

A STAY-AT-HOME MAP FOR TRACING THE CORONAVIRUS EMPLOYMENT COSTS AND TAX BENEFITS
"FAMILIES FIRST CORONAVIRUS RESPONSE ACT"¹

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INTRODUCTION

On March 18, 2020 Congress enacted and the President signed the "FAMILIES FIRST CORONAVIRUS RESPONSE ACT."² The legislation was a high speed reaction to the growing threat of the COVID-19 Pandemic. The legislation consisted of an appropriations bill which spent money to fight the disease. There are eight articles (called Divisions) in the Act. We address three of the Divisions in this document, related to paid leaves of absence and tax credits.

There are several perspectives noticeable in the three Divisions of the Act we address below. The first perspective sought a mandate that employers pay for up to 10 days of paid leave for all workers suffering from the effects of COVID-19 and unable to work. The second perspective realized that 10 days is going to be inadequate because of public health officials' warnings and mounting school closings to enforce social distancing. Therefore, the second perspective mandated an expansion for paid leave by grafting onto the existing Family and Medical Leave Act, and requiring up to 12 weeks (60 work days) of paid leave at 2/3 of pay for inability to work because of having to stay home following school and child care closings. The third perspective mandated that all employers who, struggling with the costs of these requirements, need Federal assistance. This perspective turned to payroll taxes as a means to give tax credits to employers, with the potential that these tax credits could exceed the payroll taxes owed and the employer would receive Federal cash for that excess. Finally, the fourth perspective saw the need to protect sole proprietors, partners, and S-Corporation shareholders who work in their business and are not considered "employees" in the payroll tax regime. This fourth perspective produced provisions which include self-employment tax breaks equivalent to the tax breaks corporations enjoy under the Act for people who cannot work.

The discussion below is limited to the Act. Many state and local jurisdictions have sick leave policies that may also be relevant to consider.

EMERGENCY SICK LEAVE-THE COST TO EMPLOYERS

Generally, for employees unable to work (or telework) because of "COVID-19 reasons", the employer must pay sick pay during the time the employee can't work, for a period up to 2 weeks (80 hours) at the employee's regular pay.³ This mandate goes into effect when the Secretary of Treasury announces the effective date sometime after the date of enactment (March 18, 2020) and not later than

¹ This document is a summary of principal terms of the newly enacted Act. As with any new legislation, there are ambiguities which need to be clarified with follow up regulations. This document is not meant to be relied upon without counsel from a qualified professional advisor.

² All citations are to U.S. Public Act 116-127 (H.R. 6201) signed by the President on March 18, 2020, called the "Families First Coronavirus Response Act, and sometimes referred to as the "Act". Click here to see act: <https://www.congress.gov/bill/116th-congress/house-bill/6201/text>

³ Full time employees are entitled to 80 hours of sick pay; part time employees are entitled to sick pay for hours equal to the average hours a part time employee works over a 2 week period [5102(b)] and if the part time pay is too variable, then the employer will count the average hours per day over the 6 months prior to the start of sick pay period to determine the two week hours count. [5110(5)(C)]

April 2, 2020 and can last as long as December 31, 2020.⁴ So any sick pay an employer generously provided before the declared effective date will not count toward the 80 hour Emergency Sick Leave mandate.

This mandate applies to all employers with under 500 employees. It applies to all employees no matter how long they have worked for the employer⁵. However, the amount of sick pay to be paid has a minimum and maximum. The minimum rate is the highest “minimum wage” set for the employer’s community. The maximum is \$511 per day (and no more than \$5,110 in total to any one employee) for employees covered by items #1, 2, and 3 of “COVID-19 reasons”; and \$200 per day (and no more than \$2,000 in total to any one employee) for employees covered by items # 4, 5, and 6 of “COVID-19 reasons”.⁶ An employer may not require an employee to use other earned paid leave before using Emergency Sick Pay.⁷ (But presumably, an employee can claim earned and unused vacation pay and sick pay to make up the shortfall because of the caps for Emergency Sick Leave pay.)

