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BRUBAKER CONNAUGHTON
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ATTORNEYS AT LAW

COVID 19: Employer Update



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Theresa is a partner at BCGL and the Chair of the firm's Employment and Labor Law Department. She concentrates her practice in representing businesses, municipalities, non-profits and executives in all aspects of the employment relationship. Theresa helps clients with employment and business counseling, employee manuals, discipline and termination, workplace investigations, enforcement of restrictive covenants, employee misconduct and theft, policy development, and discrimination defense. She also represents clients in business and commercial litigation, including enforcement and defense of non-competition agreements.





ADMIN GUIDANCES

PROTECTIVE MEASURES



Interim Guidance for
Businesses and Employers to
Plan and Respond to
Coronavirus Disease 2019

<https://www.cdc.gov/coronavirus/2019-cov/community/guidance-business-response.html>



Guidance on Preparing
Workplaces for COVID-19

<https://www.osha.gov/Publications/OSHA3990.pdf>



State and Local
Government Orders

Examples:

- *PA Public Health and Safety Order*
- *Ohio Amended Director's Stay at Home Order*
- *State and Local Orders requiring masks to be worn in public (NY, NJ, MD, PA)*

OSHA REPORTING



ENFORCEMENT GUIDANCE FOR RECORDING CASES OF COVID-19

Issued 4/10/2020

- ✱ Employers of workers in the healthcare industry, emergency response organizations and correcting institutions must continue to make work-relatedness determinations as usual under OSHA's recording standard
- ✱ For all other employers, OSHA will not enforce its recording standard to require employers to make work-relatedness determinations, except where:
 - ✱ There is objective evidence that a COVID-19 case may be work-related (for example, a number of COVID-19 cases developing among a group of employees that work closely together); and
 - ✱ The evidence was reasonably available to the employer (for example, information provided to or learned by an employer)

<https://www.osha.gov/memos/2020-04-10/enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19>



OSHA REPORTING



INTERIM ENFORCEMENT RESPONSE PLAN FOR COVID-19

Issued 4/13/2020

- ✱ OSHA's guidance to enforcement officers on responding to COVID-19 complaints
- ✱ Outlines OSHA standards which may apply, including: recording/reporting; PPE; eye and face protection; respiratory protection; sanitation; accident prevention signs/tags; access to employee exposure and medical records; general duty clause of OSH Act
- ✱ General Duty Clause
 - ✱ Requires employers to furnish employees with workplace that is free from recognized hazards that cause or are likely to cause serious physical harm
 - ✱ OSHA will consult CDC Guidance in assessing potential workplace hazards to evaluate adequacy of employer's protective measures for workers

<https://www.osha.gov/memos/2020-04-13/interim-enforcement-response-plan-coronavirus-disease-2019-covid-19>



OSHA REPORTING



ENFORCEMENT GUIDANCE ON EMPLOYER GOOD FAITH EFFORTS

Issued 4/16/2020

- ✱ Applies to OSHA standards with annual or recurring requirements such as: annual training and certification requirements; annual hazard assessment reviews; annual respirator fit testing, etc.
- ✱ Compliance Safety and Health Officers will evaluate whether
 - ✱ Employers impacted by COVID-19 made good faith efforts to comply with standard by assessing whether employers considered all options to comply (virtual training, interim protective measures)
 - ✱ In situations where compliance was not possible, employers took steps to ensure employees were not exposed to hazards, tasks, processes or equipment for which they were not prepared or trained
 - ✱ Employers that were closed took steps to comply as soon as possible following reopening

<https://www.osha.gov/memos/2020-04-16/discretion-enforcement-when-considering-employers-good-faith-efforts-during>



EEOC GUIDANCE



March 18: EEOC published new guidance regarding interplay of COVID-19 and ADA during COVID-19 pandemic

