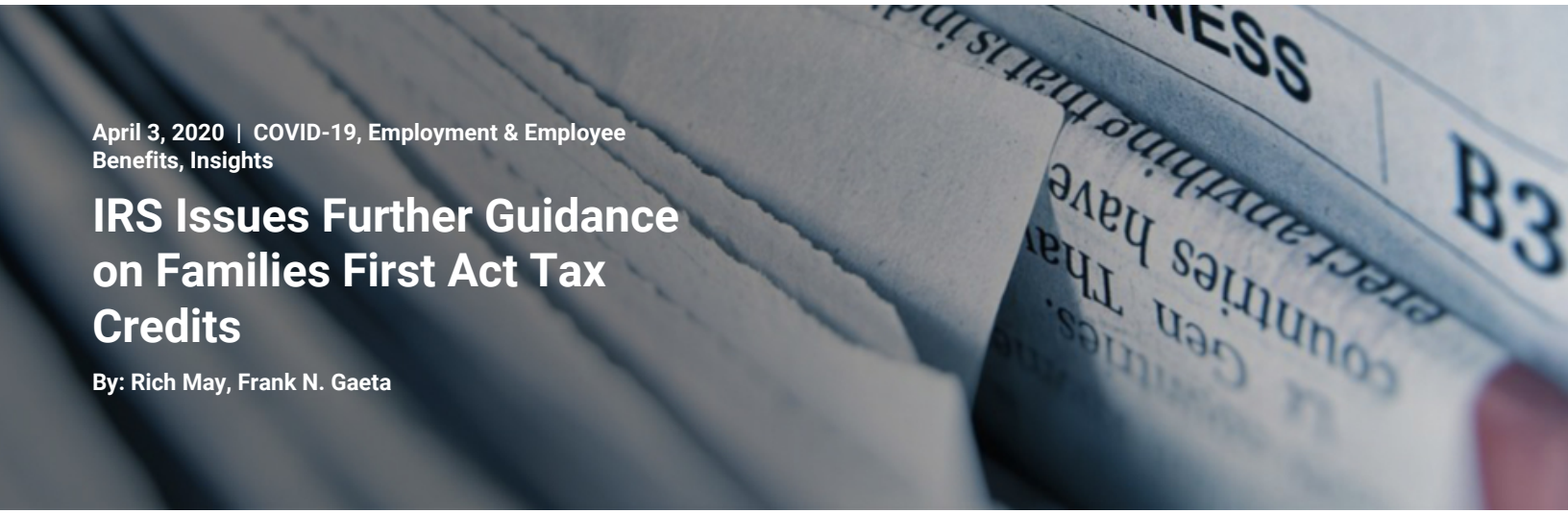


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IRS Issues Further Guidance on Families First Act Tax Credits

By: Rich May, Frank N. Gaeta

The Internal Revenue Service has issued further guidance, including FAQs, for employers looking to take advantage of the tax credits available under the Families First Coronavirus Response Act (the "Act").

We previously summarized the Act's paid sick leave and expanded family and medical leave provisions here, discussed earlier related IRS guidance here, and identified related DOL guidance here.

Under the Act, eligible employers that pay qualified leave wages will be able to retain an amount of all federal employment taxes equal to the amount of the qualified leave wages paid, plus the allocable qualified health plan expenses and the amount of the employer's share of Medicare tax imposed on those wages, rather than depositing them with the IRS.

The federal employment taxes that are available for retention by eligible employers include federal income taxes withheld from employee compensation, the employees' share of social security and Medicare taxes, and the employer's share of social security and Medicare taxes with respect to all employees.

Among the notable aspects of the new guidance, the IRS explains how the tax credits are to be increased by the qualified health plan expenses allocable to the qualified leave wages. According to the IRS, "qualified health plan expenses" are amounts paid or incurred by the eligible employer to provide and maintain a group health plan, but only to the extent that those amounts are excluded from the gross income of employees. The IRS states that qualified health plan expenses are properly allocated to the qualified sick or family leave wages if the allocation is made on a pro rata basis among covered employees (for example, the average premium for all employees covered by a policy) and pro rata on the basis of periods of coverage (relative to the time periods of leave to which such wages relate).

Also of note, in response to FAQs 44-46 below, the IRS identifies how employers should substantiate eligibility for tax credits:



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44. What information should an Eligible Employer receive from an employee and maintain to substantiate eligibility for the sick leave or family leave credits?

An Eligible Employer will substantiate eligibility for the sick leave or family leave credits if the employer receives a written request for such 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, and, 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 child care 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, and 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.

45. What additional records should an Eligible Employer maintain to substantiate eligibility for the sick leave or family leave credit?

An Eligible Employer will substantiate eligibility for the sick leave or family leave credits if, in addition to the information set forth in FAQ 44 ("What information should an Eligible Employer receive from an employee and maintain to substantiate eligibility for the sick leave or family leave credits?"), the employer creates and maintains 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.

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See FAQ 31 ("Determining the Amount of Allocable Qualified Health Plan Expenses") for methods to compute this allocation.

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).

46. How long should an Eligible Employer maintain records to substantiate eligibility for the sick leave or family leave credit?

> An Eligible Employer should keep all records of employment taxes for at least 4 years after the date the tax becomes due or is paid, whichever comes later. These should be available for IRS review.

Further, the IRS clarifies, with the following FAQ, that an employee may add family medical leave onto paid sick leave (i.e., the leave periods can run consecutively) for the purpose of caring for a child whose school or place of care is closed, or whose child care provider is unavailable:

59. Can an employee receive both "qualified sick leave wages" and "qualified family leave wages"?

> "Yes, but at different times. Qualified sick leave wages are available for up to 80 hours during which an employee cannot work or telework for any of six reasons related to COVID-19, including because the employee must care for his or her child whose school or place of care is closed, or whose child care provider is unavailable, due to COVID-19 related reasons. By contrast, qualified family leave wages are available only because the employee must care for his or her child whose school or place of care is closed, or whose child care provider is unavailable, due to COVID-19 related reasons, and only after an employee has been unable to work or telework for this reason for 80 hours.
>
> **Example**: Your child-care provider is unavailable indefinitely due to the COVID-19 outbreak, leaving you unable to work or telework to care for your child. For up to the first 80 hours of any period of leave to care for your child, you are entitled to qualified sick leave wages, up to $200 per day and $2,000 in the aggregate. After that, you are entitled to qualified family leave wages for up to ten weeks of additional leave you need, up to $200 per day and $10,000 in the aggregate."

Click here to view the IRS's new guidance and FAQs.

Disclaimer: This summary is provided for educational and informational purposes only and is not legal advice. Any specific questions about these topics should be directed to attorney

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