

U.S. IRS PUBLISHES MUCH-ANTICIPATED GUIDANCE ON DOCUMENTS THAT EMPLOYERS MUST RETAIN UNDER THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

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The Families First Coronavirus Response Act (“FFCRA”), which generally requires U.S. employers with fewer than 500 employees to provide paid sick leave (“Paid Sick Leave”) and emergency family and medical leave (“Emergency FMLA Leave”) benefits to employees in connection with COVID-19, officially goes into effect today. This also means that employers are now able to immediately seek a quarterly payroll tax credit equal to 100% of the qualified Paid Sick Leave and Emergency FMLA Leave wages paid to employees under the FFCRA.

As we summarized in an earlier post, this past weekend the Department of Labor (“DOL”) revised its guidance to refer employers to the Internal Revenue Service (“IRS”) for questions regarding what documentation employers must retain in order to receive a tax credit. Late on March 31, 2020, the IRS published this much-anticipated [guidance](#). Below are highlights from the IRS’s guidance on document collection and retention for employers to consider as they begin to comply with the FFCRA. Summaries of other aspects of the IRS’s guidance will be available soon.

- **Leave for Which Tax Credits are Available:** The IRS guidance confirms that tax credits are available only for Paid Sick Leave and Emergency FMLA Leave taken between April 1, 2020 and December 31, 2020. Moreover, tax credits are available only for Paid Sick Leave and Emergency FMLA Leave wages that are actually paid. For example, if an employer is not required to pay certain Paid Sick Leave and/or Emergency FMLA Leave wages (because it satisfies the small business exception or because it chooses to exclude health care providers and emergency responders), then no tax credit is available for such unpaid wages.
- **Documentation that Employers Must Collect When an Employee Requests Leave:** Employers must require employees to submit a written request for Paid Sick Leave and/or Emergency FMLA Leave, which includes the following information:
 - The employee’s name;
 - The date or dates for which leave is requested;

- A statement of the COVID-19 related reason the employee is requesting leave and written support for such reason (see below for additional information); and
- A statement that the employee is unable to work, including by means of telework, for such reason.
- Documentation Employees Must Submit to Substantiate their Need for Leave: As noted above, employees' written requests for leave must include a "statement of the COVID-19 related reason" why the employee needs leave, as well as "written support" for such reason. Below is a summary of the information that is to be included in the employee's statement/written documentation, which will vary based on the type of leave requested. Further, as outlined below, the guidance suggests that new limitations will apply to employees' use of Emergency FMLA Leave and Paid Sick Leave based on childcare needs, i.e., such leave is available only if no other person will be caring for the child during the period of leave, and if there are special circumstances justifying the need to provide such care for a child over age 14.
- For Paid Sick Leave requested based on a quarantine order or self-quarantine advice, the statement from the employee must include:
 - The name of the governmental entity ordering quarantine or 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.
- For Emergency FMLA Leave and Paid Sick Leave requested based on a school closing or child care provider unavailability, the statement from the employee must 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;
 - **A representation that no other person will be providing care for the child during the period for which the employee is receiving leave;** and
 - If the child is over the age of 14 and the employee is providing care during daylight hours, **the special circumstances that require the employee to provide care.**
- Additional Documentation that Employers Must Retain to Receive a Tax Credit: In addition to the documentation outlined above, employers must also retain the following documents in order to receive a tax credit:
 - Documentation to show how the employer determined the amount of Paid Sick Leave and Emergency FMLA Leave wages paid to employees, including records of work, telework, and qualified reasons for leave.

- Documentation to show how the employer determined the amount of qualified health plan expenses that the employer allocated to Paid Sick Leave and Emergency FMLA Leave 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).
- Records Retention Requirements: All of the above records must be kept for at least 4 years after the date the tax becomes due or is paid, whichever comes later. In addition, these documents must be available for IRS review.

RELATED CAPABILITIES

- Employment & Labor

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