



Employers Encouraged to Use Specific FFCRA Leave Request Forms

In the span of two days, two different federal agencies have issued guidance that demonstrates the need for employers to create carefully tailored forms for employees to complete in requesting paid leave under the Families First Coronavirus Response Act (“FFCRA”).

First, the IRS issued guidance that, while informing employers how to benefit immediately from tax credits that completely offset paid FFCRA leave, also details the kind of information and documentation employers must maintain to claim these tax credits. The IRS guidance provides a checklist for the categories of documentation employers must maintain, while also summarizing the information employers should document or include on FFCRA-tailored leave request forms to support an employee’s need for leave.

Second, temporary regulations issued by the U.S. Department of Labor (“DOL”) largely restate the IRS guidance and refer readers to the IRS guidance for more information about the documentation employers may seek from employees seeking paid leave pursuant to the FFCRA. The DOL’s temporary regulations make clear that an employer may not seek notice from employees that includes information above and beyond that described in the DOL’s regulations and the IRS guidance.

The combination of the IRS guidance and DOL temporary regulations details (a) the information that will suffice for tax recordkeeping, and (b) the limits on the information an employer may seek from an employee to substantiate paid leave under the FFCRA.

Written Request Forms

The IRS guidance makes clear that an employee’s eligibility for paid sick or paid family leave should be based on a **written** request from the employee. This written request should include the following information:

1. The employee’s name;
2. The date or dates for which leave is requested;
3. A statement of the COVID-19 related reason the employee is requesting leave and written support for such reason; and
4. A statement that the employee is unable to work, including by means of telework, for such reason.

Employers should maintain this information to substantiate employee eligibility for the sick leave or family leave credits.

Quarantine

In the case of a leave request based on a quarantine order or self-quarantine advice, the employee’s written request for leave should include the name of the governmental entity ordering quarantine or the name of the healthcare professional advising self-quarantine. If the person subject to quarantine or advised to self-quarantine is not the employee, that person’s name and relation to the employee should be provided.

Childcare

In the case of a leave request based on a school closing or childcare provider unavailability, the employee's written request 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. With respect to the employee's inability to work or telework because of a need to provide care for a child older than 14 during daylight hours, the employee's written request should include a statement that special circumstances exist requiring the employee to provide care.

Additional Records

In addition to the employee's written request described above, an employer should create and maintain the following records to substantiate eligibility for paid sick leave and paid family leave tax credits:

1. Documentation to show how the employer determined the amount of qualified sick and family leave wages paid to employees that are eligible for the credit, including records of work, telework and qualified sick leave and qualified family leave. This documentation will obviously include salary information. Additionally, the Emergency Family and Medical Leave Expansion Act (contained within the FFCRA) requires employers to pay an employee for hours the employee would have been normally scheduled to work (even if more than 40 hours in a week). This documentation should therefore include substantiation regarding how many hours the employee was scheduled to work. If the employee's hours varied by week, this documentation should include substantiation of the hours the employee worked in the prior six months.
2. Documentation to show how the employer determined the amount of qualified health plan expenses that the employer allocated to wages. Help on computing this allocation is available [here](#).
3. Copies of any completed Forms 7200, Advance of Employer Credits Due To COVID-19, that the employer submitted to the IRS. The Form 7200 is an employer's mechanism to request an advance of tax credits if the employer does not have enough federal employment taxes set aside for deposit to cover its obligation to provide qualified leave wages.
4. 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). Form 941 is used by most employers to report income tax and social security and Medicare taxes withheld from employee wages, as well as the employer's own share of social security and Medicare taxes.

Duration

An eligible employer should keep all records relating to employment taxes for at least four years after the date the tax becomes due or is paid, whichever comes later. These records should be available for IRS review.

May an Employer Seek Certification from a Medical Provider, Childcare Provider or Any Third Party?

It is not clear what additional information or documentation, if any, an employer may seek from an employee seeking paid leave under the FFCRA. The DOL temporary regulations make clear that an employer "may not require the [employee's] notice to include documentation beyond" the information described above. While this may seemingly preclude certification from a medical provider or third party, a different provision of the

temporary regulations provides that “it will be reasonable for the Employer to require the Employee to comply with the Employer’s usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances.” Many employers require a medical certification or doctor’s note as a prerequisite to requesting leave. Moreover, the regulations specifically state that for leave taken under the FMLA for an employee’s own serious health condition related to COVID-19, or to care for the employee’s spouse, son, daughter or parent with a serious health condition related to COVID-19, the normal FMLA certification requirements still apply, which can include supporting medical certification.

Newly Affected Employers Without Established FMLA Practices

The DOL recognizes that some employers affected by the Emergency Family and Medical Leave Expansion Act (“EFMLEA”) requirements of the FFCRA may not have established policies and practices for administering FMLA leave. The DOL’s temporary regulations do not require employers to respond to employees who request or use EFMLEA leave with notices of eligibility, rights and responsibilities, or written designations that leave use counts against employees’ FMLA leave allowances.

However, employers with established practices for providing individual employees with specific notices compliant with the FMLA regulatory guidance at 29 C.F.R. § 825.300 may prefer to apply their existing practices to EFMLEA leave users.

If you have additional questions or need assistance preparing a leave request form that complies with both the IRS guidance and the DOL temporary regulations, please contact a member of our national [Employment Group](#).

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