

**TECHNICAL EXPLANATION OF DIVISION G,
“TAX CREDITS FOR PAID SICK AND PAID FAMILY
AND MEDICAL LEAVE,” OF H.R. 6201,
THE “FAMILIES FIRST CORONAVIRUS RESPONSE ACT”**

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INTRODUCTION

This document,¹ prepared by the staff of the Joint Committee on Taxation, provides a technical explanation of Division G, “Tax Credits for Paid Sick and Paid Family and Medical Leave,” of H.R. 6201, the “Families First Coronavirus Response Act” (the “bill”) as received in the Senate on March 17, 2020.²

¹ This document may be cited as follows: Joint Committee on Taxation, *Technical Explanation of Division G, “Tax Credits for Paid Sick and Paid Family and Medical Leave,” of H.R. 6201, the “Families First Coronavirus Response Act”* (JCX-10-20), March 17, 2020. This document can also be found on the Joint Committee on Taxation website at www.jct.gov. All section references herein are to the Internal Revenue Code of 1986, as amended (the “Code”), unless otherwise stated.

² Certain changes were made in the engrossed bill. This Technical Explanation describes the engrossed bill.

I. PRESENT LAW

Federal employment taxes

Federal employment taxes are imposed on wages paid to employees with respect to employment and include taxes imposed under the Federal Insurance Contributions Act (“FICA”), the Federal Unemployment Tax Act (“FUTA”), and Federal income tax.³ In addition, Tier 1 of the Railroad Retirement Tax Act (“RRTA”) imposes a tax on compensation paid to railroad employees and representatives.⁴

FICA taxes are comprised of two components: the Old-Age, Survivors, and Disability Insurance (“OASDI”) and Hospital Insurance (“Medicare”).⁵ With respect to OASDI taxes, the applicable rate is 12.4 percent with half of such rate (6.2 percent) imposed on the employee and the remainder (6.2 percent) imposed on the employer.⁶ The tax is assessed on covered wages up to the OASDI wage base (\$137,700 in 2020). Generally, the OASDI wage base rises based on increases in the national average wage index.⁷

The employee portion of OASDI taxes must be withheld and remitted to the Federal government by the employer during the quarter, as required by the applicable deposit rules.⁸ The employer is liable for the employee portion of OASDI taxes, in addition to its own share, whether or not the employer withholds the amount from the employee’s wages.⁹ OASDI and Medicare taxes are generally allocated by statute among separate trust funds: the OASDI Trust Funds, Medicare’s Hospital Insurance Trust Fund, and Supplementary Medical Insurance Trust Fund.¹⁰

Generally, the term “wages” for OASDI tax purposes means all remuneration for “employment,” including the cash value of all remuneration (including benefits) paid in any

³ Secs. 3101, 3111, 3301, and 3401.

⁴ Sec. 3221.

⁵ The Hospital Insurance tax includes two components: Medicare tax and Additional Medicare tax. Additional Medicare taxes are imposed on wages in excess of certain thresholds and are only imposed on the employee. Sec. 3101(b). There is no employer match for Additional Medicare tax. For purposes of this explanation, when referencing Medicare taxes, the term does not include Additional Medicare tax.

⁶ Sec. 3101.

⁷ Sec. 230 of the Social Security Act (42 U.S.C. sec. 430).

⁸ Sec. 3102(a) and Treas. Reg. sec. 31.3121(a)-2. Sec. 6302.

⁹ Sec. 3102(b).

¹⁰ Secs. 201 and 1817 of the Social Security Act, Pub. L. No. 74-271 as amended (42 U.S.C. secs. 401 and 1395i).

medium other than cash, with certain exceptions.¹¹ The name given to the remuneration for employment is immaterial. OASDI wages includes salaries, vacation allowances, bonuses, deferred compensation, commissions, and fringe benefits. The term “employment” is generally defined for FICA tax purposes as any service, of whatever nature, performed by an employee for the person employing him or her, with certain specific exceptions.

OASDI Trust Funds

The taxes related to the OASDI program collected from FICA and under the Self-Employment Contributions Act (“SECA”) are deposited into two separate OASDI Trust Funds: (1) the Old-Age and Survivors Insurance (“OASI”) Trust Fund which pays retirement and survivor benefits, and (2) the Disability Insurance (“DI”) Trust Fund which pays disability benefits.¹² The major source of income to the OASDI Trust Funds is employment taxes, specifically FICA and SECA. The OASDI Trust Funds are financial accounts in the U.S. Treasury. The only purposes for which these trust funds can be used are to pay benefits and program administrative costs. A fixed proportion (dependent on the allocation of tax rates by trust fund) of the taxes received under FICA and SECA is deposited in the OASI Trust Fund to the extent that such taxes are not needed immediately to pay expenses. Taxes are deposited in the fund on every business day.

Railroad retirement program

Railroad workers do not participate in the OASDI system. Compensation subject to RRTA tax is exempt from FICA taxes.¹³ Instead, the railroad retirement system, while separate from and parallel to the Social Security Administration (“SSA”), is overseen by the SSA and the Railroad Retirement Board (“RRB”). The SSA collects taxes to fund the program, while the RRB is tasked with distributing benefits to eligible railroad industry employees and their family members to provide income assurance during retirement. These two governing bodies cooperate in determining an individual's benefits.

