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Paid Leave Credit for Private Sector and Nonprofit Employers Within The Families First Coronavirus Response Act

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INTRODUCTION

On March 18, 2020, the president signed into law the Families First Coronavirus Response Act (the Act). Initially, the House of Representatives passed H.R. 6201, on March 14, and approved¹ an amendment designated as a technical correction on March 16, 2020, that became a part of the Act.² The legislation was intended to help the United States combat and defeat Covid-19 by giving certain American employers funds to provide paid leave due to employee's own health needs or to care for family members.³ Among other relief, the Act also expands federal fam-

ily and medical leave, sick leave, unemployment insurance, health and employee benefits⁴ provisions.⁵

The Act contains three interrelated employee benefit⁶ components expiring December 31, 2020:⁷ expanded Family Medical Leave Act of 1993 (FMLA) leave,⁸ paid sick leave,⁹ and an employer payroll tax credit.¹⁰ This article describes the scope of the FMLA

credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs; IR 2020-62 (Mar. 31, 2020) (preliminary IRS interpretive guidance on Employee Retention Credit requirements; generally providing amount of credit up to \$10,000 of qualifying wages to private sector and nonprofit employers, regardless of size, financially impacted by Covid-19). The Employee Retention Credit generally applies to businesses suspending operations or with reduced receipts due to Covid-19 restrictions, whereas the payroll credit applies to employers with ongoing operations. Employers should evaluate from an economic perspective applicability of each credit.

⁴ See Act §4104 (short-time compensation programs permitting employers to reduce hours and employees receiving partial unemployment benefits from participating states to offset lost wages). DOL guidance may clarify whether these programs are subject to ERISA. See below, Note 6.

⁵ See Act Div. C (Emergency Family and Medical Leave Expansion Act), Div. D (Emergency Unemployment Insurance Stabilization and Access Act of 2020), Div. E (Emergency Paid Sick Leave Act), and Div. F (various provisions for health insurance plans and programs).

⁶ Generally, a paid sick leave program is not subject to the Employee Retirement Income Security Act of 1974, as amended (ERISA), Pub. L. No. 93-406, if it falls under the "payroll practice" exception to the definition of an ERISA benefit plan. See ERISA §3(1)(1), 29 U.S.C. §1002(1); 29 CFR §2510.3-1(b)(2). However, a paid leave program sponsored through insurance or a separate trust fund, such as a voluntary employees' beneficiary association (VEBA) would be a welfare benefit plan under ERISA. See ERISA §(3)(1); DOL Adv. Op. 2005-13A (ruling generally that ERISA does not preempt FMLA related state law requirements, and that an ERISA paid leave program therefore must comply with such state-level rules, which generally would occur if the state laws are stricter than applicable FMLA requirements), available at <https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions/2005-13a>.

⁷ See Act §5102, §7001 - §7004.

⁸ Act, Div. C, §3101 *et seq*; FMLA, Pub. L. No. 103-3.

⁹ Act, Div. E, §5101 *et seq*.

¹⁰ Act, Div. G, §7001 *et seq*.

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¹ H.R. 6201, Families First Coronavirus Response Act, Pub. L. No. 116-127, 116th Cong., 2d Sess. (Mar. 14, 2020).

² H.R. 6201 Technical Correction H. Res. 904, 116th Cong., 2d Sess. (Mar. 16, 2020).

³ See also CARES Act §2301 (Employee Retention Credit). An Employee Retention Credit may not be claimed for the same wages as those for which the payroll tax credit is claimed. IRS, *COVID-19-Related Tax Credits for Required Paid Leave Provided by Small and Midsize Businesses FAQs* (IRS FAQ), Q&A 18, available at <https://www.irs.gov/newsroom/covid-19-related-tax->

and sick leave provisions and delves into the application of the payroll tax credits to private sector and not-for-profit employers.

EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

Division C of the Act expands temporarily FMLA¹¹ to provide employees on payroll for at least 30 days¹² with the right to take up to 12 weeks of paid leave, including inability to telework, due to the coronavirus.¹³ The Act, in general, covers private sector and not-for-profit employers with fewer than 500 employees¹⁴ and government employers.¹⁵

FMLA generally provides 12 work weeks of unpaid leave during any 12-month period to employees at larger companies, subject to certain certification rules.¹⁶ Under the Act, after the initial two-week leave,¹⁷ subject to conditions discussed below, employees would receive a benefit from the employer in an amount not less than two-thirds of the regular rate of pay¹⁸ of the employee for the following 10 weeks.¹⁹ As an exception to the 500-employee threshold, which may benefit certain union members, the Act covers employees under a multiemployer collective agreement participating in a multiemployer fund,

¹¹ 29 U.S.C. §2611 *et seq.*

¹² See Act §3102(b), FMLA §110(a)(1)(A) (eligible employee definition).

¹³ See Act §3102, Emergency Family and Medical Leave Expansion Act; FMLA §102(a)(1)(F), §102(c), §110(b)(2). See also FMLA §110(b)(2)(B) (rules for calculating leave for an employee with varying schedule hours), §110(c) (notice of leave employee requirement); §110(d) (rules for leave of employees terminated due to coronavirus and subsequently rehired). See Department of Labor, *Families First Coronavirus Response Act: Questions and Answers* (DOL FAQ), Q&A 5, 6, 14 (preliminary guidance for calculating leave for part-time employees, overtime rules, 30-day employment requirement), available at <https://www.dol.gov/agencies/whd/pandemic/ffcr-questions>.

¹⁴ See Act §3102(b); FMLA §110(a)(1)(B). See DOL FAQ, Q&A 2 (preliminary guidance for determining the 500-employee threshold, subject to further guidance).

¹⁵ Act §3102(b). There is no limit on number of employees of government employers subject to paid leave requirements. Act §5102(b).

¹⁶ FMLA §101, §102(a)(1) (general conditions for entitlement to leave), §102(c) (except as otherwise provided, leave may be unpaid), §102(a)(1)(F) (paid leave required because of a qualifying need related to coronavirus emergency), §103 (certain certification requirements). See DOL FAQ, Q&A 16 (preliminary guidance regarding supporting documentation and certification requirements for paid sick or family leave applicable to employees).

¹⁷ See Act §5102 (generally providing two weeks of emergency paid sick leave).

¹⁸ See Act §3102(b); FMLA §110(b)(2)(B)(i)(I); Fair Labor Standards Act of 1938 (FLSA), Pub. L. No. 75-718, §7(e), 29 U.S.C. §207(e) (defining regular rate of pay).

