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Tax Provisions Impacting Government Employers arising from the Families First Coronavirus Response Act

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The Families First Coronavirus Response Act (the "Act") imposed obligations on certain employers to make sick leave and family leave payments to certain employees affected by the Covid-19 virus. To ease the burden associated with the payment requirements, the Act created payroll tax credits which can be claimed by employers.

Unfortunately, the Act does not currently allow the payroll tax credits to be claimed by the federal government, or the government of any state or political subdivision thereof, or any agency or instrumentality of the government. This means, for example, a county, municipality, or school district required to make payments to its employees under the Act cannot recoup the cost out of the employer's share of payroll taxes in the same way that a private sector employer may. This may be about to change. At the time that this *Legal Update* is being written, Congress is negotiating the terms of additional Coronavirus legislation. Included in a counter-proposal by House of Representatives Democrats is a provision that would extend the available credits to government employers, including counties, municipalities, and school districts. As soon as any additional legislation is passed, we will provide an update.

In the meantime, local government employers are inquiring on the administration of the Act as it currently exists. Below we answer questions how payments under the Act should be treated.

1) Are the sick leave and family leave payments under the Act considered wages for purposes of the employer's 6.2% share of Social Security tax?
No. The payments under the Act are specifically excluded from the definition of wages on which an employer must pay its 6.2% share of the Social Security or Railroad Retirement Tax. Therefore, the employer need not pay its 6.2% share of these taxes on the sick leave and family leave payments.

2) Does the employer have to pay the 1.45% Medicare tax on the sick leave and family leave payments made to employees under the Act?
Yes. The payments under the Act are wages for purposes of the 1.45% employer share of Medicare taxes.

3) Should the employer withhold the employee share of Social Security and Medicare tax and income taxes from the sick leave and family leave payments made under the Act?
Yes. The payments under the Act are wages for purposes of the employee share of Social Security and Medicare and for income tax withholding.

In the event that the anticipated legislation does extend the payroll tax credits to government employers, including counties, municipalities, and school districts, additional guidance expected from the IRS on how to apply the credits will become relevant. We will provide updates as things develop.

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