HAYNES BOONE

FFCRA - Temporary Non-Enforcement - Employer Payroll Tax Credit

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PRACTICES Labor and Employment, Tax

The Internal Revenue Service ("IRS"), the Department of Treasury, and the Department of Labor ("DOL") recently issued preliminary guidance on the Families First Coronavirus Response Act ("FFCRA" or the "Act") regarding (i) a temporary non-enforcement period during the first thirty (30) days of the Act; and (ii) more detail on how the employer payroll tax credit will work for the employer funding portion of the paid sick and child care leave.

Regarding the non-enforcement period, the DOL will be issuing a temporary non-enforcement policy that provides a period of time for employers to come into compliance with the Act. During this 30-day period, the DOL will not bring an enforcement action against any employer for violations of the Act so long as the employer has acted reasonably and in good faith to comply with FFCRA. Good faith means that the employee is made whole as soon as practicable, the violations were not willful, and the employer commits to the DOL in writing to comply with the Act in the future. The DOL will also be assisting employers with compliance during this temporary period.

Regarding the tax credit, the guidance initially explains that an immediate dollar-for-dollar tax offset against payroll taxes will be provided. Eligible employers that pay qualifying sick or child care leave will be able to retain a portion of the payroll taxes that the employer must normally deposit with the IRS equal to the amount of qualifying sick and child care leave that the employers paid. Employers will be able to show this credit when they file their quarterly payroll tax return (the form 941). The payroll taxes that are available for retention include withheld federal income taxes, the employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes with respect to all employees.

The guidance provides the following example:

> If an eligible employer paid $5,000 in sick leave and is otherwise required to deposit $8,000 in payroll taxes, including taxes withheld from all its employees, the employer could use up to $5,000 of the $8,000 of taxes it was going to deposit for making qualified leave payments. The employer would only be required under the law to deposit the remaining $3,000 on its next regular deposit date.

Should the amount paid to employees exceed the employer's quarterly payroll tax, the guidance states that where a refund is owed, the IRS will send the refund as quickly as possible. Specifically, employers will be able file a request for an accelerated payment from the IRS. The IRS expects to process these requests in two weeks or less. Here, the guidance provides this example:

> If an eligible employer paid $10,000 in sick leave and was required to deposit $8,000 in taxes, the employer could use the entire $8,000 of taxes in order to make qualified leave payments and file a request for an accelerated credit for the remaining $2,000.

Department of Treasury, IRS, and DOL Joint Guidance.

The guidance also explains that employers are entitled to an additional tax credit determined based on the costs to maintain health insurance coverage for eligible employees during the leave period.

More details about these above procedures will be announced soon by the IRS, according to the guidance.