



COVID-19 Best Practices:

Legislation, staffing, and marketing

Hosted by: **BAMA** 
Bay Area Manufacturers Association

April 1, 2020

Beth Galic,
Executive Director,
Bay Area
Manufacturers
Association

Webinar moderator

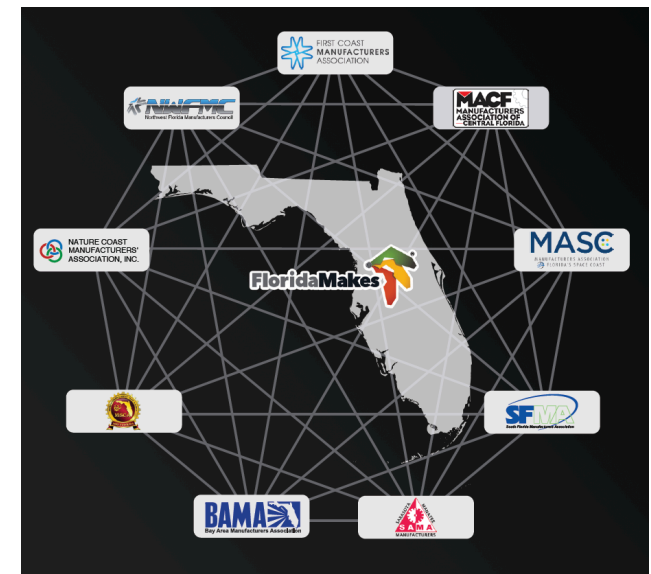


The FloridaMakes Network

Mission: Improve the productivity and technological performance of Florida's manufacturing sector.

The FloridaMakes network is an industry-led initiative operated by Florida's regional manufacturers associations in partnership with industry, research, educational and economic development organizations, both public and private, at the state and national levels.

The network provides services focused on three principle value streams: technology adoption, talent development, and business growth.





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COVID-19 Best Practice Series

April 3 - Stimulus plan, insurance and access to capital

April 6 - Blockchain, cybersecurity, and managing liquidity

Talent Development Series

April 7 - Online Training: Strategies to Develop Employees During a Time of Uncertainty

TODAY'S PRESENTERS



Changes in Legislation: Families First Coronavirus Response Act by **Grant Peterson**, Shareholder, Ogletree and Deakins



Staffing Concerns by **Christina Davenport**, Vice President / Owner, JMI



Now is the time to build company loyalty and keep the rumors at bay by **Malia Powers**, Vice President, Power On Marketing



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Families First Coronavirus Response Act: What Manufacturers Need To Know



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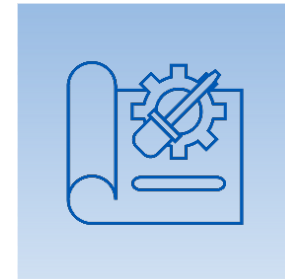
An Economic Stimulus Package – Families First Coronavirus Response Act (FFCRA)



Expanded FMLA
“E-FMLA”



Created New
Paid Sick Leave
“EPSL”



Benefit
Mandates and
Tax Credits

FFCRA – Two Benefits to Employers



Incentivized states to loosen unemployment compensation, and not have benefits affect tax rating



Created tax credits for employers who provide E-FMLA and EPSL

Before We Get to the FFCRA, DON'T FORGET!!!



- Other leaves are still out there
 - Leaves under policies
 - Follow your normal policies
 - Or feel free to amend them if they are not appropriately responding
 - Continue to monitor state and local leaves (including paid leave laws)
 - States are active too amending and creating leave laws to respond to COVID-19 scenarios
- And...