¹⁹ Act §3102(b); FMLA §110(b)(2)(B)(i)(I).

plan or program (MEP) with employer contributions, which may be used to make paid leave payments, subject to certain plan requirements.²⁰

In the original version of the bill, the additional 10 weeks of FMLA leave could be taken for quarantine, caring for an at-risk family member, or a child displaced from school or childcare arrangement due to the coronavirus.²¹ At the discretion of the Department of Labor (DOL), health-care providers and emergency responders may not be eligible for an initial two weeks of emergency paid sick leave or additional 10 weeks of leave.²² Lawmakers sought to avoid a shortage of health-care workers or emergency responders amid a surge in coronavirus cases in the United States.²³

The Administration, Congress and certain commentators noted the paid family leave limits in the original bill might be revised.²⁴ On March 16, 2020, the House passed an amendment designated as a technical correction to the Act.²⁵ The House limited eligibility for the additional 10 weeks of paid leave to employees caring for a child without school or childcare arrangements.²⁶ The version of the legislation containing the technical correction passed the Senate without amendment and was signed into law on March 18, 2020.²⁷

²⁰ Act §3103.

²¹ See H.R. 6201, §3102(b) (Mar. 11, 2020). These conditions remain as basis for the two-week emergency paid sick leave. See Act §5102(a).

²² Act §3105.

²³ See Act §3105; Siobhan Hughes, Natalie Andrews & Kate Davidson, *House Democrats Scale Back Paid-Leave Program in Coronavirus-Aid Bill*, Wall Street Journal (Mar. 17, 2020).

²⁴ Statement from President Donald J. Trump at the press conference from the White House (Mar. 16, 2020); see Kate Davidson, *U.S. Treasury to Help Advance Funds to Employers for Paid Sick Leave*, Wall Street Journal (Mar. 15, 2020), https://www.wsj.com/articles/u-s-treasury-to-help-advance-funds-to-employers-for-paid-sick-leave-11584275421?mod=article_inline; See also Notes 6 and 23, above.

²⁵ H.R. 6201, Technical Correction H. Res. 904, Res. 2, Div. C, §3102(b), 116th Cong., 2d Sess. (Mar. 16, 2020).

²⁶ See H.R. 6201 Technical Correction H. Res. 904, Res. 2, Div. C, §3102(b), 116th Cong., 2d Sess. (Mar. 16, 2020) (amending FMLA §110(a)(2)(A) to define “qualifying need” as school or daycare closure, or unavailability of a childcare provider); FMLA §102(a)(1)(F) (paid leave because of a qualifying need related to a public health emergency), §110(a)(2)(A) (defining qualifying need related to a public health emergency generally as need to care for a child because of school closure or unavailability of daycare due to a public health emergency); §110(a)(2)(B) (defining public health emergency as an emergency with respect to Covid-19 declared by a federal, state or local authority).

²⁷ Pub. L. No. 116-127.

EMERGENCY PAID SICK LEAVE ACT

Division E of the Act, the Emergency Paid Sick Leave Act²⁸ requires employers²⁹ with fewer than 500 employees and government employers³⁰ to provide two weeks of paid sick leave at the regular rate of pay for an employee, who is unable to telework, to quarantine or seek medical help for coronavirus.³¹ An employer must provide the same amount of leave at two-thirds of the regular rate³² to care for a family member with such needs, or for a child without school or childcare due to the coronavirus.³³ Full-time employees may receive 80 hours, the equivalent of two weeks of paid sick leave.³⁴ Part-time employees may take leave equal to the number of hours they work in a typical two-week period.³⁵

Unlike the Emergency Family and Medical Leave Expansion Act, with some exceptions, the Emergency Paid Sick Leave Act incorporates terms and definitions in the FLSA.³⁶ For example, for paid sick leave purposes, a covered private employer is limited to an entity or individual with fewer than 500 employees, as defined in the FLSA.³⁷ However, for family leave purposes, an employer has to apply the definition of an employee under the FMLA.³⁸ Thus, an employer must analyze the two sets of requirements to determine required compliance with each paid leave statute.³⁹ Consistently, preliminary Department of Labor guidance under the Act issued on March 31, 2020, distinguishes between the respective employee definitions under the Emergency Paid Sick Leave Act and

FMLA.⁴⁰ Employers should consult with their tax and benefits advisors regarding the applicability of the Act rules. Similarly to expanded FMLA leave, an employee may be required by the employer to provide reasonable notice to continue to be eligible to receive compensated sick leave.⁴¹ Also, an employer may elect to exclude an employee who is a health care provider or emergency responder from the sick leave requirements.⁴² Likewise, paid sick leave is available to employees who work under a multiemployer collective bargaining agreement.⁴³ The unionized employees may receive MEP payouts based on employer paid sick leave contributions.⁴⁴

If an employer fails to comply with paid sick leave requirements, it would be considered to have failed to pay minimum wages and would be subject to penalties under the FLSA.⁴⁵ The Emergency Paid Sick Leave Act and the requirements thereunder are effective on April 1, 2020.⁴⁶ and sunset on December 31, 2020.⁴⁷

EMPLOYER PAYROLL AND SELF-EMPLOYMENT TAX CREDITS

As part of the Tax Cuts and Jobs Act of 2017 (TCJA), Congress enacted §45S, an income tax credit for FMLA leave under §38 provided generally by an eligible employer to qualifying employees.⁴⁸ Based partially on that template, H.R. 6201 provides employers⁴⁹ with fewer than 500 employees⁵⁰ with a re-

²⁸ Act, Div. E, §5101 *et seq.*

²⁹ See Act §5110(2) (definition of an employer). Religious organizations are included as employers and are subject to the Act requirements. See DOL FAQ, Q&A 58.

³⁰ Act §5110(2)(B)(I).

³¹ Act §5102(a)(1) - §5102(a)(3), §5110(5)(A)(ii)(I). See generally Act §5110(5) (rules for computing paid sick leave, including for employees with varying schedules, akin to FMLA rules).

³² Act §5110(5)(B)(i) (regular rate), §5110(5)(B)(ii) (special rule for two-thirds of the regular rate for certain leave conditions).

³³ Act §5102(a)(4) - §5102(a)(6), §5110(5)(A)(ii)(II).

³⁴ Act §5102(b)(2)(A). See DOL FAQ, Q&A 44 (preliminary DOL guidance on eligible employee status).

