

GBQ&A

CORONAVIRUS

WEBINAR FAQs

Families First Coronavirus Response Act

Q: Can you provide guidance on the 500 employee rule in the FFCRA? Is it per FEIN, or does it go through the common ownership and continuity of management rules?

Additional clarification is needed in this area. Two leave requirements arise in different portions of the Act. Neither leave requirement provides specific direction on how the less than 500 employee threshold across related entities is determined. Many believe the threshold will be consistent on how it is viewed for FMLA purposes.

Under the FMLA, the general rule is that the legal entity, which employs the employee, is the “employer.” For example, a corporation is a single employer rather than its separate establishments or divisions. Where one corporation has an ownership interest in another corporation, it is a separate employer unless it is an “Integrated Employer” or a “Joint Employer.”

To determine whether separate entities are considered an “Integrated Employer” for purposes of the FMLA, the Department of Labor considers “the entire relationship” between the parties “reviewed in its totality” based on the following four factors:

- (i) Whether there is common management;
- (ii) Whether the entities’ operations are interrelated;
- (iii) Whether there is centralized control of labor relations; and
- (iv) The degree of common ownership/financial control of the entities.

If the factors indicate the entities are an Integrated Employer, the employees of all entities making up the Integrated Employer are counted to determine employer coverage and eligibility under the FMLA.

Even if separate entities are not considered an Integrated Employer, the Department of Labor may consider separate entities a “Joint Employer”, if the entities (each or all) exercise some control over the work or working conditions of an employee. Notably, the joint employer test does not require common ownership. Joint employers may be separate and distinct entities with separate owners, managers, and facilities. Nevertheless, if an employee performs work that simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, the separate entities will generally be considered a Joint Employer. Examples of Joint Employment relationships include situations where:

- (i) There is an arrangement between employers to share an employee’s services or to interchange employees;
- (ii) One employer acts directly or indirectly in the interest of the other employer in relation to the employee; or
- (iii) The employers are not completely disassociated with respect to the employee’s employment and may be deemed to share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with, the other employer.

Families First Coronavirus Response Act (continued)

Employers should exercise caution in oversimplifying the Integrated Employer and Joint Employer analyses to avoid coverage under the Act and consult your legal counsel. An employer who takes the position that they are an Integrated Employer or Joint Employer for purposes of avoiding coverage under the Act may later find they waived their ability to assert that they are separate entities in litigation or other disputes. We recommend consulting with your legal counsel to determine coverage under the Act.

Q: Can you help me understand what the mechanism is for actually benefiting from the FCCRA Tax Credit. How do you actually collect?

Specific to the FFCRA payroll tax credit and Coronavirus Emergency Leave and Emergency Sick Leave small and midsize employers can begin taking advantage of two new refundable payroll tax credits under this program, designed to immediately and fully reimburse them, dollar-for-dollar, for the cost of providing Coronavirus-related leave to their employees. Below is a summary from Information Release 2020-57 issued March 20, 2020 that explains how this reimbursement works.

Prompt Payment for the Cost of Providing Leave

When employers pay their employees, they are required to withhold from their employees' paychecks federal income taxes and the employees' share of Social Security and Medicare taxes. The employers then are required to deposit these federal taxes, along with their share of Social Security and Medicare taxes, with the IRS and file quarterly payroll tax returns (Form 941 series) with the IRS.

Under guidance that will be released next week, 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 care leave that they paid, rather than deposit them with the IRS.

The payroll taxes that are available for retention include withheld federal income taxes, the employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes with respect to all employees.

If there are not sufficient payroll taxes to cover the cost of qualified sick and child care leave paid, employers will be able to file a request for an accelerated payment from the IRS. The IRS expects to process these requests in two weeks or less. The details of this new, expedited procedure will be announced next week.

As of March 25, 2020 further details of this process have not been released.

Q: Are the "less than 50 employees" exemption definite or do companies have to apply for an exception (related to FFCRA)?

