



April 6, 2020
Paul C. Sweeney, Emmanuel
V.R. Boulukos, Tami A. Earnhart

Professionals

- Emmanuel Boulukos
- Tami Earnhart
- Paul Sweeney

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FFCRA Documentation and Record Keeping: What Employers Need to Know

The close of March and open of April 2020 brought in both Q2 of 2020 and some updated guidance from the U.S. Department of Labor (DOL) and the U.S. Internal Revenue Service (IRS) on the documentation needed for leaves under the Families First Coronavirus Response Act (FFCRA). As noted in our prior article, the DOL's Regulations, called a temporary rule, include substantial guidance related to the information an employer should (and in some cases must) obtain from an employee requesting leave. The DOL updated its FFCRA Questions and Answers (DOL Q&As) as well in conjunction with its Regulations.

When read in conjunction with the FAQs published by the IRS on March 31, 2020 ("IRS FAQs") regarding the employer tax credits associated with paid FFCRA leave, the DOL's Regulations answer some questions, but leave others unanswered. Somewhat surprisingly, the Regulations do not mention specific documentation for certain types of leave available under FFCRA, such as a copy of the doctor's order or advice to quarantine or isolate. Any records that **are** required must be retained by the employer for a period of four years.

Records Related to Small Employer Exemption

If a small employer decides to deny emergency paid sick leave or expanded family and medical leave to an employee whose child's school or place of care is closed, or whose childcare provider is unavailable (which is the only type of leave a small employer can deny), the employer must document the basis for the exception. Please refer to our article outlining the small business exception in more detail.

Although the employer should not send this documentation to the DOL, it should retain such records for its own files.

Information Supporting Reasons for Leave

The Regulations require that employees requesting leave provide their employers a "signed statement," in addition to the documentation (and information) noted below, which must contain the following: (1) the employee's name; (2) the date(s) for which leave is requested; (3) the COVID-19 qualifying reason for leave; and (4) a statement representing that the employee is unable to work or telework because of the COVID-19 qualifying reason. The Regulations also outline what an employee

must provide his or her employer for each qualifying reason for leave. The information required for each qualifying reason is summarized below.

- ***Leave because of a federal, state, or local quarantine or isolation order related to COVID-19.*** The employee must supply the employer with the name of the government entity that issued the order.
- ***Leave because a health care provider advised the employee to quarantine or self-isolate due to concerns related to COVID-19.*** The employee must supply the employer with the “name of the health care provider who advised” the employee to quarantine or self-isolate due to concerns related to COVID-19. Note that these “concerns” are limited to three COVID-19-related situations: (1) the employee has COVID-19; (2) the employee may have COVID-19; or (3) the employee is particularly vulnerable to COVID-19. Although the Regulations do not state it is required, employers may want to at least include these situations on their request forms to show that the leave is being requested – and provided – for a covered reason.
- ***Leave because the employee is caring for an individual who is subject to an order by a federal, state, or local official to quarantine or self-isolate or who has been advised by a health care provider to quarantine or self-isolate due to concerns related to COVID-19.*** The “individual” to whom the employee is providing care must be an employee’s immediate family member, a person who regularly resides in the employee’s home, or a similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person if he or she were quarantined or self-isolated. For this type of leave, “individual” does not include persons with whom the employee has no personal relationship. Although not specifically required by the Regulations, this detailed definition implies the need to request information regarding the relationship, and the collection of such information is supported by the IRS FAQs. As with similar leaves for the employee’s own circumstances, the employee must supply the employer with the name of the governmental official or entity that issued the quarantine or isolation order or the name of the health care provider who advised the individual for whom the employee is caring to self-quarantine due to concerns related to COVID-19. If the leave relates to advice from a health care provider, the same limited “concerns” noted above also apply to this form of leave, and employers may want – at a minimum – to include that list on their request forms to show that the leave is being requested for a covered reason.
- ***Leave because the employee is caring for his/her son or daughter whose school, place of care or childcare provider has been closed, or the childcare provider of such son or daughter is unavailable, for reasons related to COVID-19.*** An employee must supply the employer with (1) the name of the son or daughter for whom the employee is caring; (2) the name of the school, place of care or childcare provider that has closed or become unavailable; and, (3) **a representation that no other suitable person will be caring for the son or daughter during the leave.**
 - **NOTE:** The answer to IRS FAQ No.44 notes that, in order to receive a tax credit for the paid sick leave or expanded family and medical leave for this reason, **if the child is older than 14** and the leave is during daylight hours, the employee **must** provide a statement that special circumstances exist requiring the employee to provide care.

The Regulations do not list any additional information required for the purpose of a leave taken because the employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.

The Regulations state that employers may not require documentation beyond what

is allowed for by the Regulations. In addition to the information specified above, the Regulations state generally, that employers may also request additional information or documentation needed to support a request for tax credits pursuant to the FFCRA. According to the IRS, employers are not required to provide leave if employees requesting leave fail to provide “materials sufficient to support the applicable tax credit.” Taken together, the Regulations and the IRS FAQs suggest that employers can be required to provide the information specifically required under the FFCRA Regulations **and** any specific information that the IRS requires for a tax credit (such as the information noted above concerning children older than 14). Requiring anything beyond those categories potentially violates the FFCRA.

Notably, if an employee fails to provide the required information or documentation, the employer must provide that employee an opportunity to correct the error and provide the required documentation before denying the request for leave.

What Employers Need to Keep (and for How Long)

An employer is required to retain all documentation provided to support the need for leave for four years, **regardless of whether leave was granted or denied**. If an employee provided **oral statements** to support his or her request for paid sick leave or expanded family and medical leave, the employer is required to document and retain such information for four years also. Similarly, if an employer denies an employee’s request for leave pursuant to the small business exemption, the employer must document its authorized officer’s determination that the criteria for that exemption are satisfied and retain such documentation for four years.

The Regulations and the IRS FAQs also explain what documents the employer should create and retain to support its claim for tax credits from the IRS. Employers must maintain the following records for at least four years:

1. Documentation to show how the employer determined the amount of emergency paid sick leave and expanded family and medical leave paid to employees that are eligible for the credit, including “records of work, telework and qualified sick leave and qualified family leave;”
2. Documentation to show how the employer determined the amount of qualified health plan expenses that the employer allocated to wages;
3. Copies of any completed IRS Forms 7200 that the employer submitted to the IRS;
4. Copies of the completed IRS Forms 941 that the employer submitted to the IRS or, 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; and
5. Other documents needed to support its request for tax credits pursuant to IRS applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit.

Although the DOL’s Regulations and the IRS’s FAQs appear to be in agreement regarding the documentation needed to support an employer’s claim for tax credits from the IRS, we expect more detail from the IRS on this topic in the near future. We hope the additional detail from the IRS provides more clarity on categories 1, 2, and 5 of the records that need to be retained by employers. A more detailed explanation of how employers may claim tax credits, and what information will be needed, can be found at <https://www.irs.gov/forms-pubs/about-form-7200> and <https://www.irs.gov/pub/irs-drop/n-20-21.pdf>.

We continue to monitor future guidance from the DOL and IRS and other legislation

that may affect employers during this challenging time. If you have questions, or require any assistance with preparing forms to document your employees' requests for leave under the FFCRA, please contact Manolis Boulukos, Tami Earnhart, Paul Sweeney, or any other member of our Labor, Employment & Immigration Group.

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