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## HCM Alert

# CARES Act: Part 3 Social Security and Payroll Tax Credits for Employers

April 20, 2020



# DID YOU KNOW?

In [Part I of our CARES Act Series](#) we covered the Tax Free Student Loan Repayment Plans. Part II will cover the Further Limitations on Paid Leave.

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In this Part III Series, we will cover Social Security and payroll tax credits for Employers.

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## Overview

On March 27, 2020 Congress passed [H. R. 748, \(CARES Act\)](#), and President Trump signed it, making it a new law. Called to be the “single-biggest economic relief package in American history,” the CARES Act amends the Internal Revenue Code (IRC) and is created to provide economic relief and stimulus to workers, families, and businesses of all sizes who are suffering from the effects of Coronavirus-19 (COVID-19).

The CARES Act encompasses many provisions including:

- Health and Welfare benefits expansions
- Retirement benefit expansions
- Unemployment Benefits expansion and tax credits
- Individual tax credits
- **Social Security and payroll tax credits**
- Small, Midsize, and Large Employers Business loans, including for non-profit and public entities
- Tax Free Student Loan Repayment Plans
- Further Limitations on Paid Leave

While guidance will be forthcoming on the applicability of the various components of the CARES Act by the IRS, the Small Business Administration (SBA), the Department of Treasury, and the Department of Labor, this HCM Alert is the second in a series about the CARES Act. This alert addresses the Social Security and Payroll tax credits available to eligible employers for any required payments of Emergency Paid Sick Leave benefits paid to employees on qualified leave of absences.

## Tax Credits for Paid Sick and Paid Family and Medical Leave

The Families First Coronavirus Response Act (FFCRA) requires employers with fewer than 500 employees (unless otherwise exempted) to provide Emergency Paid Sick and Expanded Family Medical Leave Act (EFMLA) for those eligible employees affected by COVID-19 to the extent that the employee was unable to work or telework.

Under the Emergency Paid Sick leave provisions, employers are required to provide up to 80 hours of paid sick leave to both full and part-time eligible employees (from date of hire) who, are unable to work (or telework) due to a need for leave for one of the following reasons:

1. “The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID–19.
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID–19.
3. The employee is experiencing symptoms of COVID–19 and seeking a medical diagnosis.
4. The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2).
5. The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the childcare provider of such son or daughter is unavailable, due to COVID–19 precautions; or
6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

While the amount of the credit is 100% of the paid leave amount paid by employers as required under FFCRA, the amount of credit will vary by the reason for the leave. Maximum amounts of required payments and equal credits for Emergency Paid Sick leave under the FFCRA are as follows:

### **For leave reasons (1, 2 or 3):**

The maximum amount an employer is required to pay at \$511.00 per day and \$5,110.00 in the aggregate for each employee taking leave for reasons 1, 2 or 3.

**For leave reason (4, 5 or 6):**

Employees taking leave for reason 4 are entitled to pay at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$2,000 in the aggregate.

An employer may pay more to an employee than what is required for benefits under the Employer Paid Sick Leave however only the maximum amount required to be paid by an employer under FFCRA is eligible for the tax credit.

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## Emergency Family Medical Leave Act Payroll Tax Credit

Under the [Emergency Family and Medical Leave Expansion Act, \(EFMLA\)](#), an eligible employee (employee who has been employed at least 30 calendar days) is able to take up to 12 weeks leave when they are unable to work or perform telework (working away from the employers respective worksite such as at home) for the purpose of:

- an elementary or secondary school or care center has been closed, or
- when a paid\* caregiver is unable to care for child due to a public health emergency.

\*Note that the eligible childcare provider need not be compensated or licensed if he or she is a family member or friend, such as a neighbor, who regularly cares for the employee's child.

For EFMLA, the CARES Act places a limitation that an employer shall not be required to pay more than \$200.00 per day and \$10,000.00 in aggregate for each employee for EFMLA. An employer may pay more to an employee than what is required under EFMLA; however, only the maximum amount required to be paid by an employer under FFCRA is eligible for the tax credit.

Employers may take a credit of up to 100% of the employer paid EFMLA leave required under the FFCRA. If, however an employer already provides paid FMLA benefits and takes a credit under Internal Revenue Code Section 45S, the employer is not able to “double dip” and take a credit under both IRC 45S and FFCRA. Although an employer has the option to opt out of IRC 45S on a quarterly basis.