- ✱ If employee calls in sick, employer may ask if employee is experiencing symptoms of COVID-19 including fever, chills, cough, shortness of breath, sore throat - must maintain this information as confidential medical record under ADA
- ✱ Employers may measure employees' body temperature; may also measure body temperature of applicants as part of post-offer, pre-employment medical exam
- ✱ Employers may require employees to stay home if they have symptoms of COVID-19
- ✱ When employees return to work, employers may require fitness-for-duty certification - however, employers should be flexible in accepting alternative documentation from clinics and via forms, stamps or email as medical providers may be busy with treatment
- ✱ Employers may delay start date of an applicant who has COVID-19 or symptoms
- ✱ Employer may withdraw job offer when it needs applicant to start immediately, but individual has COVID-19 or symptoms

FAQ: https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm

Existing Pandemic Guidance: https://www.eeoc.gov/facts/pandemic_flu.html



TAKING TEMPS



- * Can take temps of employees before entering worksite
- * Implement screening on nondiscriminatory basis- treat info as confidential under ADA
 - * ID of employee with fever, other symptoms
- * Temperature screening threshold- 100.4 F
- * Use no-contact thermometers, least invasive (forehead/temporal artery)
 - * If not, must disinfect after each touch
- * Appoint someone with proper training to administer
- * Maintain social distancing for stations
- * Self- administration
 - * And report
 - * And show results
- * If administering, screen visitors as well





WORKFORCE REDUCTIONS

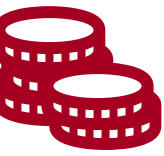
IMPACT OF FFCRA



- ✱ Employees laid off or furloughed prior to April 1
 - ✱ No paid leave required under FFCRA
- ✱ Employer closes on or after April 1
 - ✱ Employee must be paid for FFCRA leave used *prior to* closure
 - ✱ As of date of closure, employee no longer entitled to FFCRA leave
- ✱ Employer remains open on or after April 1, but employee is furloughed/laid off
 - ✱ Employee is not entitled to FFCRA leave
- ✱ Employer closes on or after April 1, but intends to reopen in the future
 - ✱ Employee is not entitled to FFCRA leave while worksite is closed
 - ✱ Once employer reopens, employee may be entitled to FFCRA leave
- ✱ Employees with reduced work schedules
 - ✱ No paid leave under FFCRA



PAYCHECK PROTECTION PROGRAM



- ✱ Small Business Administration (SBA) Loan- \$349 billion
 - ✱ Out of money as of Thurs. 4/16
 - ✱ Loan apps submitted to banks but not yet submitted to SBA will not be funded
 - ✱ Will not maintain a queue for new funding
 - ✱ Will there be additional PPP funding?
- ✱ Use of proceeds:
 - ✱ Payroll costs- 75% of forgiven loan
 - ✱ Health care expenses (insurance premiums and paid sick leave)
 - ✱ Retirement plan contributions
 - ✱ Mortgage interest obligations
 - ✱ Rent obligations
 - ✱ Utility payments
- ✱ Loan forgiveness terms
 - ✱ Amount of forgiveness is proportionally reduced if workforce is reduced
 - ✱ Bring back laid off employees, even if “working” at home



CARES ACT UC PROGRAMS



✱ 3 Programs

✱ Federal Pandemic Unemployment Compensation (FPUC)

- ✱ Provides an extra \$600 in benefits
- ✱ Must first apply and receive state benefits
- ✱ If individual receives \$1 of state UC, they receive full \$600
- ✱ Payable through week ending 7/31/20

✱ Pandemic Emergency Unemployment Compensation (PEUC)

- ✱ Extends UC eligibility by up to an additional 13 weeks
- ✱ States may not charge employers for PEUC, fully funded by federal gov't

✱ Pandemic Unemployment Assistance (PUA)

- ✱ Provides UC benefits to independent contractors, gig workers and self-employed
- ✱ Available only when workers are “forced to suspend operations”
- ✱ File through existing systems v. new application system



LAYOFF CONSIDERATIONS



LAYOFF POLICY

- ✱ Criteria for layoffs- which positions are essential?
- ✱ Identify how you decide who will be recalled and when:
 - ✱ Customer demand, productivity, work experience, job skills, performance, length of service, performance
- ✱ Require timelines for recalled employees to return to work once notified (i.e. must return to work within 2 days once notified by phone)
- ✱ Employees that are recalled and elect not to return due to COVID-19 concerns: Replace for PPP, but ADA? UC?





