



April 7, 2020 (Updated June 2, 2020)

# UPDATED: Documentation Requirements for Payroll Tax Credits and Employee Eligibility Under FFCRA

Under the Families First Coronavirus Response Act (FFCRA), employers with fewer than 500 employees are required to provide certain paid sick and family leave to their employees. Refundable payroll tax credits are available, on a quarterly basis, to an eligible employer for the paid family and sick leave wages (qualified wages) required to be paid under the FFCRA. The Internal Revenue Service (IRS) recently provided guidance, in the form of [frequently asked questions](#) (FAQs), related to those refundable payroll tax credits for required paid sick and family leave. Included in the myriad of topics addressed in the FAQs is the identification of the documentation that an employer is required to collect and maintain in order to support the payroll tax credits taken by the employer. The IRS has indicated that these FAQs will be updated as necessary.

**DOL Guidance Echoes IRS Guidance.** We note that the U.S. Department of Labor (DOL) also issued [FAQs](#) and [temporary regulations](#) (as [corrected](#) on April 10, 2020), in effect from April 1, 2020, through Dec. 31, 2020, (the “DOL Temporary Regs”) on the paid sick and family leave requirements under the FFCRA. In its guidance, the DOL stated that an employer must retain the same information that the employer is required under IRS guidance to maintain to support the payroll tax credit for FFCRA-required paid sick and family leave (discussed below). Moreover, if an employee fails to provide the documentation necessary to support the tax credit, an employer is *not* required to provide the requested paid sick or family leave.<sup>1</sup>

While the payroll tax credits for qualified leave wages apply only to qualified wages paid with respect to leave taken during the period beginning on April 1, 2020, and ending on Dec. 31, 2020, wages paid *after* Dec. 31, 2020, that relate to leave taken on or before Dec. 31, 2020, are eligible for the payroll tax credit.<sup>2</sup>

**Small Business Exception to Leave Requirements.** The DOL Temporary Regs provide a limited exception from the requirement to provide paid leave required under the FFCRA for certain employers with fewer than 50 employees.<sup>3</sup> This exemption for small businesses is an exemption only from the obligation to provide paid leave to an employee who requests leave due to school or childcare closures. Small businesses remain obligated to provide paid leave under the FFCRA to an employee who requests leave because the employee is subject to a quarantine or an isolation order, has been advised by a health care provider to self-quarantine, is experiencing COVID-19 symptoms and is seeking a medical diagnosis or is caring for an individual who is subject to a quarantine order or has been advised to quarantine.

<sup>1</sup> See FAQ 15 and 16 of the DOL guidance (as visited on April 6, 2020); DOL Temp. Reg. § 826.100(f).

<sup>2</sup> FAQs 47 and 48 of the IRS guidance (as visited on April 6, 2020).

<sup>3</sup> DOL Temp. Reg. § 826.40(b)(1).

Under the DOL Temporary Regs, an employer, including a religious or nonprofit organization, with fewer than 50 employees is not required to provide the paid leave under the FFCRA due to school or childcare closures when the paid leave requirement would jeopardize the viability of the employer's business as a going concern. The foregoing exemption requires that an officer of the employer determine, on a case-by-case basis, that (1) the leave requested would result in the business's expenses and financial obligations exceeding available business revenue and cause the business to cease operating at minimal capacity; (2) the absence of the employee requesting the leave would entail a substantial risk to the financial health and operational capabilities of the business because of the employee's specialized skills, knowledge of the business or responsibilities; or (3) there are not sufficient workers who are able, willing, and qualified and available at the time and place needed to perform the labor or services provided by the employee requesting leave and the labor or services are needed for the business to operate at a minimal capacity. The DOL Temporary Regs require that an employer who elects this exemption from the FFCRA leave requirements for an employee must document that one of the three aforementioned determinations was made and retain such documentation in its records.<sup>4</sup> We recommend that an employer create, when such a determination is made, clear and thorough documentation of why a specific exemption was applicable and why the requirements of that exemption were satisfied. A small business, even if eligible for the exemption, still must post the notice required under the DOL Temporary Regs regarding paid leave under the FFCRA.<sup>5</sup> We note that public agencies (such as certain governmental employers) must provide the paid leave required under the FFCRA, regardless of the number employees they have, subject only to the permitted exclusions under the DOL Temporary Regs for specified health care providers and emergency responders and certain other federal governmental employees excluded by the Director of the Office of Management and Budget.<sup>6</sup>

**Required Documentation.** The chart on the following pages identifies the documentation required to be (i) collected and maintained by an employer in order to support its payroll tax credits and (ii) submitted by the employee seeking leave, and provides practical considerations for collecting and maintaining both types of documentation.