RRTA tax rates

The RRTA imposes a tax on compensation paid by covered employers to employees in recognition for the performance of services.¹⁴ Employees whose compensation is subject to RRTA are ultimately eligible for railroad retirement benefits that fall under a two-tier structure.

¹¹ Sec. 3121(a).

¹² 42 U.S.C. sec. 401.

¹³ Sec. 3121(b)(9).

¹⁴ Secs. 3201 through 3233. Instead of FICA taxes, railroad employers and employees are subject, under the RRTA, to taxes equivalent to the Social Security and Medicare taxes under FICA. Under the RRTA, employers and employees are also subject to an additional tax, referred to as the “tier 2” tax, on compensation up to a certain amount.

Rail employees and employers pay tier 1 taxes at the same rate as other employment taxes.¹⁵ In addition, rail employees and employers both pay tier 2 taxes which are used to finance railroad retirement benefits over and above social security benefit levels.¹⁶ Tier 2 benefits are similar to a private defined benefit pension. Those taxes are funneled to the railroad retirement system and used to fund basic retirement benefits for railroad workers and an investment trust that generates returns for the pension fund.

Coordination between OASDI Trust Funds and RRB's Social Security Equivalent Benefit Fund

The railroad retirement system and the OASDI programs have been coordinated financially since 1951. The purpose of the financial interchange is to place the OASDI Trust Funds in the same position they would have been in if railroad employment had been covered under OASDI since its inception. Generally, under the interchange, for a given fiscal year there is computed the revenue that would have been collected by the OASDI Trust Funds if railroad employment had been covered directly by the SSA. This amount is netted against the amount of benefits SSA would have paid to railroad beneficiaries based on railroad and nonrailroad earnings during that period. Where OASDI benefits that would have been paid exceed revenue to the trust funds that would have been due, the excess, plus an allowance for interest and administrative expenses, is transferred from the OASDI Trust Funds to the RRB's Social Security Equivalent Benefit Account. If revenue exceeds benefits, the RRB would transfer an amount equal to the difference from the RRB's Social Security Equivalent Benefit Account to the OASDI Trust Funds.

OASDI and Medicare benefits

The OASDI program under the Social Security Act provides for the payment of benefits to individuals based on wages earned as an employee and credited to the employee's earnings record.¹⁷ Eligibility for Medicare coverage under the Social Security Act generally is based on eligibility for OASDI benefits and, thus, on wages credited to an employee's earnings record.¹⁸ The definitions of "wages" and "employment" for purposes of OASDI and Medicare eligibility are similar to those definitions for FICA tax purposes described above.¹⁹

¹⁵ 7.65 percent, consisting of 6.2 percent for retirement on earnings up to \$137,700 in 2020, and 1.45 percent for Medicare hospital insurance on all earnings. An additional 0.9 percent in Medicare taxes are withheld from employees on earnings above \$200,000.

¹⁶ In 2020, the tier 2 tax rate on earnings up to \$102,300 is 4.9 percent for employees and 13.1 percent for employers.

¹⁷ OASDI benefits are provided by Title II of the Social Security Act (42 U.S.C. secs. 401 *et. seq.*).

¹⁸ Sec. 226 of the Social Security Act (42 U.S.C. sec. 426).

¹⁹ Secs. 209 and 210 of the Social Security Act (42 U.S.C. secs. 409 and 410).

Self-employment taxes

SECA imposes tax on the self-employment income of an individual. SECA taxes consist of OASDI tax and Medicare tax.²⁰ Under the OASDI component, the rate of tax is 12.4 percent on self-employment income up to the OASDI wage base (\$137,700 for 2020).²¹ Under the basic Medicare tax component, the second rate of tax is 2.9 percent of all self-employment income (without regard to the OASDI wage base).²² As is the case with employees, an additional Medicare tax applies to the Medicare portion of SECA tax on self-employment income in excess of a threshold amount.²³

Self-employment income subject to SECA tax is determined as the net earnings from self-employment derived by an individual during any taxable year, subject to certain exceptions.

Net earnings from self-employment

Net earnings from self-employment is the gross income derived by an individual from any trade or business less allowed deductions which are attributable to the trade or business and permitted under the SECA rules. Certain passive income and related deductions are not taken into account in determining net earnings from self-employment, including rentals from real estate unless received in the course of a trade or business as a real estate dealer,²⁴ dividends and interest unless such dividends and interest are received in the course of a trade or business as a dealer in stocks or securities,²⁵ and sales or exchanges of capital assets and certain other property unless the property is stock in trade which would properly be included in inventory or held primarily for sale to customers in the ordinary course of the trade or business.²⁶

For purposes of computing net earnings from self-employment, taxpayers are permitted a deduction equal to the product of the taxpayer's net self-employment income (determined without regard to this deduction) and one-half of the sum of the rates for OASDI and Medicare, *i.e.*, 7.65 percent of net earnings.²⁷ This deduction is determined without regard to the 0.9 percent Additional Medicare tax that may apply to an individual. This deduction reflects the fact that the FICA rates apply to an employee's wages, which do not include FICA taxes paid by the

²⁰ Secs. 1401(a), 1401(b).

