

Payroll Tax Considerations and IRS Documentation Requirements of the FFCRA for School Districts

SCHOOL DISTRICTS MUST PAY EMPLOYER MEDICARE TAXES, BUT NOT FICA TAXES, ON FFCRA BENEFITS

Previously, there was a lack of clarity regarding whether FFCRA paid leave benefits paid by school districts were subject to employer FICA and Medicare taxes. School districts are permitted under Section 7005(a) of the FFCRA to not to pay employer FICA taxes on FFCRA benefits. However, Section 7005(b) of the FFCRA provides that the tax credits available to private employers will be expanded to cover employer Medicare taxes on FFCRA benefits. Because school districts are not eligible for the tax credits, school districts must still pay employer Medicare taxes on FFCRA benefits. The Internal Revenue Service (IRS) and the Department of Labor (DOL) have both said that they will put out guidance especially for public sector employers, but no such guidance is available yet. In the absence of such guidance, school districts should remit employer Medicare taxes on FFCRA benefits.

FFCRA LEAVE DOCUMENTATION REQUIREMENTS

As we [previously reported](#), employees requesting paid leave under the Families First Coronavirus Relief Act (FFCRA), which went into effect on April 1, 2020, are required to provide documentation for their need to leave.

On March 26, the DOL clarified that employees must support their need for FFCRA leave as “specified in applicable IRS forms, instructions, and information.” Even though school districts are not eligible for tax credits under the FFCRA, school districts should keep the documentation requested by the IRS to substantiate that the FFCRA paid leave benefits were properly not subject to FICA taxes. Additionally, even though school districts are currently not eligible for tax credits, they should still keep good documentation as the law could change in the future, and it is easier to keep good documents from the start.

Late on March 31, the IRS released new guidance for both employers and employees on the FFCRA’s documentation requirements. The guidance appears in a question and answer format on the IRS guidance page for COVID-19 related tax credits (FAQs #44-46), which can be [found here](#).

EMPLOYEE REQUEST FOR FFCRA LEAVE

To start the leave process, the IRS states that employees must submit a *written* request for FFCRA leave to the employer. In that written request, the employee must provide:

1. The employee’s name;
2. The date or dates for which leave is requested;
3. A statement of the COVID-19 related reason the employee is requesting leave and written support for such reason; and
4. A statement that the employee is unable to work, including by means of telework, for such reason.

LEAVE REQUESTS BASED ON QUARANTINE ORDERS OR MEDICAL SELF-ISOLATION ADVICE

If an employee is requesting FFCRA leave based on a quarantine order or advice by a health care provider to self-isolate, the employee must also include the following information in their written leave request:

1. The name of the governmental entity ordering quarantine or the name of the health care professional advising self-isolation; and
2. If the employee is taking leave to care for someone subject to a quarantine order or self-isolation advice, the name of the person the employee is caring for and their relation to the employee.

LEAVE REQUESTS BASED ON CHILDCARE

If the employee is requesting FFCRA leave because the employee is unable to work or telework due to the need to care for a son or daughter due to a school closing or childcare provider unavailability, the employee must also include the following information in their written leave request:

1. The name and age of the child (or children) to be cared for;
2. The name of the school that has closed or place of care that is unavailable;
3. A representation that no other person will be providing care for the child during the period for which the employee is receiving family medical leave; and
4. With respect to the employee's inability to work or telework because of a need to provide care for a child older than 14 during daylight hours, a statement that special circumstances exist requiring the employee to provide care.

Based on this guidance, it appears the IRS takes the position that an employee can only take FFCRA leave for childcare obligations if no other person is caring for the child. This implies leave is unavailable if another parent or individual is available to care for the child and that both parents/multiple caretakers may not both receive FFCRA paid leave to care for a child simultaneously. From a practical perspective, it will likely be challenging for employers to question a person's need for this leave, in the absence of specific evidence that the employee has provided false or misleading information in the employee's written leave request.

Additionally, if the child is older than 14, the employee must state that "special circumstances" exist that require the employee to provide care. The guidance does not specifically state that the employee must explain those special circumstances to the employer, which again will make it difficult for an employer to question an employee's need for the leave without specific evidence. However, if the employee does not state that special circumstances exist on the written request form, the employer risks being able to withhold employer FICA taxes on any paid FFCRA leave benefits that it grants to the employee to care for a child older than 14.

The DOL also notes in its guidance that employers "may also require your employee to provide you with additional documentation in support of such leave to the extent permitted under the certification rules for conventional FMLA requests. For example, this could include a notice that has been posted on a government, school, or day care website, or published in a newspaper, or an email from an employee or official of the school, place of care, or child care provider."

DOCUMENTATION EMPLOYERS MUST RETAIN FOR TAX CREDITS

In the absence of additional IRS guidance, to substantiate that an employee legitimately took FFCRA, school districts should create and maintain records that include the following information:

1. Documentation to show how the employer determined the amount of qualified sick and family leave wages paid to employees that are eligible for the credit, including records of work, telework, and qualified sick leave and qualified family leave.
2. Copies of the completed Forms 941, Employer's Quarterly Federal Tax Return, that the employer submitted to the IRS (or, for employers that use third party payers to meet their employment tax obligations, records of

information provided to the third party payer regarding the employer's entitlement to the credit claimed on Form 941).

The IRS states that employers should keep all records of employment taxes for at least **four years** after the date the tax is due or is paid, whichever is later. These documents should be available for the IRS to review upon request.

As of April 1st, the DOL has yet to revise its FAQ guidance to reflect the new IRS requirements. It is unclear at this time whether the IRS will create any standard forms employees may use to document their need for FFCRA leave. Both the DOL and IRS guidance may be subject to change, and employers seeking to verify an employee's eligibility for FFCRA leave should consult with counsel to ensure they have the latest DOL and IRS guidance.

The Boardman Clark School Law Practice Group will continue to provide updates on the latest DOL and IRS guidance on the FFCRA and other issues related to COVID-19.

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