



EMPLOYER DOCUMENTATION REQUIRED BY IRS TO CLAIM THE TAX CREDIT UNDER EPSL OR EFMLA

By Gregory J. Norys

On March 31, 2020, the Internal Revenue Service (“IRS”) provided employer’s guidance on what documentation it will require to support the tax credit taken under the Emergency Paid Sick Leave (“EPSL”) and the Emergency Family and Medical Leave Expansion Act (EFMLA) sections of the Families First Coronavirus Response Act (“FFCRA”). This article will discuss what your company may need to provide the IRS to obtain the tax credits available under the EPSL or EFMLA.

Information to be Obtained and Retained

This guidance suggests that the IRS will require any employee who is taking EPSL or EFMLA to provide documentation containing the following: (1) the employee’s name; (2) the dates for which the leave is being requested; (3) the qualifying reasons for the leave, which can be found in the EPSL and EFMLA sections of the FFCRA ([see link to article here](#)); and, (4) a statement from the employee or written note in the file that the employee is unable to work because of a qualified reason. As this is a new program, the IRS may require additional documentation depending upon the reason for the leave.

If the employee is taking EPSL based on a quarantine order or isolation directive (either from the government or a health care provider), the employee must provide the name of the governmental entity or the health care provider that issued the directive (i.e., Governor Newsom’s Stay at Home Order). The employer should keep a copy of the order or directive in the employee file, as well maintain a separate payroll file – or other file that separately maintains the amount of payroll for all employees who have taken EPSL - supporting the employer’s tax credit (while remembering to restrict access to this file since it may contain an employee’s personal health information in a tax related file).

The same documentation is required if the employee takes leave to care for their self or to care for the employee’s spouse, child, or parent with a serious health condition related to COVID-19 or symptoms related to COVID-19 or to take care of their child due to school being closed or child care being unavailable. The employee may also be eligible for EFMLA to take care of a child out of school or without childcare due to the virus.

When EPSL is based on children being out of school for the remainder of this school year, the immediate need for EPSL and EFMLA will likely be childcare related. If the employee is claiming leave due to some type of childcare, the employee must provide: (1) the name of their child; (2) the name of the school or place of childcare that has closed (i.e., or closure letter from the school district or child care facility); and, (3) a representation that no other suitable person will be caring for the son or daughter during the period of leave. The IRS instructs that this last requirement will help avoid the situation where both parents are utilizing EPSL and EFMLA, only one parent is needed to care for their children. Note, however, that the regulations also allow employers to request additional documentation that may be needed in the future to support a request for tax credits for providing the employee with EPSL and EFMLA.

The IRS requirements for tax credit largely follow the Department of Labor's temporary regulations, but there is a major difference when it comes to paid leave for childcare purposes. The IRS requires that the documentation include the age of the child and if the child is 14 or over, the documentation must include a statement that special circumstances exist requiring the employee to provide care during daylight hours. So, while the employer may grant leave to an employee to care for any child under 18, the employer will only be eligible to take a tax credit if the EPSL or EFMLA is for children 14 and under (absent some exceptional circumstance).

Based on this new guidance, employers need to gather the needed documentation to capture as much tax credit as possible. Given the possible financial implications to the employers, the employers should include these documentation requirements in their policies (even though this requirement expires on December 31, 2020) to ensure compliance with both Department of Labor and also IRS eligibility for tax credits. Employers should deny the EPSL and EFMLA if the employee fails to provide the documentation, after giving the employee notice and an opportunity to correct the failure.

Payment of the Sick and Family Leave Credit

The law provides that qualified EPSL and EFMLA wages are not subject to the taxes imposed on employers (i.e., social security and medicare). A credit is instead allowed against the taxes imposed on employers. If the amount of the credit exceeds the employer portion of these federal employment taxes, the excess is treated as an overpayment and refunded to the employer. ([See link to article here](#)).

This article is not intended to provide tax advice. Employers should therefore talk with an accounting professional to ensure your business receives a credit in the full amount of the qualified EPSL and EFMLA wages, plus allowable qualified health plan expenses and the employer's share of Medicare tax, paid for leave during the period beginning April 1, 2020, and ending December 31, 2020.

Employers who claim the tax credits for EPSL and EFMLA, plus allowable qualified health plan expenses and the employer's share of Medicare taxes, must retain records and documentation supporting each employee's leave to substantiate the claim for the credits. The employer must also retain the Forms 941, Employer's Quarterly Federal Tax Return, and 7200, Advance of Employer Credits Due To COVID-19, and any other applicable filings made to the IRS requesting the credit.

For more detail on specific documentation required, on refundable tax credits or the procedures to receive payment of the advance credit, see: https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs#how_to_claim



This article was written by [Gregory J. Norys](#), a partner at Coleman & Horowitz, LLP, where he manages the firm's Visalia office. As head of the firm's labor & employment practice group, Greg works in the firm's litigation department representing clients in complex commercial and real estate litigation, construction litigation, labor and employment counseling and litigation, and professional liability defense litigation. He has been named a Northern California Rising Star® by Super Lawyers (Thomson Reuters) and is a member of the Tulare and Fresno County Bar Associations and the Association of Business Trial Lawyers. Greg can be reached at gnorys@chl.com or (559) 248-4820, ext. 161.