Per IRS News Release 2020-57 Small businesses with fewer than 50 employees will be eligible for an exemption from the leave requirements relating to school closings or child care unavailability where the requirements would jeopardize the ability of the business to continue. The exemption will be available on the basis of simple and clear criteria that make it available in the circumstances involving jeopardy to the viability of an employer's business as a going concern. The Department of Labor will provide emergency guidance and rulemaking to clearly articulate this standard.

Q: Does the Emergency Sick Leave apply to businesses under 50 employees?

The Emergency Sick Leave applies to businesses under 50 employees unless they are eligible for an exclusion. Per IRS News Release 2020-57 Small businesses with fewer than 50 employees will be eligible for an exemption from the leave requirements relating to school closings or child care unavailability where the requirements would jeopardize the ability of the business to continue. The exemption will be available on the basis of simple and clear criteria that make it available in the circumstances involving jeopardy to the viability of an employer's business as a going concern. The Department of Labor will provide emergency guidance and rulemaking to clearly articulate this standard.

Families First Coronavirus Response Act (continued)

Q: What direction can you provide around labor rules for “contract employees” (1099 Non-employee Compensation)? Unemployment?

The FFCRA provides a similar refundable credit against self-employment tax. It covers 100% of self-employed individuals’ sick-leave equivalent or 67% if he/she is taking care of a sick family member or child if school is closed. The sick-leave equivalent amount will be capped at \$511 per day if caring for themselves or \$200 if caring for a family member. It would be available for 10 days. Self-employed individuals could receive a family leave credit for as many as 50 days for the lesser of \$200 or their average daily self-employment income. Self-employed individuals will have to submit documentation, as required by The Department of the Treasury. The measure will establish alternate requirements for self-employed individuals who also receive sick-leave pay from an employer.

Unemployment insurance provisions now include an additional \$600 per week payment to each recipient for up to four months, and extend UI benefits to self-employed workers, independent contractors, and those with limited work history. The federal government will provide temporary full funding of the first week of regular unemployment for states with no waiting period and extend UI benefits for an additional 13 weeks through December 31, 2020 after state UI benefits end.

All states had to opt-in to the unemployment-related provisions of the CARES Act. Governor DeWine signed Ohio’s opt-in on Saturday, March 28, 2020. Expanded eligibility begins Sunday, March 29, 2020, however, Ohio’s system is not ready yet. Ohio is working on creating the systems to implement these new provisions. The state has expanded the number of call center workers and hours, and has enhanced the capacity of the website by 20x to assist with unemployment claims.

Q: We have less than 50 employees. Are we required to provide expanded FMLA if we don’t offer FMLA now?

Per the IRS News Release 2020-57 small businesses with fewer than 50 employees will be eligible for an exemption from the leave requirements relating to school closings or child care unavailability where the requirements would jeopardize the ability of the business to continue. The exemption will be available on the basis of simple and clear criteria that make it available in circumstances involving jeopardy to the viability of an employer’s business as a going concern. Labor will provide emergency guidance and rulemaking to clearly articulate this standard.

Q: The Secretary of Labor announced today that the FFCRA is effective on 4/1. Is that correct?

Yes, this is accurate. Additional information about the effective date: The FFCRA’s paid leave provisions are effective on April 1, 2020, and apply to leave taken between April 1, 2020 and December 31, 2020. The Department of Labor (DOL) issued a Q&A related to the leave provisions required by the FFCRA on March 24. We expect the DOL will update this Q&A and provide further guidance as the week progresses. One of the most notable statements in the Q&A is that the leaves must be provided starting on April 1, not April 2, 2020, as previously thought. In addition, the Q&A clearly states that the leave requirements are not retroactive. An employer cannot deny an employee the paid leave required as of April 1 because the employer paid leave before April 1 for one of the covered reasons. In other words, if you are providing paid leave now, you will be required to provide additional paid leave as of April 1 (if you are a covered employer).

Q: If you apply for a disaster loan, will you be able to apply for the loans under the CARES Act also?

Though we are awaiting clarification, it would appear that these loans are under different provisions of the SBA and that a business may apply for both. We will update this answer when we receive further clarification.

