



# National Compliance Update

## USI EMPLOYEE BENEFITS

March 26, 2020

## Payroll Tax Credits under FFCRA – Initial Guidance Issued

On March 20, 2020, the Internal Revenue Service (“IRS”) and Department of Labor (“DOL”) announced that employers with fewer than 500 employees can begin taking advantage of two new refundable payroll tax credits, designed to immediately and fully reimburse them, dollar-for-dollar (subject to a daily cap), for the cost of providing COVID-19 leave to their employees.

### BACKGROUND

On March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act (“FFCRA”). Included in this legislation are two new paid leave requirements affecting private sector employers with fewer than 500 employees and public sector employers.<sup>1</sup>

- *Emergency Paid Sick Leave Act.* An employee can receive two weeks (up to 80 hours) of paid sick leave:
  - At 100% of the employee's pay where the employee is unable to work (or telework) because the employee is quarantined, and/or experiencing COVID-19 symptoms, and seeking a medical diagnosis. The maximum payment is capped at \$511/day and \$5,110 in the aggregate.
  - At 2/3 of the employee's pay where the employee is unable to work (or telework) because of (1) a need to care for an individual subject to quarantine, (2) to care for a child whose school is closed or child care provider is unavailable for reasons related to COVID-19, and/or (3) the employee is experiencing substantially similar conditions as specified by the Department of Health and Human Services (“HHS”). The maximum payment is capped at \$200/day and \$2,000 in the aggregate.
- *Emergency Family & Medical Leave Expansion Act.* An employee who has been employed at least 30 days and is unable to work (or telework) due to a need to care for a child whose school is closed, or child care provider is unavailable for reasons related to COVID-19, may receive an additional 10 weeks of expanded paid family and medical leave at 2/3 of the employee's pay (after 10 days). The maximum is capped at \$200/day and \$10,000 in the aggregate.

---

<sup>1</sup> All government employers are subject to these new leave requirements except the Emergency Family Medical Leave Expansion Act, which does not apply to the federal government.

## WHAT'S NEW

### *Paid Sick Leave Credit*

Guidance indicates that sick leave is for a total of 10 days.

In addition, eligible employers are entitled to an additional tax credit for employer costs incurred to maintain health insurance coverage for the eligible employee during the leave period.

### *Prompt Payment*

While further details are expected soon, the IRS described the employer's process to claim these available tax credits:

- Currently, when employers pay their employees, they are required to withhold from their employees' paychecks federal income taxes and the employees' share of Social Security and Medicare taxes. Employers must deposit these federal taxes, along with their share of Social Security and Medicare taxes, with the IRS and file quarterly payroll tax returns ([Form 941 series](#)) with the IRS.
- Eligible employers who pay qualifying sick or childcare leave will be able to retain an amount of the payroll taxes equal to the amount of qualifying sick and childcare leave that they paid, rather than deposit them with the IRS.
- The payroll taxes that are available for retention include withheld federal income taxes, the employee share of Social Security and Medicare taxes, and the employer's share of Social Security and Medicare taxes with respect to all employees.
- If there are not sufficient payroll taxes to cover the cost of qualified sick and childcare leave paid, employers will be able to file a request for an accelerated payment from the IRS. The IRS expects to process these requests in two weeks or less.

#### Example 1

If an eligible employer paid \$5,000 in sick leave and is otherwise required to deposit \$8,000 in payroll taxes, including taxes withheld from all its employees, the employer could use up to \$5,000 of the \$8,000 of taxes it was going to deposit for making qualified leave payments. The employer would only be required under the law to deposit the remaining \$3,000 on its next regular deposit date.

#### Example 2

If an eligible employer paid \$10,000 in sick leave and was required to deposit \$8,000 in taxes, the employer could use the entire \$8,000 of taxes in order to make qualified leave payments and file a request for an accelerated credit for the remaining \$2,000.

### *Small Business Exception*

Under this early guidance, the IRS announced that businesses with fewer than 50 employees will be eligible for an exemption from the leave requirements relating to school closings or childcare unavailability due to COVID-19 where the requirements would jeopardize the ability of the business to continue. While FFCRA permits the regulators to provide relief to small businesses, this announcement from the IRS indicates that such relief is being actively worked on and expected.

Further guidance is expected from the DOL.

## *Non-Enforcement Period*

The DOL will be issuing a temporary non-enforcement policy that provides a period of time for employers to come into compliance with FFCRA. Under this policy, the DOL will not bring an enforcement action against any employer for FFCRA so long as the employer has acted reasonably and in good faith to comply with the Act. The Department will focus on compliance assistance during the 30-day period.

### **EMPLOYER NEXT STEPS**

- Expect formal regulations from IRS and DOL to implement the information outlined in this recent guidance.
- Discuss with payroll and tax advisors on how to take advantage of the dollar-for-dollar reimbursement of costs associated with the two new leave provisions under FFCRA. Keep in mind, the amount of the credit can be adjusted upward to reflect to the employer's cost for continuing health insurance coverage during this time.
  - While further guidance is needed, USI believes this adjustment would be based on the employer's share of the insured premium (or fully equivalent premium in a self-funded arrangement) for health coverage offered to the employee on leave.
- Small employers (fewer than 50 employees) should await formal guidance on relief from the requirement to provide leave associated with childcare closures or unavailability due to COVID-19 when providing such leave would jeopardize the viability of the business.

### **FOR MORE INFORMATION**

IRS and DOL Plan to Implement FFCRA Tax Credits <https://www.irs.gov/newsroom/treasury-irs-and-labor-announce-plan-to-implement-coronavirus-related-paid-leave-for-workers-and-tax-credits-for-small-and-midsize-businesses-to-swiftly-recover-the-cost-of-providing-coronavirus>

A dedicated USI website on public health emergencies can be found at <https://www.usi.com/public-health-emergencies/>.

**USI** [usi.com/locations](https://www.usi.com/locations)

This summary is intended to convey general information and is not an exhaustive analysis. This information is subject to change as guidance develops. USI does not provide legal or tax advice. For advice specific to your situation, please consult an attorney or other professional.

These materials are produced by USI Insurance Services for educational purposes only. Certain information contained in these materials is considered proprietary information created by USI. Such information shall not be used in any way, directly or indirectly, detrimental to USI and/or their affiliates.

Neither USI nor any of its respective representatives or advisors has made or makes any representation or warranty, expressed or implied, as to the accuracy or completeness of these materials. Neither USI nor their respective representatives or advisors shall have any liability resulting from the use of these materials or any errors or omission therein. These materials provide general information for the use of our clients, potential clients, or that of our clients' legal and tax advisors.

IRS Circular 230 Disclosure: USI Insurance Services and its affiliates do not provide tax advice. Accordingly, any discussion of U.S. tax matters contained herein (including any attachments) is not intended or written to be used, and cannot be used, in connection with the promotion, marketing or recommendation by anyone unaffiliated with USI of any of the matters addressed herein or for the purpose of avoiding U.S. tax-related penalties.

© 2020 USI Insurance Services. All Rights Reserved.