

Practice Update

UPDATED: Interplay Between Paycheck Protection Program Loans and Payroll Tax Provisions Under FFCRA and the CARES Act

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This Practice Update was updated pursuant to the IRS-issued guidance on April 10, 2020. Please contact the authors if you have any questions or comments.

Congress enacted the Families First Coronavirus Response Act (FFCRA), which requires certain employers to provide paid leave to workers who are unable to work (or telework) due to circumstances related to COVID-19 and, in return, Congress created a refundable payroll tax credit to offset the cost of providing the required leave. Then, fewer than ten days later, Congress passed the unprecedented Coronavirus Aid, Relief, and Economic Security (CARES) Act, which, among other things, provides for (i) Paycheck Protection Program (PPP) loans administered by the Small Business Administration (SBA), (ii) a tax credit for certain “employee retention” costs, and (iii) potential deferral of employer Social Security taxes. The payroll tax credit and deferral provisions of FFCRA and the CARES Act intersect in different ways with the PPP loans.

There are a number of factors a business should consider in determining which course of action is

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best for it. These factors include, among other things:

- Type and amount of loans available under the CARES Act;
- Whether the business wants or intends to seek loan forgiveness under the CARES Act;
- The availability of any payroll tax credits; and
- The availability of payroll tax deferral under the CARES Act.

This post provides an overview of the interplay between the three types of payroll tax credits and one type of payroll tax deferral available under FFCRA and the CARES Act, and addresses some of the common questions we have received from employers.

Payroll Tax Credits

The three types of available payroll tax credits correspond to:

1. Wages, employer health plan expenses, and Medicare taxes paid by eligible employers for required sick leave under FFCRA[1] (FFCRA Section 7001);
2. Wages, employer health plan expenses, and Medicare taxes paid by eligible employers for required family leave under FFCRA[2] (FFCRA Section 7003); and
3. Wages and employer health plan expenses paid by eligible employers to or on behalf of certain employees during the COVID-19 crisis[3] (CARES Act section 2301).

Family/Sick Leave Tax Credits: An employer is generally eligible for PPP loans under the CARES Act even if the employer is also receiving sick/family leave tax credits under FFCRA; however, the amount of “payroll costs” included in the loan will not include the amount of wages/expenses for required

sick/family leave under FFCRA and the loan proceeds may not be used for wages/expenses for required FFCRA sick/family leave for which a tax credit is allowed.

Employee Retention Tax Credit. The CARES Act provides a refundable payroll tax credit equal to 50% of qualified wages for certain “eligible employers” for wages paid or incurred between March 13, 2020 and December 31, 2020 (an “employee retention tax credit”). An employer may not however “double up” on tax credits for the same wages. Thus, an employer may not take an employee retention tax credit for required sick/family leave wages under FFCRA for which the employer also receives a payroll tax credit. Further, employers may not receive an employee retention tax credit if the employer also receives a PPP loan. CARES Act section 2301(l)(3) specifically requires Treasury to issue regulatory guidance on how the IRS will recoup the tax credit if an employer receives a credit and then also receives a PPP loan, so it appears an employer’s eligibility for a PPP loan will not be affected by taking the tax credit – rather, there will be some form of repayment or offset of the tax credit if the employer also receives a PPP loan.

In this regard, taking the tax credit may affect the amount of forgiveness available (meaning, a reduction in the amount of loan forgiveness may be how Treasury decides to recoup the credit).

However, given the current lack of guidance, we do not have certainty on what position Treasury will take.

Given this, and the expectation that SBA PPP loans may be oversubscribed, every employer should model out the various options and potential outcomes to make a business decision based on what makes the most sense for their particular circumstances.

Payroll Tax Deferral

Under CARES Act section 2302, an employer may defer the employer portion of Social Security taxes

due between March 27 and December 31, 2020, provided at least 50% of the deferred taxes are paid by the end of 2021 and the remainder is paid by the end of 2022. However, employers that have their indebtedness forgiven under the Paycheck Protection Program are not eligible to defer these taxes.

As we noted in our original posting, it is unclear from the statutory language precisely how this provision would work. However, on April 10, the IRS issued guidance clarifying that an employer may defer the employer's portion of Social Security taxes until it actually receives a decision from its lender that its PPP loan has been forgiven. At that point, the employer may no longer defer the employer portion of Social Security taxes. Importantly, no Social Security taxes deferred prior to the date of loan forgiveness will immediately become due – the employer is permitted to delay depositing previously-deferred taxes until the applicable due dates (i.e., December 31, 2021 and December 31, 2022).

As noted above, we recommend modeling the various costs and benefits to determine what makes sense for your business given your particular facts and circumstances.

[1] FFCRA section 5102 requires employers with fewer than 500 employees to provide all employees (regardless of the length of time employed) with up to two weeks of paid sick leave which is: (1) paid at the employee's regular rate of pay if the employee is subject to a quarantine or isolation order, advised by a medical provider to self-quarantine, or experiencing symptoms of COVID-19 and seeking a diagnosis; or (2) paid at 2/3 the employee's regular rate of pay if the employee needs leave to care for a family member who is subject to isolation or self-quarantine or is caring for a his/her child because the child's school or child care provider is closed or unavailable. FFCRA section 5110 caps the required

paid sick leave at \$511 per day and \$5,110 in total for an employee who needs leave due to his/her own quarantine or illness and \$200 per day and \$2,000 in total for an employee who needs leave to care for someone else. FFCRA section 7001 provides employers with a corresponding payroll tax credit for 100% of the paid sick leave required by FFCRA section 5102 (the tax credit is subject to the same dollar limits as the required paid leave).

[2] FFCRA section 3102 expands the Family and Medical Leave Act to require employers with fewer than 500 employees to provide employees who have been on the job for at least 30 days with up to 12 weeks of job-protected family leave if the employees need leave in order to: (1) adhere to a quarantine requirement or recommendation; (2) care for an at-risk family member who is in quarantine; or (3) care for a child of the employee because the child's school or child care provider is close or unavailable due to coronavirus. The first two weeks/ten days of required family leave may be unpaid (if not subject to FFCRA section 5102) and then the next 10 weeks of leave must be paid at 2/3 the employee's regular rate of pay up to a limit of \$200 per day and \$10,000 total per employee. Small businesses with fewer than 50 employees may be exempt if providing the leave would jeopardize the viability of the business as a going concern. FFCRA section 7003 provides employers with a corresponding payroll tax credit for 100% of the paid family leave required by FFCRA section 3102 (the tax credit is subject to the same dollar limits as the required paid leave).

[3] CARES Act section 2301 provides a payroll tax credit for 50% of certain wages paid by eligible employers to certain employees from March 13 through December 31, 2020. An employer is eligible for the tax credit if it: (1) had operations fully or partially suspends as a result of a government order limiting commerce, travel, or group meetings; or (2) experienced a greater than 50% reduction in quarterly gross receipts as compared to the same quarter in 2019 (eligibility under this subsection

ends after the first quarter in which gross receipts are more than 80% of the gross receipts for the same quarter in 2019). Employers with 100 or fewer employees on average in 2019 may take a 50% credit for all wages paid to all employees during this time period even if the employees are still working. Employers with more than 100 employees on average in 2019 may take a 50% credit for only those wages paid to employees who are “not providing services” due to the employer’s suspension of operations or reduction in gross receipts.

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