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MEMORANDUM

To: Clients
From: Schultheis & Panettieri, LLP
Date: April 24, 2020

We are providing you this memorandum to ensure you are aware of compliance requirements in regard to the **Families First Coronavirus Response Act** ("FFCRA") and the **Coronavirus Aid, Relief, and Economic Security Act** ("CARES Act") as the legislation pertains to paid sick leave or expanded family and medical leave and employment tax credits.

Paid Leave

FFCRA requires employers to provide paid leave through two separate provisions:

- 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.
- 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 employment 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). Covered employers qualify for this dollar-for-dollar reimbursement through employment tax credits for all qualifying leave wages paid under the FFCRA during the period beginning April 1, 2020 and ending December 31, 2020.

Employment tax credits are increased by the qualified health plan expenses allocable to, and the employer's share of Medicare tax on, the qualified leave wages. There is no credit for the employer portion of Social Security tax that employers are required to pay on the qualified leave wages because the qualified leave wages are not subject to this tax.

Qualified Health Plan Expenses

“Qualified health plan expenses” are amounts paid or incurred by the employer to provide and maintain a group health plan. For this purpose, a “group health plan” includes all plans that are subject to the continuation of coverage requirements under COBRA. As a result, the following employer-sponsored plans are included for purposes of determining the payroll tax credit under both the FFCRA and the CARES Act: Medical/prescription drugs; Dental; Vision; Medical Flexible Spending Account; Health Reimbursement Arrangement (HRA), except for Qualified Small Employer HRAs; Employee Assistance Plans (other than referral-only EAPs); and On-Site Medical Clinics.

The amount of qualified health plan expenses taken into account in determining the credits generally includes both the portion of the cost paid by the employer and the portion of the cost paid by the employee with pre-tax salary reduction contributions. However, the qualified health plan expenses should not include amounts that the employee paid for with after-tax contributions.

An employer who sponsors a fully insured group health plan may use any reasonable method to determine and allocate the plan expenses, including:

1. the COBRA applicable premium for the employee typically available from the insurer,
2. one average premium rate for all employees, or
3. a substantially similar method that takes into account the average premium rate determined separately for employees with self-only and other than self-only coverage.

An employer who sponsors a self-insured group health plan may use any reasonable method to determine and allocate the plan expenses, including:

1. the COBRA applicable premium for the employee typically available from the administrator, or
2. any reasonable actuarial method to determine the estimated annual expenses of the plan.

Claiming Employment Tax Credits

To take immediate advantage of the employment tax credits, employers can retain and access funds that they would otherwise deposit with the IRS as employment taxes. The employment taxes that are available for retention include:

- federal income taxes
- employee’s share of Social Security and Medicare taxes
- employer’s share of Social Security and Medicare taxes

Employers will report their total qualified leave wages (and allocable qualified health plan expenses and the employer’s share of Medicare tax on the qualified leave wages) for each quarter on their federal employment tax return - *Form 941, Employer’s Quarterly Federal Tax Return*. The revised Form 941 will be available for the second quarter of 2020 for reporting data related to the three new refundable employment tax credits, amounts of employment taxes retained instead of deposited in consideration of these credits, and amounts of the employer portion of Social Security tax deferred to 2021 and 2022.

Claiming Employment Tax Credits (cont'd)

If an employer does not have enough federal employment taxes set aside for deposit to cover its obligation to provide qualified leave wages (and allocable qualified health plan expenses and the employer's share of Medicare tax on the qualified leave wages), the employer may request an advance of the credits by completing *Form 7200, Advance Payment of Employer Credits Due to COVID-19* and may fax the completed form to (855) 248-0552.

Coordination with the CARES Act

If an employer also meets the requirements for the employee retention credit, it may receive both credits, but not for the same wage payments. The CARES Act allows certain employers subject to a full or partial closure order due to COVID-19 or experiencing a significant decline in gross receipts a tax credit for retaining their employees. This employee retention credit is equal to 50% of qualified wages (including allocable qualified health plan expenses) paid to employees after March 12, 2020, and before January 1, 2021, up to \$10,000 in qualified wages for each employee for all calendar quarters. However, the qualified wages for the employee retention credit do not include the amount of qualified leave wages for which the employer received tax credits under the FFCRA.