³⁵ Act §5102(b)(2)(B). See DOL FAQ, Q&A 5 (preliminary guidance on calculating part-time employee hours).

³⁶ See generally Act §5110.

³⁷ See Act §5110(2)(B)(I) (defining a covered employer as a private entity or individual that employs fewer than 500 employees, or a public agency or other governmental employer than employs one or more employees). See also Act §5110(2)(B)(iii)(II); FLSA §3(e) (defining an employee for purposes of the Emergency Paid Sick Leave Act). See DOL FAQ, Q&A 2 (preliminary guidance on determining 500-employee threshold).

³⁸ Act §3102(b); FMLA §101, §110(a)(1) (modifying the definition of an eligible employee under FMLA §101 for purposes of paid family leave requirements under the Act).

³⁹ See generally Act §3102, §5102.

⁴⁰ See DOL FAQ, Q&A 48, 49 (distinguishing between part-time employee definitions for paid sick leave purposes and under FMLA).

⁴¹ Act §5110(5)(E).

⁴² Act §5102(a).

⁴³ Act §5106(a).

⁴⁴ Act §5106(b).

⁴⁵ Act §5105(a); FLSA §6, §16, §17; 29 U.S.C. §206, §216, §217.

⁴⁶ Act §5108; Notice 2020-21 provides implementation date of §5108.

⁴⁷ Act §5109. See DOL FAQ, Q&A 1 (paid leave provisions under the Act applicable to leave taken between and including April 1, 2020 and December 31, 2020).

⁴⁸ See Pub. L. No. 115-97 §13403(a)(1); see Pub. L. No. 116-94 §142(a) (extending applicability of paid family and medical leave business income tax credit past December 31, 2020); see generally §38, §45S. All Section references herein are to the Internal Revenue Code of 1986, as amended (the "Code") or the regulations promulgated thereunder, unless otherwise noted.

⁴⁹ Possession residents generally may get the benefits of a self-employment tax credit distributed by the possession, but a payroll tax credit does not apply to governmental employers. See Act §7001(e)(4), §7002(f), §7003(e)(4), §7004(f).

⁵⁰ See Act §3102(b); FMLA §101(4)(A)(i) (general definition of FMLA employer threshold), §110(a)(1)(B) (modified definition of

fundable payroll tax credit⁵¹ to offset the cost of providing a worker⁵² with paid sick or family leave.⁵³ Under current law, the 12.4% Social Security payroll tax and 2.9% Medicare payroll tax on earnings are evenly split between employer and employee.⁵⁴ The payroll credit applies to the employer segment of Social Security portion of employment taxes, or 6.2% of wages.⁵⁵

Additional credit reimburses the employer for the employer portion of Medicare tax imposed on the paid sick leave or the paid family leave, but does not apply to a self-employed individual.⁵⁶ Any credit taken under §45S is deducted from the payroll tax credit under the Act.⁵⁷ Employers must evaluate whether the benefits of a credit under §45S may outweigh the economic benefit of the payroll tax credit under the Act. An employer may elect out of the payroll tax credit for any calendar quarter paid sick or family leave is provided. The U.S. Chamber of Commerce has commented that, “Temporary relief from these taxes would give businesses more breathing room and operating capital to keep paying their employees and avoid layoffs.”⁵⁸ Employers in the not-for-profit sector also benefit from a payroll tax credit, unlike from a credit against income tax that generally does not apply to tax-exempt organizations.⁵⁹ Notice 2020-21, issued on March 30, 2020, sets April 1, 2020, as the effective date on which the paid leave wages or compensation for tax credit purposes would first be taken into account.

employer threshold for purposes of provisions of the Act); see generally FMLA §101 for applicable definitions in connection with the paid leave requirements under the Act.

⁵¹ See Act §7001. See also §3111(a) (employer portion of Social Security employment taxes).

⁵² See Act §3102(b); FMLA §110(a)(1)(A) (modifying FMLA definition of eligible employee).

⁵³ Act §7001, §7003; see Note 3, above.

⁵⁴ §3101(a) - §3101(b) (employee portion of Federal Insurance Contributions Act (FICA)), §3111(a)-§3111(b) (employer portion of FICA), §3201(a) (employee portion of excise tax under Railroad Retirement Tax Act (RRTA)), §3221(a) (employer portion of excise tax under RRTA). See generally FICA, §3101 - §3128; RRTA, §3201 - §3241 (employment excise taxes imposed on employer and deductible from wages of employee).

⁵⁵ Act §7001(b)(3).

⁵⁶ Act §7005(b)(1).

⁵⁷ Act §7001(d)(1), §7003(d)(1). See IRS FAQ, Q&A 52.

⁵⁸ U.S. Chamber of Commerce, “Let’s Keep Going:” *Three New Actions Needed Now to Aid Businesses and Workers, Mitigate Job Losses Amid Coronavirus Pandemic* (Mar. 16, 2020), available at <https://abouttax.com/PS9>.

⁵⁹ See §501(a), §501(c); Cf. §511(a) (unrelated business income tax).

PAYROLL TAX CREDIT FOR PAID SICK LEAVE

Scope of Tax Credit

The Act caps, with some exceptions, the amount of qualified sick leave wages taken into account, for purposes of the Social Security (or equivalent) employer tax credit at \$511 per employee per day, or \$5,110 for a total of 10 days for all calendar quarters.⁶⁰ The tax credit is limited to \$200 per day, or \$2,000 total of paid sick leave for employees who must care for a family member or whose child is home because of a school or daycare closure.⁶¹ Any days taken into account for all prior calendar quarters are subtracted from the 10 allowable days in a subsequent calendar quarter for which the credit is allowed.⁶²

Two additional credits fall outside of the paid sick leave wage limits above.⁶³ First, a credit for the employer portion of the Medicare tax is allowed.⁶⁴ Furthermore, there is a payroll tax credit for allocable group health plan expenses that also are excluded from the limitation.⁶⁵

At first glance, the credit for wages, including allocable credit for health plan expenses,⁶⁶ may not exceed the total Social Security (or equivalent) tax on wages paid by the employer, adjusted for some credits.⁶⁷ However, the excess is refundable to the employer for any calendar quarter during which the credit applies.⁶⁸ The refund is treated as an overpayment of tax due to the employer.⁶⁹ IRS has specified that an employer must keep applicable records to substantiate paid leave credit for four years after the later of the payroll tax being due or being paid.⁷⁰

Income Tax Treatment of Payroll Tax Credit for Employer

This subsection addresses federal tax consequences of a payroll credit, including taking it into account for

⁶⁰ Act §7001(b)(1), §7001(b)(2).

