
Coates' Canons Blog: Which Tax and Retirement Deductions Must Be Taken from FFCRA Emergency Paid Leave?

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When employers make payments to employees under the new emergency paid leave provisions of legislation enacted to address the COVID-19 crisis, they will not take out deductions for social security, but they will take out all other normal deduction – federal and state income tax, Medicare, and contributions North Carolina state and local government employee retirement systems. This blog post explains why. At the conclusion of the blog post are a series of frequently asked questions and answers about FFCRA emergency paid leave and the social security tax exemption.

Background

The emergency paid leave provisions of the Families First Coronavirus Response Act (the “FFCRA”) are found in two separate sections of the Act. The first section, the Emergency Family and Medical Leave Expansion Act (“Emergency FMLA Act”), adds a new category of leave eligibility to the Family and Medical Leave Act. It applies to times when an employee is unable to work because of school closures or the unavailability of childcare due to the COVID-19 crisis. The Emergency FMLA Act mandates that this new form of leave (“childcare FMLA”) be paid leave after the first 10 days. The second section, the Emergency Paid Sick Leave Act (the “Sick Leave Act”), requires employers to provide paid sick leave (“emergency paid sick leave”) to employees who have must self-isolate or self-quarantine, who are caring for someone in quarantine or isolation, or who must care for children because their regular caregivers are unavailable due to COVID-19. These provisions are discussed in detail in an earlier blog post.

This blog post discusses the payroll implications of the FFCRA: When does the payroll tax relief provided by the Act apply? Does federal and state income tax have to be withheld on paid emergency FMLA leave or on emergency paid sick leave? Do LGERS contributions need to be made on emergency paid leave? What if an employer decides to supplement the paid leave provided by the FFCRA with a bonus cash payment or with paid leave that employees have accrued under the employer’s independent sick leave policies or with accrued compensatory time off?

Payroll Tax Relief under the Families First Act

Paid sick, vacation and personal leave days are considered wages for virtually all purposes. Under section 7005(a) of the FFCRA, however, neither employer nor employee will pay the social security portion (also called the OASDI portion) of the FICA tax, normally imposed on all wages, on any payments made under the Emergency FMLA Act or the Sick Leave Act. Both employers and employees must continue to pay the Medicare portion or “hospital” portion of FICA. For a more detailed explanation of this provision, see here.

Local government employers have asked me whether other deductions typically made from wages must be deducted from emergency leave payments made pursuant to the FFCRA. The answer to that question is a blanket “yes.” In section 7005(a), the Families First Act refers to payments made under the Emergency FMLA Act and the Sick Leave Act as “wages” and says that they shall not be considered wages *only* for the purposes of Internal Revenue Code section 3111(a), the section that imposes the social security tax:

Any wages required to be paid by reason of the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act shall not be considered wages for the purposes of section 3111(a) of the Internal Revenue Code of 1986 . . .

No other tax is mentioned. Hence, federal income tax withholding applies to all Families First Act emergency leave payments. The Act does not change state income tax withholding, so North Carolina income tax withholding must also be applied to emergency leave payments.

LGERS Contributions

The Local Governmental Employee Retirement System is established by Chapter 128 of the North Carolina General Statutes (N.C.G.S.). Section 128-21(7a)a. says that for retirement purposes, “compensation” shall mean “all salaries and wages prior to any reduction pursuant . . . the Internal Revenue Code . . .” Subsection (7a)b. of that section lists specific exceptions to the definition of compensation. The emergency leave payments made under the FFCRA do not fall within any of the exceptions. Therefore, both employer and employee contributions on emergency leave payments must be made to LGERS.

Other Payroll Deductions

All other payroll deductions should continue to be taken out of emergency FMLA leave and emergency paid sick leave. Only Congress can change the definition of “wages” under federal law and, with respect to FFCRA emergency leave payments, it has done so only for the purposes of the social security portion of FICA – in other words, not for contributions to tax-favored retirement plans like 401(k) or 457 plans. Only the North Carolina General Assembly can create exceptions for emergency paid leave to state income tax withholding, LGERS contributions or any other state mandated deductions from wages or employer contributions based on wages.

Deductions for health insurance premiums or other benefits elections may be made from emergency FMLA leave and emergency paid sick leave if the employee has no other income from the employer during the month or that other income is not sufficient to cover those deductions.