FFCRA UPDATES



- ✱ Requires employers with *fewer than 500 employees* to provide Paid Sick Leave (EPSL) and Paid Family and Medical Leave (EFMLA) for COVID-19 effective *April 1, 2020*
- ✱ Tax credits for paid leave, but *no double dipping*
- ✱ FFCRA terminates on December 31, 2020
- ✱ April 6: DOL published regulations-
<https://www.dol.gov/agencies/whd/ffcra>
- ✱ 79 FAQ's as of 4/17- <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>



Two “buckets” of paid leave under FFCRA:





EMPLOYER COVERAGE

Employers whose employee census fluctuates above and below 500

- ✱ Based on number of employees at the time an employee's leave is to be taken
- ✱ Employee count includes full-time, part-time, employees on leave, temporary employees jointly employed with another employer; day laborers supplied by temp agency

Related/affiliated companies, staffing company arrangements

- ✱ Joint employer test: If companies are joint employers under FLSA, then all of their common employees must be counted in determining whether paid leave is available under
- ✱ Integrated employer test: If companies are "integrated employer" under FMLA, then all of their common employees must be counted in determining whether paid leave is available



Emergency Paid Sick Leave Act

Provides two
weeks of paid
sick time to all
employees for 6
eligible reasons
related to
COVID-19

ELIGIBLE REASONS TO USE EPSLA LEAVE

- 1) The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
- 2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
- 3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- 4) The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2).
- 5) The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the childcare provider of such son or daughter is unavailable, due to COVID-19 precautions.
- 6) The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.



TELEWORKING

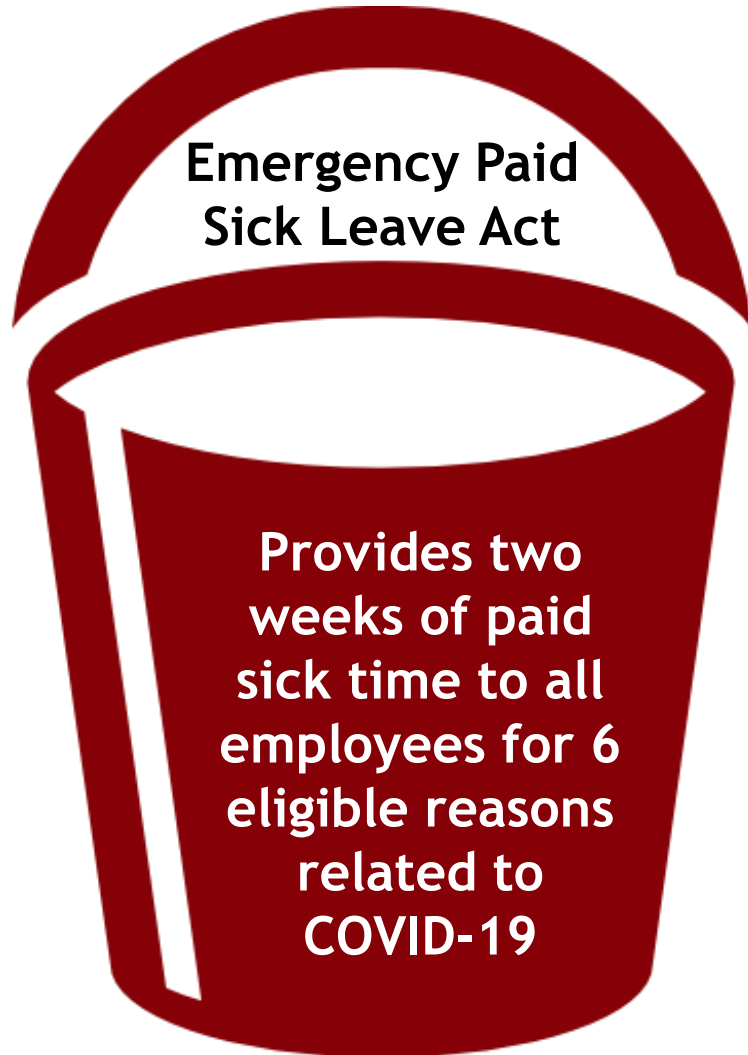
- ✳ FFCRA leave applies when employee is unable to work on site AND unable to telework
- ✳ If an employee is able to telework, the employee would not be entitled to leave under reasons #2, #3, #4 and #5, unless extenuating circumstance prevents teleworking
- ✳ DOL encourages flexible work arrangements, including work at unconventional hours
- ✳ DOL will not apply “continuous work day” rule under FFCRA - hourly employees can break up work throughout day and be compensated for only hours worked



