

# HOLLRAH LLC

WASHINGTON, DC

TO: Private Care Association

FROM: Russell A. Hollrah

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RE: Federal Government Response to Coronavirus

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In response to the coronavirus, the federal government enacted new laws and issued administrative guidance intending to ameliorate its potential impact on the economy. The following is an overview of two of these actions, namely, the enactment of the *Emergency Family and Medical Leave Expansion Act*, H. R. 6201, and an administrative announcement by the Internal Revenue Service (“IRS”) to temporarily defer certain federal tax obligations.

## **I. The Emergency Family and Medical Leave Expansion Act**

The *Emergency Family and Medical Leave Expansion Act*, H. R. 6201, contains six sets of provisions: (1) Public Health Emergency Leave; (2) Emergency Paid Sick Leave; (3) Payroll Credit for Required Paid Sick Leave; (4) Payroll Credit for Required Paid Family Leave; (5) Credit for Sick Leave for Certain Self-Employed Individuals; and (6) Credit for Family Leave for Certain Self-Employed Individuals. Each is discussed below.

### **A. PUBLIC HEALTH EMERGENCY LEAVE (“PHE Leave”)**

- This new law requires a private sector employer with < 500 employees to provide an “eligible employee” with a total of 12 workweeks of Public Health Emergency Leave (“PHE Leave”) under the Family and Medical Leave Act (“FMLA”) during any 12-month period for a “qualifying need related to a public health emergency.”
- The U.S. Department of Labor (“DOL”) is given regulatory authority (i) to exempt small businesses with fewer than 50 employees when the imposition of such requirements would jeopardize the viability of the business as a going concern, and (ii) to exclude certain health care providers and emergency responders.
- A “qualifying need related to a public health emergency” means the employee is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of

such son or daughter is unavailable, due to an emergency with respect to COVID–19 declared by a Federal, State, or local authority.

- An “eligible employee” is an employee who has been employed for at least 30 calendar days by the employer with respect to whom leave is requested.
- The first 10 days of PHE Leave may be unpaid leave (though an employee is permitted to use other paid time off for this period). After the initial 10 day-period, an employer is required to provide paid PHE Leave.
- Paid PHE Leave for an employee shall be  $\geq 2/3$  of the employee’s regular rate of pay for the number of hours the employee would otherwise be normally scheduled to work, provided that in no event shall such paid leave exceed \$200 per day and \$10,000 in the aggregate.
- In any case where a need for PHE Leave is foreseeable, an employee is required to provide the employer with notice of leave as is practicable.
- The FMLA duty to restore an employee to the employee’s prior position upon returning from leave does not apply to an employer with  $< 25$  employees, if specified conditions are satisfied.
- An employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee from these provisions.
- PHE Leave applies during the period beginning no later than 15 days after the date of enactment, March 18, 2020, and ending on December 31, 2020.

## **B. THE EMERGENCY PAID SICK LEAVE**

- A private sector employer (including an individual) engaged in commerce or in any industry or activity affecting commerce that employs  $< 500$  employees is required to provide to each of its employees paid sick time to the extent the employee is unable to work (or telework) due to a need for leave because of a circumstance described in either Group #1 or Group #2 below:<sup>1</sup>

### Group #1

- (1) The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID–19.
- (2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID–19.
- (3) The employee is experiencing symptoms of COVID–19 and seeking a medical diagnosis.

### Group #2

- (4) The employee is caring for an individual who is subject to an order as described in paragraph (1) or has been advised as described in paragraph (2).
- (5) The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID–19 precautions.
- (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 Treasury and the Secretary of Labor.

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<sup>1</sup> Special rules apply to an employer of an employee who is a health care provider or an emergency responder.