In addition, if an employer receives employment tax credits for qualified leave wages, those wages are not eligible as "payroll costs" for purposes of receiving loan forgiveness under the Small Business Administration Paycheck Protection Program.

Lastly, the CARES Act provides that certain employers may defer the deposit and payment of the employer's portion of Social Security taxes. The deferral applies to deposits and payments of the employer's share of Social Security tax that would otherwise be required to be made during the period beginning on March 27, 2020 and ending December 31, 2020. Employers will not be required to make a special election to be able to defer deposits and payments of these employment taxes. The deferred deposits must be deposited by the following dates to be considered timely:

- On December 31, 2021, 50% of the deferred amount; and
- On December 31, 2022, the remaining amount.

Employers that received a Paycheck Protection Program loan may not defer the deposit and payment of the employer's share of Social Security tax that is otherwise due after the employer receives a decision from the lender that the loan was forgiven.

Documentation Requirements

Employers claiming the credits for qualified leave wages (plus allocable qualified health plan expenses and the employer's share of Medicare taxes) under FFCRA and qualified wages under the CARES Act, must retain records and documentation related to and supporting each employee's leave to substantiate the claim for the credits, as well as retaining the Forms 941, Forms 7200 and any other applicable filings made to the IRS requesting the credit.

These records should be maintained for at least four years after the date the tax becomes due or is paid, whichever comes later. Employer records should include the following information:

- Documentation to show how the employer figured the amount of qualified sick and family leave wages eligible for the credit.
- Documentation to show how the employer figured the amount of qualified health plan expenses that was allocated to wages.
- Documentation to show how the employer determined that the employees were qualified to receive sick and family leave wages.
- Documentation to show how the employer figured the amount of the employee retention credit.
- Documentation to show the employer eligibility for the employee retention credit based on suspension of operations or significant decline in gross receipts.

With regard to documentation determining that the employees were qualified to receive sick and family leave wages, the employer should receive a written request for such leave from the employee in which the employee provides:

1. The employee's name;
2. The date or dates 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, including by means of telework, for such reason.

In the case of a leave request based on a quarantine order or self-quarantine advice, the statement from the employee should include the name of the governmental entity ordering quarantine or the name of the health care professional advising self-quarantine, and, if the person subject to quarantine or advised to self-quarantine is not the employee, that person's name and relation to the employee.

In the case of a leave request based on a school closing or child care provider unavailability, the statement from the employee should include the name and age of the child (or children) to be cared for, the name of the school that has closed or place of care that is unavailable, and a representation that no other person will be providing care for the child during the period for which the employee is receiving family medical leave and, with respect to the employee's inability to work or telework because of a need to provide care for a child older than fourteen during daylight hours, a statement that special circumstances exist requiring the employee to provide care.

Documentation Requirements (cont'd)

With regard to documentation determining employer eligibility for the employee retention credit based on a significant decline in gross receipts, the employer should note the following:

- A significant decline in gross receipts begins on the first day of the first calendar quarter of 2020 for which an employer's gross receipts are less than 50% of its gross receipts for the same calendar quarter in 2019.
- The significant decline in gross receipts ends on the first day of the first calendar quarter following the calendar quarter in which gross receipts are more than 80% of its gross receipts for the same calendar quarter in 2019.

Fringe Benefits on Paid Leave

To the extent that an employee has a salary reduction agreement in place with the employer, the FFCRA does not include any provisions that explicitly prohibit taking salary reduction contributions for any plan from qualified sick leave wages or qualified family leave wages. Therefore, an employee can make salary reduction contributions from the amounts paid as qualified leave wages for their employer sponsored health plan, 401(k) or other retirement plan.

Qualified leave wages are wages subject to withholding of federal income tax and the employee's share of Social Security and Medicare taxes. Qualified leave wages are also considered wages for purposes of other benefits that the employer provides, such as contributions to 401(k) plans.

Summary

Please refer to our previous memorandums on FFCRA and the CARES Act in conjunction with the information outlined above. We anticipate continuing developments in regard to COVID-19 legislation and will keep you apprised of additional guidance as it becomes available. Please visit the U.S. Department of Labor Wage and Hour Division Families First Coronavirus Response Act: Questions and Answers website at <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions> for continually updated compliance assistance to employers and employees on their responsibilities and rights under the FFCRA.