

# TaxViews

A tax periodical for the private club community

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## Social Clubs and Families First Coronavirus Response Act

The President signed the Families First Coronavirus Response Act (the "Act") into law on March 18, 2020 that requires employers, including social clubs, with fewer than 500 employees to provide paid leave to employees for various reasons relating to coronavirus. The Act is effective on April 1, 2020 and has an expiration date of December 31, 2020. The Act requires social clubs to provide up to two weeks (i.e., 80 hours) of paid sick leave to employees for various reasons relating to the coronavirus. Employees who have been on the payroll for 30 calendar days are eligible for this leave.

Club employers should consult with their labor attorneys, as well as their tax advisors, with respect to the applicability and implementation of the Act, as IR-2020-57, refers to the Internal Revenue Service ("IRS"), as well as to the Department of Labor ("DOL"). We will provide a brief overview of the key provisions of the Act for our clients. Consistent with the coronavirus itself, there are unresolved issues (*see below*) with respect to the Act. As additional guidance is provided by the IRS, we will notify our clients.

### *Exemption from the Act*

Clubs with fewer than 50 employees will be eligible for an exemption from the leave requirements relating to school closings or childcare 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. We have been advised that the DOL will provide emergency guidance and rulemaking to clearly articulate this exemption.

### **Refundable Payroll Tax Credits to Provide Cost of Coronavirus-Related Employee Leave**

On March 20, 2020, the US Treasury Department, the IRS, and the DOL announced that employers with fewer than 500 employees can begin taking advantage of two new refundable payroll tax

credits, designed to immediately and fully reimburse them, dollar-for-dollar, for the cost of providing coronavirus-related leave to their employees.

The Act will assist eligible businesses with funds to provide employees with paid leave, either for the employee's own health needs or to care for family members. The legislation will enable employers to keep their workers on their payrolls.

- *Eligible Employers*

Eligible employers are businesses and tax-exempt organizations with fewer than 500 employees that are required to provide emergency paid sick leave and emergency paid family and medical leave under the Act. Eligible employers will be able to claim these credits based on qualifying leave they provide between the effective date and December 31, 2020.

The Act provides paid sick leave and expanded family and medical leave for coronavirus related reasons and creates the refundable paid sick leave credit and the paid childcare leave credit for eligible employers.

#### *Coverage*

For coronavirus related reasons, employees receive up to 80 hours of paid sick leave and expanded paid childcare leave when employees' children's schools are closed or childcare providers are unavailable.

Employers receive 100% reimbursement for paid leave pursuant to the Act:

- Health insurance costs are also included in the credit.
- Employers face no payroll tax liability.
- Self-employed individuals receive an equivalent credit.

Reimbursement will be quick and easy to obtain.

- An immediate dollar-for-dollar tax offset against payroll taxes will be provided.
- Where a refund is owed, the IRS will send the refund as quickly as possible.

#### *Non-Enforcement Period*

Requirements subject to 30-day non-enforcement period for good faith compliance efforts.

Although we do not typically provide DOL advice, it was noted in the joint IRS and DOL advisory that the DOL will be issuing a temporary non-enforcement policy that provides a period of time for employers to come into compliance with the Act. Under this policy, the DOL will not bring an enforcement action against any employer for violations of the Act so long as the employer has acted reasonably and in good faith to comply with the Act. We have been advised that the DOL will instead focus on compliance assistance during the 30-day period.

## **Paid Leave for Employees and Employer Credit**

The Act provides that employees of eligible employers can receive two weeks (up to 80 hours) of paid sick leave at 100% of the employee's pay where the employee is unable to work because the employee is quarantined, and/or experiencing coronavirus symptoms, and seeking a medical diagnosis.

- For an employee who is unable to work because of coronavirus quarantine or self-quarantine or has coronavirus symptoms and is seeking a medical diagnosis, eligible employers may receive a refundable sick leave credit for sick leave at the employee's regular rate of pay, up to \$511 per day and \$5,110 in the aggregate, for a total of 10 days.

An employee who is unable to work because of a need to care for an individual subject to quarantine, to care for a child whose school is closed or child care provider is unavailable for reasons related to coronavirus, and/or the employee is experiencing substantially similar conditions as specified by the U.S. Department of Health and Human Services can receive two weeks (up to 80 hours) of paid sick leave at 2/3 the employee's pay.