FMLA and ADA

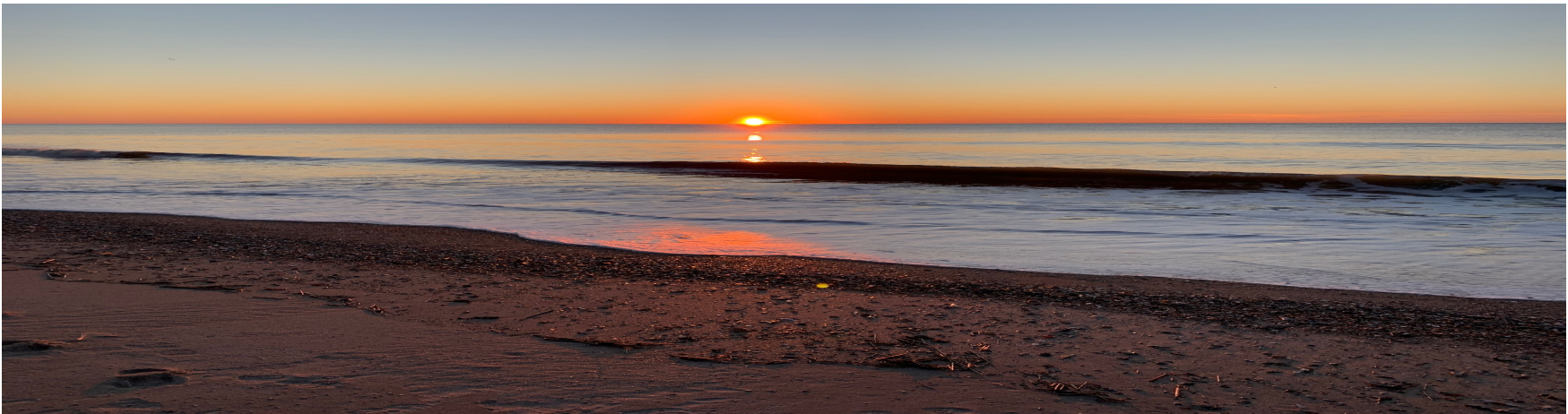
- “Old School” FMLA
 - Own serious health condition
 - Family serious health condition
- ADA
 - Could be a disability under the ADA
 - Leave can be a reasonable accommodation



FAMILIES FIRST CORONAVIRUS RESPONSE ACT

FFCRA

- Effective April 1, 2020 (according to DOL) – December 31, 2020



NOTE – THERE IS ALSO A SUNRISE – ANY LEAVE GIVEN PRIOR TO APRIL 1 FOR THE REASONS WE ARE ABOUT TO DISCUSS GETS NO CREDIT UNDER THE NEW REQUIREMENTS.

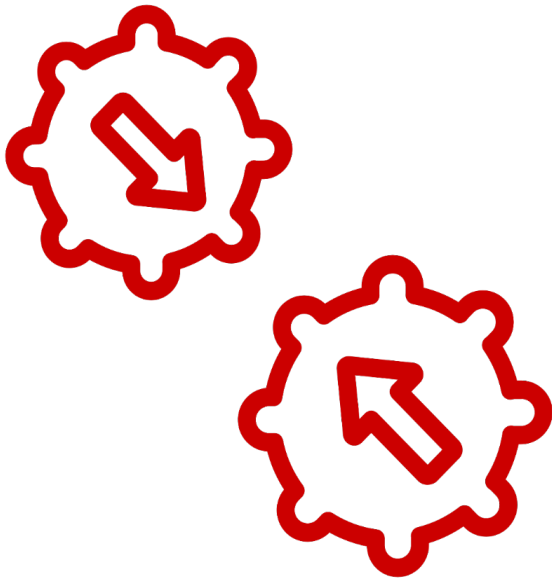
FFCRA

- Applies to schools, governmental employers of any size, and private employers with less than 500 employees
 - How do you count? For either E-FMLA or EPSL
 - Start with the W-2 employees
 - Add to that # any temporary employees, leased employees, or other “shared” employees
 - That’s your number



FFCRA

- Wait! We are still counting . . .
 - Definitely for E-FMLA (and possibly for EPSL)
 - Consider whether you are an “**integrated employer**,” which allows you to aggregate employees with another W-2 employer when you are affiliated or parents. Factors:
 - Common management
 - Interrelation between operations
 - **Centralized control of labor relations: Courts have found centralized control of labor when business entities share policies regarding hiring, firing, and training employees, and in developing and implementing personnel procedures.**
 - A degree of common ownership and financial control (least important)



FFCRA

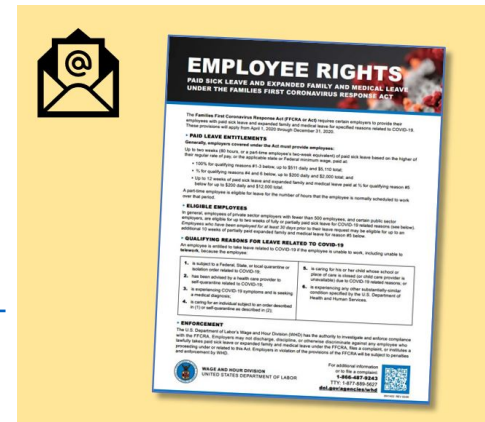
- What about **employers under 50**. Aren't they exempt?
 - **NO! Not unless the DOL lets you out**
 - Act requires DOL to pass regulations that will develop the criterion for an employer with <50 to prove that providing the paid leave **for school closures** in accordance with the Act would jeopardize the businesses ability to continue as a going concern
 - DOL intends to pass regulations on it