DURATION OF PAID EPSLA LEAVE

- ✱ All employees entitled to two weeks of paid leave
- ✱ Full-time Employees
 - ✱ An employee normally scheduled to work **40 hours/week**
 - ✱ Employer definition of full-time does not control
- ✱ Part-time Employees
 - ✱ Employees scheduled to work fewer than **40 hours/week**
 - ✱ Employer definition of PT does not control
 - ✱ Entitled to leave for employee's average number of hours normally scheduled to work

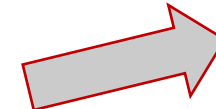
Example: Employee scheduled for 25 hours/week entitled to 50 hours of paid leave under EPSLA



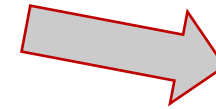
AMOUNT OF PAY UNDER EPSLA

* Greater of:

- * Employee's regular rate of pay
- * Federal minimum wage
- * State minimum wage



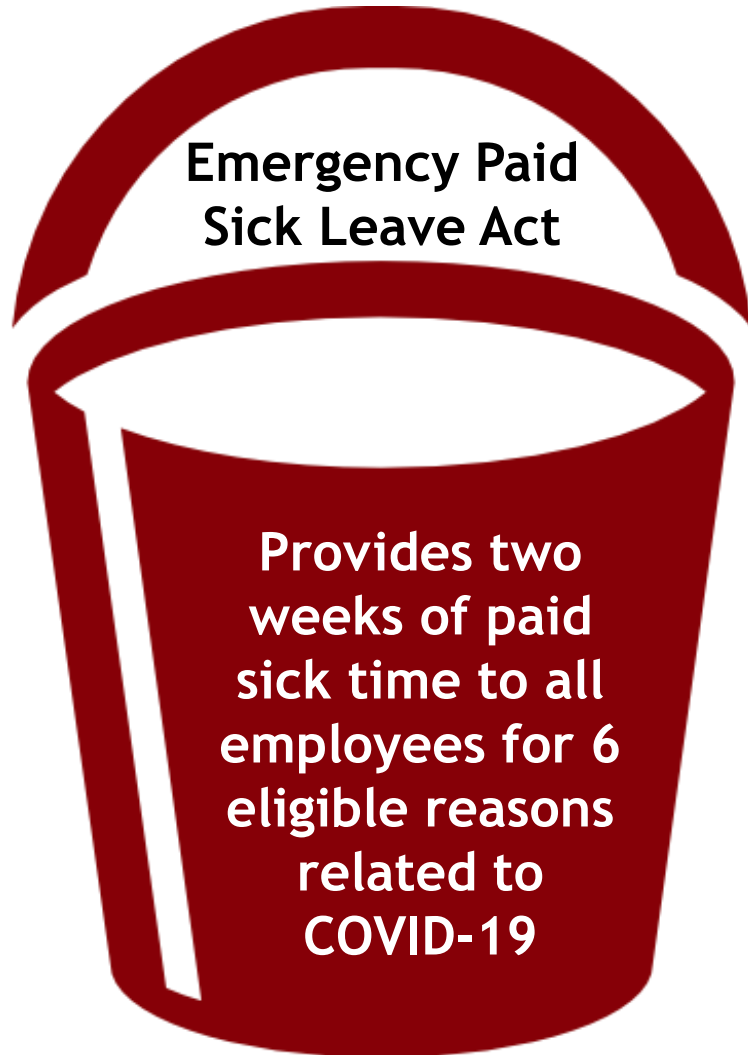
100% for
reasons #1-3



2/3 for
reasons #4-6

* Determining an employee's "regular rate"

- * Average of the employee's "regular rate" under Fair Labor Standards Act over a period of up to 6 months prior to date on which leave is taken
- * "Regular rate" includes amounts beyond hourly wage that contribute to OT rate - bonuses, shift differentials, commissions, etc.
- * All compensation that is part of regular rate / all hours worked over applicable period of time



REQUIRED DOCUMENTATION

- ✱ Employers that intend to claim tax credit must retain appropriate documentation as required by IRS
https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs#substantiate_eligibility
- ✱ Written request from employee for leave which states:
 - ✱ Employee's name
 - ✱ Date/dates for which leave is requested
 - ✱ Statement of the COVID-19 reason the employee is requesting leave and **written support** for such reason
 - ✱ Statement that the employee is unable to work, including by means of telework, for such reason
 - ✱ **Specific information must be obtained from employee under each eligible reason for leave**
 - ✱ **BCGL Advice:** Have written leave request form for employees to complete and request supporting documentation



INTERMITTENT EPSLA LEAVE

- ✱ Employer may agree to permit employee to take paid sick leave intermittently while teleworking - may be taken in any increment agreed upon by employer and employee