Some Frequently Asked Questions and Answers About Taxes, Deductions and Use of Regular Accrued Paid Leave to Supplement FFCRA Emergency Leave Pay

When reading these questions and answers, keep in mind the following:

For emergency paid FMLA,

- the rate of pay **will be not less than two-thirds** of an employee’s regular rate of pay.
- for each employee, the maximum amount an employer may be required to pay is \$200 per day or \$10,000 in total.

For emergency paid sick leave,

- for those employees needing leave because the employee himself or herself is under isolation or quarantine or is seeking a diagnosis of COVID-19 (reasons 1, 2 or 3) the rate of pay will be the employee’s full regular rate of pay. The maximum amount an employer will be required to pay for each employee in these three categories is \$511 per day or \$5,110 in total.
- For those employees needing leave because they are either caring for someone else in quarantine or isolation or who has COVID-19 symptoms, or they must take care of children whose schools are closed or childcare providers are unavailable (reasons 4 and 5), the rate of pay **will be two-thirds** of the employee’s regular rate of pay. The maximum amount an employer will be required to pay for each employee is one of these two categories is \$200 per day or \$2,000 in total.

QUESTIONS AND ANSWERS

Some of the questions may seem the same but read carefully. The answers differ depending on whether the leave is taken under the Emergency FMLA Act, the self-care provisions of the Sick Leave Act or the provisions for the care of

others under the Sick Leave Act.

Question #1

Paid leave taken under the Emergency FMLA Act is to be paid at not less than two-thirds of an employee's regular rate of pay but not more than \$200 per day or \$10,000 in total for each employee. Can an employer choose to pay employees the full amount of their regular rate of pay for emergency FMLA leave? In other words, may an employer pay employees more than two-thirds of their regular rate? If the answer is yes, will the social security tax exemption be limited to two-thirds of their regular rate? Will it be limited to \$200 per day and \$10,000 in total, the maximum amounts allowed in the Emergency FMLA Act?

Answer #1

Yes. Under the Emergency FMLA Act, employers may pay employees more than two-thirds of their regular rate and more than \$200 per day. But the social security tax exemption will be limited to \$200 per day. The text of the Emergency FMLA Act may be found at section 3102 of the FFCRA. It says that paid emergency FMLA leave will be based on "an amount that is not less than two-thirds of an employee's regular rate of pay" (as determined under the Fair Labor Standards Act) multiplied by "the number of hours the employee would otherwise be scheduled to work." The key phrase is "an amount that is not less than two-thirds" of the regular rate. That phrase means that employers may pay an amount that is greater than two-thirds of an employee's regular rate. See U.S. Department of Labor, Families First Coronavirus Response Act: Questions and Answers at Question 34.

The section of the Emergency FMLA Act that addresses the calculation of paid leave says that "[i]n no event shall such paid leave exceed \$200 per day and \$10,000 in the aggregate." This does not prohibit employers from paying employees more than \$200 per day. It just means that only the first \$200 of any payment for any one workday (or \$10,000 total) will be an Emergency FMLA Act payment. See U.S. Department of Labor, Families First Coronavirus Response Act: Questions and Answers at Question 34.

In my opinion, employers who pay their employees their regular rate – or any amount in excess of two-thirds of their regular rate – will not withhold the social security portion (OASDI) of FICA (or make the employer matching contribution) on the amount in excess of two-thirds of the employee's regular wages, but the exemption applies only up to a payment of \$200 a day. See U.S. Department of Labor, Families First Coronavirus Response Act: Questions and Answers at Question 34 (note that this question and answer reference the tax credit for which only private employers are eligible, but that tax credit is directly tied to the social security exemption). If the employee is being paid more than \$200 a day while using Emergency FMLA Leave, then the amount in excess of \$200 will be subject to the social security portion of FICA. Both the employee and the employer will have to make their regular contributions of 6.2% of wages on any amount over \$200 per day. The social security tax exemption is found in section 7005(a) of the FFCRA. It says that

[a]ny wages required to be paid by reason of the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act shall not be considered wages for the purpose of section 3111(a) of the Internal Revenue Code . . . [section 3111(a) imposes the social security payroll tax].

The key phrase here is "any wages required to be paid by reason of" the Emergency FMLA Act. Amounts paid in excess of two-thirds of the employee's regular rate are still amounts required to be paid by the Emergency FMLA Act so long as they do not exceed \$200 per day. Hence, it appears that they are eligible for the social security tax exemption. But amounts in excess of \$200 per day are not required to be paid by the Emergency FMLA Act so when an amount that is calculated based on more than two-thirds of the employee's regular rate turns out to be more than \$200 per day, the excess cannot qualify for the social security tax exemption.

