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Employer Tax Credits in the Families First Coronavirus Response Act

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Posted By: Robert B. Teuber

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On March 18, 2020, President Trump signed the Families First Coronavirus Response Act (the "Act") into law. The Act provides emergency assistance to Americans during the COVID-19 pandemic. In part, the Act provides much needed relief to employers in the form of tax credits while employees take time off using the Act's sick leave and family leave programs. The Act also provides self-employed individuals with comparable tax credits against their self-employment tax. von Briesen has also released a detailed discussion of the non-tax aspects of the Act which analyzes the obligations of employers. That *Legal Update* can be found here.

Employer Tax Credits
Sick Leave. Under the Act, a private sector employer may be required to pay its employees emergency paid sick leave. If so, the Act allows employers a credit against the 6.2% employer share of payroll tax in an amount equal to 100% of the "Qualified Sick Leave Wages" that are paid under the Act. With respect to any individual employee, the credit is limited to $511 per day (in the case of sick leave to care for themselves) or $200 per day (if the sick leave is to care for a family member or child whose school is closed) for a total of 10 days.

Family Leave. The Act also provides employers with a similar credit for employees utilizing the Act's family leave program. Employers are allowed a separate credit against their payroll tax obligations in an amount equal to 100% of the "Qualified Family Leave Wages" that are paid under the Act. The credit is limited to $200 per day and $10,000 in the aggregate for any individual employee.

Common Limitations. For any calendar quarter, the aggregate sick leave and family leave credits cannot exceed the employer's 6.2% share of Social Security tax (under Internal Revenue Code section 3111(a) or 3221(a) - the Railroad Retirement Tax Act). The family leave credits are reduced by any sick leave credits already being utilized by the employer.

Refunds. While the amount of the available credits is limited to the 6.2% employer share of Social Security tax (and Railroad Retirement tax), if the credits exceed the limit, the excess will be treated as an overpayment and will be refundable to the employer.

Additional Credits. An employer may increase the credits claimed under either the sick leave or family leave provisions of the Act in certain circumstances where the employer pays or incurs expenses related to maintaining a group health plan.

The Act provides that the Qualified Sick Leave Wages and Qualified Family Leave Wages are not considered "wages" for purposes of the 6.2% Social Security and Railroad Retirement tax. However, the same exclusion from wages does not apply to the 1.45% employer's share of Medicare tax. Thus, the payments under the Act are still technically subject to the Medicare tax. However, the amount of the credit that can be claimed is automatically allowed to be increased by the 1.45% Medicare tax imposed on each the Qualified Sick Leave Wages and Qualified Family Leave Wages.

Double Benefit. To avoid the possibility that an employer receives a double benefit from the existence of the payroll tax credits created by the Act, an employer's gross income is increased by the amount of the payroll tax credits claimed under the Act. Additionally, any wages taken into account in determining the credit, will not be taken into account for purposes of determining the credit pursuant to Internal Revenue Code Section 45S (the credit for family and medical leave already existing in the law).

Self-Employed Tax Credits

Sick Leave. The Act also provides a comparable tax credit for eligible self-employed individuals to apply against their self-employment taxes. The credit is equal to 100% of the "Qualified Sick Leave Equivalent Amount" for that individual. An eligible self-employed individual is one who regularly carries on any trade or business and would be entitled to receive paid sick leave pursuant the Act if he or she was an employee.

The Qualified Sick Leave Equivalent Amount is equal to the number of days during the taxable year that the individual is unable to perform services in any trade or business (for reasons that would entitle them to sick leave payments under the Act), multiplied by the lessor of:

1. $200 if caring for a sick family member or child following a school closing or $511 if caring for themselves; or
2. 67% (if caring for a sick family member or child following a school closing) or 100% (if caring for themselves), of the average daily self-employment income for the taxable year.

The average daily self-employment income is calculated by dividing the net earnings from self-employment by 260.

As is the case for employers making sick leave payments, the number of days for which credit may be claimed by a self-employed person is limited to 10. To the extent that any individual is already receiving sick leave payments from an employer under the Act, the amount allowed to the self-employed individual is reduced to the extent that the total amount exceeds $2,000 (if caring for a sick family member or child following a school closing) or $5,110 (if caring for themselves).

Family Leave. Eligible self-employed individuals may also claim a credit equal to 100% of the "Qualified Family Leave Equivalent Amount" if they would otherwise be entitled to receive paid family leave pursuant to the Act if he or she was an employee.

The Qualified Family Leave Equivalent Amount is equal to the number of days during the taxable year that the individual is unable to perform services in any trade or business (for reasons that would entitle them to receive family leave pursuant to the Act), multiplied by the lessor of:

1. 67% of the average daily self-employment income of the individual for the taxable year; or
2. $200.

The total number of days used in the calculation cannot exceed 50. As with the self-employed sick leave credits, the average daily self-employment income is calculated by dividing the net earnings from self-employment by 260. If a self-employed individual is already receiving family leave payments from an employer under the Act, the Qualified Family Leave Equivalent Amount is reduced to the extent that the total exceeds $10,000.

Refunds. To the extent that either of the credits allowed exceed the self-employment tax obligation, the excess is refundable to the self-employed person.

Recordkeeping
Additional guidance is expected to provide details on adequate recordkeeping. It is important that both employers and self-employed individuals establish and maintain record retention policies to prove eligibility for the credits. These records may include proof of illness, quarantine, or child care/school closure related to employees, family members or self-employed individuals to whom claimed credits relate.

What is next?
Additional regulations are forthcoming. The Act details several areas in which additional regulations will be issued. Significant among these is guidance on the waiver of any Failure to Deposit penalties that may be imposed for incorrectly determining the adjusted deposit amounts due as a result of the anticipated credits. Ordinarily, an employer is required to make federal tax deposits throughout a calendar quarter attributable to the wages paid. As the Act creates credits against the payroll taxes that will be due, the amount of payroll tax deposits is likely to decrease (thereby increasing liquidity to the employer). As the regulations concerning these penalty waivers have not yet been issued, employers should be careful to be as accurate as possible in determining the proper amount of their payroll tax deposits.

The Act does not give any indication as to whether similar estimated tax penalty relief may be provided to self-employed individuals under the regulations. However, the Internal Revenue Service recently announced that any tax payments (within certain thresholds) that are required with the filing of a 2019 income tax return due April 15, 2020 can be extended for 90 days. In a Notice issued on March 18, the IRS expanded the 1st quarter 2020 estimated tax payment deadline by 90 days as well. These payments are now due on July 15, 2020.

On March 20, 2020, Treasury Secretary Steven Mnuchin also announced that the April 15 tax filing deadline is now also extended to July 15. Previously only the tax payment deadline had been extended.

Effective date. The employer and self-employed tax credits under the Act will become effective within 15 days and further guidance will be forthcoming.

Additional relief. The federal government is currently considering additional relief for businesses and individuals. We will continue to monitor updates and promptly provide guidance concerning the tax aspects and impact of what happens next.