²¹ Sec. 1401(a). In calculating the SECA tax for OASDI, the OASDI wage base taken into account is reduced by FICA wages paid to the individual during the taxable year.

²² Sec. 1401(b)(1).

²³ Sec. 1401(b)(2).

²⁴ Sec. 1402(a)(1).

²⁵ Sec. 1402(a)(2).

²⁶ Sec. 1402(a)(3).

²⁷ Sec. 1402(a)(12).

employer, whereas the self-employed individual's net earnings are economically equivalent to an employee's wages plus the employer share of FICA taxes.²⁸ This is generally referred to as the "regular method" of determining net earnings from self-employment, and in Internal Revenue Service forms and publications is expressed as multiplying total net earnings from self-employment by 92.35 percent.

Employment tax and income tax in the U.S. territories

FICA tax

Employers and employees in the U.S. territories are generally subject to FICA payroll tax obligations.²⁹ In contrast, employers and employees in the territories are generally not subject to withholding at the source for Federal income tax, although they are subject to withholding of local taxes.³⁰ These payroll obligations of the employers are generally applicable to Federal agencies with personnel in the territory. Employers in the territories file quarterly tax returns with the Federal government to report and pay FICA taxes for employees in the respective territories.

Income tax

Citizens of the United States are generally subject to Federal income tax on their worldwide income, including those citizens in the U.S. territories. Residents of the U.S. territories are generally subject to the Federal income tax system based on their status as U.S. citizens or residents in the territories, with certain special rules for determining residence and source of income specific to the territory. Broadly, a bona fide individual resident of a territory is exempt from U.S. tax on income derived from sources within that territory but is subject to U.S. tax on U.S.-source and non-territory-source income.³¹

The application of the Federal income tax rules to the territories varies from one territory to another. Three territories, Guam, the Commonwealth of the Northern Mariana Islands, and the U.S. Virgin Islands, are referred to as mirror Code territories because the Code serves as the internal tax law of those territories (substituting the particular territory for the United States wherever the Code refers to the United States). A resident of one of those territories generally files a single tax return only with the territory of which the individual is a resident, and not with

²⁸ The deduction is intended to provide parity between FICA and SECA taxes because the employer may deduct, as a business expense, its share of the FICA taxes paid. As presently written, the deduction for SECA taxes is not the exact economic equivalent to the deduction for FICA taxes. See Joint Committee on Taxation, *Options to Improve Tax Compliance and Reform Tax Expenditures*, (JCS-2-05), January 27, 2005, for a detailed description of this issue.

²⁹ The U.S. territories referred to in this document are American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, and the U.S. Virgin Islands.

³⁰ Under section 3401(a)(8), most wages paid to U.S. persons for services performed in one of the territories are excluded if the payments are subject to withholding by the territory, or, in the case of Puerto Rico, the payee is a bona fide resident of the territory for the full year.

³¹ See secs. 932, 933, and 937.

the United States. American Samoa and Puerto Rico, by contrast, are referred to as non-mirror Code territories that have their own internal tax laws. A resident of either American Samoa or Puerto Rico may be required to file income tax returns with both the territory of residence and the United States.

II. EXPLANATION OF PROVISIONS

A. Payroll Credit for Required Paid Sick Leave (sec. 7001 of the bill)

Explanation of Provision

In general

Under the provision, an employer is allowed a credit against the OASDI tax or RRTA tax imposed on the employer for each calendar quarter in an amount equal to 100 percent of the qualified sick leave wages paid by the employer with respect to that calendar quarter, subject to the limits described below. The provision defines qualified sick leave wages as wages (as defined in section 3121(a)) and compensation (as defined in section 3231(e)) paid by an employer which are required to be paid by reason of Division E of the bill, the Emergency Paid Sick Leave Act. As described below, the credit may be increased by certain health plan expenses of the employer.

The Emergency Paid Sick Leave Act requires certain employers to provide an employee with paid sick time to the extent that the employee is unable to work or telework due to a need for leave because: (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 described in clause (1) or has been advised as described in clause (2); (5) the employee is caring for the employee's son or daughter if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable due to COVID-19 precautions; or (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.³²

Credit against OASDI and RRTA tax

The provision limits the amount of qualified sick leave wages that is taken into account with respect to an individual for purposes of the credit. The provision provides different limitations for different circumstances under which qualified sick leave wages are paid. In the case of paid sick time qualifying under clauses (1), (2), or (3) above, the amount of qualified sick leave wages taken into account for purposes of the credit may not exceed \$511 for any day (or any portion thereof) for which the individual is paid such sick time. In the case of paid sick time qualifying under clauses (4), (5), or (6) above, the amount of qualified sick leave wages taken into account may not exceed \$200 for any day (or portion thereof) for which the individual is paid such sick time. In addition, the provision provides that the aggregate number of days taken into account for the calendar quarter with respect to an individual under all clauses may not

³² Division E of the bill, sec. 5102(a).

exceed the excess (if any) of 10 over the aggregate number of days so taken into account for all preceding calendar quarters.