“COVID-19 reasons” means:

1. Federal, State, or local quarantine or isolation order
2. A health care provider advised the employee to self-quarantine
3. The employee is experiencing symptoms of COVID-19 and seeking medical diagnosis
4. The employee is caring for someone subject to items 1 or 2 above
5. The employee must care for a son or daughter who cannot attend school or child care because the school or child care was shut down for COVID-19 risks.
6. An employee is experiencing any other substantially similar condition declared by the Secretary of Health and Human Services.

The Secretary of Labor is given the authority to (a) permit employers of health care workers and first responders to opt out of these mandates, and to (b) exempt employers with less than 50 employees from these mandates.⁸

Employers are supposed to post notice of rights to Emergency Sick Pay on its premises, using a model form suggested by the Secretary of Labor.⁹ There is the usual prohibition against discriminating against an employee who claims rights under the Emergency Sick Pay program, and employers can be subject to penalties for not paying Emergency Sick Pay when required.¹⁰

EMERGENCY SICK LEAVE – THE FEDERAL TAX BENEFITS TO EMPLOYERS

In an effort to reimburse an employer for paying mandatory Emergency Sick Pay, an employer is entitled to a tax credit against its OASDI portion of FICA (i.e. its 6.2% of wages share of payroll tax) for the Emergency Sick Leave it pays to its employees. Thus an employer can subtract from its OASDI payroll tax bill the amount of Emergency Sick Leave it has paid to its employees, subject to certain conditions. The employer must choose which 10 days it wishes to claim in any calendar quarter, because it cannot claim more than 10 days of Emergency Sick Leave in any quarter. If the Emergency Sick leave payments exceed the OASDI payroll tax otherwise due in the calendar quarter, the employer can claim the excess as a “refund” of the payroll tax. Of course the dollar limits of \$511 or \$200 per day per employee apply.¹¹

⁴ 5108; Health care workers may be excluded from this mandate by their health care employer. 5102(a)

⁵ 5102(e)

⁶ 5110(5)

⁷ 5102(e)

⁸ 5111(2)

⁹ 5103; this is a curious requirement to post on premises a notice, when the entire thrust of the Act is to address COVID-19 and the quarantine effects, which means employees are likely not now, and will not be, on premises.

¹⁰ 5104 and 5105

¹¹ 7001(b)

Because an employer is getting reimbursed from the Federal Treasury, the employer cannot deduct the wages it is paying that will be reimbursed, so the employer must reverse any such deduction.¹²

Also, the employer cannot double dip on tax credits for Emergency Sick Pay. The 2017 Tax Cuts and Jobs Act created Internal Revenue Code Section 45S which provided an employer with a tax credit for part of the wages paid to an employee during FMLA leave. The employer can choose whether it wants to invoke the 45S tax credit or the Emergency Sick Leave tax credit.¹³

Congress went beyond attempting to reimburse employers for the Emergency Sick Leave pay. They also allow a further refundable tax credit for a pro rata portion of the group health insurance premiums it pays on behalf of its employees (so long as the payment is tax free to the employees) in a quarter, determined by calculating a proportion of all employees' pay for each period represented by the employees' Emergency Sick Leave pay in a quarter.¹⁴

An employer who pays Emergency Sick Leave pay will not pay OASDI payroll taxes (6.2%) on the Emergency Sick Leave Pay¹⁵. Nor will the employer pay the 1.45% payroll hospital insurance tax on the Emergency Sick Leave Pay.¹⁶ Since the employer is not incurring the cost of these payroll taxes, it cannot take a deduction for them.¹⁷

EMERGENCY FMLA EXPANSION – THE COST TO EMPLOYERS

Beginning March 18, 2020 and ending December 31, 2020¹⁸, the rules of the Family and Medical Leave Act are expanded to include paid leave for one narrow "COVID-19 Reason" - that the employee must care for a son or daughter who cannot attend school or child care because the school or child care was shut down for COVID-19 risks and cannot work (or telework). This is similar to the COVID-19 Reason #5 for Emergency Sick Pay, except that for Emergency FMLA leave, the required leave only applies to children under the age of 18 years, and the definitions of child care provider and school (elementary and secondary) are more explicit. These new rules apply to any employer with less than 500 employees, and it applies to any employee who has been employed for at least "30 calendar days".¹⁹

