



KAHN, SOARES & CONWAY, LLP



Families First Coronavirus Response Act (FFCRA) Update

The FFCRA requires employers to provide paid leave through two separate provisions: (i) the Emergency Paid Sick Leave Act (EPSLA), which entitles workers to up to 80 hours of paid sick time when they are unable to work for certain reasons related to COVID-19, and (ii) the Emergency Family and Medical Leave Expansion Act (Expanded FMLA), which entitles workers to certain paid family and medical leave. The FFCRA provides that employers subject to the EPSLA and the Expanded FMLA paid leave requirements are entitled to fully refundable tax credits to cover the cost of the leave required to be paid for these periods of time during which employees are unable to work (which for purposes of these rules, includes telework). Certain self-employed persons in similar circumstances are entitled to similar credits.

Below are recent updates regarding the FFCRA.

The US Treasury Department updated its Q and A: <https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs>. The following are some highlights regarding federal tax-credit reimbursements to eligible employers who pay COVID- related sick and family leave.

Immediate Reimbursement:

- Employers can be immediately reimbursed for the credit by reducing their required deposits of payroll taxes that have been withheld from employees' wages by the amount

of the credit. An employer that pays qualified leave wages to its employees in a calendar quarter before it is required to deposit federal employment taxes with the IRS for that quarter may reduce the amount of federal employment taxes it deposits for that quarter by the amount of the qualified leave wages (and allocable qualified health plan expenses and the employer's share of Medicare tax on the qualified leave wages) paid in that quarter.

- Eligible employers will claim the credits on their federal employment tax returns (e.g., Form 941, Employer's Quarterly Federal Tax Return), but they can benefit more quickly from the credits by reducing their federal employment tax deposits. Form 941 will have instructions on how to reflect the reduced liabilities for the quarter related to the deposit schedule.

Advancement:

- If the employer's employment tax deposits are not sufficient to cover the credit, the employer may receive an advance payment from the IRS by submitting Form 7200, Advance Payment of Employer Credits Due to COVID-19. Employers should first reduce its remaining federal employment tax deposits for wages paid in the same quarter to zero.
- An employer can claim the credits once it has paid the employee for the period of paid sick leave or expanded family and medical leave.
- If an employer fully reduces its required deposits of federal employment taxes otherwise due on wages paid in the same calendar quarter to its employees in anticipation of receiving the credits, and it has **not** paid qualified leave wages (and any allocable qualified health plan expenses and the Eligible Employer's share of Medicare tax on the qualified leave wages) in excess of this amount, it **should not** file the Form 7200. If it files the Form 7200, it will need to reconcile this advance credit and its deposits with the qualified leave wages on Form 941 (or other applicable federal employment tax return such as Form 944 or Form CT-1), and it may have an underpayment of federal employment taxes for the quarter.

Additionally, Department of Labor issued a temporary rule implementing the FFCRA, available at: <https://www.federalregister.gov/documents/2020/04/06/2020-07237/paid-leave-under-the-families-first-coronavirus-response-act>. The following are some highlights related to small businesses and employee requests for leave.

Small Business Exemption

- Small businesses with fewer than 50 employees can deny an employee paid sick leave or expanded family and medical leave when:
 1. Such leave would cause the small employer's expenses and financial obligations to exceed available business revenue and cause the employer to cease operating at a minimal capacity;
 2. The absence of the employee or employees requesting leave would pose a substantial risk to the financial health or operational capacity of the small employer because of their specialized skills, knowledge of the business, or responsibilities; or
 3. The employer cannot find enough workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services the employee or employees requesting leave provide, and these labor or services are needed for the employer to operate at a minimal capacity.
- For reasons 1, 2, and 3, the employer may deny paid leave only to those otherwise eligible employees whose absence would cause the employer's expenses and financial obligations to exceed available business revenue, pose a substantial risk, or prevent the small employer from operating at minimum capacity, respectively.
- Employer must document the facts and circumstances that meet this criteria. The employer should not send such documentation to the Department, but rather retain the records in its files.

Employee Requests for Leave

- Employers may require employees to follow reasonable notice procedures as soon as practicable after the first workday or portion of a workday for which an employee receives paid sick leave in order to continue to receive such leave.
- It will be reasonable for an employer to require notice as soon as practicable after the first workday is missed, and to require that employees provide oral notice and sufficient information for an employer to determine whether the requested leave is covered under

the FFCRA. Employers may not require that the notice include documentation beyond, and employees must provide:

1. The employee's name;
 2. Date(s) for which leave is requested;
 3. The COVID-qualifying reason for leave; and
 4. A statement representing that the employee is unable to work or telework because of the COVID-qualifying reason.
- Employees must provide additional documentation depending on the qualifying reason for leave, such as:
 - Employees requesting paid sick leave because of a quarantine order must provide the name of the government entity that issued the order.
 - Employees requesting paid sick leave due to health care provider advice must provide the provider's name.
 - Employees requesting paid sick leave to care for another must provide either (1) the government entity that issued the order to which the individual is subject or (2) the name of the health care provider who advised the individual to self-quarantine, depending on the precise reason for the request.
 - Employees requesting paid sick leave or family and medical leave to care for his or her child must provide (1) name of the child, (2) name of the school/place of care that is unavailable due to COVID-19 concerns, and (3) a statement representing that no other suitable person is available to care for the child during the period of requested leave.

For more information please contact Louie Brown at lbrown@kscsacramento.com.

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