FFCRA

- Notice Posting—Already issued
 - Maintain, in a **conspicuous location**, where notices to employees are customarily posted, in **all work locations**
 - **Email or direct mailing** to employees
 - Posting via **intranet or external website**

https://www.dol.gov/sites/dolgov/files/WH1422_Non-Federal.pdf



- DOL has already issued guidance on over 30 hot topics
- And more are expected today, over the weekend, and into next week...

FFCRA

- Damages and **penalties** as under the FLSA for unpaid EPSL, including:
 - *Unpaid wages*
 - An additional equal amount as *liquidated damages*
 - *Attorneys' fees and costs*
- Injunctive relief as under the FLSA for unlawful discharge, discipline, or discrimination, including:
 - *Reinstatement*



EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

Expanded FMLA or Emergency FMLA (E-FMLA)

– Key Points

- It is just another form of FMLA (so 12 weeks; same FMLA year as usual)
 - Normal FMLA rules apply (e.g., benefit protection, etc.)
 - If leave is granted, and you are already an FMLA covered employer, any leave taken will count against the normal 12-week period for other types of FMLA
 - Other than pulling out of the same 12-week bank, this law is different enough that it should not alter how you normally go about processing FMLA leaves for traditional reasons, and you should not try to modify your forms – just build new ones for this
- It provides **leave for ONLY ONE type of COVID-19 situation**
 - If the employee has a minor child
 - The child's school or daycare closes because of COVID-19 concerns or if the child's normal, paid care provider is unavailable because of COVID-19
 - As a result, the employee cannot work **or telework**
 - Because they need to care for the child

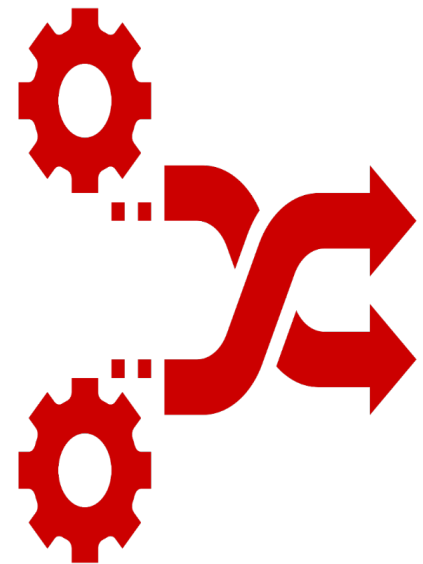
Expanded FMLA or Emergency FMLA (E-FMLA)

– Key Points

- Changed the definition of employer (SOLELY FOR E-FMLA)
 - Private employers <500
 - Schools
 - Public agencies (governmental employees)

The OLD definition of employer still applies for all other forms of FMLA

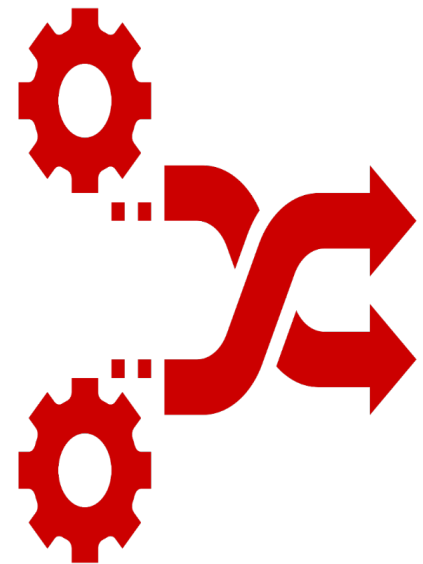
- Employers with 50 or more employees in 20 or more workweeks this year or last
- Changed the definition of eligible employee (SOLELY FOR E-FMLA)
 - Any employee who has been on payroll for more than 30 calendar days (whether working or not)
 - If not eligible when requested, but they become eligible because they are still on payroll, then they get it when they hit 30 days



Expanded FMLA or Emergency FMLA (E-FMLA)

– Key Points

- CARES revised the E-FMLA to include employees who:
 - were laid off by that employer not earlier than March 1, 2020,
 - had worked for the employer for at least 30 of the last 60 calendar days prior to the layoff, and
 - were rehired by the employer.



