

Employment Alert: Employer Documentation Required to Support New Paid Leaves, and Related Tax Credits, Detailed by DOL and IRS

April 8, 2020

On April 1, the U.S. Department of Labor (DOL) issued temporary regulations related to the new Families First Coronavirus Response Act. One notable feature of the regulations is that the DOL clarified the documentation an employer can request when an employee seeks to take leave under the emergency paid sick leave and expanded FMLA paid leave provisions. The only information that an employer can require of employees is the documentation specified in the regulations and any additional documentation required by the Internal Revenue Service (IRS). In this regard, the IRS has also issued parallel guidance outlining the documentation that is required to support a claim for the payroll tax credit that may reimburse an employer for making the Act's required paid leave payments to employees. According to these two pronouncements, employers should obtain, and maintain, the following information:

- For all requests for emergency paid sick leave and expanded paid FMLA leave, the DOL regulations and IRS guidance identify four basic pieces of documentation to be obtained from the employee requesting leave:
 - the employee's name;
 - the dates for which leave is requested;
 - the COVID-19 qualifying reason for leave (this should correspond to one of the six reasons under the Act that qualify an employee to take emergency paid sick leave or the one qualifying reason for expanded paid FMLA leave); and
 - the employee's statement representing that the employee is unable to work or telework because of the identified COVID-19 qualifying reason.
- Additional documentation is required from the employee, depending on the specific qualifying reason for leave:
 - for emergency paid sick leave due to a government ordered quarantine or isolation order, the name of the government entity that issued the order;
 - for emergency paid sick leave due to a health care provider's advice to self-quarantine, the name of the health care provider;
 - for emergency paid sick leave to care for an individual who has been required to quarantine or isolate because of a government order or health care provider's advice, the name of the government

agency or health care provider that issued the order/advice covering the individual to be cared for, along with the name of the individual to be cared for and that person's relation to the employee; and

- for emergency paid sick leave or FMLA leave due to school closing or unavailability of child care provider, (i) the name and age of the son or daughter being cared for, (ii) the name of the school, place of care or child care provider that has closed or is unavailable, (iii) a representation that no other suitable person will be caring for the son or daughter during the period for which the employee is taking the leave and (iv) if the child is older than 14 and leave is during daylight hours, a statement that special circumstances exist requiring the employee to provide care.

As noted above, this is the only information which an employer can require from an employee seeking leave. Notably, none of the circumstances allow an employer to request any kind of certification or note from a health care provider. Also, no additional documentation is allowed, beyond the four basic items listed above, when the qualifying reason for leave is that the employee is exhibiting symptoms of COVID-19 and is seeking medical diagnosis.

In addition to this employee-provided information, the IRS requires the employer to retain additional information to support the right to the tax credit. This information consists of:

- documentation showing how the employer determined the amount of paid leave that was paid to eligible employees, including records of work, telework and leave taken;
- documents detailing how the employer determined the amount of qualified health plan expenses if tax credits are sought for those amounts;
- any completed Forms 7200, for Advance of Employer Credits Due To COVID-19;
- completed Forms 941, Quarterly Federal Tax Returns.

With respect to the timing of documentation, the DOL regulations provide that employees can be encouraged to provide the information as soon as practicable, but employers may only require the information to be provided after the first day that an employee is off work except that, where the leave is due to a school/daycare closing and is foreseeable, the employee can be required to give as much notice as is practicable. The regulations further state that, if the employee does not provide the required information in a timely way, the employer should give the employee notice of the deficiency and an opportunity to provide the required information before denying leave. The regulations state that employers should follow "reasonable" notification procedures, noting that a reasonable procedure would include the ability of a spouse, family member or other adult to provide the necessary information if the employee is unable to do so. These provisions, along with the relatively minimal information an employer can require, apparently reflect a desire that there not be unnecessary administrative barriers between a qualified employee and the paid leave.

There are no specific forms provided by the DOL for employers to use to collect the required information. In fact, the regulations expressly state that some of the information (e.g. the statement from the employee



representing that the inability to work is for a qualifying reason) can be provided orally. In contrast, the IRS guidance requires the information to be in writing if the employer will be claiming the tax credit. This may be difficult given that the employer generally can't require the information until after the employee has already started the leave. The IRS guidance requires that all of the information listed, both provided by the employee and generated by the employer, must be retained for four years from the date the underlying tax was due, or paid, whichever is later.

The entire set of DOL regulations are available [here](#) and the IRS guidance is available [here](#) (particularly FAQ's 4, 44, 45 and 46).

If you have questions about these new paid leave provisions, please contact Brian Woolley, Megan Anderson, Employment & Labor Practice Lead Kathryn Nash or your regular Lathrop GPM contact.