The credit allowed is increased under the provision by so much of the employer's qualified health plan expenses as are properly allocable to the qualified sick leave wages for which the credit is allowed. Qualified health plan expenses are amounts paid or incurred by the employer to provide and maintain a group health plan,³³ but only to the extent such amounts are excluded from the employees' income as coverage under an accident or health plan.³⁴ Qualified health plan expenses are allocated to qualified sick leave wages in such manner as the Secretary of the Treasury (or the Secretary's delegate) may prescribe. Except as otherwise provided by the Secretary, such allocations is treated as properly made under the provision if made on the basis of being pro rata among covered employees and pro rata on the basis of periods of coverage (relative to the time periods of leave to which such wages relate).

The provision provides that the credit allowed may not exceed the OASDI tax or RRTA tax imposed on the employer, reduced by any credits allowed for the employment of qualified veterans³⁵ and research expenditures of qualified small businesses³⁶ for that calendar quarter on the wages paid with respect to all the employer's employees. However, if for any calendar quarter the amount of the credit exceeds the OASDI tax or RRTA tax imposed on the employer, reduced as described in the prior sentence, such excess is treated as a refundable overpayment.³⁷

If an employer claims a credit under this provision, the amount so claimed is included in gross income. Thus, the credit is not taken into account for purposes of determining any amount allowable as a payroll tax deduction, deduction for qualified sick leave wages, or deduction for health plan expenses (or any amount capitalizable to basis). For example, assume an employer claims a credit of \$5,510 for \$5,110 of qualified sick leave wages and \$400 of health plan expenses paid during the quarter. Under the provision, the employer has an offsetting income inclusion amount of \$5,510, and the employer may deduct \$5,110 of qualified sick leave wages and \$400 of health plan expenses (assuming such costs are not subject to capitalization). In

³³ Group health plan for this purpose is defined in section 5000(b)(1).

³⁴ For the exclusion, see section 106(a).

³⁵ This credit is described in section 3111(e).

³⁶ This credit is described in section 3111(f).

³⁷ The excess is treated as an overpayment and refunded under sections 6402(a) and 6413(b). In addition, any amount that is due to an employer is treated in the same manner as a refund due from a credit provision. 31 U.S.C. sec. 1324. Thus, amounts are appropriated to the Secretary of the Treasury for refunding such excess amounts.

addition, the employer's income tax deduction for any tax imposed by section 3111(a) or 3221(a), the employer's share of OASDI or RRTA tax, for such quarter will not be reduced.³⁸

Any qualified sick leave wages taken into account under the provision are not taken into account for purposes of determining a section 45S credit.³⁹ Thus, the employer may not claim a credit under section 45S with respect to the qualified sick leave wages paid, but may be able to take a credit under section 45S with respect to any additional wages paid, provided the requirements of section 45S are met with respect to the additional wages.

Under the provision, an employer may elect, at such time and in such manner as provided by the Secretary of the Treasury (or the Secretary's delegate), to have the provision not apply to such employer for a calendar quarter. Further, the credit allowed under this provision does not apply to the Government of the United States, the government of any State or political subdivision thereof, or any agency or instrumentality of any of those entities. Under the provision, employers in the U.S. territories may claim the credit by filing their quarterly Federal employment tax returns.

The provision provides that the Secretary of the Treasury (or the Secretary's delegate) shall prescribe such regulations or other guidance as may be necessary to carry out the purposes of this provision, including regulations or other guidance: (1) to prevent the avoidance of the purposes of the limitations under this provision; (2) to minimize compliance and record-keeping burdens under this provision; (3) providing for waiver of penalties for failure to deposit amounts in anticipation of the allowance of the credit under this provision; (4) for recapturing the benefit of credits determined under this provision in cases where there is a subsequent adjustment to the credit; and (5) to ensure that the wages taken into account under this provision conform with the paid sick time required to be provided under the Emergency Paid Sick Leave Act.⁴⁰ With respect to clause (5), it is intended that the Secretary of the Treasury (or the Secretary's delegate) be provided broad authority to ensure qualified sick leave wages under this provision includes paid sick time required to be paid under the Emergency Paid Sick Leave Act.

Under the provision, amounts are appropriated to the OASDI Trust Funds and the Social Security Equivalent Benefit Account established under the Railroad Retirement Act of 1974⁴¹ equal to the reduction in revenues to the Treasury by reason of the provision. Such amounts are transferred from the general fund at such times and in such manner as to replicate to the extent possible the transfers that would have occurred to the OASDI Trust Funds or Social Security Equivalent Benefit Account had this provision not been enacted.

³⁸ Note that the qualified sick leave wages paid are not subject to the tax imposed by section 3111(a) or 3221(a). Employers also receive an increase in the otherwise available credit in the amount of the tax imposed by section 3111(b) on qualified sick leave wages.

³⁹ Section 45S provides an employer credit for certain paid family and medical leave.

⁴⁰ Division E of the bill.

⁴¹ Sec. 15A(a) (45 U.S.C. sec. 231n-1(a)).