The first 10 days of Emergency FMLA Leave need not be paid (but remember the employer is already required to pay Emergency Sick Pay for the first 80 hours (generally two work weeks or 10 work days) of leave for reasons described in "Covid-19 Reasons" #5 above. Subsequent to the first 10 days of leave, the employer must pay Emergency FMLA Leave pay at a rate of 2/3 of an employee's regular rate of pay for the balance of the regular FMLA 12 week leave period (generally 10 work weeks). However, no employee can receive more than \$200 per day, and \$10,000 in the aggregate for Emergency FMLA pay. (Presumably, an employee with accrued and unused vacation pay and regular sick pay can use that pay to make up the shortfall for the 2/3 limit and cap applicable by Emergency FMLA Leave pay). For part time employees, there is a calculation similar to that in Emergency Sick Pay rules for calculating the rate of pay

¹² 7001(e)(1)

¹³ 7001(e)(1) and (2)

¹⁴ 7001(d)

¹⁵ 7005(a)

¹⁶ 7005(b)(1)

¹⁷ 7005(b)(2)

¹⁸ 3102(a)(1); while 3106 describes the effective date for Emergency FMLA the same way as for Emergency Sick Pay (i.e. to take effect when the Secretary of Treasury declares an effective date within 15 days after enactment), it seems that once in effect, the FMLA modifications for Emergency FMLA leave applies retroactively to March 18, 2020.

¹⁹ 3102(b); note this is a significant enlargement of FMLA for a narrow scope. Under existing FMLA law before this Act, employers of 50 or more are covered and employees need a year of employment and 1250 hours of work to qualify for FMLA job protection and 12 weeks of leave. There was no mandate for paid leave.

per hour. When the maximum 12 weeks is reached, the FMLA limit is reached and the employer doesn't have to pay for the work days the employee is absent thereafter.²⁰

There is a recognizable FMLA rule addressing restoration to employment after Emergency FMLA leave, with special exceptions for employers with under 25 employees. Employers who violate an employee's FMLA rights are subject to the normal FMLA sanctions.²¹ The Emergency FMLA leave does not add an additional 12 weeks to the 12 week limit on FMLA leave. Rather it adds another condition under which FMLA leave may be claimed, and makes that claim entitled to pay. Thus, if an employee already used up 6 weeks of FMLA leave before claiming Emergency FMLA leave, only 6 more weeks would be available, of which 2 weeks are not paid for Emergency FMLA Leave pay, but would be paid by Emergency Sick Leave pay.²²

The Secretary of Labor is given the authority to (a) permit employers of health care workers and first responders to opt out of these mandates, and to (b) exempt employers with less than 50 employees from these mandates.²³

EMERGENCY FMLA LEAVE – THE FEDERAL TAX BENEFITS TO EMPLOYERS

In an effort to reimburse an employer for paying mandatory Emergency FMLA Leave pay, an employer is entitled to a tax credit against its OASDI portion of FICA (i.e. its 6.2% of wages share of payroll tax) for the Emergency FMLA Leave it pays to its employees. Thus an employer can subtract from its OASDI payroll tax bill the amount of Emergency FMLA Leave it has paid, subject to certain conditions. If the Emergency FMLA leave payments exceed the OASDI payroll tax otherwise due in the calendar quarter, the employer can claim the excess as a further "refund" of the payroll tax. Of course the dollar limits of \$200 per day, and \$10,000 in the aggregate for all quarters, for an employee, apply in measuring the eligible refundable Emergency FMLA Leave pay.²⁴ Because an employer is getting reimbursed from the Federal Treasury, the employer cannot deduct the wages it is paying that will be reimbursed, so the employer must reverse any such deduction.²⁵

Also, the employer cannot double dip on tax credits for Emergency Sick Pay. The 2017 Tax Cuts and Jobs Act created Internal Revenue Code Section 45S which provided an employer with a tax credit for part of the wages paid to an employee during FMLA leave. The employer can choose whether it wants to invoke the 45S tax credit or the Emergency Sick Leave tax credit.²⁶

