

IRS Releases Guidance on FFCRA Tax Credit

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The IRS has released guidance and sample forms related to the tax credit available to private employers with fewer than 500 employees who are required to provide Paid Sick Leave and Expanded FMLA leave as required by the recently passed Families First Coronavirus Response Act (FFCRA). The tax credits are not available to public entities, even those who are required to provide Paid Sick Leave or Expanded FMLA.

Background

The FFCRA requires certain employers (generally private employers with fewer than 500 employees, and all public employers) to provide Paid Sick Leave and Expanded FMLA leave for certain events related to the COVID-19 pandemic. Private employers can recoup their costs of providing this leave through an advanced payroll tax credit. The credit is designed to reimburse private employers who are subject to the law for the extra cost of compensation and benefits provided to employees entitled to take leave due to one of the reasons defined in the FFCRA.

The IRS provided detailed guidance on the process employers need to follow in order to take advantage of the tax credit. The process permits affected employers to withhold an amount equal to qualified wages and health expenses from payroll taxes that are to be deposited with the federal government. The employer's qualified costs can be withheld from the employer's portion of payroll taxes, payroll taxes deducted from the employees' pay, and federal income tax withheld from employees' pay. The amounts withheld will then be reported on the employer's quarterly payroll tax filing. If there are insufficient payroll tax funds available to offset the employer's qualified wage and health expenses related to providing FFCRA protected leave, the employer can file a Form 7200 to claim an advance credit.

The IRS guidance can be found at <https://www.irs.gov/newsroom/faqs-employee-retention-credit-under-the-cares-act>. In this summary, we provide details on how to determine the cost of employee benefits that can be applied toward the tax credit and documentation requirements. The employer's tax advisor and/or payroll provider can provide additional detail on the process for filing for the payroll tax credit.

Determining the Amount of Qualified Health Plan Expenses

Employer tax credits to cover the cost of employees taking FFCRA qualified leave include what are referred to as "qualified health plan expenses." Qualified health plan expenses include plans defined as group health plans in Code section 5000(b)(1). This is a broad definition that includes employer-sponsored medical plans, HRAs, dental plans, vision plans, Rx plans, health FSAs, and others, but does not include employer contributions to a QSEHRA, Archer MSA or HSA.

The amount of qualified health plan expenses generally includes both the portion of the cost paid by the employer and the portion of the cost paid by the employee with pre-tax salary reduction contributions. If an employee participates in more than one eligible plan, the qualified expenses of each plan in which the employee participates are aggregated for that employee.

Calculating the Qualified Health Plan Expense Eligible for the Tax Credit

An employer who sponsors a fully-insured group health plan may use any reasonable method to determine and allocate the plan expenses, including:

- (1) the COBRA applicable premium for the employee typically available from the insurer;
- (2) one average premium rate for all employees; or
- (3) a substantially similar method that takes into account the average premium rate determined separately for employees with self-only and other than self-only coverage.

An employer who sponsors a self-insured group health plan may use any reasonable method to determine and allocate the plan expenses, including:

- (1) the COBRA applicable premium for the employee typically available from the administrator; or
- (2) any reasonable actuarial method to determine the estimated annual expenses of the plan.

Qualified health plan expenses must be allocated on a pro rata basis for the periods of time coverage is provided while an employee is on FFCRA qualified leave. If an employer uses an average premium rate for all employees, the IRS provided the following description of how the daily allocable costs could be determined:

1. *The employer's overall annual premium for the employees covered by the policy is divided by the number of employees covered by the policy to determine the average annual premium per employee.*
2. *The average annual premium per employee is divided by the average number of work days during the year by all covered employees (treating days of paid leave as a work day and a work day as including any day on which work is performed) to determine the average daily premium per employee. For example, a full-year employee working five days per week may be treated as working 52 weeks x 5 days or 260 days. Calculations for part-time and seasonal employees who participate in the plan should be adjusted as appropriate. Employers may use any reasonable method for calculating part-time employee workdays.*
3. *The resulting amount is the amount allocated to each day of qualified sick or family leave wages.*

Example: An employer sponsors an insured group health plan that covers 400 employees, some with self-only coverage and some with family coverage. Each employee is expected to have 260 workdays a year. (Five days a week for 52 weeks.) The employees contribute a portion of their premium by pre-tax salary reduction, with different amounts for self-only and family. The total annual premium for the 400 employees is \$5.2 million. (This includes both the amount paid by the employer and the amounts paid by employees through salary reduction.)

For an employer using one average premium rate for all employees, the average annual premium rate is \$5.2 million divided by 400, or \$13,000. For each employee expected to have 260 workdays a year, this results in a daily average premium rate equal to \$13,000 divided by 260, or \$50. That \$50 is the amount of qualified health expenses allocated to each day of paid sick or family leave per employee.

Documentation

The IRS also provided guidance on documentation employers must obtain from employees who take FFCRA leave. This documentation does not need to be submitted to the IRS but must be maintained to justify tax credits claimed by the employer in the event of an audit.

Employee Certification

The employer must require a written request for FFCRA leave from the employee in which the employee provides:

- (1) The employee's name;
- (2) The date or dates for which leave is requested;
- (3) A statement of the COVID-19 related reason the employee is requesting leave and written support for such reason; and
- (4) A statement that the employee is unable to work, including by means of telework, for such reason.

In the case of a leave request based on a quarantine order or self-quarantine advice, the statement from the employee should include the name of the governmental entity ordering quarantine or the name of the health care professional advising self-quarantine

If the person subject to quarantine or advised to self-quarantine is not the employee, that person's name and relation to the employee.

In the case of a leave request based on a school closing or childcare provider unavailability, the statement from the employee should 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 family medical leave; and
- with respect to the employee's inability to work or telework because of a need to provide care for a child older than fourteen during daylight hours, a statement that special circumstances exist requiring the employee to provide care.

Employer Record Keeping

Employers must also maintain internal records that include the following information:

- (1) Documentation to show how the employer determined the amount of qualified sick and family leave wages paid to employees that are eligible for the credit, including records of work, telework and qualified sick leave and qualified family leave.
- (2) Documentation to show how the employer determined the amount of qualified health plan expenses that the employer allocated to wages.
- (3) Copies of any completed Forms 7200 ("Advance of Employer Credits Due To COVID-19") that the employer submitted to the IRS.
- (4) 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).

Summary

The implementation of the FFCRA requirements and tax credit is happening at an unprecedented speed due to the nature of the crisis the country is dealing with. Employers should check the relevant IRS and DOL websites often as the agencies are expected to continue to issue additional guidance in many forms, including regulations, FAQs, and agency memos.

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