Effective Date

The provision is effective on the date of enactment. The provision applies for the period that begins on a date within 15 days of the date of enactment, prescribed by the Secretary of the Treasury (or the Secretary's delegate), and that ends on December 31, 2020.

**B. Credit for Sick Leave for Certain Self-Employed Individuals
(sec. 7002 of the bill)**

Explanation of Provision

In general

Under the provision, an eligible self-employed individual is allowed an income tax credit for any taxable year for a qualified sick leave equivalent amount, as described below. An eligible self-employed individual is defined as an individual who regularly carries on any trade or business⁴² and would be entitled to receive paid leave during the taxable year under Division E of the bill, the Emergency Paid Sick Leave Act, if the individual were an employee of an employer (other than himself or herself) that is subject to the requirements of the Act.

The Emergency Paid Sick Leave Act requires certain employers to provide an employee with paid sick time to the extent that the employee is unable to work or telework due to a need for leave because: (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 described in clause (1) or has been advised as described in clause (2); (5) the employee is caring for the employee's son or daughter if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable due to COVID-19 precautions; or (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.⁴³

Qualified sick leave equivalent amount

The qualified sick leave equivalent amount with respect to an eligible self-employed individual is an amount equal to the number of days during the taxable year that the self-employed individual cannot perform services for which that individual would have been entitled to sick leave pursuant to the Emergency Paid Sick Leave Act⁴⁴ (if the individual were employed by an employer), multiplied by the lesser of two amounts: (a) \$511 in the case of paid sick time described in clauses (1), (2), or (3) above (\$200 in the case of paid sick time described in clauses (4), (5), or (6) above); or (b) 100 percent of the average daily self-employment income of the individual for the taxable year in the case of any day of paid sick time described in clauses (1), (2), or (3) above (67 percent in the case of paid sick time described in clauses (4), (5), or (6) above).

⁴² Within the meaning of sec. 1402.

⁴³ Division E of the bill, sec. 5102(a).

⁴⁴ Division E of the bill.

The number of days taken into account in determining the qualified sick leave equivalent amount may not exceed, with respect to any taxable year, 10 days, taking into account any days taken in all preceding taxable years. The individual's average daily self-employment income under the provision is an amount equal to the net earnings from self-employment for the taxable year divided by 260.

Additional rules

The provision provides that the credit allowed is refundable.⁴⁵ No credit is allowed to an individual unless the individual maintains such documentation as the Secretary of Treasury (or the Secretary's delegate) may prescribe to establish that the individual is an eligible self-employed individual.

If an eligible self-employed individual receives qualified sick leave wages,⁴⁶ the individual's qualified sick leave equivalent amount determined under the provision is reduced (but not below zero) to the extent that the sum of the qualified sick leave equivalent amount and the qualified sick leave wages received exceeds \$2,000 (\$5,110 in the case of any day any portion of which is paid sick time described in clause (1), (2), or (3) above, with respect to section 5102(a) of the Emergency Paid Sick Leave Act). For example, assume that an eligible self-employed individual's qualified sick leave equivalent amount is \$1,500, but the individual also works for a covered employer under the Emergency Paid Sick Leave Act and received qualified sick leave wages under clause (5) above (with respect to section 5102(a) of such Act) of \$1,000 to care for the individual's son or daughter while school was closed due to COVID-19. The individual's qualified sick leave equivalent amount would be reduced by \$500,⁴⁷ resulting in a credit under the provision of \$1,000.⁴⁸

Application of credit in certain territories

Under the provision, the Secretary of the Treasury (or the Secretary's delegate) is directed to make payments to each territory with a mirror Code tax system that relate to the cost (if any) of each territory's credits for sick leave for certain self-employed individuals. The Secretary is further directed to make similar payments to each non-mirror Code territory.

With respect to mirror Code territories, the Secretary makes payments equal to the loss in revenue by reason of the application of the credit for sick leave for certain self-employed individuals to the territory's mirror Code. This amount is determined by the Secretary based on information provided by the governments of the respective territories.

⁴⁵ Any refund due to an individual is treated in the same manner as a refund due from a credit provision. 31 U.S.C. sec. 1324. Thus, amounts are appropriated to the Secretary of the Treasury for refunding such amounts.

⁴⁶ As defined by sec. 7001(c) of the bill, described above.

⁴⁷ $(\$1,500 + \$1,000) - \$2,000 = \500 .

⁴⁸ $\$1,500 - \$500 = \$1,000$.

With respect to Puerto Rico and American Samoa (non-mirror Code territories), the Secretary is directed to make payments in an amount estimated by the Secretary as being equal to the aggregate benefits that would have been provided to the residents of each territory from the credit for sick leave for certain self-employed individuals if a mirror Code tax system had been in effect in such territory. These payments will not be made unless the territory has a plan approved by the Secretary to promptly distribute the payments to its residents.

Regulatory authority

The Secretary of the Treasury (or the Secretary's delegate) is directed to prescribe such regulations or other guidance as may be necessary to carry out the purposes of the bill, including (1) to effectuate the purposes of this provision, and (2) to minimize compliance and record-keeping burdens under the provision.

