

**DOL Refers to “Viability” Exemption for Small Businesses in Notice on the Coronavirus Relief Act; Allows Employers to Apply Payroll Taxes Toward Sick Leave**

By a news release posted this weekend, the U.S. Department of Labor (DOL) provided a preview of its implementation of the new federal sick leave mandated by the Families First Coronavirus Response Act (CRA) passed March 18, 2020.

It does not appear that the DOL will implement any broad relief for smaller employers under the CRA, which requires all employers with 500 or fewer employees to give 80 hours of paid sick leave at 100% of their normal pay rate up to \$511 per day to its employees for COVID-19 related absences due to to their own illness, symptoms and pursuit of a diagnosis, or mandated quarantine. Such benefits are maxed out at \$5,110 in the aggregate for any employee absent for these reasons. The CRA also provides partial pay for the two-week period for absences mandated by school and day care closures or the need to care for another suffering from COVID-19. The CRA also amended the Family and Medical Leave Act (FMLA) to provide extended leave at partial pay for employees who cannot work due to the closure of schools and day care centers as a result of the pandemic. A complete set of FAQs explaining the impact of the CRA is available under the special COVID-19 section of our website ([www.ohaganmeyer.com](http://www.ohaganmeyer.com)).

**Small Employer “Viability” Exemption**

The release refers to an exemption available to businesses with fewer than 50 workers from the extended childcare-related leave provisions “where the viability of the business is threatened.” Specifically, the release states that if compliance with the extended paid leave provisions would “jeopardize the ability of the business to continue,” such an employer could qualify for an exemption “on the basis of simple and clear criteria” that demonstrate “circumstances involving jeopardy to the viability of the business as a going concern.” The DOL states that it will provide emergency guidance and rulemaking “to clearly articulate” the standard applied to determine whether a business qualifies for the exemption.

**30-Day Enforcement Delay**

The DOL’s release also states the agency’s intention to allow a 30-day compliance period for employers to meet their obligations under the CRA before it will pursue any enforcement actions against noncompliant employers, so long as the employer has acted in good faith in an effort to comply with the statute.

### **Payroll Tax Relief for Covered Employers**

The DOL, in cooperation with the U.S. Treasury Department and the Internal Revenue Service, issued information this weekend on the availability of a payroll tax credit to reimburse covered employers for mandated sick leave required under the CRA. According to the release, employers of fewer than 500 employees will receive “100% reimbursement” for paid leave provided under the Act. According to the release, health insurance costs are included in the reimbursement and self-employed individuals can claim an equivalent credit.

The release indicates that employer reimbursement for the paid sick leave mandated under the Act will be accomplished by allowing employers to retain a commensurate portion of the federal payroll tax routinely paid to the IRS. The release indicates that employers will be able to retain the payroll taxes, including the employer and employee’s portion of the Social Security and Medicare taxes for any sick leave paid through the end of this year. Thus, if an employer paid \$5000 in paid sick leave, and owed \$8,000 in federal income taxes, it could withhold \$5000 of the taxes owed to offset its payment of the sick leave, and remit only the remaining \$3000. If an employer is required to pay more in sick leave than it owed in payroll taxes, it could apply the entire amount of its payroll taxes to sick leave and file for an accelerated credit for the amount of leave paid over the payroll tax reimbursement available to the employer.

The agencies refer employers for additional guidance on the payroll tax relief to an [IRS.gov](https://www.irs.gov) “Coronavirus Tax Relief” webpage, promising guidance for employers to begin immediately using the tax credit in the coming week.

O’Hagan Meyer will keep you posted as further detail is provided on implementation of the Coronavirus Relief Act.