In this, as in all matter related to tax liabilities, public employers should consult their auditors or other qualified tax professionals.

Question #2

Leave take under the Sick Leave Act for reasons 1, 2 and 3 (quarantine or isolation order, quarantine recommendation by health care provider and seeking a COVID-19 diagnosis) must be paid at an employee's regular rate of pay. If an

employee's regular rate of pay is more than the maximum \$511 per day provided for in the Sick Leave Act may an employer pay the full amount of the employee's regular rate? If the answer is yes, will the social security tax exemption be limited to the maximum amount of \$511 per day and \$5,110 in total?

Answer #2

Yes. Nothing prohibits an employer from paying employees more than \$511 per day when they are using emergency paid sick leave. However, any amount over \$511 per day is not eligible for the social security tax exemption. Social security taxes must be paid on the amounts over \$511 per day.

The text of the Sick Leave Act may be found at section 5102 – 511 of the FFCRA. It says that paid emergency sick leave says that “[i]n no event shall such paid leave exceed \$511 per day and \$5,110 in the aggregate.” *This does not prohibit employers from paying employees more than \$511 per day.* It just means that only the first \$511 of any payment for any one workday (or \$5,110 total) will be a Sick Leave Act payment. If the employee is being paid more than \$511 a day while using emergency paid sick leave, then the amount in excess of \$511 will be subject to the social security portion of FICA. See U.S. Department of Labor, Families First Coronavirus Response Act: Questions and Answers at Question 34 (note that this question and answer reference the tax credit for which only private employers are eligible, but that tax credit is directly tied to the social security exemption). Both the employee and the employer will have to make their regular contributions of 6.2% of wages on any amount over \$511 per day.

The social security tax exemption is found in section 7005(a) of the FFCRA. It says that

[a]ny wages required to be paid by reason of the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act shall not be considered wages for the purpose of section 3111(a) of the Internal Revenue Code . . . [section 3111(a) imposes the social security payroll tax].

The key phrase here is “any wages required to be paid by reason of” the Sick Leave Act. When an employee's regular rate multiplied by the number of hours the employee would normally be scheduled to work results in a sick leave payment at or below \$511 per day, that payment is one required to be paid by the Sick Leave Act. Hence, the payment is eligible for the social security tax exemption.

But when an employee's regular rate multiplied by the number of hours the employee would normally be scheduled to work results in a sick leave payment above \$511 per day, that excess payment is not required to be paid by the Sick Leave Act so it cannot qualify for the social security tax exemption.

Question #3

Leave take under the Sick Leave Act for reasons 4 and 5 (care for someone else or because of the lack of child care) must be paid at two-thirds of an employee's regular rate of pay. Can an employer choose to pay employees their regular rate of pay for emergency paid sick leave for reasons 4 and 5? In other words, may an employer pay employees more than two-thirds of their regular rate? If the answer is yes, will the social security tax exemption be limited to \$200 per day and \$2,000 in total, the maximum amounts allowed under the Sick Leave Act?

Answer #3

Yes. Under the Sick Leave Act, nothing prohibits an employer from paying employees compensation under the provisions of their own policies, beyond what the Sick Leave Act requires. Employers may also pay employees more than the maximum \$200 per day allowed by the Sick Leave Act for leave taken for reasons 4 and 5. But amounts that exceed either two-thirds of the employee's regular rate of pay or the \$511 maximum are not eligible for the social security tax exemption.

The text of the Sick Leave Act may be found at sections 5102 – 5111 of the FFCRA. Section 5110(5)(b)(ii) says that an employee's "required compensation" for paid emergency sick leave taken for reasons 4 and 5 "shall be two-thirds" of the employee's regular rate of pay. *The key phrase is "shall be two-thirds" of the regular rate.* That phrase means no more and no less than two-thirds of the regular rate. In other words, employers may not pay an amount that is greater than two-thirds of an employee's regular rate and call it emergency paid sick leave.

Section 5111(5)(A)(ii)(II) of the Sick Leave Act says that "[i]n no event shall such paid leave exceed \$200 per day and \$2,000 in the aggregate." *This does not prohibit employers from paying employees more than \$200 per day.* It just means that only the first \$200 of any payment (or \$2,000 total) will be a Sick Leave Act payment.