⁶¹ Act §7001(b)(1), §7001(b)(2).

⁶² Act §7001(b)(1), §7001(b)(2).

⁶³ See Act §7001(b)(1), §7001(b)(2).

⁶⁴ Act §7005(b)(1).

⁶⁵ See Act §7001(d)(1), §7001(d)(3) (group health plan expense allocation rules for paid sick leave payroll credit).

⁶⁶ See Act §7001(b)(3) (limit on credit allowable under Act §7001(a) to social security or equivalent portion of payroll tax liability of employer for all employees), §7001(c)(1) (amount of credit under Act §7001(a) is increased by the allocable qualified health plan expenses).

⁶⁷ See Act §7001(b)(3).

⁶⁸ Act §7001(b)(4)(A).

⁶⁹ Act §7001(b)(4)(A). See also §6402(a), §6413(b).

⁷⁰ IRS FAQ, Q&A 46.

income tax purposes, applicability of employment excise taxes to creditable paid leave, and refund and recapture provisions in the Act and IRS guidance.⁷¹

An employer takes the amount of the payroll tax credit into gross income as of the last day of a calendar quarter, with respect to which the employer claims the credit, to avoid a double tax benefit.⁷² As mentioned above, if an employer claims the payroll credit, the employer must exclude the qualified sick leave or family leave wages for purposes of claiming an income tax business credit under §45S.⁷³ Further IRS guidance would clarify the interaction of the §45S credit, the payroll credit for paid leave and the requirements to elect out of the payroll credit.⁷⁴

Although the credit is includible in gross income of the employer, as mentioned earlier, the amount of paid leave is not wages subject to FICA or compensation subject to RRTA.⁷⁵ Thus, an employer does not pay social security or equivalent taxes on the amount of paid leave provided to an employee.⁷⁶ Accordingly, an employer does not need a credit gross up for the social security or equivalent taxes on the credited paid leave to be made whole for the payments.

In contrast, an employer claims a dollar-for-dollar credit for the Medicare portion of employment excise taxes on the amount of paid leave.⁷⁷ That credit, similarly to the credit for qualified sick leave or family leave wages, is includible in gross income of the employer.⁷⁸ The IRS, Treasury, and the DOL issued News Release IR-2020-57, which states that, “Employers receive 100% reimbursement for paid leave pursuant to the Act.”

The IRS also has confirmed that paid leave wages, allocable qualified health plan expenses and the employer share of Medicare tax are deductible as ordinary and necessary business expenses.⁷⁹ Furthermore, the IRS clarified that the payroll credit is a payment includible in gross income of the employer.⁸⁰ Therefore, unlike a tax credit,⁸¹ the payroll credit does not reduce the amount of employment taxes deductible by the employer under §162(a).⁸² However, an employer effectively would need a gross up for the out-of-

pocket portion of wages and Medicare taxes to make the employer whole for paid leave.⁸³

The TCJA amended §448(c) to allow certain small business taxpayers with average annual gross receipts not exceeding \$25 million to use the cash method of accounting. Cash basis taxpayers with fiscal tax years may have a timing mismatch with respect to refunds for a calendar quarter, the last day of which is included in the fiscal year of the employer. Thus, a taxpayer may provide paid leave in one fiscal year and receive a refund for excess payroll credit in a subsequent tax year.

However, the amount of credit, which appears to include the refund portion, is includible in gross income of the employer for the taxable year, which includes the last day of any calendar quarter with respect to which a payroll credit is allowed.⁸⁴ As stated above, the excess unused portion of the payroll credit is immediately refundable and is treated as an overpayment of tax.⁸⁵ Also as noted previously, the refund applies on a calendar quarter basis.⁸⁶ Thus, a refund of excess credit for deductible qualified paid leave wages and the employer portion of Medicare tax that is received in a following tax year, is treated as income constructively received by as cash basis taxpayer in the year for which the credit is allowed. However, because the unused credit would not reduce tax liability, even if the refund was not covered by this timing rule, it would not be includible in gross income of a cash basis employer for the tax year of actual receipt under the tax benefit rule.⁸⁷ Further IRS guidance may confirm this income tax treatment with respect to the refundable excess credit.

The IRS is also expected to issue guidance on recapture of payroll tax credit if the IRS determines subsequently that an employer was not eligible for all or a portion of the credit.⁸⁸

⁷¹ See discussion below for the advance feature of the payroll credit in the CARES Act.

⁷² Act §7001(e)(1).

⁷³ Act §7001(e)(1); §45S.

⁷⁴ See Act §7001(a), §7001(e), §7003(a), §7003(e); §45S.

⁷⁵ Act §7005(a).

⁷⁶ Act §7005(a); §3111(a), §3221(a).

⁷⁷ Act §7005(b). See IRS FAQ, Q&A 23.

⁷⁸ Act §7001(e)(1), §7003(e)(1), §7005(b)(2).

⁷⁹ IRS FAQ, Q&A 50; see §162(a) (deduction).

⁸⁰ IRS FAQ, Q&A 51.

⁸¹ See, e.g., §45S.

⁸² §45S.

⁸³ Cf. §38, §45S (business tax credit not includible in gross income of employer).

⁸⁴ Act §7001(e)(1).

⁸⁵ Act §7001(b)(4); §6402(a), §6413(b); IR-2020-57 (Mar. 20, 2020) (stating, where a refund is owed, the IRS will send the refund as quickly as possible).

⁸⁶ Act §7001(b)(4)(A).

⁸⁷ See Act §7001(b)(4)(B). See also §61(a), §111(b), §451(a); Reg. §1.111-1(a)(2), §1.451-1(a)(2). See, e.g., Rev. Rul. 2019-11 (requirement for inclusion in income under the tax benefit rule of a refund of state and local taxes that were deducted on an individual income tax return for a prior year subject to the \$10,000 cap on deduction enacted under the TCJA and codified in §164(b)(6)).

⁸⁸ See Act §7001(f)(4).