Congress went beyond attempting to reimburse employers for the Emergency FMLA Leave pay. They also allow a further refundable tax credit for a pro rata portion of the group health insurance premiums it pays on behalf of its employees (so long as the payment is tax free to the employees) in a quarter, determined by calculating a proportion of all employees' pay for each quarter represented by the employees' Emergency FMLA Leave pay in a quarter.²⁷

²⁰ 3102(b)

²¹ 3102(b)

²² 3102(a)

²³ 3102(b))

²⁴ 7003(b)

²⁵ 7003(e)(1)

²⁶ 7001(e)(1) and (2)

²⁷ 7003(d)

An employer who pays Emergency FMLA Leave pay will not pay OASDI payroll taxes (6.2%) on the Emergency FMLA Leave Pay²⁸. Nor will the employer pay the 1.45% payroll hospital insurance tax on the Emergency FMLA Leave pay.²⁹ Since the employer is not incurring the cost of these payroll taxes, it cannot take a deduction for them.

FEDERAL TAX BENEFITS AVAILABLE TO SELF-EMPLOYED

Congress added provisions to protect sole proprietors, partners, LLC members, and S-Corporation shareholders who are unable to work in their business because of COVID-19 Reasons.

Self-Employed Emergency Sick Leave Tax Credit

For the first 10 days of eligible Emergency Sick Pay leave (treating the self-employed taxpayer as if he were an employee eligible for Emergency Sick Pay from an employer), occurring during the period from the time the Secretary of Treasury announces the effective date until December 31, 2020, the self-employed taxpayer can obtain Emergency Sick Pay tax credits.³⁰ The tax credit is refundable³¹ and applied to self-employment tax (i.e. the self-employed's 12.40% OASDI tax, plus 2.90% Medicare tax).³²

The tax credit is calculated by multiplying (i) the number of days (not in excess of 10) the taxpayer qualifies for one of the "COVID-19 Reasons" (described above), times (ii) the lesser of (A) \$511 per day if the COVID-19 Reason is described in items #1, 2, or 3 above, or \$200 per day if the COVID-19 Reason is described in items #4, 5, or 6 above, or (B) 100% of the "average daily self-employment income for the year" (or 67% of the "average daily self-employment income for the year" if the COVID-19 Reason is item # 4, 5, or 6). To compute the "average daily self-employment income for the year", divide self-employment income earned for the year by 260.³³ For example, if the partner earned self-employment income of \$200,000 for the year, then average daily self-employment income is \$769. \$769 is greater than \$511. If the partner were ordered to quarantine by state authority for at least 10 days after the effective date of the Act (item #1), the partner could claim \$511 X 10 days = \$5,110 in tax credits for 10 days of quarantine.

Self-Employed Emergency FMLA Leave Tax Credit

The calculations for the Self Employed Emergency FMLA Tax Credit is similar to the Emergency Sick Leave Tax Credit. The tax credit is available for up to 50 work days (i.e. generally 10 work weeks) following the first 10 work days (generally 2 work weeks already covered by the Emergency Sick Pay tax credit) which occur after the effective date of the Act until December 31, 2020.³⁴ But remember, it is only for a COVID-19 Reason #5. This was Congress' way to address the 12 weeks of Emergency FMLA for self-employed's. The calculation of the credit is simpler. It is determined by multiplying (i) the number of days of leave for COVID-19 Reason #5, times (ii) the lesser of \$200, or 67% of the "average daily self-employment income for the year."³⁵ For example, the same partner in the preceding example earned \$769 per day. \$769 x 67% = \$515, which is greater than \$200. If the partner were ordered quarantined

²⁸ 7005(a)

²⁹ 7005(b)(1)

³⁰ 7003(c)(3)

³¹ 7003(d)

³² 7002(a)

³³ 7002(c)

³⁴ 7004(c)

³⁵ 7004(c)

for a total of 60 days, the 50 days of Emergency FMLA tax credit would equal $\$200 \times 50 = \$10,000$ (which corresponds to the maximum an employee could earn for Emergency FMLA Leave).

There is much to digest and much to implement in an extraordinarily short period of time. The pace of the legislation and its implementation seems to have matched the pace of spread of COVID-19 itself.

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