- ✱ Employer may agree to permit employee to take paid sick leave intermittently while working at work site for eligible reason #5 ONLY
- ✱ DOL encourages employers to collaborate with employees to achieve maximum flexibility



EFMLA INTERPLAY WITH TRADITIONAL FMLA

- ✱ For employers with 50 or more employees, employee is entitled to 12-weeks of total FMLA leave within 12 month period, including EFMLA

Example: Employer uses the look back method for FMLA purposes. Employee took 7 weeks of FMLA in November 2019 for back surgery. Employee has 5 weeks of available FMLA leave which can be used for EFMLA.

Example: Employer uses calendar year for FMLA purposes. Employee takes 4 weeks of EFMLA in April 2020. Employee undergoes surgery in August 2020. Employee has 8 weeks available for FMLA leave in August.

- ✱ Does not apply for employers with fewer than 50 employees





OVERTIME UNDER EFMLA

- ✱ EFMLA requires employers to pay an employee for hours the employee would normally have been *scheduled* to work, even if more than 40 hours in a work week
- ✱ Base EFMLA on scheduled hours, do not have to include unscheduled overtime





INTERMITTENT EFMLA

- ✱ Employer may agree to permit employee to take paid sick leave intermittently while teleworking
- ✱ Employer may agree to permit employee to take paid sick leave intermittently while working at work site

Example: Employee takes EFMLA on Monday, Wednesday and Friday, and reports to work on Tuesday and Thursday





HEALTH CARE PROVIDERS AND EMERGENCY RESPONDERS

- ✱ Employers of “health care providers” and “emergency responders” may exclude such employees from EPSLA and EFMLA
- ✱ “Health Care Provider” defined broadly by DOL
 - ✱ *Anyone employed at any doctor’s office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity*
 - ✱ Includes other categories: certain vendors, suppliers of medical products/equipment
- ✱ “Emergency Responders” defined broadly by DOL
 - ✱ *An employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19*
 - ✱ *Military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility*
- ✱ Other individuals declared by highest official of a state or territory