Families First Coronavirus Response Act (continued)

Q: Any opinion on whether Ohio's shelter-in-place order meets the definition of "state quarantine or isolation order" under the emergency leave/sick leave provision in FFCRA?

Here is what the FFCRA says: "Employees qualify for emergency paid sick leave if they are unable to work or telework because: the employee is in self-isolation due to a federal, state, or local quarantine or isolation order related to COVID-19 (which presumably will include shelter-in-place orders issued by federal, state or local government." Ohio has called its order "stay at home", as opposed to "shelter in place", but Governor DeWine has repeatedly said that these phrases "mean the same thing." We believe that Ohio's order qualifies, however hope for further guidance on this point.

Q: What is the tax filing cut-off for stimulus checks to be based on 2019 returns, as opposed to 2018 returns?

According to the new law, the IRS is going to look first to your 2019 tax return to compute the payment. If no 2019 return had been filed, however, the IRS will grab your 2018 return instead. (If you receive Social Security and do not need to file a return, the IRS will send you a payment based on your Form 1099-SSA). This process presents an opportunity. An individual who has not yet prepared his or her 2019 return should take into account the relevant variables — adjusted gross income, marital status, number of children — and determine which year would yield the bigger payment. If it's 2019, then you'd better hurry up and file; if it's 2018, then hold that 2019 return back until you receive your payment.

The amount that you will receive depends on your filing status: if you are single, the payment is \$1,200, but it doubles for a married couple filing jointly to \$2,400. It also depends on your family size; you will get an additional \$500 for every child under the age of 17. In addition, if you are claimed as a dependent on someone else's tax return, you are not entitled to any payment at all. For high-income taxpayers, it depends on just how high your income goes. A married couple will start to lose the payment once adjusted gross income (AGI) exceeds \$150,000, and the same will occur for a single taxpayer once AGI exceeds \$75,000.

You should also take into consideration any refund you would be due on your 2019 return. If you are going to receive a substantial refund, you likely do not want to wait. The tradeoff is a large refund now and potentially a smaller stimulus payment, or a larger stimulus payment now and the same refund in a few months.

The stimulus payment is intended to be an advance payment against an actual credit you will compute on your 2020 tax return. This is favorably one-directional: if your advance payment is LESS than what you're owed when you compute your 2020 return, you'll get the excess as a credit on that return. However, if your advance credit is GREATER than what you are actually owed come the filing of your 2020 return, there appears to be no mechanism at this time to either 1) repay the excess payment, or 2) recognize the excess amount as income.

As a result, every taxpayer who has not yet filed his or her 2019 return must consider whether doing so will increase or decrease their stimulus payment and react accordingly.

Q: Are wages paid through the Families First Coronavirus Response Act (FFCRA) exempt from the employer's FICA-Social Security, Employer's FICA-Medicare, Federal Unemployment and State of Ohio Unemployment taxes? Also, from an employee's perspective, should all payroll taxes (Federal W/H, FICA-SS, FICA-Medicare, State W/H, Local W/H) be deducted from these wages as it is for all other wages?

All wages paid through the FFCRA should be properly withheld and remitted from a payroll and withholding tax standpoint, unless otherwise modified. The mechanism for employers to be repaid for the wages related to the leave is through payroll taxes. That concept was discussed in IRS Information Release 2020-57. See next page for details..

Families First Coronavirus Response Act (continued)

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No further guidance has been released at this time.

Q. During the webinar it was mentioned there wasn't a clear answer regarding intermittent emergency time off.

The U.S. Department of Labor added some additional questions and answers to its COVID-19 and the America Workplace Questions and Answers section on March 26, 2020. The Questions and Answers are not law but provides clarification and guidance on practical matters related to the Families First Coronavirus Response Act. The following link discusses intermittent employment and other issues.

<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

Q. Do you have any idea what the temporary waiver of 20-day rule for municipal payroll tax withholding is going to look like? We are a construction contractor with employees working in MANY different muni localities and we process payroll weekly. Or do you anticipate additional guidance soon?