Please contact your regular Brownstein attorney for assistance with the FFCRA and/or the CARES Act, including questions about the documentation requirements for payroll tax credits discussed below. Our employment law attorneys can help you navigate the employment law aspects of the paid sick and family leave requirements.

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<sup>4</sup> DOL Temp. Reg. § 826.40(b)(2).

<sup>5</sup> DOL Temp. Reg. § 826.40(b)(3)

<sup>6</sup> DOL Temp. Reg. § 826.40(c)

DOCUMENTATION REQUIREMENTS FOR PAYROLL TAX CREDITS UNDER FFCRA			
Required Documentation	Provided by Employee	Compiled by Employer	Practical Considerations
1. A written request for the leave from the employee that includes: <sup>7</sup>	X		Given the current shelter-at-home orders, emails from employees containing the requisite information should suffice. Given that the writing must come from the employee, transcripts of voicemail messages would not appear to satisfy this requirement, nor would text messages that cannot be printed or cannot be printed in a manner that clearly indicates that the text message came from the employee.  Making employees aware of the information that must be included in the written leave request will be important to ensure that the leave request process runs as smoothly and efficiently as possible.
(a) the employee's name and the date or dates for which the leave is requested,	X		
(b) a statement of the COVID-19-related reason the employee is requesting leave and written support for such reason, and	X		The COVID-19-related reasons for which FFCRA-required paid sick and family leave can be taken are: <ol style="list-style-type: none"> <li>1. The employee is subject to a federal, state or local quarantine or isolation order related to COVID-19.</li> <li>2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.</li> <li>3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.</li> <li>4. The employee is caring for an individual who is subject to an order as described in item (1) or has been advised as described in item (2).</li> <li>5. The employee is caring for a son or daughter under the age of 18 if the school or place of care of the son or daughter has been closed, or the child care provider of the son or daughter is unavailable due to COVID-19 precautions.<sup>8</sup></li> <li>6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.</li> </ol> <p>An employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee from the application of the emergency sick and family leave provisions.</p>

<sup>7</sup> FAQ 44 of the IRS guidance. We note that the DOL Temporary Regs state that the notice may not be required in advance and may only be required after the first workday or portion thereof for the employee takes the paid sick or family leave. DOL Temp. Reg. § 826.90((b)). It is considered reasonable for the employer to require the notice as soon as practicable under the facts and circumstances of the employee's particular case. *Id.* An employer may not require information in a notice beyond what is required under DOL Temp. Reg. § 826.100, which includes any information necessary to support the related tax credit. DOL Temp. Reg. § 826.100(f).

<sup>8</sup> Note that this reason for leave also qualifies the employee for extended Family and Medical Leave, for a total of 12 weeks of leave.

DOCUMENTATION REQUIREMENTS FOR PAYROLL TAX CREDITS UNDER FFCRA			
Required Documentation	Provided by Employee	Compiled by Employer	Practical Considerations
(c) a statement that the employee is unable to work, including by means of telework, for such reason. <sup>9</sup>	X		As indicated above, ensuring employees are aware of what information is required to be included in their written leave requests is important. The employee must explain why he or she cannot work during the period of leave being requested. For example, if an employee cannot telework because the employee will be caring for an individual experiencing COVID-19 symptoms (for example, a parent) and the location at which care will be given does not have the necessary internet access to permit telework, a statement to that effect would be required in the leave request.
For leave requests based on a quarantine order or self-quarantine advice, the employee statement 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 and either the name of the governmental entity that issues the quarantine or isolation order to which the individual being cared for is subject or the name of the health care provider who advised the individual being cared for to self-quarantine due to COVID-19-related concerns. <sup>10</sup>	X		<p>We note that some jurisdictions require that the order or self-quarantine advice be attached to the leave request.<sup>11</sup> We recommend that the employer treat all medical information confidentially and afford it the same protections as those granted to protected health information (PHI) by HIPAA, noting that there are certain circumstance in which an employer is permitted to disclose such information (for example, disclosure to authorized personnel without permission of the person whose records are being disclosed if the disclosure is necessary to prevent or lessen a serious and imminent threat to the health and safety of a person or the public).</p> <p>Employers should be careful in not requiring additional documentation beyond what is required, due to limitations imposed by the Americans with Disabilities Act.</p>

<sup>9</sup> While the DOL Temporary Regs permit this statement to be provided either orally or in writing, we recommend that a written statement be required in order to be able to substantiate, at a later date, that all of the applicable requirements were satisfied. See DOL Temp. Reg. § 826.100(a)(4).

<sup>10</sup> FAQ 45; DOL Temp. Reg. § 826.100(d).

<sup>11</sup> For example, see the leave request form for New York at <http://docs.paidfamilyleave.ny.gov/content/main/forms/PFLDocs/scovid19.pdf>.

