applicable minimum wage) up to a maximum of \$200 per day (or \$2,000 in the aggregate). In either case, the leave must be taken between April 1, 2020, and December 31, 2020, and the employer may not require the employee to use other paid leave provided by the employer before taking paid sick leave under the FFCRA.

B. Family and Medical Leave

Covered employers generally also must also provide family and medical leave under the FFCRA where an employee is unable to work in-person or remotely by telework because the employee is caring for a son or daughter whose school or place of care has been closed or whose childcare provider is unavailable due to COVID-19.³ The first two weeks of family and medical leave are unpaid — although the employee may concurrently receive other paid leave, including paid sick under the FFCRA — and the employer must pay the employee at two-thirds the employee's regular rate of pay (or, if greater, the applicable minimum wage) up to a maximum of \$200 per day (or \$10,000 in the aggregate) for the remaining period of the leave under the FFCRA. Family and medical leave taken by an employee under the FFCRA is applied toward the maximum leave that may otherwise be available to the employee under the Family and Medical Leave Act of 1993, as amended ("FMLA"), and may be used (or the employer may require it to be used) concurrently with other paid leave in accordance with the FMLA. Employees generally must be employed for at least 30 days before taking family and medical leave under the FFCRA and, as with the paid sick leave, the family and medical leave must be taken between April 1, 2020, and December 31, 2020.

II. Employer Tax Credits under the CARES Act and FFCRA

Employers subject to the paid sick leave and family and medical leave provisions of the FFCRA generally are eligible to claim a refundable tax credit under the FFCRA for wages paid to their employees as required by the leave provisions of the FFCRA, the cost of coverage allocable to the wages under the employer's group health plan (including the cost paid by the employee with pre-tax salary reduction contributions), and the employer portion of

³ An employer with fewer than 50 employees generally may be exempt from this requirement where an authorized officer determines that (1) it would cause the employer's expenses and financial obligations to exceed available business revenue and cause the employer to cease operating at a minimal capacity, (2) an employee's absence would pose a substantial risk to the employer's financial health or operational capacity, or (3) the employer is unable to find other workers available to perform the labor or services provided by an employee and the labor or services are needed to operate at minimal capacity.

the associated Medicare tax. The required paid leave also is excluded from the definition of wages for purposes of the employer's Social Security tax obligations under the FFCRA. Under a complimentary provision of the CARES Act, eligible employers (including employers not subject to the leave provisions of the FFCRA) may be entitled to receive a refundable "employee retention" tax credit equal to 50 percent of wages (and group health plan expenses allocable to the wages) paid after March 12, 2020, and before January 1, 2021, to employees who are not providing services in connection with COVID-19, up to a maximum of \$10,000 wages and health plan expenses (for a maximum credit of \$5,000) per employee.⁴

An employer generally will be eligible to claim the employee retention credit under the CARES Act for any calendar quarter in 2020 if either (1) the employer's operations are fully suspended or partially suspended (*i.e.*, such that the operations may continue to operate, but not at the normal capacity) due to a governmental order limiting commerce, travel, or group meetings due to COVID-19 or (2) the quarter occurs during a period in which the employer experiences a significant decline in gross receipts (*i.e.*, defined as the period commencing with the first calendar quarter in 2020 in which gross receipts are less than 50 percent of gross receipts for the corresponding quarter in 2019, and ending with the calendar quarter following the first calendar quarter in which gross receipts are greater than 80 percent of the gross receipts for the corresponding quarter in 2019). In addition, if the employer averaged more than 100 full-time employees in 2019, the wages taken into account for purposes of the credit must be paid to an employee for services the employee is not providing due to either the full or partial suspension in the employer's operations or significant decline in gross receipts.⁵

III. Conclusion

In light of these provisions, employers should evaluate whether they meet the 500-employee threshold for coverage under the paid sick leave and family and medical leave requirements under the FFCRA. Employers also should assess what steps may be needed to ensure compliance with the FFCRA and determine if they may claim the tax credits under the CARES Act and/or FFCRA for payments to their employees who are unable to work due to reasons relating to COVID-19.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email authors Glenn J. Waldrip, Jr. at 212.701.3110 or gwaldrip@cahill.com; or Mark J. Gelman at 212.701.3061 or mgelman@cahill.com; or email publications@cahill.com.

⁴ The amount of the wages and health plan expenses that are taken into account for purposes of the employee retention tax credit under the CARES Act does not include the amount of any paid sick leave or family and medical leave for which the employer receives a tax credit under the FFCRA. In addition, an employer that receives a Small Business Interruption Loan under the Paycheck Protection Program is not eligible to receive the employee retention tax credit under the CARES Act.

⁵ Generally, both the paid leave tax credit under the FFCRA and the employee retention credit under the CARES Act are taken against the employer portion of the Social Security taxes on all wages paid to all employees by the employer for the calendar quarter and the excess over this amount (after offsetting any remaining liability on the employer's quarterly employment tax return) is fully refundable (subject to any other required offsets) and may be claimed as an advance refund (if the anticipated credit exceeds the employer's federal employment tax deposits for the quarter) on Form 7200. *See* Form Advance Payment of Employer Credits Due to COVID-19, available at <https://www.irs.gov/forms-pubs/about-form-7200>.