An employee who is unable to work due to a need to care for a child whose school is closed, or child care provider is unavailable for reasons related to coronavirus, may in some instances receive up to an additional ten weeks of expanded paid family and medical leave at 2/3 the employee's pay.

- For an employee who is caring for someone with coronavirus, or is caring for a child because the child's school or child care facility is closed, or the child care provider is unavailable due to the coronavirus, eligible employers may claim a credit for two-thirds of the employee's regular rate of pay, up to \$200 per day and \$2,000 in the aggregate, for up to 10 days. Eligible employers are entitled to an additional tax credit determined based on costs to maintain health insurance coverage for the eligible employee during the leave period.
- In addition to the sick leave credit, for an employee who is unable to work because of a need to care for a child whose school or childcare facility is closed or whose child care provider is unavailable due to the coronavirus, eligible employers may receive a refundable child care leave credit. This credit is equal to two-thirds of the employee's regular pay, capped at \$200 per day or \$10,000 in the aggregate. Up to 10 weeks of qualifying leave can be counted towards the childcare leave credit. Eligible employers are entitled to an additional tax credit determined based on costs to maintain health insurance coverage for the eligible employee during the leave period.

## **Immediate Advantage**

To take immediate advantage of the paid leave credits, businesses can retain and access funds that they would otherwise pay to the IRS in payroll taxes.

- 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 eligible employees.

If those amounts are not sufficient to cover the cost of paid leave, employers can seek an expedited advance from the IRS by submitting a streamlined claim form that will be released in the near term.

### *Examples*

- If an eligible employer paid \$5,000 in sick leave and is otherwise required to deposit \$8,000 in payroll taxes, including taxes withheld from all its employees, the employer could use up to \$5,000 of the \$8,000 of taxes it was going to deposit for making qualified leave payments. The employer would only be required under the law to deposit the remaining \$3,000 on its next regular deposit date.
- If an eligible employer paid \$10,000 in sick leave and was required to deposit \$8,000 in taxes, the employer could use the entire \$8,000 of taxes in order to make qualified leave payments and file a request for an accelerated credit for the remaining \$2,000.
- Equivalent childcare leave and sick leave credit amounts are available to self-employed individuals under similar circumstances. These credits will be claimed on their income tax return and will reduce estimated tax payments.

### **Unresolved Issues**

As we noted previously, there are unresolved issues regarding the Act; these are areas, among others, for which regulatory guidance would be appreciated:

1. In the case of emergency paid sick time, an employee is not eligible if they are able to telework (the ability to work remotely). An employee's ability to work remotely subsequent to a coronavirus-related workplace (e.g., office or clubhouse) closure may vary depending on their normal job functions. Regulatory guidance is needed to determine if an employee who is teleworking at a reduced schedule because of childcare responsibilities, due to a coronavirus school closing, is eligible for emergency sick time.
2. Absent regulatory advice, the Act does not appear to cover employees that were furloughed or laid-off prior to the enactment of the Act.
3. The provisions of the Act described come into effect no later than 15 days after enactment (April 1, 2020), but in many cases, employers may have already closed their workplaces for coronavirus-related reasons in adhering to federal (CDC) and state guidance. Many

employees may have already experienced temporary absences, including, among others, their inability to effectively telework. The Act does not address whether employers who are currently providing, or have previously provided, paid leave benefits on a voluntary basis that are similar to, the paid leave requirements under the Act but that were provided prior to passage of the Act may satisfy or receive credit against these new paid leave requirements.

Absent regulatory guidance, a possible interpretation of the Act may suggest that employers will not receive credit for such leave provisions because it was intended that the new paid leave requirements would be funded through employer payroll tax credits. Those new tax credits seem to apply only to wages paid by an employer that are required to be paid by reason of the Act. Regulatory guidance is necessary.

### **Closing**

We wish all our clients the best during this challenging time. We are here...we are available to assist you. The IRS still has to do its part with regulatory guidance with respect to these matters, but in the IRS's defense, things are moving rapidly.

As an indication of how matters are developing rapidly, please note more comprehensive relief is expected from the CARES Act being considered by the House of Representatives. As actionable information becomes available, we will advise our clients.

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