Expanded FMLA or Emergency FMLA (E-FMLA)

– Key Points

- Unpaid for first two weeks
 - But could be paid by EPSL or employer's other paid leaves (at employee's option)
- Provides for pay to employees for weeks 3-12
 - At two-thirds regular rate of pay (over past 6 months) (subject to applicable minimum wage)
 - Regular rate of pay is same definition as FLSA (includes all non-discretionary bonuses)
 - Capped at \$200 per day
- Employer cannot require employees to supplement with other paid leaves, and employee cannot demand. Must be by agreement.



E-FMLA – Other Aspects

Employer Help	Employee Help
Intermittent leave must be by agreement	If an employee says they cannot telecommute, then they cannot
If you have to close a facility, terminate, or furlough before or after the law becomes effective, then the employee's entitlement ends	
<p>You can, AND SHOULD, require documentation from employee attesting to the reasons for leave, and require documentation substantiating the need for leave. Think TAXES – this will be part of your claim and your proof for tax credits.</p> <p>E.g., notice of closure or unavailability from your child's school, place of care, or child care provider, including a notice that may have been posted on a government, school, or daycare website, published in a newspaper, or emailed to you from an employee or official of the school, place of care, or child care provider.</p>	

EMERGENCY PAID SICK LEAVE ACT

Larger Employers (500+)

- Employers with 500 or more employees **can** offer EPSL
 - Often, they *must* given state and local requirements
- But larger employers are not **required** to provide EPSL and are **not** eligible for tax credits



Employee Eligibility

- ***All employees*** are eligible for EPSL
 - Length of employment does not matter
 - Unlike E-FMLA provisions, there is ***no calendar days, hours of service, or geographic proximity requirements***
- ***No waiting period***
- All covered employers have the same obligation



When Can ESL Be Used?

- State or local ***quarantine or isolation order*** related to COVID-19
- ***Self-quarantine*** at healthcare provider's advice related to COVID-19
- Experiencing ***COVID-19 symptoms*** and seeking a medical diagnosis
- ***Caring for an "individual"*** (*undefined*) subject to a quarantine/isolation order or self-quarantine related to COVID-19
- ***Caring for a son or daughter whose school or place of care*** has been closed, or whose child care provider is unavailable, due to COVID-19
- When experiencing a ***"substantially similar condition"*** as specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor

Available Hours



- **Full-time** employees get **80 hours**
- **Part-time** employees get the number of hours they work, on average, over a 2-week period
 - For example, if part-time employees average 24 hours a week, they get 48 hours
- Hours for part-time employees with **variable schedules** – available EPSL hours should be calculated according to:
 - Their average daily hours scheduled in the **six (6) months prior** to use of EPSL, or
 - If they did not work for six months prior, a “reasonable expectation” of average daily hours scheduled upon hire

EPSL Pay

- Unlike E-FMLA, ***all EPSL is paid***
- ***Pay is calculated*** at the ***higher*** of:
 - Regular rate, federal minimum wage, or local minimum wage
 - Inclusive of commissions, tips, or piece rates
- However, EPSL is ***capped***:
 - \$511 per day
 - \$5,110 in the aggregate
- But, employees absent for “Care for Others,” “School/Childcare Closure,” and “Similar Conditions” receive two-thirds (2/3) of their regular rate, capped at \$200 per day (\$2,000 in the aggregate)



Notice by the Employee

- FFCRA states “[**a**]**fter** the first workday (or portion thereof)” that EPSL is used, employers “may require” employees to follow “**reasonable notice procedures.**”
- But, FFCRA contains no explicit provision for notice **prior to** “the first workday.”
- Employer policies requiring advance notice should be reviewed and provide for advance notice only when reasonable under the circumstances.

Carryover and Payout

- Unused EPSL does ***not*** carry over to subsequent years.
- EPSL is ***not*** required to be paid out at termination, resignation, retirement, etc.



Preexisting Policies and Other Paid Leave

- The final version of FFCRA removes a provision requiring paid sick leave be provided “***in addition to***” other paid leave.
- However, the DOL’s Q&As clarify the FFCRA’s EPSL provisions “impose[] a ***new leave requirement*** on employers that is effective beginning on April 1, 2020.”
- Employers may ***not*** require use of ***other paid leave*** before use of EPSL.

