Blog Post

Claiming Payroll Tax Credits for Paid Leave Under the Families First Coronavirus Response Act

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The paid leave requirements under the Families First Coronavirus Response Act (FFCRA) will end on December 31, but employers should take steps now to claim the associated tax credits for any required leave they provided to their employees.

In March, Congress passed the FFCRA, which generally requires employers with fewer than 500 employees to provide up to 80 hours of paid sick leave and up to 12 weeks (up to 10 paid weeks) of family and medical leave to employees who are unable to work due to certain specified reasons relating to the COVID-19 pandemic. To help employers cover these additional unexpected costs, Congress also provided a corresponding payroll tax credit for the wages and certain other items associated with the new paid leave requirements.

Expenses Eligible for the Credit

The payroll tax credit is available for required paid sick leave and required paid family leave during the period from April 1, 2020 through December 31, 2020. As of the date of publication, Congress has not extended the FFCRA's paid leave requirements beyond December 31, 2020.

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An employer cannot be more generous than the FFCRA requires and then seek to recoup a tax credit for paid leave beyond that required by the FFCRA. The maximum amount of the available credit is the amount of required paid leave, plus Medicare tax on the leave wages, plus any associated employer-paid health plan expenses.

The maximum amount of required paid leave wages are as follows:

- An employee who is unable to work because of coronavirus quarantine or self-quarantine or has coronavirus symptoms and is seeking a medical diagnosis, is entitled to paid sick leave for up to ten days (up to 80 hours) at the employee's regular rate of pay, or, if higher, the applicable minimum wage, up to $511 per day, but no more than $5,110 in total.
- An employee who is unable to work due to caring for someone with coronavirus, or caring for a child because the child's school or place of care is closed, or the paid child care provider is unavailable due to the coronavirus, is entitled to paid sick leave for up to two weeks (up to 80 hours) at two-thirds the employee's regular rate of pay or, if higher, the applicable minimum wage, up to $200 per day, but no more than $2,000 in total.
- An employee who is unable to work because of a need to care for a child whose school or place of care is closed or whose child care provider is unavailable due to the coronavirus, is also entitled to paid family and medical leave equal to two-thirds of the employee's regular pay, up to $200 per day and $10,000 in total. Up to ten weeks of qualifying leave can be counted towards the family leave credit.

The maximums above do not include employer Medicare taxes or employer health plan expenses. So, for example, if an employer paid the maximum amount of required paid sick leave to an employee

who is absent from work due to self-quarantining, the employer would claim a payroll tax credit equal to: the $5,110 in paid sick leave wages; plus $74.10 for the employer portion of Medicare tax (1.45 percent of the wages); plus the amount of any employer-paid health plan expenses.

Leave wages required by FFCRA are not subject to the employer's share of Social Security taxes.

How to Claim the Credit

In anticipation of receiving the payroll tax credit, employers are permitted to:

- retain and not deposit federal employment taxes, including withheld taxes that would otherwise be required to be deposited with the IRS, in an amount up to the amount of the anticipated credit as of the time of the required deposit (see IRS Notice 2020-22); and
- to the extent federal employment taxes are insufficient to cover the amount of employer's qualified leave wages and qualified health plan expenses, request an advance of the credit from the IRS for the amount of the credit by filing Form 7200.

Note that prior to retaining payroll tax deposits in anticipation of the FFCRA credit, eligible employers are permitted to defer the deposit and payment of the employer's share of Social Security tax under section 2302 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act. For more information, see the IRS's FAQs concerning the deferral of employment tax deposits and payments through December 31, 2020. An employer that elects to defer its share of social security tax would apply the deferral first and then offset the anticipated FFCRA credit amount against the remaining federal payroll taxes.

Eligible employers will report their total qualified leave wages and qualified health plan expenses

under the FFCRA for each calendar quarter on their federal employment tax returns, usually Form 941. The IRS issued a new Form 941 in July that contains specific fields for the qualified sick and family leave wages (lines 5a(i) and 5a(ii)), the qualified health plan expenses (lines 19 and 20), and any advances received from filing Form 7200 (line 13f).
The instructions for Form 941 also contain a new Worksheet 1 for determining the total amount of payroll tax credits for FFCRA leave (as well as the employee retention tax credit under the CARES Act). If an employer deposited its payroll taxes on its normal schedule rather than retaining them to offset the amount of any anticipated credit, the employer may have an overpayment on its quarterly return once it applies its payroll tax credits. In that circumstance, the employer will elect to either receive any overpayment as a refund or credit the overpayment amount to its next return (and reduce future deposits by the credit amount).

If an employer filed its quarterly return for the second or third quarter of 2020 without reporting its FFCRA leave wages and qualified health plan expenses, the employer may file an adjusted quarterly return (typically, Form 941-X) with the IRS to claim the payroll tax credits. In October, the IRS issued a new Form 941-X that contains fields for the FFCRA credit amounts (lines 9, 10, 28, and 29), along with corresponding instructions for Form 941-X. If an employer has overreported (and overpaid) its federal payroll taxes, it may choose to apply the credit amount to its current quarterly return or use the claim process to obtain a refund. Generally, an employer may correct overreported taxes on a previously filed Form 941 if the employer files Form 941-X within 3 years of the date Form 941 was filed or 2 years from the date the employer paid the tax reported on Form 941, whichever is later. That being said, we do not recommend waiting – employers should act now to preserve and compile their records documenting paid leave and associated health plan expenses and to prepare and file any adjusted returns to claim the available credits.

If you have questions about how to properly calculate and claim available tax credits under the FFCRA, please contact your Akerman attorney.

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