Payroll Tax Credit for Paid Family Leave

The payroll credit for paid family leave operates similarly to the paid sick leave credit.⁸⁹ The aggregate limitation on creditable paid sick leave and paid family leave is \$10,000 per employee.⁹⁰ For payroll tax credit purposes, any amount of credited sick leave is deducted from allowable paid family leave.⁹¹

Special Considerations for Types of Employers Covered

Self-Employed and Sole Proprietorships

A tax credit for paid sick leave or family leave would benefit self-employed individuals in the private sector, such as owners of unincorporated sole proprietorships and religious workers who qualify as ministers subject to the Self-Employment Contributions Act (SECA).⁹² Self-employment credits may apply to religious employees deemed self-employed particularly since religious organizations were subject to the requirements of the Act, as DOL has confirmed.⁹³ Religious organizations with fewer than 50 employees may claim an exemption from paid leave requirements under the Act.⁹⁴ However, ministers deemed self-employed for SECA purposes generally would be deemed employees for purposes of the paid leave provisions of the Act.⁹⁵

Generally, the self-employment credits apply similarly to the payroll tax credits.⁹⁶ Some differences are noted below. Self-employed workers qualify for the same level of refundable tax credit to offset wages paid during an illness.⁹⁷ There is a corresponding lower amount available if the absence from work is used to take care of a family member or provide for a school-aged child who must stay home.⁹⁸ However, instead of employer portion of payroll tax liability, the

credit applies against income tax of the self-employed individual.⁹⁹ Likewise, unlike the payroll credit, a self-employed individual claims the self-employment credit on the individual income tax return on Form 1040 for the taxable year the credit was claimed.¹⁰⁰

The average daily self-employment income may be less than the prescribed daily amounts of qualified sick leave equivalent.¹⁰¹ In that case, a self-employed person would be eligible only for the average daily self-employment income, or two-thirds of such income in case of family or childcare sick leave.¹⁰² However, akin to the payroll tax credit, the maximum amount of creditable paid leave remains at \$10,000 for the self-employment tax credit.¹⁰³

Unlike the payroll credit, a self-employment credit for paid leave is based on net income for the taxable year of the taxpayer.¹⁰⁴ However, despite the longer timeline for the payment, the credit effectively reduces any estimated tax payments due from the self-employed individual.¹⁰⁵ The eligibility for the self-employment credit is subject to documentation requirements, which would be clarified in forthcoming IRS guidance.¹⁰⁶ A self-employed person first would have to determine hypothetical eligibility for paid sick leave or family leave, in order to determine eligibility for corresponding self-employment credits.¹⁰⁷

Similarly to payroll credit, the excess of the credit not applied against income tax liability is refundable.¹⁰⁸ Unlike paid leave provided to an employee, paid leave equivalent of a self-employed individual would not be subject to income tax.¹⁰⁹ Further IRS guidance may clarify whether a refund of self-employment credit is taxable to the recipient.

The Act includes an anti-abuse rule where a self-employed individual also received wages from an employer. If a self-employed individual also received paid leave wages subject to a payroll credit, the qualified paid leave equivalent amount would be reduced

⁸⁹ Compare Act §7001 (employer payroll credit requirements and limitations for paid sick leave) with §7003 (mirror provisions for employer payroll credit requirements and limitations with respect to paid family leave).

⁹⁰ Act §7003(b)(1)(B).

⁹¹ Act §7003(b)(2).

⁹² Act §7002, §7004. See also §1402(a)(8) (minister treated as self-employed, subject to SECA, §1401 *et seq.*); Form 1040, Schedule C (reporting sole proprietorship income and loss); Schedule F (reporting farmer self-employment income).

⁹³ See DOL FAQ, Q&A 58.

⁹⁴ DOL FAQ, Q&A 58.

⁹⁵ See DOL FAQ, Q&A 48, 49.

⁹⁶ Compare Act §7001, §7003 (payroll credits for paid sick or family leave) with §7002, §7004 (credits for sick or family leave for certain self-employed individuals).

⁹⁷ Act §7002(c)(1).

⁹⁸ Act §7002(c)(1), §7004(b)(2).

⁹⁹ Act §7002(a), §7004(a) (allowing a credit against tax imposed by Subtitle A of the Code applicable to the Act sections). See IRS FAQ, Q&A 60 (income tax credit to offset federal self-employment tax for any taxable year equal to qualified sick leave equivalent amount or qualified family leave equivalent amount).

¹⁰⁰ IRS FAQ, Q&A 66.

¹⁰¹ See Act §7002(c)(1)(B)(i).

¹⁰² See Act §7002(c)(1)(A), §7002(c)(1)(B)(ii).

¹⁰³ Act §7004(d)(3).

¹⁰⁴ Act §7002(c)(2), §7004(c)(2).

¹⁰⁵ IRS FAQ, Q&A 66.

¹⁰⁶ Act §7002(d)(2), §7004(d)(2). See IRS FAQ, Q&A 46 (four-year record-keeping requirement for eligible employers with respect to payroll credit).

¹⁰⁷ See Act §7002(b)(2), §7002(c)(1)(A), §7004(b)(2), §7004(c)(1)(A).

¹⁰⁸ Act §7002(d)(1)(A), §7004(d)(1)(A).

¹⁰⁹ See Act §7002(d)(3), §7004(d)(3).

to the extent both credits would exceed the \$10,000 aggregate cap on the credit.¹¹⁰ Additionally, the Act directs Treasury and the IRS to limit avoidance of purposes of the payroll credit provisions.¹¹¹

Thus, for example, an employer may place one or more independent contractors on payroll within a calendar quarter, for which the employer claimed credit for paid leave provided to the new employees. The contractor otherwise might have claimed self-employment credit for a period prior to being hired. Under the anti-abuse rule or the broader anti-avoidance rule, there is lack of clarity whether the new employee may be able to claim a tax credit for pre-hire days due to coronavirus. Treasury and the IRS may specify in forthcoming guidance a facts and circumstances analysis to be employed in applying the anti-abuse or anti-avoidance rules.

