



# Employment Law Note

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## Interested in a Possible FFCRA Tax Credit? Better Check Your Documentation



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The Families First Coronavirus Response Act (FFCRA) took effect on April 1, 2020.

As most employers are aware by now, the FFCRA creates an 80-hour bank of Emergency Paid Sick Leave that can be taken by employees affected by COVID-19 in certain situations. The FFCRA also extends FMLA protections by providing paid leave to employees who need to care for children affected by COVID-19 school and childcare disruptions.

Employers must fund these leaves out of their own pockets. However, in anticipation of the hardship this might cause, the FFCRA provides that employers can claim tax credits for some of these costs.

The IRS has now issued guidance about exactly what employers must do if they would like to claim these credits.

Unsurprisingly, **much** documentation will be required.

### Employees Must Request Leave in Writing

The IRS states in its guidance that employers will be required to retain records and documentation "related to and supporting each employee's leave to substantiate the claim for the credits."

The IRS clarifies that this means that employees must make "a written request" for FFCRA leave. No specific form or document is required. However, the employee's written request must contain at least the following information:

- The employee's name
- The date or dates for which leave is requested
- A statement of the COVID-19-related reason for which the employee is requesting leave and "written support for such reason"
- A statement that the employee is unable to work, including by means of telework, for such reason

Additional information will also be required, depending on the type of FFCRA leave being requested.

### FFCRA Leave Due to Quarantine or Isolation

If an employee requests FFCRA Emergency Paid Sick Leave because they (or someone for whom they care) are subject to a quarantine or isolation order, employers who desire a tax credit are required to collect from the employee—in addition to the information above—a written statement specifying "the name of the governmental entity ordering quarantine," or "the name of the health care professional advising self-quarantine," whichever is applicable.

If the person who is subject to the order or advice in question is not the employee himself or herself, the written request must also include the name of the person for whom the employee is caring and their "relation to the employee."

The IRS guidance does **not** state that employers must also collect a copy of the quarantine or isolation order itself, or documentation from the employee's health care provider, in order to substantiate eligibility for a potential FFCRA tax credit.

### FFCRA Leave for Child Care Obligations

If an employee requests FFCRA Emergency Paid Sick Leave or paid FMLA Public Health Emergency Leave because their child's school is closed or unavailable due to COVID-19, employers who desire to claim a FFCRA tax credit must collect a written statement from the employee specifying all of the following:

- the names and ages of all children to be cared for
- the name of the school that has closed (or place of care that is unavailable)
- a representation "that no other person will be providing care for the child" during the period that leave is being requested

In addition, if any of the employee's children to be cared for is older than 14, the employee's statement must also include an attestation that "special circumstances exist requiring the employee to provide care."

## Additional Documentation is Required

The employees' statements are not the only documents that the IRS is requiring to be maintained by employers who wish to claim a FFCRA tax credit. The IRS guidance describes four categories of documents that employers must create and maintain.

First, employers must prepare documentation showing how they calculated the amount of qualified wages for which they will be claiming a credit. This must include not only documentation of the exact days and hours of FFCRA leave taken, but also "records of work" showing how the employer calculated the employee's regular rate of pay (which must be the basis for the employee's FFCRA wages during leave). Note that these "records of work" must also be maintained pursuant to other laws, such as the federal Fair Labor Standards Act and the Washington State Minimum Wage Act, which generally require employers to preserve records of employees' hours worked and wages paid.

Second, employers who are interested in obtaining a tax credit for health plan expenses under the FFCRA must document how they calculated the amount of qualified health plan expenses that are allocable to the employee taking FFCRA leave and potentially eligible for the credit. Elsewhere in its guidance, the IRS notes that employers may use "any reasonable method" to allocate a group health insurance plan's expenses to the particular employee who is taking leave (and even gives some examples of methods that the IRS will consider reasonable) but the employer must document whatever method it uses.

Third, if the employer is seeking advance payment of anticipated FFCRA tax credits directly from the IRS (in lieu of simply retaining funds withheld for the payment of employment taxes for the quarter, which is also discussed in the IRS's guidance), the employer must preserve a copy of the form submitted to the IRS that was used to claim this advance payment: the newly-created Form 7200, "*Advance of Employer Credits Due To COVID-19*."

Lastly, the employer must retain copies of its completed Form 941 quarterly federal tax returns, which is where FFCRA tax credits will be reconciled and formally reported to the IRS.

## What to Do With These Documents

Apart from filing their ordinary quarterly tax returns (and their Form 7200, if the employer is seeking advance payment), employers are not being asked to send any of the above documentation directly to the IRS.

Rather, the IRS guidance states that employers must obtain the above records and preserve them for at least four years. If an employer's eligibility to claim the credits is challenged, the above documentation will prove useful in resolving questions about that eligibility.

## Other Issues Addressed in the IRS Guidance

The IRS guidance is not limited to answering questions about the documentation employers must collect and create in order to substantiate eligibility for FFCRA tax credits.

The guidance covers a host of other issues relating to the FFCRA tax credits—including:

- Reiteration of the Department of Labor's separate guidance about how to calculate an employee's "regular rate" for purposes of determining their wages while taking FFCRA leave
- Confirmation that employers can fund the payment of wages to employees taking FFCRA leave by drawing directly from funds previously withheld for the payment of that quarter's employment taxes
- Clarification that **both** the employer's portion of health insurance premiums, and the employee's "pre-tax" portion, are eligible for the FFCRA tax credit
- Confirmation that employers who are interested not only in FFCRA tax credits, but also the Paycheck Protection loans and employee retention tax credits offered pursuant to the new CARES Act, can take advantage of **all** of these programs simultaneously, subject to each program's own eligibility rules (although FFCRA wages will not count for purposes of those other programs)

If you have any questions about how to best position your employment operations in order to take full advantage of these programs, please let us know.

For more information about this month's Employment Law Note  
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