Interaction of EPSL and E-FMLA

- EPSL and E-FMLA provide leave when an employee's child's school or child care provider is closed, or when the child care provider is unavailable due to COVID-19.
- DOL Q&As clarify employees may be eligible for EPSL and E-FMLA, but only for a total of twelve (12) weeks of paid leave.
- EPSL provides for an initial two weeks (10 days) of paid leave, which are unpaid under E-FMLA.
- After two weeks (10 days), employees receive E-FMLA at the 2/3 regular rate for the next ten (10) scheduled weeks.

BENEFIT MANDATES AND TAX CREDITS

Mandated Coverage for Testing

- Requires all group health plans to provide coverage for novel Coronavirus testing – all costs
 - Includes grandfathered plans
 - Takes effect on date of enactment, Wednesday, March 18, 2020



Scope of Covered Services/Tests (cont.)

- Specific types of visits covered include:
 - Health care provider office visits (including both in-person and telehealth visits);
 - Urgent care center visits; and
 - Emergency room visits.



No Mandate to Cover Treatment

- The Act does not require group health plan to cover Coronavirus *treatment* without cost-sharing or medical management.
- IRS Notice 2020-15 permits group health plans to cover both *testing* and *treatment* on a first-dollar basis without affecting the eligibility of participants to participate in health savings accounts (HSAs).

Tax Credits for Wages

- Employers with fewer than 500 employees are eligible for:
 - Tax credits on amounts paid to employees who go out on qualified EPSL or E-FMLA
 - Costs to maintain health insurance coverage for employees during period of leave for EPSL or E-FMLA



Basis for Tax Credits

- Payments are not considered wages subject to Social Security Tax or Medicare tax
- Employers receive refundable credits toward the employer's quarterly share of these taxes



E-FMLA Leave Credit

- Credit is equal to amount employer paid during the quarter, subject to certain limits:
 - Up to \$200/per day of E-FMLA leave, and
 - Capped at \$10,000 per employee for entire leave period



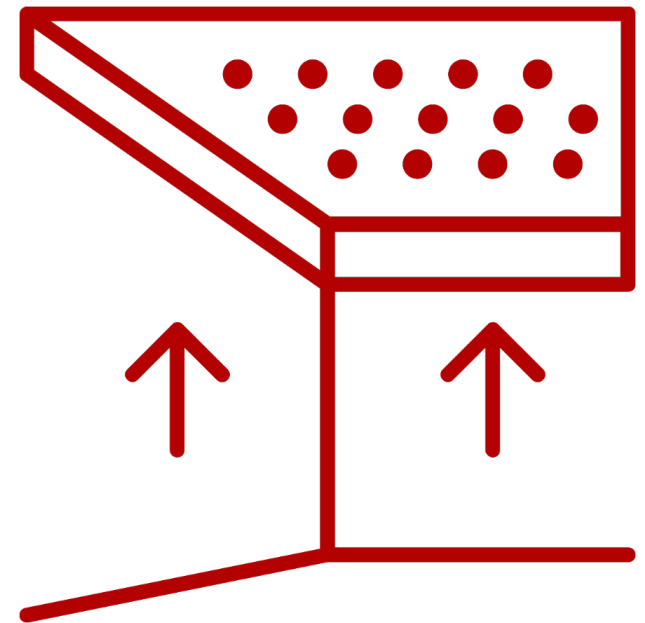
Paid Sick Leave Credit

- EPSL credit limited to 10 days total per employee.
- Other limits depend upon reason for absence:
 - Tier 1:
 - Employee is caring for someone in isolation or quarantine,
 - Employee is caring for child due to school closure, or
 - Substantially similar circumstances, as determined by HHS.
 - Tier 2:
 - Employee is quarantined or isolated per federal, state or local order,
 - Employee is advised to self-quarantine by healthcare provider, or
 - Employee is seeking symptoms and seeking medical diagnosis.



Emergency Paid Sick Leave Credit

- Tier 1 absences: Credit limited to \$200/employee per day, capped at \$2,000 per employee
- Tier 2 absences: Credit limited to \$511/employee per day, capped at \$5,110 per employee
- Plus: qualified health plan expenses allocable to emergency paid sick leave



Qualified Health Plan Expenses

- Track any continued health coverage costs for anyone entitled to qualified sick leave or family leave
- Waiting on guidance as to how to calculate credit.
- Possible approaches:
 - Insured plans – employer premium share?
 - Self-funded plan – use COBRA rate (without 2% administrative cost) as proxy and determine employer share?
 - Subsidized COBRA coverage for those on leave?



