

Client Alert: The Families First Act, the CARES Act, and IRS Guidance for Employers

2 Apr 2020

The Families First Coronavirus Response Act (FAMILIES FIRST ACT), Public Law No. 116-127 (March 18, 2020), and the Coronavirus Aid, Relief, and Economic Security Act (CARES ACT), Public Law No. 116-136 (March 27, 2020) provide relief to employees and employers (including nonprofits) during this pandemic. The relief provided by the FAMILIES FIRST ACT is in the form of additional paid sick leave and partially paid family leave that is needed by employees to deal with the current pandemic. For more information, please review our [Families First Client Alert](#). The relief provided by the CARES ACT is in the form of continued employment for employees who might otherwise lose their job, with incentives paid to their employers to retain them.

All of this relief is funded, at least partially, by refundable tax credits that will be “paid” to employers through their own employment tax trust funds, which are those amounts that would normally be paid to the Internal Revenue Service (“IRS”). The quarterly payments, i.e., withholding credits, may instead be retained by employers if the employer is eligible for any of these incentives. The IRS guidance assures employers that the employer will not be subject to penalty for nonpayment. [Notice 2020-22](#) provides penalty relief for qualifying employers utilizing the employment taxes as a refundable credit.

Many questions have arisen regarding the practice and procedure for employers to give the relief to employees, and for employers to obtain relief through use of their otherwise payable employment taxes. The IRS issued guidance in the form of Frequently Asked Questions (“FAQ”) along with several newly released Notices. This Client Alert will provide a summary of the new IRS guidance, along with links to the source documents.

CARES ACT

The FAQ document released by the IRS explaining the [Employee Retention Credit](#) clarifies that the government assistance for the refundable credit comes from the employer portion of Social Security taxes (IRC §3111(a) (“SS”) and the employer portion of taxes similar to Social Security under the Railroad Retirement Tax Act (IRC §3221(a) (“RRTA”). Employers may retain amounts that would otherwise be paid quarterly to the IRS for the purpose of funding wages for employees who otherwise might be terminated or furloughed, either fully or partially. The employers who qualify for this assistance are those whose business has been wholly or partially suspended due to the coronavirus, or those employers who suffered a significant decline in gross receipts during the relevant time period. The specific eligibility requirements are set forth in the [FAQ Document](#). The amount eligible for the credit is a maximum of \$10,000 in wages paid after March 12, 2020 and before January 1, 2021. It is a 50% credit, and so an employer could retain from its SS or RRTA withholding taxes up to \$5,000 for each qualifying employee. If the employer portion of SS or RRTA is not enough to fully fund the eligible Retention Credits, an employer may file the new [Form 7200](#) to receive an advance payment of these employment credits to help cover the employee’s qualifying wages.

The IRS guidance does not specify the documentation that an employer will need if ever questioned about its eligibility for the employee retention credit. However, at a minimum the employer should retain the financial information reflecting the business’ “significant decline in gross receipts” or confirmation that the employer “fully or partially suspended operations” during the 2020 time period due to governmental action.

Funding Emergency Leave

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Similarly, refundable tax credits are being used to help fund the emergency sick leave and family leave provided in the FAMILIES FIRST ACT for small and mid-size employers (including nonprofits). The effective date for this emergency leave is April 1, 2020 through December 31, 2020. The IRS also issued detailed answers to FAQs related to emergency sick leave and family leave for those impacted by COVID-19. In [FAQs for emergency leave](#), the IRS detailed the requirements for qualification along with similar refundable tax credit procedures. Not only wages are eligible for reimbursement, but also health care coverage, including Medicare taxes paid to or on behalf of the employee during the relevant time period.

The documents required by the IRS to be retained by the employer as substantiation for eligibility for the Federal assistance for sick and family leave include the following:

- Written request from employee for sick leave or family leave including:
 - Employee's name.
 - Date(s) of requested leave.
 - Statement of the COVID-19 related reason for the leave and written support for the reason and that therefore the employee is unable work/telework.
 - If related to a government ordered quarantine, the name of the governmental entity or health care professional.
 - If leave is related to an individual who is in the care of the employee, the name and relationship of the individual.
 - If leave is related to child-care, the name and age of the child, name of the school or child care facility that closed, and a representation that alternate childcare is not available.
 - If child is older than 14, the employee must provide a statement regarding the special circumstances that prevent work or telework.

The wages paid under these programs by the employer are treated as wages for all purposes, including Federal withholding taxes, 401k deductions, or other wage deductions or taxes. Employers should report their total qualified wages and the related credits withheld for each calendar quarter on their federal employment tax returns, usually Form 941, which is the Employer's Quarterly Federal Tax Return. As indicated above, the IRS has assured employers that they will not be subject to penalty for nonpayment of employment taxes in [Notice 2020-22](#).

Jackson & Campbell routinely provides advice to large and small employers on tax and business issues. Please contact the author or a member of the Tax or Business Group if you have additional questions.

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TAGGED: Tax Law, Internal Revenue Code, COVID-19, emergency leave, Families First Act, CARES Act, Employee Retention Credit