<b>DOCUMENTATION REQUIREMENTS FOR PAYROLL TAX CREDITS UNDER FFCRA</b>			
<b>Required Documentation</b>	<b>Provided by Employee</b>	<b>Compiled by Employer</b>	<b>Practical Considerations</b>
<p>For leave requests based on a school closing or child care provider unavailability, the statement from the employee should include:</p> <ul style="list-style-type: none"> <li>(i) the name and age of the child (or children) to be cared for,</li> <li>(ii) the name of the school that has closed or place of care that is unavailable, and</li> <li>(iii) 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 age 14 during daylight hours, a statement that special circumstances exist requiring the employee to provide care.</li> </ul>	X		<p>The DOL FAQs state that a notice posted on a government, school or day care website, or published in a newspaper, or an email from an employee or official of the school, place of care or child care provider could be used as support for a leave request for family care for a child whose school or place of care is closed or whose child care provider is unavailable due to COVID-19, and a copy of this documentation should also be sufficient for the documentation requirements under the IRS FAQs.</p>

DOCUMENTATION REQUIREMENTS FOR PAYROLL TAX CREDITS UNDER FFCRA			
Required Documentation	Provided by Employee	Compiled by Employer	Practical Considerations
2. The allocable qualified health plan expenses <i>and</i> documentation showing how the employer determined the amount of qualified health plan expenses that the employer allocated to wages. <sup>12</sup>		X	<p>The payroll tax credit allowed for FFCRA-required paid sick and family leave is <i>increased</i> by the amount of the “qualified health plan expenses” paid or incurred by the employer during the calendar quarter. Qualified health plan expenses are the amounts paid or incurred by the employer to provide and maintain a group health plan to the extent those amounts are excludible from the taxable income of employees by reason of Code Section 106(a) (contributions by employer to accident and health plans).</p> <p>IRS FAQs 31 through 36 detail how to determine the amount of qualified health plan expenses and provide that qualified health plan expenses are properly allocated to the qualified sick or family leave wages if the allocation is made on a pro rata basis among covered employees (for example, the average premium for all employees covered by a policy) and pro rata on the basis of periods of coverage (relative to the time periods of leave to which such wages relate). It is likely that the calculation and allocation of the qualified health plan expenses will have to be done manually (for example, through the use of a spreadsheet), and the spreadsheet for <i>each</i> calendar quarter should be saved and maintained separately (i.e., do not keep reusing the same spreadsheet and saving over the information for the prior calendar quarter).</p>
3. The employer share of the Hospital Insurance tax (also known as Medicare tax) portion of the FICA taxes applicable to FFCRA-required paid sick and family leave. <sup>13</sup>		X	<p>The payroll credit allowed for FFCRA-required paid sick and family leave is <i>increased</i> by the employer’s share of the Medicare portion of FICA taxes applicable to FFCRA-required paid sick and family leave. Documentation to support the employer’s share of the Medicare taxes on FFCRA-required paid sick and family leave will likely depend on how these payments are coded and handled through an employer’s payroll system. For example, if the qualified wages can be coded separately within the payroll system, it may be possible to generate a report from the payroll system supporting and detailing the employer’s share of the Medicare taxes on the qualified wages. Alternatively, a separate spreadsheet, reconciling the applicable taxes to the aggregate taxes for all wages shown on a payroll run report, may be supportive if the requisite detail is included.</p>

<sup>12</sup> FAQs 4, 31 through 36, and 45 of the IRS guidance; DOL Temp. Reg. § 826.140(c)(2).

<sup>13</sup> FAQs 4 & 10.

