

Paid Leave & Corresponding Employer Tax Credits in COVID-19 Federal Legislation

(as of April 6, 2020)

In response to the 2020 COVID-19 pandemic, Congress passed and President Trump signed into law a series of emergency response packages.

The second package (H.R. 6201) contains paid sick and emergency family leave requirements specific to the COVID-19 response as well as tax credits employers can claim based on the COVID-19 paid leave they provide to their employees. The third relief package (H.R. 748) made further changes to the paid leave requirements and refined the tax credits to employers. Department of Labor and Department of the Treasury have issued guidance and released rules further addressing both leave programs and their corresponding tax credits. Below is an overview of the leave programs, small business exemption, recordkeeping requirements, and tax credits, as of April 6, 2020.

Paid Leave Requirements Summary

- The COVID-19 paid sick leave and paid emergency family leave requirements are designed and implemented to ensure employees have a consistent source of income if they cannot work or telework due to COVID-19 responses.
- COVID-19 paid sick leave and paid emergency family leave cannot be applied to the same day of leave.
- Requirements for both types of leave apply to employers with fewer than 500 employees, but the Secretary of Labor has issued guidance regarding an exemption for businesses with fewer than 50 employees (below).
- Requirements for both types of leave take effect April 1, 2020 and sunset on December 31, 2020.

Sick Leave

Employees are granted paid sick leave if they are unable to work or telework because they themselves are ill or subject to a government-ordered quarantine or isolation *or* if they are caring for an individual or child affected by COVID-19 precautions. There is no minimum amount of a time an employee must have worked to qualify.

Employees are entitled to approximately two weeks of paid sick leave (80 hours for full time employees; average number of hours worked over two weeks for part time employees). If the employee is taking leave due to personal illness or ordered precautions, the employee must be paid the higher of his/her regular pay, federal minimum wage, or state/local minimum wage, with paid leave not exceeding \$511/day or \$5,110 total. If the employee is taking leave due to caretaking responsibilities, the employee must be paid at least 2/3rd of the higher of his/her regular pay, federal minimum wage, or state/local minimum wage, with paid leave not exceeding \$200/day or \$2,000 total.

An employee may choose to use paid sick leave prior to using any other type of paid leave they have accrued or to which they are entitled. No employer shall require, coerce, or unduly influence an employee to use another source of paid leave or unpaid leave before taking paid sick leave.

Emergency Family Leave

Employees are granted emergency family leave if they have been employed for at least 30 calendar days *and* they cannot work or telework because they must care for their child whose school has been closed or for whom childcare is unavailable due to COVID-19. Employees laid off or otherwise terminated after February 29, 2020 but then rehired or otherwise reemployed before January 1, 2021 are eligible for paid emergency family leave *if* the employee had been employed for at least 30 of the last 60 calendar days prior to the layoff.

Employees are entitled up to 12 weeks of paid family leave per year. If an employee had taken paid family leave under the Family and Medical Leave Act in the 12 months prior to COVID-19, the employee's 12 weeks of paid emergency family leave resulting from COVID-19 are reduced by the amount of paid family leave already taken (before COVID-19).

The first two weeks of emergency family leave may be unpaid, but an employee may choose to apply any accrued vacation, personal, medical, or sick leave or COVID-19 paid sick leave to these unpaid days, but not both accrued paid days and COVID-19 paid sick leave for the same days.

After two weeks, the employer must pay the employee no less than 2/3rd of the employee's regular pay for the number of hours the employee would normally work, with paid leave not exceeding \$200/day or \$10,000 total.

No employer shall require, coerce, or unduly influence an employee to use another source of paid leave before taking emergency family leave. However, an employee may choose, or an employer may require, that an employee use paid leave available under the employer's preexisting policies to care for a child (such as vacation, personal leave, or paid time off) at the same time as COVID-19 emergency family leave. If used at the same time, the total weeks of paid family leave to which the employee is entitled remains 12 weeks. If used at the same time, the employer must pay the employee the full amount due under the employer's preexisting paid leave policy, even if that amount is greater than \$200 per day or \$10,000 in the aggregate. However, the employer's eligibility for the tax credit is still limited to the wage cap of \$200 per day or \$10,000 in the aggregate.

Exemption for Businesses with Fewer than 50 employees

As of April 6, 2020, Department of Labor has issued guidance that a small business is exempt from the paid sick and emergency family leave requirements only if the:

- employer employs fewer than 50 employees;
- leave is requested because the child's school/place of care is closed or childcare provider is unavailable due to COVID-19 related reasons; and
- an authorized officer of the business has determined that at least one of the three following conditions is satisfied:
 - 1) The paid leave would cause the small business's expenses and financial obligations to exceed available business revenues and cause the small business to cease operating at a minimal capacity;
 - 2) The absence of the employee(s) requesting the paid leave would pose a substantial risk to the financial health or operational capacity of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
 - 3) There are not enough other workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee(s) requesting paid leave, and these labor or services are needed for the small business to operate at a minimal capacity.

The employer may only deny paid leave to those employees whose absence satisfies at least one of these three conditions.

To use the exemption, a certified officer of the business must document their determination that paid leave must be denied because the specific employee's paid leave would result in at least one of these conditions. According to Department of Labor, business owners should not send any materials related to the exemption to the Department, but should rather retain their documentation for their records.

Documentation and Recordkeeping

Regardless of whether leave is granted or denied, the employer must retain documentation for at least four years for both of the following situations:

- An employee must provide their employer with documentation containing specific information when requesting leave
- An employer must document why leave is denied if the employer is claiming the small business exemption

Additionally, if the employer wants to receive the tax credits associated with COVID-19 paid leave (see below), the employer is advised to maintain the following records for four years:

- 1) Documentation showing how the employer determined the amount of paid leave they paid to employees, including records of work, telework, and paid leave
- 2) Documentation showing how the employer determined the amount of qualified health plan expenses the employer paid
- 3) Copies of any completed IRS Forms 7200 that the employer submitted to the IRS, which is the form used to request an advance payment of employer credits due to COVID-19
- 4) Copies of the completed IRS Forms 941 that the employer submitted to the IRS, which is the employer's quarterly federal tax return; For employers that use third-party payers to meet their employment tax obligations, records of information provided to the third-party payer regarding the employer's entitlement to the credit claimed on IRS Form 941
- 5) Other documents needed to support the request for tax credits pursuant to IRS applicable forms, instructions, and information for the procedures that must be followed to claim the tax credits

Employer Payroll Tax Credit for Paid Leave

Each quarter, employers are entitled to a tax credit related to COVID-19 paid emergency family leave and paid sick leave. Each tax credit will be applied first to the employer's Social Security payroll tax for the quarter, with any remaining amount being refunded to the employer.

The tax credits will be the summation of three amounts:

- the qualified paid leave wages paid due to COVID-19 paid leave requirements, with a cap on wages credited matching the cap on wages paid
- the amount the employer paid to provide and maintain the employee's group health plan coverage (certain limitations apply) during the period of leave
- the amount of Hospital Insurance Tax the employer paid on qualified leave wages (certain limitations apply)

In anticipation of tax credits for paid leave, employers may request an advance payment of employer credits due to COVID-19 by submitting Form 7200 to the IRS (form located here: <https://www.irs.gov/forms-pubs/about-form-7200>).

Here is more information from the IRS on what employers must do to claim tax credits related to COVID-19 paid leave: <https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs>