CLIENT ALERTS & INSIGHTS

Benesch COVID-19 Resource Center: Employer Tax Credits Against Payroll Tax Obligations Under the Families First Coronavirus Response Act

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Authors: Jordan J. Call, Leah Beitner, Margo Wolf O'Donnell

The Families First Coronavirus Response Act ("FFA"), signed by President Trump on March 18, 2020, provides employers with refundable payroll tax credits for COVID-19 related paid sick leave and paid emergency family leave that certain employers (generally those with fewer than 500 employees) must provide under the FFA. In our previous client alert "Revised Families First Coronavirus Response Act Narrows the Scope of Emergency FMLA Expansion and Paid Sick Leave Benefits," we outlined the basic rules regarding the new paid sick leave and paid emergency family leave obligations applicable to certain employers.

At a high level, the refundable payroll tax credits under the FFA are equal to 100 percent of the amount of qualified sick leave wages and emergency FMLA leave wages paid by an employer, subject to certain limitations discussed below.

The following highlights some of the key features of the newly-available refundable payroll tax credits under the FFA:

- There are two separate tax credits available: (1) a refundable tax credit for paid sick leave wages (the "Paid Sick Leave Tax Credit"), and (2) a refundable tax credit for the expanded emergency FMLA leave for childcare disruption (the "Expanded FMLA Tax Credit"). For purposes of this discussion, the Paid Sick Leave Tax Credit and the Expanded FMLA Tax Credit are referred to collectively as the FFA Tax Credits.

- Employers may claim the Paid Sick Leave Tax Credit for qualified paid sick leave wages paid pursuant to the FFA. The Paid Sick Leave Tax Credit is available for up to 100 percent of the amount of sick leave wages an employer pays, for up to 10 days per year. The Paid Sick Leave Tax Credit is limited to, depending on the reason for the emergency sick leave, up to $200 per day per employee ($2,000 in total) or $511 per day per employee ($5,110 in total).
- Employers may also claim the Expanded FMLA Tax Credit for emergency FMLA leave provided to employees for childcare disruption under the FFA. The Expanded FMLA Tax Credit is available for up to 100 percent of the emergency FMLA wages an employer pays, capped at $200 per day and $10,000 in the aggregate per employee.

- Both FFA Tax Credits may be claimed by employers on a quarterly basis. We expect that employers will be required to report and claim these tax credits on their quarterly Form 941 employment tax returns.
- Each of the FFA Tax Credits are refundable to the extent that either tax credit exceeds the amount an employer owes in payroll tax.
- To the extent that an employer is required to cover an employee's health insurance while the employee is on paid sick leave or emergency FMLA leave, the refundable tax credit is grossed up in order to continue such coverage. In addition, covered sick pay and covered emergency FMLA leave pay are exempt from employment taxes otherwise imposed on the employer. These provisions ensure that the employer is made whole for its obligation to pay covered sick leave and emergency FMLA leave.
- We note that the FFA includes a "denial of double benefit" limitation. Employers may not receive the FFA Tax Credits against their payroll tax obligations if they are already providing paid family and medical leave for which they are receiving tax credits under the 2017 Tax Cuts and Jobs Act.
- In addition, employers must increase their gross income for the tax year by the amount of FFA Tax Credits they claim under the FFA.
- The period during which employees may take the expanded paid sick and FMLA leave, and thus the period for which employers may claim the refundable FFA Tax Credits against their payroll tax obligations, ends on December 31, 2020. The FFA takes effect no later than April 2, 2020.

The FFA directs the Department of the Treasury to prescribe regulations and issue guidance on compliance with the FFA's tax credit provisions, including anti-abuse provisions.

Employers that have a significant fraction of their work force on covered leave should stay alert for future developments related to the FFA. In particular, the Department of the Treasury has acknowledged that employers may not be able to fund the enhanced paid sick and emergency FMLA leave with current employment tax withholdings or other funds. In response to that concern, the FFA provides the Treasury Department and the IRS broad discretion to ensure that accrued tax credits are effectively advanced to employers as soon as possible. In line with the authority granted by the FFA, the Department of the Treasury and the Internal Revenue Service have signaled they may implement a system for such employers to accelerate payment of credits provided for by the Act. In the event the Treasury and IRS implement a system for employers to accelerate payment of credits provided for by the FFA, it will be wise to look out for new forms from the IRS for claiming accelerated refundable credits.

As these issues continue to develop, Benesch's dedicated COVID-19 task force will continue to provide updates and analysis to help guide its business partners in an effort to navigate the fast-paced and changing legal landscape. Additional information is available on the Benesch COVID-19 Resource Center.

If you have any questions regarding the above, please contact a member of your Benesch team.

Jordan J. Call at jcall@beneschlaw.com or 216.363.6169.

Leah Beitner at lbeitner@beneschlaw.com or 312.624.6327.

Margo Wolf O'Donnell at modonnell@beneschlaw.com or 312.212.4982.

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Please note that this information is current as of the date of this client bulletin, based on the available data. However, because COVID-19's status and updates related to the same are ongoing, we recommend real-time review of guidance distributed by CDC and local officials.

