



## MEMORANDUM

**TO:** Employer Clients

**FROM:** MPL Law Firm, LLP

**DATE:** March 23, 2020

**RE:** Employer Tax Credits – The Families First Coronavirus Response Act

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This article provides updates from a prior article posted regarding a Summary of the Families First Coronavirus Response Act signed into law on Wednesday, March 18, 2020 (the “*Act*”). Per the prior summary and the Act, additional paid leave under the updated Family and Medical Leave Act (the “*FMLA*”) and the Emergency Paid Sick Leave Act (the “*EPSLA*”) is subject to immediate tax credit for the paying employer. The additional information is based on the IRS’ guidance memo, which is also on our website.

### Summary

While the Act mandates certain paid leave to employees regarding COVID-19 related absences, the Act also provides for offsets to employers required to pay such amounts. The offsets are taken directly against payroll withholdings that the employer was otherwise required to make for wages paid. The tax credit is a dollar for dollar offset for paid leave amounts paid by the Employer. Where the payroll taxes owed are less than the credit (or offset) amount, an expedited reimbursement will be established to refund employers the additional amounts paid for COVID-19 related paid leave.

### FMLA and EPSLA Review

The Act amends the current FMLA by permitting eligible employees to use FMLA leave related to a public health emergency for child-care related absences. The new law applies to government employers and employers with fewer than 500 employees. Eligible employees may take up to twelve (12) weeks of job protected FMLA leave where they are unable to work or telework because of a need for leave to care for a child if their (primary or secondary) school or place of care has been closed, or their child-care provider is unavailable, because of a public health emergency declared with respect to COVID-19. While the first 10 days of FMLA leave is unpaid, employees may elect to substitute accrued vacation, personal leave, or sick leave for the unpaid leave under this section. After the 10 days, employers must pay the employee not less than two-thirds of the employee’s regular rate of pay for each day of FMLA leave taken thereafter, capped at \$200 per day, and capped at \$10,000 in the aggregate.

The EPSLA permits employees to use sick leave related to COVID-19. Like the FMLA expansion, this applies to government employers and employers with fewer than 500 employees. All full-time employees (subject to limited exceptions), regardless of their length of employment, are entitled to take 80 hours paid sick leave immediately. Employers additionally must permit employees to use COVID-19 related sick leave before other sick leave. To be eligible, the employee must be subject to one of a possible six qualifying circumstances (which are set forth in the prior article). If an employee qualifies under the enumerated conditions, employers are required to pay an employee (i) at his or her regular rate of pay up to a cap of \$511 per day and \$5,110 in the aggregate for sick leave use under reasons (1)-(3) (employee quarantine or isolation order, self-quarantine recommendation or experiencing symptoms and seeking treatment), and (ii) at 2/3rds his or her regular rate of pay capped at \$200 per day and \$2,000 in the aggregate for sick leave use under reasons (4)-(6) (caring for others and additional government-specified conditions). Employers must post a notice related to this section in a conspicuous place in the workplace.

### **Tax Credits for Employer's Paid Leave**

Paid Sick Leave Credit. These credits are related to paid leave under the EPSLA. For an employee who is unable to work because of COVID-19 quarantine or self-quarantine, or has COVID-19 symptoms and is seeking a medical diagnosis, eligible employers may receive a refundable sick leave credit for sick leave at the employee's regular rate of pay, capped at \$511 per day and \$5,110 in the aggregate, for a maximum of 10 days. For an employee caring for someone with COVID-19, or caring for a child because the child's school or child care facility is closed, eligible employers may claim a credit for two-thirds (2/3) of the employee's regular rate of pay, capped to \$200 per day and \$2,000 in the aggregate, for up to 10 days. Eligible employers are entitled to an additional tax credit based on costs to maintain health insurance coverage for the eligible employee during the leave period.

Child Care Leave Credit. These credits are related to paid leave under the COVID-19 specific changes to the FMLA. In addition to the sick leave credit, for an employee who is unable to work because of a need to care for a child whose school or child care facility is closed or whose child care provider is unavailable due to the COVID-19, eligible employers may receive a refundable child care leave credit. This credit is equal to two-thirds of the employee's regular pay, capped at \$200 per day or \$10,000 in the aggregate. Up to 10 weeks of qualifying leave can be counted towards the child care leave credit. As with the paid sick leave credit, eligible employers are also entitled to an additional tax credit based on costs to maintain health insurance coverage for the eligible employee during the leave period

### **Prompt Payment for the Cost of Providing Leave.**

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. The employers then are required to 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.

Under guidance to be issued this week from the IRS, eligible employers who pay qualifying sick or child care leave will be able to retain an amount of the payroll taxes equal to the amount of qualifying sick and child care 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 share of Social Security and Medicare taxes with respect to all employees.

If there are not sufficient payroll taxes to cover the cost (offset) of qualified sick and child care 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. The details of this expedited payment procedure will be announced later this week with the additional guidance referenced above.

#### Illustrations:

- 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.
- 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.
- Equivalent child care leave and sick leave credit amounts are available to self-employed individuals under similar circumstances. These credits will be claimed on their income tax return and will reduce estimated tax payments.

#### Non-Enforcement Period

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

While our office will remain closed pursuant to Governor Wolf's shutdown order, our attorneys will remain available via cell phone and email. If you have any questions, please contact your MPL attorney to discuss the above, or other questions about the effect of COVID-19 on your operations. *Email contacts: Andy Miller ([amiller@mpl-law.com](mailto:amiller@mpl-law.com)); James Sanders ([jsanders@mpl-law.com](mailto:jsanders@mpl-law.com)); and Christian Miller ([cmiller@mpl-law.com](mailto:cmiller@mpl-law.com)).*