

Monthly Minute Memo: *Guidance on the Families First Coronavirus Response Act*

On the heels of the newly passed Families First Coronavirus Response Act (“the Act”), employers with under 500 employees, are faced with questions regarding how to fund the emergency paid sick days and pay required under the new FMLA leave provisions mandated under this Act. The Internal Revenue Service and Department of Labor recently issued guidance regarding the tax credits and its enforcement policy including providing specific examples as to the tax credit process.

I. The Department of Labor

In its latest press release, the Department of Labor (“DOL”) issued a temporary non-enforcement policy that will allow 30 days for employers to come into compliance with the Act. During this 30-day window, the DOL will not bring an enforcement action against an employer for violations under the act “so long as the employer has acted reasonably and in good faith to comply with the Act.” The DOL did not provide any further guidance on what it considers to be acting reasonably and in good faith. However, the DOL did state it will focus on compliance assistance during this 30-day period, thus, we anticipate additional guidance by the DOL regarding compliance questions.

Furthermore, the DOL will provide emergency guidance and rulemaking regarding the Small Business Exception under the Emergency Paid Sick Leave Act. Under this exemption, the DOL has the authority to issue regulations for “good cause” to address circumstances in which a small business with fewer than 50 employees may be exempt from the requirements under the Act, to the extent it would jeopardize the viability of the business. According to the DOL, this exemption will be available based on “simple and clear criteria.” No further details were provided in this press release, but when the DOL issues its emergency guidance and rulemaking in the upcoming weeks, it is expected to provide clarity on these criteria.

II. The Internal Revenue Service

In conjunction with the DOL’s press release, the Internal Revenue Service (“IRS”) issued initial guidelines regarding the tax credits provided to employers under the Act. While the official IRS guidance is expected to be released next week, the IRS stated eligible employers who pay qualifying sick or child care leave will be able to retain an amount of the payroll taxes equal to the amount of qualifying sick and child leave that the employer paid, rather than deposit the entire amount with the IRS. The payroll taxes that are available for retention include withheld federal income taxes and the employee’s share of Social Security and Medicare taxes. If there are

insufficient payroll taxes to cover the cost of qualified sick and childcare leave paid, employers will be able to file a request for an accelerated payment from the IRS. The IRS anticipates it will process accelerated payment requests in two weeks or less.

The IRS provided two examples regarding how tax credits will be issued to employers:

Example 1: An eligible employer paid \$5,000 in sick leave. It is required to deposit \$8,000 in payroll taxes (including taxes withheld from the employee). The employer could use up to \$5,000 of the \$8,000 it was going to deposit for making qualified leave payments. The employer would only be required to deposit the remaining \$3,000 on its next regular deposit date.

Example 2: An eligible employer paid \$10,000 in sick leave. It was required to deposit \$8,000 in payroll taxes (including taxes withheld from the employee). The employer could use the \$8,000 of taxes to make qualified leave payments and then file a request for an accelerated credit for the remaining \$2,000.

We will continue to notify our clients on any new guidance issued regarding the Families First Coronavirus Response Act.

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