

IRS Publishes Detailed Guidance on Tax Credits For Employers Who Give Paid Sick Leave and Emergency FMLA - What Documentation May Employers Ask For?

The Families First Coronavirus Response Act (the "FFCRA"), signed by President Trump on March 18, 2020, provides small and midsize employers refundable tax credits that reimburse them, dollar-for-dollar, for the cost of providing paid sick and family leave wages to their employees for leave related to COVID-19.

Yesterday, the IRS Published guidance and [FAQs](#) with respect to these tax credits

The FAQs address 66 different topics. One topic we have discussed with many of our clients is what documentation should employers ask for when substantiating leave requests. The IRS addressed this issue verbatim below:

44. What information should an Eligible Employer receive from an employee and maintain to substantiate eligibility for the sick leave or family leave credits?

An Eligible Employer will substantiate eligibility for the sick leave or family leave credits if the employer receives a written request for such leave from the employee in which the employee provides:

- The employee's name;
- The date or dates for which leave is requested;

- A statement of the COVID-19 related reason the employee is requesting leave and written support for such reason; and
- A statement that the employee is unable to work, including by means of telework, for such reason.

In the case of a leave request based on a quarantine order or self-quarantine advice, the statement from the employee should include the name of the governmental entity ordering quarantine or the name of the health care professional advising self-quarantine, and, if the person subject to quarantine or advised to self-quarantine is not the employee, that person's name and relation to the employee.

Leave for School Closings

In the case of a leave request based on a school closing or child care provider unavailability, the statement from the employee should include the name and age of the child (or children) to be cared for, the name of the school that has closed or place of care that is unavailable, and a representation that no other person will be providing care for the child during the period for which the employee is receiving family medical leave and, *with respect to the employee's inability to work or telework because of a need to provide care for a child older than fourteen during daylight hours, a statement that special circumstances exist requiring the employee to provide care.*

Employers Should Not Use the IRS Guidance as a Sword to Deny Leave

Employers who strictly require written notice to deny leave for their employees do so at their peril. If an employee is sick, in the hospital, on a ventilator, that employee is entitled to paid sick leave under the statute. Requiring that employee to put his request for paid sick leave in writing because the IRS wants this documentation is a mistake. Remember, the courts interpret these laws, not the IRS. Moreover the [guidance from Department](#) of Labor with respect to the normal use of FMLA leave is that notice of an employee's right to FMLA leave may be given orally or in writing.

The guidance provided by the IRS with respect to children 14 years and older is new language from the IRS. There is no language in the statute that would tend to support this additional requirement.

CCM'S Recommendation to Employers

Employers should do their best to comply with the recently published IRS guidelines. However, employers who exalt form over substance in the middle of a pandemic, and require sick employees to provide written documentation may regret such a stringent stance.

We encourage HR Professionals to handle each request for paid leave on a case by case basis. HR Professionals can create the written documentation that the IRS may later require by contemporaneously recording employees' oral notice. HR Professionals are best suited to weed out employees who are

taking advantage of paid leave versus those employees who genuinely need it.

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