### **Allowable Emergency Paid Sick Leave and EFMLA Payroll Tax Credit**

Employers may take a payroll tax credit for the Emergency Paid Sick Leave and EFMLA required under the FFCRA that is paid to eligible employees. The amount of credit to be taken as the payroll tax credit is for:

- 100% of the required paid sick leave gross wages paid,
- 100% of the applicable employer and employee Federal income taxes withheld, FICA and Medicare taxes, and
- 100% of the paid qualified healthcare expenses\*\*

The Emergency Paid Sick Leave and EFMLA Payroll tax credit is available during each quarter from April 1, 2020 and ending December 31, 2020. This credit can be taken against the federal tax obligation as recorded on IRS Form 941, not just against those who have received emergency paid sick leave.

*\*\*For purposes of the tax credit, the qualified healthcare expenses include both the employer contributions and employee pre-tax contributions. There is no tax credit for employee post-tax contributions.*

### **Payroll Tax Relief - Federal Insurance Contribution Act (FICA)**

For purposes of FICA (i.e., the 6.2% Social Security tax and 1.45% Medicare tax), wages paid under the Emergency Paid Sick Leave and EFMLA are subject to withholding of federal income tax and the employee's portion of FICA. They are not subject to employer Social Security contributions (6.2%), but the employer must withhold its share of Medicare taxes (1.45%), for which it will receive a credit.

### **How to file for the Payroll Tax Credit**

Employers will file for their tax credit using IRS Form 941, Employers Quarterly Federal Tax Return. Although employers can receive credits by reducing their federal employment tax deposits. Where the credit is more than the tax deposit, employers can request an advance payment of their credit by filing [IRS Form 7200](#), Advance Payment of Employer Credits Due to COVID-19.

In lieu of depositing the federal taxes, the IRS is making available a [Prompt Payment for the Cost of Providing Leave](#) mechanism. Employers will be able to keep an amount equal to the payroll taxes to the amount of Paid Sick Leave and EFMLA. This includes federal income tax and both the employer and employee share of Social Security and Medicare taxes.

### **Record keeping requirements for the Payroll Tax Credit**

Employers will be responsible for maintaining records to support the Emergency Paid Sick Leave and EFMLA payroll tax credits. An employer should maintain leave request records even if an employee was denied Emergency Paid Sick Leave or EMFLA. The Information should be maintained for at least four (4) years. These records would include:

- The employee's name;
- The date(s) for which leave is requested;
- The COVID-19 qualifying reason for leave;
- A statement representing that the employee is unable to work or telework because of the COVID-19 qualifying reason.
- Documentation to support that an employee subject to a federal, state, or local quarantine or isolation order related to COVID-19 provided the name of the government entity that issued the quarantine or isolation order to which the employee is subject.
- Supporting documentation that an employee who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19 provided the name of the health care provider.
- The documentation that an employee is caring for an individual who is subject to a governmental quarantine or isolation order or who has been told by a health care provider to self-quarantine provided either (1) the government entity that issued the quarantine or isolation order to which the individual is subject, or (2) the name of the health care provider who advised the individual to self-quarantine.
- The required documentation supporting that an employee who requested emergency paid sick leave or expanded family and medical leave to care for his/her child whose school or place of care is closed, or whose child care provider is unavailable due to COVID-19 provided (1) the name of the child being cared for; (2) the name of the school, place of care, or child care provider that closed or became unavailable due to COVID-19; and (3) a statement representing

that no other suitable person is available to care for the child during the period of requested leave.

- Documentation showing how the employer determined the amount of paid leave paid to eligible employees, including records of work, telework, paid sick leave, and expanded family and medical leave;
  - Documentation showing how the employer determined the amount of qualified health plan expenses that the employer allocated to wages;
  - Copies of any completed [IRS Forms 7200](#) the employer submitted to the IRS;
  - Copies of the completed [IRS Forms 941](#) the employer submitted to the IRS or, for employers using third-party payers to meet employment tax obligations, records of information provided to the third-party payer regarding the employer's entitlement to the credit claimed on IRS Form 941; and
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## Payroll Tax Deferrals

The Cares Act allows that the employers portion of the [Social Security taxes deposit and payments to be deferred](#) for depositing with the IRS. This deferral is in effect for deposits and payments made from March 27, 2020 until December 31, 2020.

