

FFCRA – Refundable Payroll Tax Credits for Paid Sick and Family Leave



ARTICLE 04.02.20 DEAN DORTON

What are the basics?

The FFCRA created the Emergency Paid Sick Leave Act (the Sick Leave Act) and the Emergency Family and Medical Leave Expansion Act (the Family Leave Act). These laws require most government employers, as well as tax-exempt organizations and private employers with fewer than 500 employees, to provide employees with paid sick or family leave for various COVID-19 related reasons. The Sick Leave Act entitles an employee to two weeks (up to 80 hours) of paid sick leave if the employee is unable to work (which includes telework) because the employee:

1. Is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
2. Has been advised by a healthcare provider to self-quarantine due to COVID-19 concerns;
3. Is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
4. Is caring for an individual subject to an order described in item (1) or who has been advised as described in item (2);
5. Is caring for a child whose school or place of care has been closed or childcare provider is unavailable due to COVID-19 precautions; or
6. Is experiencing any other substantially similar condition specified by federal government.

If an employee is unable to work due to item (1), (2), or (3), the employer must provide the employee with his or her regular rate of pay, up to \$511 per day and \$5,110 total. If an employee is unable to work due to item (4), (5), or (6), the employer must provide the employee with two-thirds of his or her regular rate of pay, up to \$200 per day and \$2,000 total.

The Family Leave Act also entitles employees who are unable to work due to item (5) to 12 weeks of job-protected family leave. The first two weeks may be unpaid (although the employee may be able to receive paid sick leave for these two weeks under the Sick Leave Act). After the first two weeks, the employer must provide the employee with two-thirds the employee's regular rate of pay, up to \$200 per day and \$10,000 total. To receive paid family leave under the Family Leave Act, employees must be on the payroll for at least 30 days. In addition, they must be unable to work due to a need to care for a child whose school or place of care has closed due to a COVID-19 emergency declared by a federal, state, or local authority.

Small businesses with fewer than 50 employees are eligible for an exemption from the leave requirements relating to school closings or childcare unavailability where the requirements would jeopardize the viability of the business as a

going concern. The Department of Labor intends to provide guidance on the requirements to meet this standard. Small businesses that claim this exemption are not entitled to tax credits for any qualified leave wages they are exempt from paying.

The FFCRA also exempts employers whose employees are health care providers or emergency responders from the requirement to provide sick or family leave for these employees.

To offset the cost of providing paid sick and family leave, the FFCRA provides employers with refundable payroll tax credits equal to 100% of “qualified sick leave wages” (wages paid under the Sick Leave Act) and “qualified family leave wages” (wages paid under the Family Leave Act) paid each calendar quarter. The credit is allowed against the employer share of Social Security tax and Railroad Retirement tax on wages paid to all employees. If the amount of the credit exceeds the employer portion of these federal employment taxes, the excess is refunded to the employer.

Are there limitations?

Yes. For employees unable to work due to items (1), (2), or (3), the amount of qualified sick leave wages an employer can take into account is capped at the employee’s regular rate of pay, up to \$511 per day and \$5,110 total, for up to 10 days. For employees unable to work due to items (4), (5), or (6), the amount of qualified sick leave wages an employer can take into account is capped at two-thirds the employee’s regular rate of pay, up to \$200 per day and \$2,000 total, for up to 10 days.

The amount of qualified family leave wages an employer can take into account per employee is capped at two-thirds the employee’s regular rate of pay, up to \$200 per day and \$10,000 total.

Employers are entitled to receive a credit for the full amount of qualified sick and family leave wages, plus allocable health plan expenses and the employer’s share of Medicare tax. The IRS has provided guidance on calculating allocable health plan expenses in its FAQs.

Who is eligible?

Tax-exempt organizations and private employers with fewer than 500 employees that are required to provide paid sick or family leave under the Sick Leave Act or the Family Leave Act are eligible for the refundable payroll tax credits. Governmental employers, including the federal government, state and local governments, and governmental agencies and instrumentalities, are not eligible for payroll tax credits.

Equivalent credits are available for self-employed individuals.

When does it take effect?

The Sick Leave Act and Family Leave Act took effect April 1, 2020. The payroll tax credits for qualified sick and family leave wages apply to wages paid for the period beginning on April 1, 2020, and ending on December 31, 2020. The same period is used to determine credits for qualified sick and family leave equivalent amounts for self-employed individuals.

How do I claim the tax credits?

Employers claim sick and family leave tax credits on Form 941, Employer’s Quarterly Federal Tax Return. However, employers can benefit more quickly by reducing their federal employment tax deposits. Employers are entitled to retain an amount of all federal employment taxes equal to the qualified sick and family leave wages paid (plus allocable health plan expenses and the employer’s share of Medicare tax imposed on those wages) rather than depositing them with the IRS. The federal employment taxes available for retention include federal income taxes withheld from employees, 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.

If the federal employment taxes set aside to deposit are insufficient to cover the amount of the tax credits, the employer may request an advance payment of the credits from the IRS by submitting Form 7200, Advance Payment of Employer Credits Due to COVID-19. The IRS expects to begin processing these requests in April 2020.

Is any documentation required?

Yes! Employers must retain (1) records supporting each employee's leave to substantiate their claim for tax credits; (2) Forms 941; and (3) Forms 7200. Employers can substantiate an employee's eligibility for sick or family leave by obtaining a written request for leave from the employee in which the employee provides:

1. His or her name;
2. The date(s) 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.

In the case of a leave request based on a quarantine order or advice to self-quarantine, the employee's statement should include the name of the governmental entity ordering quarantine or the name of the healthcare professional advising self-quarantine. If the employee is caring for another individual subject to quarantine, the employee must provide that person's name and relation to the employee.

If the employee is requesting leave based on a school closing or childcare unavailability, the employee's statement must include:

1. The name and age of the child;
2. The name of the school that closed or place of care that is unavailable; and
3. A representation that no other person will be providing care for the child during the period the employee is on leave. If the employee is caring for a child older than 14, the employee must provide a statement that special circumstances exist requiring the employee to provide care.

An employer must keep all records of employment taxes for at least four years after the date the tax becomes due or is paid, whichever is later.

[Non-Federal Employee Rights Poster](#)[Federal Employee Rights Poster](#)