Effective Date

The provision is effective on the date of enactment. The only days that may be taken into account in determining the qualified sick leave equivalent amount are days occurring during the period beginning on a date selected by the Secretary of the Treasury (or the Secretary's delegate) which is during the 15-day period beginning on the date of enactment and ending on December 31, 2020.

**C. Payroll Credit for Required Paid Family Leave
(sec. 7003 of the bill)**

Explanation of Provision

In general

Under the provision, an employer is allowed a credit against the OASDI tax or RRTA tax imposed on the employer for each calendar quarter in an amount equal to 100 percent of the qualified family leave wages paid by the employer with respect to that calendar quarter, subject to the limits described below. The provision defines qualified family leave wages as wages (within the meaning of section 3121(a)) and compensation (within the meaning of section 3231(e)) paid by an employer by reason of Division C of the bill, the Emergency Family and Medical Leave Expansion Act. As described below, the credit may be increased by certain health plan expenses of the employer.

The Emergency Family and Medical Leave Expansion Act requires certain employers to provide public health emergency leave to employees under the Family and Medical Leave Act of 1993 (“FMLA”).⁴⁹ This requirement generally applies when an employee is unable to work or telework due to a need for leave to care for a son or daughter under age 18 because the school or place of care has been closed, or the child care provider is unavailable, due to a public health emergency. The bill defines a public health emergency as an emergency with respect to COVID-19 declared by a Federal, State, or local authority. An employer that is required to provide this additional family and medical leave is allowed a tax credit in respect of the leave.

The first 10 days of public health emergency leave required under the Emergency Family and Medical Leave Expansion Act may consist of unpaid leave, after which paid leave is required. The paid leave is for the duration of the period provided in the Emergency Family and Medical Leave Expansion Act, which is a maximum of 10 weeks. The amount of required paid leave under the provision is based on an amount not less than two-thirds of an employee’s regular rate of pay, and the number of hours the employee would otherwise be normally scheduled to work. Additional guidance is provided for employees with varying schedules. The paid leave mandated by the Emergency Family and Medical Leave Expansion Act may not exceed \$200 per day and \$10,000 in the aggregate.

Credit against OASDI and RRTA tax

Under the provision, employers are allowed a credit against OASDI or RRTA taxes in an amount equal to 100 percent of qualified family leave wages paid by the employer during the quarter. Qualified family leave wages for purposes of the credit means wages⁵⁰ and compensation⁵¹ paid by an employer which were required to be paid pursuant to the Emergency

⁴⁹ Division C of the bill, section 3102.

⁵⁰ Sec. 3121(a) (defining wages for FICA tax purposes).

⁵¹ Sec. 3221(a) (defining compensation for RRTA tax purposes).

Family and Medical Leave Expansion Act. The maximum amount of qualified family leave wages eligible for the credit is \$200 for any day (or portion thereof) for which the employee is paid qualified family leave wages, and in the aggregate with respect to all calendar quarters, \$10,000. The credit is not allowed in respect of unpaid leave.

The credit allowed is increased under the provision by so much of the employer's qualified health plan expenses as are properly allocable to the qualified family leave wages for which the credit is allowed. The provision defines qualified health plan expenses as amounts paid or incurred by the employer to provide and maintain a group health plan,⁵² but only to the extent such amounts are excluded from the employees' income as coverage under an accident or health plan.⁵³ Qualified health plan expenses are allocated to qualified family leave wages in such manner as the Secretary of the Treasury (or the Secretary's delegate) may prescribe. Except as otherwise provided by the Secretary, such allocations are treated as properly made under the provision if made on the basis of being pro rata among covered employees and pro rata on the basis of periods of coverage (relative to the time periods of leave to which such wages relate).

The provision provides that the credit allowed may not exceed the OASDI tax or RRTA tax imposed on the employer, reduced by any credits allowed for the employment of qualified veterans⁵⁴ and research expenditures of qualified small businesses⁵⁵ for that calendar quarter on the wages paid with respect to all of the employer's employees. However, if for any calendar quarter the amount of the credit exceeds the OASDI tax or RRTA tax imposed on the employer, reduced as described under the prior sentence, such excess is treated as a refundable overpayment.⁵⁶

If an employer claims a credit under this provision, the amount so claimed is included in gross income. Thus, the credit is not taken into account for purposes of determining any amount allowable as a payroll tax deduction, deduction for qualified family leave wages, or deduction for health plan expenses (or any amount capitalizable to basis). For example, assume an employer claims a credit of \$2,700 for \$2,500 of qualified family leave wages and \$200 of health plan expenses paid during the quarter. Under the provision, the employer will have an offsetting income inclusion amount of \$2,700, and the employer may deduct \$2,500 of qualified family leave wages and \$200 of health plan expenses (assuming such costs are not subject to capitalization). In addition, the employer's income tax deduction for any tax imposed by section

⁵² Group health plan for this purpose is defined in section 5000(b)(1).

⁵³ For the exclusion, see section 106(a).

⁵⁴ This credit is described in section 3111(e).

⁵⁵ This credit is described in section 3111(f).

⁵⁶ The excess is treated as an overpayment and refunded under sections 6402(a) and 6413(b). In addition, any amount that is due to an employer is treated in the same manner as a refund due from a credit provision. 31 U.S.C. sec. 1324. Thus, amounts are appropriated to the Secretary of the Treasury for refunding such excess amounts.