Credit Refunds

- Refundable – if employer’s credit claim exceeds FICA (Social Security/Medicare) tax owed for the quarter
- Claim after considering other credits –
 - Hiring veterans
 - Small business research
- Employer’s gross income is increased by amount of credit claimed
 - Negates corresponding deduction
 - Avoids double dipping on tax benefit
- Do not consider when calculating credit for paid FMLA
- Credits not available to governmental employers



Process for Claiming Credit

- On March 20, 2020, IRS announced employers can retain and access funds they would otherwise pay in payroll taxes.
- If not sufficient to cover cost of paid leave, employers can seek expedited advance from IRS by submitting streamlined claim form.
- Guidance expected week of March 23 on process for claiming tax credits.



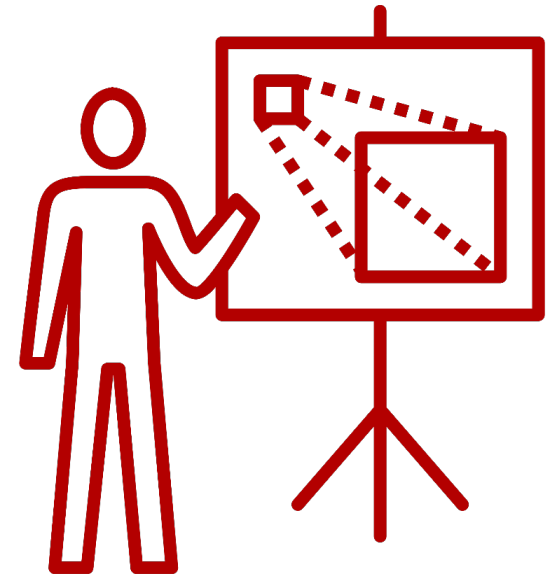
Process for Claiming Credit

- With the enactment of the CARE Act, the anticipated refundable amount of the tax credit allowed for paid leave under the FFCRA, calculated through the end of the most recent payroll period in the quarter, can now be advanced in accordance with forms and instructions that will be provided by the Department of Treasury. Additionally, a covered employer will not be penalized for failure to make a deposit of payroll tax if such failure was in anticipation of the tax credit generated from payment made to employees who take paid leave under the FFCRA.



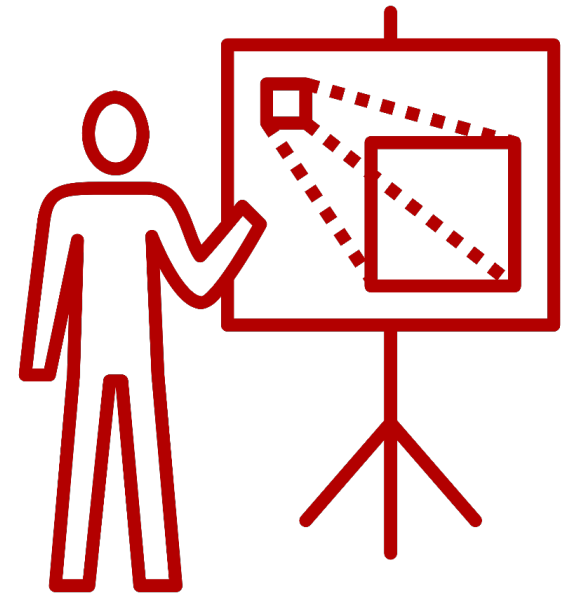
Example 1

- Eligible employer paid \$5,000 in qualified sick leave
- Was required to deposit \$8,000 in payroll taxes, including taxes withheld from all employees
- Employer could use up to \$5,000 of the \$8,000 of taxes as a credit for qualified leave payments
- Employer is only required to deposit remaining \$3,000 on next regular deposit date



Example 2

- Eligible employer paid \$10,000 in qualified sick leave
- Was required to deposit \$8,000 in payroll taxes, including taxes withheld from all employees
- Employer could use all \$8,000 of taxes as a credit for qualified leave payments and make no tax deposit on the next quarterly tax deposit date
- Employer could file a request for an expedited advance (accelerated credit) for the remaining \$2,000 on IRS form



General Rules for Credits

- Effective until December 31, 2020
- Take effect 15 days after signed into law (March 18, 2020, so April 3, 2020)
- Impact on Social Security and Medicare will be made up from the General Fund



<https://ogletree.com/solutions/coronavirus-covid-19-resource-center/>



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Questions

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