Only the first \$200 of emergency paid sick leave taken for reasons 4 and 5 will be exempt from social security taxes. The social security tax exemption is found in section 7005(a) of the FFCRA. It is the same provision that applies to paid leave under the Emergency FMLA Act. Section 7005(a) says that

[a]ny wages required to be paid by reason of the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act shall not be considered wages for the purpose of section 3111(a) of the Internal Revenue Code . . . [section 3111(a) imposes the social security payroll tax].

The key phrase here is "any wages required to be paid by reason of" the Emergency Paid Sick Leave Act. Amounts paid in excess of two-thirds of the employee's regular rate and/or in excess of \$200 per day are **not** amounts required to be paid by the Sick Leave Act. Hence, they are **not** eligible for the social security tax exemption.

Employers should probably think of any payment in excess of \$200 using another name.

Question #4

The first 10 days of emergency FMLA leave are unpaid. May we allow employees to use accrued paid leave to turn the first 10 days of emergency FMLA leave into paid leave?

Answer #4

Yes, the Emergency FMLA Act says that "an employee may elect to substitute any accrued vacation leave, personal leave, or medical or sick leave for unpaid leave."

But note that employers may not **require** employees to use any accrued paid leave for the first 10 days of emergency FMLA leave. See U.S. Department of Labor, Families First Coronavirus Response Act: Questions and Answers at Question 33.

Question #5

Under the Emergency FMLA Act, can we allow employees who are receiving only two-thirds of their regular rate to use accrued paid leave or accrued comp time to make up the missing third of their regular rate to make their daily compensation whole?

Answer #5

Yes. Nothing in the Emergency FMLA Act prohibits this.

But note that an employer may not require employees to use accrued paid leave or comp time to supplement the two-thirds pay. See U.S. Department of Labor, Families First Coronavirus Response Act: Questions and Answers at Question 33. Note that for the reasons set out in Answer #1, if the use of accrued paid leave or accrued comp time results in a payment in excess of \$200 per day, then social security taxes would have to be paid on the amount over \$200. The caveats set out in Answer #1 apply here as well.

This is because the use of accrued paid leave to supplement an employee's emergency FMLA payment is not required by the Act. The supplemental payment is not paid emergency FMLA leave – it is employer provided paid leave. The social

security exemption only applies to paid-leave payments required by the Emergency FMLA Act.

Question #6

Under the Sick Leave Act, can we allow employees who are receiving only two-thirds of their regular rate (that is, employees taking leave for reasons 4 and 5) to use accrued paid leave or accrued comp time to make up the missing third of their regular rate to make their daily compensation whole?

Answer #6

Yes. Nothing in the Sick Leave Act prohibits this, but you may not require them to do so. But amounts that exceed either two-thirds of the employee's regular rate of pay or the \$200 per day maximum are not eligible for the social security tax exemption.

This is because the use of accrued paid leave to supplement an employee's emergency FMLA payment is not required by the Act. The supplemental payment is not emergency paid sick leave – it is regular sick leave (or vacation leave or comp time). The social security exemption only applies to wages required by the Emergency FMLA Act.

Question #7

What happens if an employer chooses to pay emergency paid sick leave for more than 80 hours?

Answer #7

An employer who chooses to pay “emergency paid sick leave” for more than 80 hours is not paying “emergency paid sick leave” as that term is used in the Sick Leave Act. That can only be 80 hours.

An employer who pays the equivalent of what is provided under the Sick Leave Act is paying regular sick leave or COVID-19 employer-provided sick leave or whatever you choose to call it. Those paid sick leave hours above the 80 hours provided by the Sick Leave Act are subject to the 6.2% social security tax contribution by both the employee and the employer.

Question #8

If our governing board approved additional paid sick leave prior to the new law are we still obligated to pay that in addition to the pay required from the law?

Answer #8

If your governing board took formal action to approve additional paid sick leave before the FFCRA was passed, it is required to follow its policy and provide that additional sick leave in addition to the leave required by the Sick Leave Act and the Emergency FMLA Act. The only option the town or county would have would be to amend or repeal the resolution or ordinance approving the earlier additional paid sick leave it had voted to provide.

Links

- www.law.cornell.edu/uscode/text/26/3111
- www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_128/GS_128-21.html
- www.congress.gov/116/bills/hr6201/BILLS-116hr6201enr.pdf
- www.dol.gov/agencies/whd/pandemic/ffcra-questions