The Payroll Tax deferral is available to all employers (not just those required to pay Emergency Paid Sick Leave and/or EFMLA and for all wages paid to all employees (not just those for Emergency Paid Sick leave and/or EFMLA benefits paid). An exception is made for those employers who received a Paycheck Protection Program loan – they may defer the deposit and payment of Social Security taxes through the date they receive a decision from the lender that the loan is forgiven.

The deposits are to be paid in 2 payments with 50% of the deferred amount to be paid on December 31, 2021 and the remaining 50% on December 31, 2022. Payments received according to this deferment plan will be considered timely and will not be subject to a deposit penalty.

## Employee Retention Tax Credit

In addition to the aforementioned payroll tax credits, [Section 2301](#) of the Cares Act provides an employee retention tax credit to any employer that sustains an economic hardship when the business:

- Fully or partially suspends operation during any calendar quarter in 2020 due to orders from an appropriate governmental authority limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to COVID-19; or
- Experiences a significant decline in gross receipts during the calendar quarter.\*

*\*Where there is a decline of 50% or more of the gross receipts in the 1<sup>st</sup> quarter in calendar year 2020 compared to same calendar quarter in 2019 and continuing for 2020 until such time as the gross receipts are greater than 80% in 2020 calendar quarter compared to same calendar quarter in 2019.*

Eligible employers are entitled to a tax credit equal to 50% of the qualified wages and health plan expenses paid after March 12, 2020 and before January 1, 2021 up to a maximum amount of \$10,000.00 paid per employee for total of all calendar quarters. Therefore, the maximum amount an eligible employer would receive is \$5,000.00 per employee. This tax credit allowable for qualified wages is available as a credit against the employer social security tax contribution owed for all paid employees.

Qualified wages are defined as compensation and qualified health plan expenses associated with the wages. These qualified wages available for the Employee Retention Tax Credit are determined based upon the number of full-time employees an eligible employer had in 2019.

For those eligible employers who *averaged more than 100 full-time employees in 2019*, qualified wages are determined by taking the wages for those employees who are **not working** due to the qualifying reasons above for the 30-days preceding the period of economic hardship.

For those eligible employers that *averaged less than 100 full-time employees in 2019*, the qualified wages are those that were paid to any employee during the period of economic hardship as stated above.



It is important to note that an eligible employer that payments made for Emergency Paid Leave or EFMLA are not considered qualified wages for the Employee Retention Tax Credit. An employer may receive credits as outlined in this paper for those wages. Additionally, an eligible employer may not receive both the Employee Retention Credit and a Small Business Interruption Loan.

Eligible employers would report their qualified wages on their Form 941, Employers Quarterly Federal Tax Return. Additionally, an eligible employer may reduce up to one-half (50%) of the amount of their quarterly federal tax deposit to fund the qualified wages, reporting this reduction on the associated quarterly Form 941.

An advance of the Employee Retention Tax Credit may be available to employers who do not have the ability to fund the qualified wages either through direct payment or through a reduction of their federal tax deposit. Those employers may need to file IRS Form 7200 Advance Payment of Employer Credits Due to COVID-19, or IRS Form 944.

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It is important that employers filing for any of the FFCRA and CARES Act tax credits consult with their Tax Accountant to determine the appropriate credit for their organization. Employers should maintain all records to support their tax filings. While the IRS is allowing for some latitude, in certain instances allowing for a [30-day non-enforcement period](#) for reasonable, good faith efforts to comply with the provisions of the FFCRA and the CARES Act, compliance is required and non-compliant employers could face penalties and fees.



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With more than 20 years of Human Resource Generalist & Executive Level HCM Management experience, Kloss serves as the Director for the Human Capital Management Department for Benefit Advisors Network (BAN). With a deep understanding of the increasingly complex and diverse HR industry, Kloss provides her expertise to BAN's employee benefit brokerage members as well as their employer clients. She oversees all HR-related functions for the association, initiating pro-active, strategic compliance practices, which limits exposure in all areas of potential liability for BAN members and their clients.

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