- DOL is given regulatory authority (i) to exempt small businesses with fewer than 50 employees when the imposition of such requirements would jeopardize the viability of the business as a going concern, and (ii) to exclude certain health care providers and emergency responders.
- An employee is entitled to paid sick time as follows:<sup>2</sup>
  - full-time employees: 80 hours.
  - part-time employees: the number of hours that such employee works, on average, over a 2-week period.
- “Paid sick time” for an absence from employment for a reason described above in Group #1 is calculated based on the employee’s “required compensation”<sup>3</sup> and the number of hours the employee would otherwise be normally scheduled to work (for an absence for a reason described above in Group #2, the calculation is based 2/3 of the employee’s “required compensation”), except that in no event shall such paid sick time exceed:
  - \$511 per day and \$5,110 in the aggregate for a use described in Group #1; and
  - \$200 per day and \$2,000 in the aggregate for a use described in Group #2.
- The term “employee” is given the same meaning as under the Fair Labor Standards Act, subject to certain exceptions, and paid sick time is available to an employee, regardless of how long the employee has been employed by an employer.
- The paid sick time provided to an employee shall cease, beginning with the employee’s next scheduled work shift immediately following the termination of the need for paid sick time.
- Each employer is required to post a notice of these requirements on its premises.
  - DOL is required to publish a model notice within 7 days after the date of enactment.
- The Emergency Paid Sick Leave Act is effective not later than 15 days after the date of enactment, March 18, 2020, and will expire on December 31, 2020.

### **C. PAYROLL CREDIT FOR REQUIRED PAID SICK LEAVE**

- An employer is allowed a refundable credit against the employer-share of FICA tax for each calendar quarter with respect to 100 percent of the “qualified sick leave wages”<sup>4</sup> paid by such employer with respect to such calendar quarter<sup>5</sup>
  - provided that the amount of qualified sick leave wages taken into account with respect to any individual shall not exceed \$200 (\$511 in the case of any day any portion of which is paid sick time described in Group #1) for any day (or portion thereof) for which the individual is paid qualified sick leave wages.

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<sup>2</sup> An employer cannot require, as a condition of providing paid sick time, that the employee search for or find a replacement employee to cover while the employee is using paid sick time, and cannot retaliate against an employee for requesting paid sick time.

<sup>3</sup> The term “required compensation” means the greater of (i) the employee’s regular rate of pay, as determined under the FLSA, or (ii) the applicable minimum wage.

<sup>4</sup> The term “qualified sick leave wages” means wages and compensation paid by an employer by reason of the Emergency Paid Sick Leave Act.

<sup>5</sup> The amount of the credit shall be increased by so much of the employer’s qualified health plan expenses as are properly allocable to the qualified sick leave wages for which such credit is so allowed.

- The aggregate number of days taken into account for any calendar quarter shall not exceed the excess (if any) of 10, over the aggregate number of days so taken into account for all preceding calendar quarters.
- These provisions apply to wages paid with respect to the period beginning on a date selected by the Secretary of the Treasury which is during the 15-day period beginning on the date of the enactment, March 18, 2020, and ending on December 31, 2020.

#### **D. PAYROLL CREDIT FOR REQUIRED PAID FAMILY LEAVE**

- An employer is allowed a refundable credit against the employer share of FICA tax for each calendar quarter with respect to 100 percent of the “qualified family leave wages” paid by such employer with respect to such calendar quarter,<sup>6</sup> provided that the amount of qualified family leave wages taken into account with respect to any individual shall not exceed
  - \$200 for any day (or portion thereof) for which the individual is paid qualified family leave wages, and
  - in the aggregate with respect to all calendar quarters, \$10,000.
- The term “qualified family leave wages” means wages and compensation paid by an employer which are required to be paid by reason of the PHE Leave provisions.
- This payroll credit applies to wages paid with respect to the period beginning on a date selected by the Secretary of the Treasury which is during the 15-day period beginning on the date of enactment, March 18, 2020, and ending on December 31, 2020.

#### **E. CREDIT FOR SICK LEAVE FOR CERTAIN SELF-EMPLOYED INDIVIDUALS**

- An “eligible self-employed individual” is allowed a refundable tax credit for any taxable year equal to the individual’s “qualified sick leave equivalent amount.”
- An “eligible self-employed individual” is an individual who:
  - regularly carries on any trade or business, and
  - would be entitled to receive paid leave during the taxable year pursuant to the Emergency Paid Sick Leave Act if the individual were an employee of an employer (other than himself or herself).
- The term “qualified sick leave equivalent amount” means an amount equal to the number of days during the taxable year (up to the “applicable number of days”<sup>7</sup>) that an eligible self-employed individual is unable to perform services in any trade or business for a reason with respect to which such individual would be entitled to receive sick leave, multiplied by
  - the lesser of—
    - \$200 (\$511 in the case of any day of paid sick time described in Group #1), or
    - 67 percent (100 percent in the case of any day of paid sick time described in

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<sup>6</sup> The amount of the credit shall be increased by so much of the employer’s qualified health plan expenses as are properly allocable to the qualified family leave wages for which such credit is so allowed.