Self-employed ministers who may be eligible for an income-tax-free parsonage allowance, and thus would receive a lower amount of taxable compensation subject to SECA, still would be eligible for a paid leave tax credit.¹¹² If a religious employee has insufficient taxable income for the tax year, against which to apply the tax credit, the individual would receive a refund for the excess. Unlike the payroll credit, the self-employment credit for absence from work would not be includible in gross income of the religious employee.¹¹³

LLCs

Single-member LLCs that are disregarded for tax purposes¹¹⁴ generally are treated as corporations for employment tax purposes.¹¹⁵ An exception is, if the sole member of the LLC is a sole proprietorship subject to SECA. In that case, the self-employment tax regime would continue to apply to the individual owner of the sole proprietorship that is the sole member of the LLC.¹¹⁶ Under the 2019 final Treasury regulations, the same result obtains for a partner of an upper-tier partnership that owns a disregarded LLC. The self-employment credit provisions would apply to the upper-tier partner, rather than the paid leave credit provisions under the Act.¹¹⁷

An LLC treated as a corporation for FICA purposes is also responsible for withholding.¹¹⁸ Thus, the LLC may retain the amounts subject to withholding, which

include individual income tax and employee portion of FICA, as well as the employer portion of FICA taxes if it is eligible for the payroll credit.¹¹⁹ Therefore, the LLC would retain the withholding taxes in the amount of the paid leave credits as a result of treating the LLC as the employer of the owner.¹²⁰ Likewise, the otherwise disregarded LLC would be eligible for the tax credit.¹²¹

Also, compared to unincorporated businesses, individual sole members of LLCs would be eligible for prescribed amounts of paid leave credit, rather than a potentially lesser rate of average daily self-employment income.¹²² Further IRS guidance may clarify this rule.

Tax-Exempt Organizations.

Nonprofits may need the tax relief to remain solvent because lack of liquidity in markets may result in reduced charitable contributions and government funding of not-for-profit organizations. Exempt organizations must be fewer than 500 employees to be subject to the paid leave requirements and to claim the payroll credit.¹²³ For FICA purposes, a §501(c)(3), a §501(c)(4) or other exempt organization would be treated as an employer.¹²⁴

Exempt Employers

In a “last-minute deal” on March 13, 2020, “negotiators agreed to exempt businesses with fewer than 50 employees from the House bill if it would jeopardize their ability to operate.”¹²⁵ In addition, “President Trump instructed Treasury Secretary Steven Mnuchin and Labor Secretary Eugene Scalia to propose regulations to ensure the legislation doesn’t hurt

¹¹⁹ See Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116-136, §3606; IR-2020-57 (Mar. 20, 2020) (eligible employer permitted to retain payroll taxes the employer otherwise is required to deposit in the amount of qualified sick or family leave paid to an employee, including federal income taxes, employee share of FICA and employer share of FICA for all employees; stating also that pursuant to forthcoming guidance, an advance payment will be made available by submitting a prescribed request form).

¹²⁰ See Act §7001, §7003.

¹²¹ Reg. §301.7701-2(c)(2)(iii)(A)(3). See also IRS Form 7200 (Mar. 2020); Instructions to IRS Form 7200 (Mar. 2020) (applicable to disregarded LLCs).

¹²² See Act §7002(c), §7004(c).

¹²³ See generally Act §3102, §5102, §7001.

¹²⁴ See §3111(a) - §3111(b).

¹²⁵ Kate Davidson, *Coronavirus Sick-Leave Bill Raises Concern Over Small-Business Burden*, Wall Street Journal (Mar. 16, 2020), available at https://www.wsj.com/articles/coronavirus-sick-leave-bill-raises-concern-over-small-business-burden-11584369229?mod=hp_lista_pos4.

¹¹⁰ Act §7002(d)(3), §7004(d)(3).

¹¹¹ See Act §7001(f)(1), §7003(f)(1).

¹¹² See Act §7002. See also §107.

¹¹³ See Act §7002(d)(3), §7004(d)(3).

¹¹⁴ See Reg. §301.7701-2(a).

¹¹⁵ Reg. §301.7701-2(c)(2)(iv).

¹¹⁶ See §1402; Reg. §301.7701-2(c)(2)(iv)(C)(2).

¹¹⁷ See §1402; Reg. §301.7701-2(c)(2)(iv)(C)(2).

¹¹⁸ Cf. §3406; Reg. §301.7701-2(c)(2)(iv)(C)(1).

small businesses.”¹²⁶ Thus, employers with fewer than 50 employees may claim an exemption from childcare paid leave requirements,¹²⁷ pursuant to forthcoming guidance by the DOL.¹²⁸ The exemption would apply to paid leave on condition of school closings or childcare unavailability.¹²⁹

In order to be exempt, the IRS stated in a news release, that small businesses would have to show circumstances involving jeopardy to the viability of the business as a going concern.¹³⁰ In The statement appears to refer to providing either paid family leave or paid sick leave.¹³¹ Accordingly, a payroll tax credit for childcare leave would not apply to the exempt small business employer.¹³²

The DOL set forth three hardship criteria in preliminary guidance for a small business, including a nonprofit organization, to claim the exemption.¹³³ In order to claim the exemption, an authorized officer must determine whether at least one of the three conditions was met.¹³⁴ In addition, an employee actually must request paid sick or family leave for childcare due to coronavirus to trigger the exemption.¹³⁵ Thus, to claim the exemption, there is an internal documentation requirement for the employer.¹³⁶ Therefore, small businesses must document the basis for the exemption from paid leave requirements properly.

Effective Date

The IRS or DOL will not assess penalties for failure to comply with the paid leave requirements in the Act for 30 days beginning on the date of enactment, March 18, 2020.¹³⁷ But employers have to make good faith efforts to comply with the new legislation during that period.¹³⁸

FURTHER IRS RELIEF AND LEGISLATION — CARES ACT

The IRS deferred the federal income tax filing deadline of April 15, 2020, for all taxpayers because of the coronavirus.¹³⁹ In a March 21, 2020, news release, the IRS announced extension of the due date to July 15, 2020, for filing income tax returns, and for the tax payments regardless of the amount.¹⁴⁰ A taxpayer may file an income tax return extension not later than July 15, 2020, to extend the due date to October 15, 2020.¹⁴¹ However, the extension does not apply to excise taxes, including payroll taxes.¹⁴²

On March 25, 2020, the IRS issued another news release, suspending all tax payments pursuant to installment agreements or offers in compromise (OIC) due between April 1, 2020, and July 15, 2020.¹⁴³ The IRS also suspended tax collection activities and deferred due dates for filing delinquent returns or submitting earned income tax credit (EITC) or wage verification documentation.¹⁴⁴ In addition, the IRS deferred until July 15, 2020, a deadline to submit additional supporting documentation for an OIC.¹⁴⁵ Likewise, the IRS also announced it would not pursue litigation on statute of limitations actions that do not expire in 2020, deny certain tax credits, close an OIC request or default an OIC for delinquent taxpayers before July 15, 2020.¹⁴⁶

Simultaneously, lawmakers were considering the third relief package for businesses and individuals, including possible tax credits for workers and loans for industries hard-hit by the virus, such as airlines and hotels.¹⁴⁷ After extensive negotiations, the Senate bill was finalized on March 25, 2020.¹⁴⁸ The CARES Act was then passed by the Senate on March 26, 2020.

