

Treadwell, Tamplin & Co.

Certified Public Accountants
A Limited Liability Partnership

157 West Jefferson Street
Madison, Georgia 30650

Ph: 706-342-1040
Fax: 706-342-1041

March 21, 2020

Dear clients and friends:

On March 18, 2020, President Trump signed the Emergency Family and Medical Leave Expansion Act and the Emergency Paid Sick Leave Act (the Acts). We have summarized the key components of each law in this letter. The laws are supposed to take effect “not later than 15 days after the enactment” of the Acts and sunset on December 31, 2020.

Emergency Family and Medical Leave Expansion Act

The Act mandates all employers with fewer than 500 employees to provide paid sick and family leave under certain circumstances. The Act is effective through December 31, 2020.

In order to qualify for protections under the Act, an employee must meet the following qualifications:

1. Have been employed for at least 30 calendar days by the employer,
2. Employee must provide notice to the employer of the need for the leave, and the employee’s minor child’s school or day care is closed as a result of COVID-19 preventing the employee from working (or teleworking).

Calculation of Medical and Family Leave Pay

The first 10 days of leave under the Act are unpaid, but the employee may elect to use any accrued paid leave available to the employee. After the initial 10 day period, pay is based on an amount not less than two-thirds of an employee’s regular rate of pay and the number of hours that the employee would normally be scheduled to work. In the event that the employee’s hours vary from week to week, the statute requires that the hours to calculate paid leave on be the “average number of hours the employee was scheduled per day over the 6-month period ending on the date on which the employee takes such leave”. There is a statutory cap of \$200/day with a \$10,000 aggregate cap on all statutorily required paid leave

Restoration to Position

Employers with greater than 25 employees must generally restore the employee from leave to his or her former position, or an equivalent position, following the leave. Employers with fewer than 25 employees are not required to restore the employee provided that:

1. the position held by the employee no longer exists as a result of changes to the employer's business caused by COVID-19
2. the employer makes reasonable efforts to restore the employee to a comparable position, and
3. the employer makes reasonable efforts to notify the employee of a comparable position coming open within one year

Emergency Paid Sick Leave Act

The president also signed the Emergency Paid Sick Leave Act. This Act requires the employer to provide paid sick leave to an employee under the following circumstances:

1. The employee is subject to a Federal, State, or local quarantine or isolation order
2. The employee has been advised by a health care provider to self-quarantine
3. The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis
4. The employee is caring for an individual described in item 1 or 2 above
5. The employee is caring for a son or daughter if the child's school or place of care has been closed or the childcare provider is unavailable due to COVID-19 precautions, *or*
6. The employee is experiencing any other substantially similar condition specified in forthcoming regulations

For full-time employees, the employee will be entitled to 80 hours of such leave. Part-time employees are entitled to leave equal to the average number of hours that they work over a 2-week period.

Calculation and limitations on sick pay

Sick pay is calculated at the employee's regular rate of pay and is limited to \$511 per day and \$5,110 in the aggregate for leave related to items 1-3 above and is limited to \$200 per day and \$2,000 in the aggregate for items 4-6 above.

Additional requirements for employers

1. Employers may not require that the employee assist in a search for a replacement employee to cover the hours that the employee is using paid sick time.
2. Paid sick time is available for immediate use irrespective of how long the employee has worked for the employer
3. Employer may not require that the employee use other paid leave provided by the employer before using this emergency paid sick leave.
4. Employers must post a notice along with where employer customarily posts employee notices about this leave and the Secretary of Labor will provide a model notice.
5. Employer may not discipline or discriminate against any employee who takes leave under the Act or files a complaint (or testifies or is preparing to testify) seeking enforcement of the Act

Tax Credits Related to Paid Leave Under Either Act

Employers providing paid leave under either Act are entitled to a credit against their Social Security and Medicare tax equal to 100% of the qualified sick leave wages paid by the employer. The credit is also increased by the properly allocable expense incurred to provide a qualified health plan (an ACA compliant plan). For example, if the employee uses 80 hours of emergency sick leave and the total work hours for that month are 160, then one-half of the employer's contribution to the cost of health insurance would be added to the wages to calculate the credit amount. There will be more regulations about how to allocate the cost, but this method seems to meet the requirements of the statute.

The credit for sick leave payments is limited to the total amount of Social Security and Medicare taxes paid by the employer. It appears that the limitation is the employer's share of the total Social Security and Medicare tax remitted, but we will monitor developments to see if this is what emerges in practice. Amounts in excess of this limit will be refunded to the employer subject to the normal rules for refunds (i.e. the IRS can use them to offset other amounts owed by the employer).

Recognition of Income For Any Employer Credits Received

The employer is required to recognize taxable income for the value of any credits received under the Acts.

FICA Taxes on Any Amounts Paid Under Either Act

Any wages or compensation required to be paid under either Act are not considered to be wages for purposes of FICA tax, so the employer need not withhold any FICA tax from the employee on any such sick or medical leave wages and the employer would not pay FICA tax on any such wages.

The law calls for the Secretary of Health and Human Services, Secretary of Labor and Secretary of Labor to provide certain regulations that will provide more detailed rules to allow employers to implement the requirements of both Acts. This is an early analysis and we believe it correctly summarizes the key points of the Acts.

IRS indicates in Information Release IR-2020-57 that the reimbursement to employers will be an “immediate dollar-for-dollar tax offset”. This seems to indicate that employers would reduce the amount of their payroll tax deposit by the eligible amount of their credit for that pay period. This is an excellent result for employers as it minimizes the amount of paid leave that employers will have to front.

We will continue to follow the development of the regulations to implement the laws and will provide further guidance to you as that guidance is issued by the federal government. If you have employees that qualify for either of these types of leave, please contact us for guidance to help you ensure that you are capturing the correct information to ensure that you get the maximum credit and that you avoid withholding and paying unnecessary FICA taxes.

Very truly yours,

Treadwell Tamplin & Co.