<sup>7</sup> The term “applicable number of days” means, with respect to any taxable year, the excess (if any) of 10 days over the number of days taken into account for these purposes in all preceding taxable years.

Group #1) of the “average daily self-employment income”<sup>8</sup> of the individual for the taxable year.

- To qualify, an individual must maintain such documentation as the Secretary of the Treasury may prescribe to establish such individual as an eligible self-employed individual.
- Special rules apply to avoid a double-benefit to an individual who works as both a self-employed individual and also as an employee of an employer.
- Only days occurring during the period beginning on a date selected by the Secretary of the Treasury (during the 15-day period beginning on the date of the enactment, March 18, 2020), and ending on December 31, 2020, may be taken into account for purposes of calculating an individual’s “qualified sick leave equivalent amount.”

#### **F. CREDIT FOR FAMILY LEAVE FOR CERTAIN SELF-EMPLOYED INDIVIDUALS**

- An “eligible self-employed individual” is allowed a refundable tax credit for any taxable year equal to 100 percent of the individual’s “qualified family leave equivalent amount.”
- An “eligible self-employed individual” is an individual who
  - regularly carries on any trade or business, and
  - would be entitled to receive paid leave during the taxable year pursuant to the Emergency Family and Medical Leave Expansion Act if the individual were an employee of an employer (other than himself or herself).
- The term “qualified family leave equivalent amount” means, with respect to any eligible self-employed individual, an amount equal to the product of—
  - up to 50 days during the taxable year that the individual is unable to perform services in any trade or business for a reason with respect to which such individual would be entitled to receive paid leave, multiplied by
  - the lesser of (i) 67 percent of the “average daily self-employment income”<sup>9</sup> of the individual for the taxable year, or (ii) \$200.
- To qualify, an individual must maintain such documentation as the Secretary of the Treasury may prescribe to establish such individual as an eligible self-employed individual.
- Special rules apply to avoid a double-benefit to an individual who works as both a self-employed individual and also as an employee of an employer.
- Only days occurring during the period beginning on a date selected by the Secretary of the Treasury which is during the 15-day period beginning on the date of enactment, March 18, 2020, and ending on December 31, 2020, may be taken into account for purposes of determining an individual’s “qualified family leave equivalent amount.”

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<sup>8</sup> An individual’s “average daily self-employment income” is equal to the net earnings from self-employment income of the individual for the taxable year, divided by 260.

<sup>9</sup> Id.

## II. Deferral of Certain Federal Tax Obligations

In Internal Revenue Service Notice 2020-18 (March 20, 2020), the IRS postponed certain federal income tax filing and payment obligations.

- Notice 2020-18 automatically postpones the due date for:
  - filing Federal income tax returns, and
  - making Federal income tax payments otherwise due April 15, 2020, to July 15, 2020.<sup>10</sup>
- There is no limitation on the amount of the payment that may be postponed.
- The expanded relief applies to an individual, a trust, estate, partnership, association, company or corporation.
- This relief is available with respect to:
  - Federal income tax payments (including payments of tax on self-employment income) and federal income tax returns due on April 15, 2020, in respect of a taxpayer's 2019 taxable year, and
  - Federal estimated income tax payments (including payments of tax on self-employment income) due on April 15, 2020, for a taxpayer's 2020 taxable year.
- To obtain the relief, taxpayers do not have to file applications for extensions (i.e., Forms 4868 or 7004).
- No postponement is provided in this Notice for the payment or deposit of any other type of federal tax, or for the filing of any federal information return.
- This Notice does not affect state-tax obligations, although many states have taken similar actions.

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If you have any questions or comments concerning the foregoing, please let me know.

**The foregoing is intended solely as general information and may not be considered tax or legal advice; nor can it be used or relied upon for the purpose of (i) avoiding penalties under any taxing statute or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein. You should not take any action based upon any information contained herein without first consulting legal counsel familiar with your particular circumstances.**

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<sup>10</sup> Interest, penalties, and additions to tax with respect to such postponed Federal income tax filings and payments will begin to accrue on July 16, 2020.