The CARES Act was passed by the House, presented to and signed into law by President Trump, on

¹²⁶ See above, Note 125.

¹²⁷ See Act §3102, §5102.

¹²⁸ IR-2020-57 (Mar. 20, 2020).

¹²⁹ IR 2020-57 (Mar. 20, 2020).

¹³⁰ IR 2020-57 (Mar. 20, 2020).

¹³¹ In the section titled Small Business Protection “Employers with fewer than 50 employees are eligible for an exemption from the requirements to provide leave to care for a child whose school is closed, or childcare is unavailable in cases where the viability of the business is threatened.” IR-2020-57 (Mar. 20, 2020). See Act §3102, §5102.

¹³² Cf. Act §7001, §7003.

¹³³ See DOL FAQ, Q&A 58.

¹³⁴ DOL FAQ, Q&A 58.

¹³⁵ See DOL FAQ, Q&A 59 (exemption requirements).

¹³⁶ DOL FAQ, Q&A 59 (Mar. 31, 2020).

¹³⁷ IR-2020-57 (Mar. 20, 2020).

¹³⁸ IR-2020-57 (Mar. 20, 2020).

¹³⁹ Notice 2020-18.

¹⁴⁰ IR-2020-58 (Mar. 21, 2020); see, Kate Davidson, *Coronavirus Sick-Leave Bill Raises Concern Over Small-Business Burden*, Wall Street Journal (Mar. 16, 2020), available at https://www.wsj.com/articles/coronavirus-sick-leave-bill-raises-concern-over-small-business-burden-11584369229?mod=hp_list_pos4.

¹⁴¹ IR-2020-58 (Mar. 21, 2020).

¹⁴² See Notice 2020-18.

¹⁴³ IR-2020-59 (Mar. 25, 2020).

¹⁴⁴ IR-2020-59 (Mar. 25, 2020).

¹⁴⁵ IR-2020-59 (Mar. 25, 2020).

¹⁴⁶ IR-2020-59 (Mar. 25, 2020).

¹⁴⁷ See Kate Davidson, *Coronavirus Sick-Leave Bill Raises Concern Over Small-Business Burden*, Wall Street Journal (Mar. 16, 2020).

¹⁴⁸ See CARES Act, H.R. 748, 116th Cong., 2d Sess. (Mar. 25, 2020).

March 27, 2020.¹⁴⁹ The CARES Act provides taxpayer¹⁵⁰ financial assistance and relief through numerous tax, employee benefits, and other economic stimulus provisions.¹⁵¹ The CARES Act includes clarifications regarding limitation on paid leave, exempt employers, covered employees and advance of payroll credit, paid leave reimbursement of federal contractors, as well as certain technical corrections.¹⁵²

Paid Family Leave

CARES Act §3601 amends FMLA §110(b)(2)(B)(ii) added by Act §3102 by limiting the wages for family paid leave to a maximum of \$200 per day or \$10,000 in the aggregate for each employee.¹⁵³ Thus, the amendment clarifies the maximum amount of wages¹⁵⁴ that an employer would pay at two-thirds the regular rate to an employee who takes the additional 10 weeks of leave to care for a child without school or daycare due to coronavirus.¹⁵⁵

An employer receives a payroll credit for an additional amount for qualified health plan expenses allocable to the qualified family leave wages subject to the credit.¹⁵⁶ The expenses are incurred in providing and maintaining benefits for employees under a group health plan.¹⁵⁷ However, to qualify for the credit, the amounts must be excluded from gross income of the employee as employer plan contributions or insurance premiums under §106(a).¹⁵⁸

¹⁴⁹ Pub. L. No. 116-136.

¹⁵⁰ See CARES Act §2201 (financial assistance provided to taxpayers generally based on the income reflected on their most recent income tax returns).

¹⁵¹ See generally CARES Act, Title II — Assistance for American Workers, Families, and Businesses.

¹⁵² See generally CARES Act §3601 - §3611.

¹⁵³ CARES Act §3601 - §3611.

¹⁵⁴ See §3111(a), §3221(a); Act §7001(b)(3) (payroll credit for paid sick leave limited to employment excise taxes applicable to wages paid by employer), §7001(c) (defining qualified sick leave wages as wages within the meaning of §3121(a) and compensation in §3231(e)).

¹⁵⁵ CARES Act §3601; Act §3102(b); FMLA §102(a)(1)(F) (additional paid leave for a qualifying need related to a public health emergency), §110(a)(2)(A) (defining qualifying need as a need for leave to care for a minor child if school or daycare was closed, or a child care provider is not available due to a public health emergency), §110(a)(2)(A) (defining public health emergency as emergency with respect to Covid-19, illness caused by novel coronavirus, declared by a federal, state or local authority), §110(b)(2)(B)(ii) (cap on additional paid leave).

¹⁵⁶ Act §7003(d)(1).

¹⁵⁷ Act §7003(d)(2); §5000(b)(1); IRS FAQ, Q&A 31 (pre-tax employee expenses included).

¹⁵⁸ Act §7003(d)(2); See also §106(a); Reg. §1.106-1(a).

Emergency Paid Sick Leave

In addition, CARES Act §3602 contains a limitation on emergency paid sick leave as an amendment to Act §5102.¹⁵⁹ The bill provision expressly limits wages for emergency sick leave under Act §5102(a) to \$511 per day or \$5,110 in the aggregate for each employee paid at regular rate.¹⁶⁰ Likewise, CARES Act §3602 limits paid caretaker leave to \$200 per day or \$2,000 in the aggregate for an employee taking the leave.¹⁶¹ Similarly to family leave, a payroll credit for an amount above the aggregate wage limit is allowable for allocable group health plan expenses of the employer for the employee taking leave.¹⁶²

Covered Employees

Certain federal government employees may be exempt at the discretion of the Office of Management and Budget (OMB) from paid sick leave and family leave provisions.¹⁶³ On the other hand, paid leave requirements apply to those employees who worked at minimum 30 out of the last 60 days before being laid off after March 1, 2020, and subsequently were re-hired.¹⁶⁴

Advance for Payroll Credit

CARES Act §3606(a) amends Act §7001 by providing for advance of payroll credit including the refundable portion for required paid sick leave wages, pursuant to Treasury and IRS regulations or guidance.¹⁶⁵ Private sector and not-for-profit employers may use IRS Form 7200, released March 31, 2020, to request the advance.¹⁶⁶ The amount of the payroll credit advance is limited to 100% of qualified sick leave wages paid by an employer for a calendar quarter.¹⁶⁷ CARES Act §3606(a)(3) provides deposit rules for the employer portion of the excise taxes subject to

¹⁵⁹ See Act §5102; CARES Act §3602.