3111(a) or 3221(a), the employer's share of OASDI or RRTA tax, for such quarter will not be reduced.⁵⁷

Any wages taken into account in determining the credit under this provision are not taken into account for purposes of determining the section 45S credit. Thus, the employer may not claim a credit under section 45S with respect to the qualified family leave wages paid, but may be able to take a credit under section 45S with respect to any additional wages paid, provided the requirements of section 45S are met with respect to the additional wages.

Under the provision an employer may elect, at such time and in such manner as provided by the Secretary of the Treasury (or the Secretary's delegate), to have the provision not apply to the employer for a calendar quarter. The credit allowed under this provision does not apply to the Government of the United States, the government of any State or political subdivision thereof, or any agency or instrumentality of any of these entities. Under the provision, employers in the territories may claim the credit by filing their quarterly Federal employment tax returns.

The provision provides that the Secretary of the Treasury (or the Secretary's delegate) shall prescribe such regulations or other guidance as may be necessary to carry out the purposes of the provision, including regulations or other guidance: (1) to prevent the avoidance of the purposes of the limitations under the provision; (2) to minimize compliance and record-keeping burdens under the provision; (3) providing for waiver of penalties for failure to deposit amounts in anticipation of the allowance of the credit under the provision; (4) for recapturing the benefit of credits determined under the provision in cases where there is a subsequent adjustment to the credit; and (5) to ensure that the wages taken into account under the provision conform with the paid family leave required to be provided under the Emergency Family and Medical Leave Expansion Act.⁵⁸ With respect to clause (5), it is intended that the Secretary of the Treasury (or the Secretary's delegate) be provided broad authority to ensure qualified family leave wages under this provision includes paid sick time required to be paid under the Emergency Family and Medical Leave Expansion Act.⁵⁹

Under the provision, amounts are appropriated to the OASDI Trust Funds and the Social Security Equivalent Benefit Account established under the Railroad Retirement Act of 1974⁶⁰ equal to the reduction in revenues to the Treasury by reason of the provision. Such amounts are transferred from the general fund at such times and in such manner as to replicate to the extent possible the transfers that would have occurred to the Trust Funds or Account had the provision not been enacted.

⁵⁷ Note that the qualified family leave wages paid are not subject to the tax imposed by section 3111(a) or 3221(a). Employers also receive an increase in the otherwise available credit in the amount of the tax imposed by section 3111(b) on qualified family leave wages. See subsequent explanation of sec. 7005 of the bill.

⁵⁸ Division C of the bill, sec. 3102.

⁵⁹ *Ibid.*

⁶⁰ Sec. 15A(a) (45 U.S.C. sec. 231n-1(a)).

Effective Date

The provision is effective on the date of enactment. The provision applies for the period that begins on a date, within 15 days of the date of enactment, prescribed by the Secretary of the Treasury (or the Secretary's delegate) and that ends on December 31, 2020.

**D. Credit for Family Leave for Certain Self-Employed Individuals
(sec. 7004 of the bill)**

Explanation of Provision

In general

Under the provision, an eligible self-employed individual is allowed an income tax credit for any taxable year for a qualified family leave equivalent amount, as described below. An eligible self-employed individual is defined as an individual who regularly carries on any trade or business⁶¹ and would be entitled to receive paid leave during the taxable year under Division C of the bill, the Emergency Family and Medical Leave Expansion Act, if the individual were an employee of an employer (other than himself or herself) that is subject to the requirements of the Act.

The Emergency Family and Medical Leave Expansion Act requires certain employers to provide public health emergency leave to employees under the Family and Medical Leave Act of 1993 (“FMLA”).⁶² This requirement generally applies when an employee is unable to work or telework due to a need for leave to care for a son or daughter under age 18 because the school or place of care has been closed, or the child care provider is unavailable, due to a public health emergency. The bill defines a public health emergency as an emergency with respect to COVID-19 declared by a Federal, State, or local authority.

An employer that is required to provide this additional family and medical leave is allowed a tax credit in respect of the leave. In general, under the provision, a self-employed individual is allowed a similar tax credit in situations in which a credit would be allowed if the individual were an employee of an employer subject to the leave requirements.

The first 10 days of public health emergency leave required under the Emergency Family and Medical Leave Expansion Act may consist of unpaid leave, after which paid leave is required. The paid leave is for the duration of the period provided in the Emergency Family and Medical Leave Expansion Act, which is a maximum of 10 weeks. The amount of required paid leave under the provision is based on an amount not less than two-thirds of an employee’s regular rate of pay, and the number of hours the employee would otherwise be normally scheduled to work. Additional guidance is provided for employees with varying schedules. The paid leave mandated by the Emergency Family and Medical Leave Expansion Act may not exceed \$200 per day and \$10,000 in the aggregate.

Qualified family leave equivalent amount

The qualified family leave equivalent amount with respect to an eligible self-employed individual is an amount equal to the number of days (up to 50) during the taxable year that the

⁶¹ Within the meaning of sec. 1402.