The bill specifies that, for municipal income tax purposes, employees who must report to a temporary worksite (including their homes) **during the emergency period and for 30 days thereafter**, are considered to be working at their principal places of work (which, by law, is where the employee reports for work on "a regular and ordinary basis"). The emergency period has yet to be defined.

For contractor employees in the field, existing rules would apply. For office workers, for example, reporting to a temporary worksite (in most cases, their homes) then the waiver rule would apply during the emergency period and 30 days after the emergency period ends. The waiver essentially allows employers to maintain their current municipal income tax withholding practices.

SBA Loans

Q: When can applicants expect to start receiving responses on SBA applications?

The SBA has never seen volume like this on their site. The turnaround time is unknown at this time; historically, the SBA has been able to address applications in a week's time.

For the proposed Paycheck Protection Loans, first, the bill will have to become legislation. Then according to the current version of the bill, the SBA has up to 15 days to write the rules and procedures for the SBA lenders to originate the loans. It is our understanding that the lenders will not originate loans until those rules are in place. The speed at which the money becomes available is dependent on how quickly this process moves.

Q: What are the criteria for a small business? Number of employees? Sales?

For the Economic Injury Disaster Loan, the criteria will be based on the number of employees or revenue per industry NAICS. You can use this link to determine the requirements for your industry. [SBA size standard](#)

For the Paycheck Protection Loans, as described in the pending CARES Act, the revenue qualification has been waived and the business must have less than the greater of 500 employees or the SBA size standard if that is greater than 500. For those industries with an NAICS code starting with 72, the 500 employee test is per location.

Q: I've heard that the SBA Disaster Loan program doesn't apply to companies that already have "access to capital". What does that mean? If we have a line of credit that isn't maxed out, are we disqualified?

It is our understanding that the access to capital could still be a consideration under the Economic Injury Disaster Loans but that it is not an issue under the proposed Paycheck Protection Loans.

Q: Are these SBA loan application processes the same for the not-for-profit programs (i.e. churches and synagogues)?

Yes, it is the same SBA loan process for nonprofits under the pending legislation.

Q: Is there any time window for applying for the SBA loans? Or is it simply until the money runs out?

The way we understand it is that it is first-come, first-serve until the money is gone. We have a bias for action, and sooner is better than later. It's only a matter of time until we are all impacted directly or indirectly. There is a possibility that it may be funded more, but we can't count on that.

Q. Are self-rent payments included?

The bill does not differentiate between rents paid to a related party or a third-party. The bill does state that it should be only for rents paid on buildings where there was a lease in place prior to February 15, 2020. We will look to the SBA to release additional guidance.

Q. Are principal payments eligible under the pending PPL loan program or is it restricted to interest expense?

No. The bill is explicit that it is interest only on mortgages, and interest only on debt service incurred prior to February 15, 2020.

Q. Under CARES, do you think that S Corp Owner wages will be excluded from Qualified Wages? What about paying spouses wages (e.g. hiring them on effective April 1)? My sense is that unless this is specifically defined / excluded from the legislation, these wages would fall under qualified wages.

The Payroll Protection Program loans do not exclude owners, but do provide for a cap on wages of \$100,000 per employee. We are awaiting further guidance for a better understanding of how this cap will be applied.

SBA Loans (continued)

Q. Are ESOPs excluded from the Payroll loan program?

No. ESOP companies are excluded from Paycheck Protection Program, however ESOPs are eligible for Emergency Injury Disaster Loans (EIDL).

Q. Most of the information you have provided are for companies with less than 500 employees. What is available for companies over 500 employees? Can you provide information?

The current legislative actions are focused primarily on businesses with few than 500 employees. The SBA Payroll Protection Program has an exception for applicants in industries with an NAICS code beginning with 72 (hospitality/restaurant industries). Such applicants may apply as long as they have less than 500 employees **per location**. The Emergency Relief and Taxpayer Protections program is available to large employers meeting the specified criteria, although no forgiveness is provided.