¹⁶⁰ CARES Act §3602 (adding new Act §5102(f)); see Act §5102(a)(1) - §5102(a)(3).

¹⁶¹ CARES Act §3602; see Act §5102(a)(4) - §5102(a)(6) (paid family or childcare leave).

¹⁶² Act §7001(d). See also §106; Reg. §1.106-1(a).

¹⁶³ CARES Act §3604.

¹⁶⁴ CARES Act §3605; FMLA §110(a)(1)(A)(ii).

¹⁶⁵ CARES Act §3606(a); Act §5102, §7001(b)(4)(A)(ii), §7001(f)(6).

¹⁶⁶ IRS Form 7200; see Instructions to IRS Form 7200 (Mar. 2020).

¹⁶⁷ See CARES Act §3602 (amending Act §5102 to clarify the limitation on payroll credit amount), §3606(a)(1)(B); Act §5102(f) (limitation on payroll credit for emergency paid sick leave), §7001(a) (credit for entire paid sick leave wages during a calendar quarter), §7001(b)(2) (limiting aggregate sick leave wages subject to payroll credit to 10 days, less the number of days taken

payroll credit.¹⁶⁸ CARES Act §3606(a)(3) permits an IRS waiver of the failure to deposit penalty under §6656 payroll taxes due to anticipation of receipt of the sick leave payroll credit.¹⁶⁹ CARES Act §3606(b) includes analogous advance rules for family leave payroll credit.¹⁷⁰

Notice 2020-22, issued on March 31, 2020, provided requirements for the payroll credit and the employee retention credit under the CARES Act to avoid a failure to deposit penalty. An employer would not incur a §6656 penalty generally if the amount of withheld taxes not deposited is less than or equal to the amount of the payroll credit to which the employer is entitled. The second requirement for waiver is that the employer has not filed Form 7200 for an advance of the credit.

Thus, the amount of credit for which an employer ultimately is eligible may be lower than anticipated. In that case, an employer that retains withheld taxes in the maximum amount of expected payroll credit, may be liable under §6656. In addition, the employer would be subject to recapture of credit. In this instance, considering the respective benefits of retaining withheld taxes or seeking an advance of the payroll credit may be advisable.

Reimbursement of Contractors for Paid Leave

CARES Act §3610 authorizes a federal agency, to the extent funds are available, to reimburse a contractor for paid sick leave or paid family leave in the amount that would equal to the payroll credit allowable under Division G of the Act.¹⁷¹ An agency must reimburse the contractor at the minimum billing rate and for not more than 40 weeks per week.¹⁷² Covered paid leave includes sick leave, and is paid to its em-

into account for a previous quarter), §7001(b)(3) (limiting payroll credit for paid sick leave to employer portion of FICA or RRTA excise taxes, subject to reduction for certain credits).

¹⁶⁸ CARES Act §3606(a)(3) (amending the Act to add new §7001(i)); Act §7001(a) (credit against employer social security portion of employment taxes); §3101 (social security portion of employment excise taxes to be deposited), §6302(g) (general requirement to deposit applicable employment taxes the first banking day after the employer is obligated to deposit in the aggregate the amount equal to or exceeding \$100,000 on any given day), §6656(a) (underpayment penalty for failure to deposit taxes, including employment taxes). *See also* CARES Act §2302 (deferral periods for deposit of certain payroll taxes).

¹⁶⁹ CARES Act §3606(a)(3); Act §7001(a), §7001(b)(3) (credit against payroll taxes); §6302(g), §6656(a), §6656(c).

¹⁷⁰ CARES Act §3606(b)(1) (amending Act §7003(b)(3)(B)), §3606(b)(2) (adding Act §7003(f)(6)), §3606(b)(3) (adding Act §7003(i)).

¹⁷¹ CARES Act §3610; Act §7001 *et seq.*

¹⁷² CARES Act §3610.

ployees or subcontractors to keep them ready to perform work, including life saving duties, until September 30, 2020.¹⁷³ The workers must be incapable of performing their duties on a site approved by the federal government, or to telework due to Covid-19.¹⁷⁴ The reimbursement is reduced by payroll tax credits under Division G of the Act and by any credits under the CARES Act.¹⁷⁵

CONCLUSION

Employers are statutorily required until December 31, 2020, to provide paid leave in connection with coronavirus. Payroll tax credit capped by the amount of allowable paid leave would assist private sector employers by crediting Social Security or equivalent portion of employment taxes owed on wages of eligible employees. The amount of payroll tax credit is determined based on paid leave wages of eligible employees. But the credit applies against the employer portion of any employment or self-employment taxes. The employer may seek an advance in the amount of the credit and would not be penalized for failure to deposit withheld taxes due to eligibility for the payroll tax credit. A refund is issued to the employer for the excess of paid leave not credited against employment excise tax liability.

Business owners who are sole members of LLCs will benefit from the payroll credit to the extent of FICA taxes owed for a calendar quarter, because a disregarded LLC generally is treated as a corporation for employment tax purposes. The tax credit also would assist tax-exempt organizations, including religious organizations that have payroll. Religious employees of exempt organizations, who are deemed ministers subject to self-employment tax, as well as individuals or sole proprietorships will be eligible for self-employment credit against their income tax liability.

Further IRS and DOL guidance, some of which has been issued ahead of the April 1, 2020, effective date will clarify the implementation of the payroll tax credit. Under the Families First Coronavirus Response Act, the CARES Act, and current or forthcoming IRS and DOL guidance, private sector, not-for-profit, and governmental employers must ensure compliance with paid leave provisions. Business taxpayers and exempt organizations subject to unrelated business income tax (UBIT) also must determine whether to apply the §45S income tax credit in conjunction with or in lieu of the payroll credit for paid sick or family

¹⁷³ CARES Act §3610.

¹⁷⁴ CARES Act §3610.

¹⁷⁵ CARES Act §3610; *see* Act §7001 *et seq.*

leave, or whether to apply an Employee Retention Credit under CARES Act §2301 with the correspond-

ing IRS guidance.