DOCUMENTATION REQUIREMENTS FOR PAYROLL TAX CREDITS UNDER FFCRA			
Required Documentation	Provided by Employee	Compiled by Employer	Practical Considerations
4. Documentation showing how the employer determined the amount of qualified sick and family leave wages paid to employees who are eligible for the credit, including records of work, telework and qualified sick leave and qualified family leave. <sup>14</sup>		X	<p>The amount of the qualified wages required under the FFCRA is subject to limitations.</p> <p><i>Required Paid Sick Leave.</i> Generally, an employee who is unable to work (i) for reasons due to a COVID-19 circumstance relating to the employee is entitled to paid sick leave for up to two weeks (up to 80 hours) at the employee’s regular rate of pay, or, if higher, the federal minimum wage or any applicable state or local minimum wage, up to \$511 per day and \$5,110 in the aggregate, and (ii) for other circumstances (caring for others) is entitled to paid sick leave for up to two weeks (up to 80 hours) at two-thirds of the employee’s regular rate of pay or, if higher, the federal minimum wage or any applicable state or local minimum wage, up to \$200 per day and \$2,000 in the aggregate.</p> <p><i>Required Paid Family Leave.</i> Generally, an employee who is unable to work (including telework) because of a need to care for a child whose school or place of care is closed or whose child care provider is unavailable due to COVID-19 is entitled to paid family and medical leave equal to two-thirds of the employee’s regular pay, up to \$200 per day and \$10,000 in the aggregate.</p>
5. Copies of any completed Forms 7200, Advance of Employer Credits Due To COVID-19, that the employer submitted to the IRS <sup>15</sup> ; and		X	<p>If these forms are filed on behalf of an employer by a third party, such as an accountant or third-party payroll agent, we recommend that the employer request copies of the fully executed and filed forms, including the fax confirmation in the case of Form 7200, as soon as each form is filed, rather than relying on the third party to retain and maintain copies of these forms. We are aware that it sometimes can be difficult, if not impossible, to obtain copies of the payroll tax forms from a third party at a later date, such as when an IRS inquiry or audit arises. Given the specific document retention requirements for the payroll tax credits, we recommend that employers gather copies of the requisite IRS forms as they are filed and maintain those records themselves.</p> <p>If payroll reports or spreadsheets are furnished to the form preparer, we recommend that those documents also be retained with each related Form 941.</p>
6. Copies of the completed Forms 941, Employer’s Quarterly Federal Tax Return, 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 Form 941). <sup>16</sup>		X	

<sup>14</sup> FAQ 45; DOL Temp. Reg. § 826.140(c)(1).

<sup>15</sup> FAQ 45; DOL Temp. Reg. § 826.140(c)(3).

<sup>16</sup> FAQ 45; DOL Temp. Reg. § 826.140(c)(4).

**Additional Documentation That May Be Required by the Employer:** Although not required pursuant to the IRS guidance, the DOL guidance provides that an employer may require an employee to provide additional documentation in support of leave requested to care for the employee's child whose school or place of care is closed, or child care provider is unavailable due to COVID-19-related reasons. The DOL guidance states that such documentation may include a notice of closure or unavailability from the child's school, place of care or child care provider, including notices that may have been posted on a government, school or day care website, published in a newspaper, or emailed by the school, place of care or child care provider. Information requested and provided must be retained by the employer.<sup>17</sup> In addition, an employer may enforce all existing certification requirements under the Family and Medical Leave Act (FMLA) if an employee is taking leave for a qualifying reason under the FMLA (e.g., if a COVID-19-related reason rises to the level of a serious health condition).<sup>18</sup>

**Documentation Retention Period:** The above-referenced documents are required to be retained by an employer claiming the payroll tax credits for at least four years after the date the payroll taxes become due or are paid, whichever comes later, and the documents are required to be available for review by the IRS.<sup>19</sup> We note that under the DOL Temporary Regs, the documentation is required to be maintained regardless of whether the leave was granted or denied.

**Documentation Organization:** Lastly, while everyone is scrambling to keep up with the new rules and requirements in this ever-changing environment, it is important to organize the documentation required under the IRS and DOL FAQs. Throwing everything into a folder with the intention of organizing it later may never actually happen and, if there is a later inquiry or a claim by an employee that the employer interfered with his or her FFCRA rights, trying to organize all of the documentation together into a meaningful and convincing inquiry response may be difficult if not impossible, especially if documentation is being gathered by more than one person (for example, HR personnel, accounting personnel, third-party payroll providers, etc.).

Since the payroll tax credit is determined on a quarterly basis, we recommend organizing the documentation on a per-quarter basis. In addition, documentation that supports or feeds into another document or form should be kept with the document or form into which it feeds (for example, documents and spreadsheets related to the preparation of a quarterly Form 941 should be kept with the copy of that Form 941). Moreover, documentation regarding each employee's FFCRA leave request, the employer's response, the time off that is granted and taken, and compensation provided, including the calculation thereof, should be maintained in individual employee leave folders.

Obviously, the maintenance of all required documentation in a paper format may not be practical (for example, it may be impractical to print large spreadsheets). Scanning paper documentation into an electronic format and setting up a thoughtfully organized folder structure could be useful in maintaining all required documentation in a consistent format and organizational structure. Spending a little time upfront to develop a process for gathering, organizing and maintaining the requisite documentation will help ensure that all of the required documentation is gathered from all sources, that the documentation is maintained and organized in a consistent and meaningful manner, and that the foregoing steps are accomplished in the most efficient manner possible.

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<sup>17</sup> FAQs 15 and 16 of the DOL guidance.

<sup>18</sup> FAQ 16 of the DOL guidance.

<sup>19</sup> FAQ 46 of the IRS guidance; DOL Temp. Reg. § 826.140(a).



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*This document is intended to provide you with general information regarding IRS guidance on documentation requirements for payroll tax credits and employee eligibility under FFCRA. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorneys listed or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.*