Q. My son and I are self-employed commissioned sales representatives in the giftware industry. We are all but shut down. All of my customers have been ordered closed. Many orders have been canceled, some orders have been put on hold and are not shipping out, no commissions are being paid. Is there any help that the CARES ACT Bill will assist self-employed commissioned sales representative to survive?

Eligibility for both the SBA Emergency Injury Disaster Loans (EIDL) and Paycheck Protection program loans has been extended to include sole proprietors, independent contractors and self-employed individuals.

HR Related

Q: Can you please provide an example of accommodations that may conflict with ADA or FMLA rules?

Under the ADA, providing certain accommodations to some workers, but not to all who are similarly situated, could create a liability for the employer. When moving to a remote working environment, or requiring shift work or other changes to a worker's physical situation, these accommodations must be considered similarly across the impacted population. The ADA definition of reasonable accommodation is here:

A reasonable accommodation is any change or adjustment to a job or work environment that permits a qualified applicant or employee with a disability to participate in the job application process, to perform the essential functions of a job, or to enjoy benefits and privileges of employment equal to those enjoyed by employees without disabilities. For example, reasonable accommodation may include:

- providing or modifying equipment or devices,
- job restructuring,
- part-time or modified work schedules,
- reassignment to a vacant position,
- adjusting or modifying examinations, training materials, or policies,
- providing readers and interpreters, and
- making the workplace readily accessible to, and usable by, people with disabilities.

An employer is required to provide a reasonable accommodation to a qualified applicant or employee with a disability unless the employer can show that the accommodation would be an undue hardship. That is, it would require significant difficulty or expense on behalf of the employer.

HR Related (continued)

In stressful and difficult situations, mistakes are more likely to happen in conversations with employees who are requesting leave. For businesses that are fighting to survive and need certain employees to make that happen, discouraging or suggesting that an employee reconsider FMLA leave could prove to be problematic, especially, if it is granted to others.

- Examples of prohibited conduct under FMLA include: Refusing to authorize FMLA leave for an eligible employee,
- Discouraging an employee from using FMLA leave,
- Manipulating an employee's work hours to avoid responsibilities under the FMLA,
- Using an employee's request for, or use of, FMLA leave as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions, or
- Counting FMLA leave under "no fault" attendance policies.

Q. If I significantly reduce the hours of my hourly employees, would they then be eligible for unemployment? What's that threshold?

Reducing your hourly employees to less than a full-time work week and they earn less than the unemployment weekly benefit amount they may be deemed "partially unemployed" and eligible for benefits. In 2020 the average weekly wage is \$269. We recommend consulting your employment law advisors for further clarification.

Q. CARES Act - the fed expanded dollar amount and time of \$600 - how can small biz owners protect themselves against workers who attempt to "game" the system? In other words, at face value, some workers could potentially make more by not working, even though the employer is an essential employer.

The CARES Act provides additional funding to all states to increase unemployment benefits by \$600/recipient for four months. Employees will still have to demonstrate that they qualify for unemployment due to the loss of their jobs, not due to quitting. As of right now, we do not have any advice for employers to prevent dishonesty.

CARES – Tax Provisions

Q: Is the Employee Retention Credit \$10,000 per employee, per quarter or annual basis?

The employee retention credit is equal to 50% of qualified wages paid by eligible employers to each employee for the quarter. However, the amount of qualified wages for each employee for ALL quarters cannot exceed \$10,000.

Q: Do we know the filing deadline date for when 2019 tax return data will be used vs. 2018 tax return data for individual stimulus payments?

The IRS hasn't indicated at what point they are going to look at 2019 vs. 2018. They did say that the checks will be in the mail within three weeks. We do know that when they start cutting checks if you have not filed 2019, they will pull your 2018 return. To the extent you think 2019 income is higher than 2018, hold off on filing until you get that check in the mail.

Q. 15-year depreciation for tenant improvements, are those for improvements beginning as of a certain date? Or simply any such payments after a given date?

It includes qualified improvements placed in service after 12/31/17, therefore taxpayers should be able to amend already filed tax returns for 2018 and 2019 to change to 15 years and take bonus depreciation.