⁶² Division C of the bill.

self-employed individual cannot perform services for which that individual would be entitled to paid leave pursuant to the Emergency Family and Medical Leave Expansion Act⁶³ (if the individual were employed by an employer), multiplied by the lesser of two amounts: (1) 67 percent of the average daily self-employment income of the individual for the taxable year, or (2) \$200. The individual's average daily self-employment income under the provision is an amount equal to the individual's net earnings from self-employment for the year divided by 260.

Additional rules

The provision provides that the credit allowed is refundable.⁶⁴ No credit is allowed to an individual unless the individual maintains such documentation as the Secretary of the Treasury (or the Secretary's delegate) may prescribe to establish that the individual is an eligible self-employed individual.

If an eligible self-employed individual receives qualified family leave wages,⁶⁵ the individual's qualified family leave equivalent amount determined under the provision is reduced (but not below zero) to the extent that the sum of the qualified family leave equivalent amount and the qualified family leave wages received exceeds \$10,000. For example, assume that an eligible self-employed individual's qualified family leave equivalent amount is \$5,000, but the individual also works for an employer that is a covered employer under the Emergency Family and Medical Leave Expansion Act and received qualified family leave wages of \$9,000 to care for the individual's son or daughter while school was closed due to COVID-19. The individual's qualified family leave equivalent amount would be reduced by \$4,000,⁶⁶ resulting in a credit under the provision of \$1,000.⁶⁷

Application of credit in certain territories

Under the provision, the Secretary of the Treasury (or the Secretary's delegate) makes payments to each territory with a mirror Code tax system that relate to the cost of each territory's credits for family leave for certain self-employed individuals. The Secretary of the Treasury (or the Secretary's delegate) makes similar payments to each non-mirror Code territory.

With respect to mirror Code territories, the Secretary of the Treasury (or the Secretary's delegate) makes payments equal to the loss in revenue by reason of the application of the credit for family leave for certain self-employed individuals to the territory's mirror Code. This

⁶³ Division C of the bill.

⁶⁴ Any refund due to an individual is treated in the same manner as a refund due from a credit provision. 31 U.S.C. sec. 1324. Thus, amounts are appropriated to the Secretary of the Treasury for refunding such amounts.

⁶⁵ As defined by sec. 7003(c) of the bill, described above.

⁶⁶ $(\$5,000 + \$9,000) - \$10,000 = \$4,000$.

⁶⁷ $\$5,000 - \$4,000 = \$1,000$.

amount is determined by the Secretary of the Treasury (or the Secretary's delegate) based on information provided by the governments of the respective territories.

With respect to Puerto Rico and American Samoa (non-mirror Code territories), the Secretary makes payments in an amount estimated by the Secretary of the Treasury (or the Secretary's delegate) as being equal to the aggregate benefits that would have been provided to the residents of each territory from the credit for family leave for certain self-employed individuals if a mirror Code tax system had been in effect in such territory. These payments will not be made unless the territory has a plan approved by the Secretary of the Treasury (or the Secretary's delegate) to promptly distribute the payments to its residents.

Regulatory authority

The Secretary of the Treasury (or the Secretary's delegate) is directed to prescribe such regulations as are necessary to carry out the purposes of the provision, including (1) to prevent the avoidance of the purposes of the bill, and (2) to minimize compliance and record-keeping burdens under the provision.

Effective Date

The provision is effective on the date of enactment. The only days that may be taken into account in determining the qualified family leave equivalent amount are days occurring during the period beginning on a date selected by the Secretary of the Treasury (or the Secretary's delegate) which is during the 15-day period beginning on the date of enactment and ending on December 31, 2020.

E. Special Rule Related to Tax on Employers
(sec. 7005 of the bill)

Explanation of Provision

Under the provision, any wages or compensation required to be paid to employees by reason of the Emergency Family and Medical Leave Expansion Act and the Emergency Paid Sick Leave Act are not considered wages of the employer for purposes of FICA tax or compensation for purposes of RRTA tax. As a result, no federal employment taxes will be collected on such amounts from employers or employees to be contributed to the OASDI or railroad retirement programs.

The amount of the credit allowed by sections 7001 and 7003 of the bill is increased by the amount of tax imposed by section 3111(b)⁶⁸ on qualified sick leave wages or qualified family leave wages, for which a credit is allowed under such section 7001 or 7003, respectively. The no-double-benefit rule described above for sections 7001 and 7003 applies for purposes of this credit increase.

The provision provides that amounts will be transferred to the Federal Old-Age and Survivors Insurance Trust Fund, the Federal Disability Insurance Trust Fund, and the Social Security Equivalent Benefit Account from Treasury's general fund in an amount equal to the reduction in revenues to the Treasury resulting from not treating such paid emergency sick leave and emergency family and medical leave as wages or compensation for employment tax purposes. Such amounts are to be transferred from the general fund at such times and in such manner as to replicate, to the extent possible, the transfers which would have occurred to such Trust Fund or Account had the provision not been enacted.

Effective Date

The provision is effective on the date of enactment.

⁶⁸ Section 3111(b) imposes on the employer a Medicare hospital insurance excise tax of 1.45 percent on all earnings.