SMALL BUSINESS EXEMPTION

- ✱ Applies to employers with fewer than 50 employees when providing EPSLA leave for reason #5 **ONLY** and EFMLA leave would jeopardize the small business as a going concern
- ✱ Small businesses may claim this exemption when:
 1. The provision of paid sick leave or expanded family and medical leave would result in the small *business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity*;
 2. The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of *their specialized skills, knowledge of the business, or responsibilities*; or
 3. There are *not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed*, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.



SMALL BUSINESS EXEMPTION

✱ Requirements for exemption:

- ✱ Employer employs fewer than 50 employees;
- ✱ Leave is requested because child's school or place of care is closed or child care provider is unavailable due to COVID-19 related reasons; AND
- ✱ An authorized officer of the business has determined that at least one of the three conditions on prior slide is satisfied

✱ Document why criteria are met

✱ Do not send/submit anything to DOL

- ✱ Based on guidance, it does not appear that DOL is creating a formal process for claiming exemption



ENFORCEMENT

DOL Guidance:

- ✱ Employers in violation of Emergency Paid Sick Leave Act will be subject to penalties and enforcement under FLSA
- ✱ Employers in violation Emergency FML Expansion Act will be subject to enforcement provisions of FMLA
- ✱ DOL observed a *temporary period of non-enforcement for the first 30 days* which expired *on April 17, 2020*



FFCRA TAX CREDITS



TAX CREDIT MECHANISMS

- ✱ Option #1: Claim tax credits on federal employment tax returns
 - ✱ Form 941: Employer's Quarterly Federal Tax Return
 - ✱ FFCRA leave wages are capped
 - ✱ \$511 day/\$5,110 total for EPSLA reasons #1, #2, and #3
 - ✱ \$200 day/\$2,000 total for EPSLA reasons #4, #5 and #6
 - ✱ \$200 day/\$10,000 total for EFMLA
 - ✱ FFCRA leave wages include qualified health plan expenses - amounts paid or incurred by an employer to provide and maintain a group health plan that are allocable to the employee's qualified wages
 - ✱ *See, IRS Guidance Questions 31-36*
- ✱ Option 1 does not provide immediate cash flow assistance



TAX CREDIT MECHANISMS

- ✱ Option #2A: Reduce federal employment tax deposits
 - ✱ Employers can retain federal employment taxes they would otherwise have deposited, in amount of FFCRA qualifying leave wages paid *in the same quarter*
 - ✱ Retention applies to: Federal income tax withheld from employees; employee's share of Social Security and Medicare; and employer's share of Social Security and Medicare
 - ✱ Account for reductions on Form 941
 - ✱ Provides immediate cash flow assistance to cover wages



TAX CREDIT MECHANISMS

- ✱ Option #2B: Advance payment of credits that exceed tax liability
 - ✱ Employers first reduce required deposit by amount of qualifying FFCRA leave paid in the same quarter
 - ✱ If amount of qualifying FFCRA wages *exceeds* employment tax liability, employers can claim an advance credit for remaining qualifying leave wages
 - ✱ IRS Form 7200 - <https://www.irs.gov/pub/irs-pdf/f7200.pdf>
 - ✱ Draft instructions: <https://www.irs.gov/pub/irs-dft/i7200--dft.pdf>



ADDITIONAL DOCUMENTATION FOR TAX CREDITS

In addition to written leave request and supporting documentation from employee, employer should also maintain:

- ✱ 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
- ✱ Documentation to show how the employer determined the amount of qualified health plan expenses that the employer allocated to wages
- ✱ Copies of any completed Forms 7200, Advance of Employer Credits Due To COVID-19, that the employer submitted to the IRS
- ✱ 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)



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