March 19, 2020

Tax Credits under the Families First Coronavirus Response Act

The President signed the Families First Coronavirus Response Act (the "Act") on March 18, 2020. Among its many components, it provides for up to 14 days of additional Paid Sick Leave for the coronavirus emergency ("Temporary Paid Sick Leave") and additional Family and Medical Leave protections including paid leave ("Temporary Extended FMLA Leave Protection") during the coronavirus (COVID-19) emergency for employees of employers with fewer than 500 employees and governmental employers. Please see our more detailed description of the leave provisions here.

The Act provides tax credits (and refunds) to private employers to cover a portion of the cost of paid sick leave and paid family and medical leave.

Under the Act, a private employer will have the ability to reduce the employer portion of its quarterly Social Security taxes (the employer's portion is 6.2 percent of wages, subject to the Social Security wage cap) by crediting the amount of the qualified sick leave wages and qualified family leave wages required to be paid by the employer under the Act, subject to the following limits:

- The amount of *qualified sick leave wages* (wages required to be paid under the Temporary Paid Sick Leave section of the Act, described above) that may be offset in this manner is limited to $511 per employee taking leave per day if the leave is related to COVID-19 associated requirements to quarantine, isolate, or self-quarantine, or a situation where an individual is experiencing COVID-19 symptoms and awaiting a test. If the leave is related to assisting a family member with the same (COVID-19 associated requirements to quarantine, isolate, or self-quarantine, or a situation where an individual is experiencing COVID-19 symptoms) or to care for the child of such employee where the child's school or place of care has been closed or the child's care provider is unavailable due to COVID-19, then the

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limit is $200 per employee taking leave per day. The total number of days taken into account cannot exceed ten (10) days (i.e. the 10-day limit is a cumulative limit, rather than a per-quarter limit) per employee taking leave.

- The amount of *qualified family leave wages* (wages required to be paid under the Temporary Extended FMLA Leave Protection section of the Act described above) that may be offset in this manner is limited $200 per employee taking leave per day. The total amount cannot exceed $10,000 (i.e. the $10,000 limit is a cumulative limit, rather than a per-quarter limit).

The employer Social Security tax offset, which is technically a tax credit, is also increased by the amount of the employer's qualified health plan expenses that are allocable to the qualified sick leave wages and qualified family leave wages (the allocation is generally proper if made pro rata among covered employees and pro rata based on periods of coverage). Qualified health plan expenses are those expenses incurred by the employer to provide a group health plan, but only to the extent that such amounts are excluded from an employee's income because they are paid by the employer. Finally, the amount of the credit will be increased by the amount of the employer's side of the Medicare tax (1.45%) that would apply to the qualified sick leave wages and qualified family leave wages required to be paid by the employer under the Act.

Although the Act indicates that the credit cannot exceed the total of the employer's Social Security tax for the calendar quarter, it also provides that any credit that exceeds the total of the employer's Social Security tax for the calendar quarter is to be treated as an overpayment that will be refunded to the employer. The mechanism for such refunds is unclear at this stage. Employers should also be aware that the credit (or refund) is treated as income to the employer (so as to not provide a duplicative tax benefit to the employer).

A similar credit applies to self-employed individuals who regularly carry on a trade or business and who would otherwise be entitled to receive paid leave (pursuant to the Temporary Paid Sick Leave or the Temporary Extended FMLA Leave Protection provisions of the Act) if the individual were an employee of an employer (other than himself or herself). This credit is applied against self-employment taxes, but different rules apply in determining the amount of the credit (for example there is no specific credit for health plan expenses), the limitations on the credit, and the crediting mechanism.

Governmental employers (the federal government, state government or political subdivisions, and any agency or instrumentality of the same) do not appear to be eligible for the credit (or refunds).

Many of the details of the tax credits and refunds will need to be addressed in regulations or more likely, given the short time frame, in pronouncements by the IRS.

The tax credits under the Act apply only to wages paid with respect to the period beginning on a date selected by the Secretary of the Treasury which is during the 15-day period beginning on the date of the enactment (March 18, 2020), and ending on December 31, 2020. As a result, we do not know, at this time, when the tax credits will begin to apply. We will continue to monitor and will provide timely updates as necessary.

Related People

Daniel Kaufman
Partner

dakaufman@michaelbest.com
T 312.836.5077

Mark Lotito
Senior Counsel
malotito@michaelbest.com
T 414.223.2507

Charles Palmer
Partner
cbpalmer@michaelbest.com
T 262.956.6518

Brian Paul
Partner
bppaul@michaelbest.com
T 312.527.6843

Kirk Pelikan
Partner
kapelikan@michaelbest.com
T 414.223.2529

Farrah Rifelj
Partner
fnwrifelj@michaelbest.com
T 608.283.0110

Martin Tierney
Partner
mptierney@michaelbest.com
T 414.223.2533