

Practice Update

IRS Provides Guidance on Refundable and Advance Tax Credits Under CARES and FFCRA Acts

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On March 31, the IRS issued guidance on the paid leave tax credits provided by the Families First Coronavirus Response Act (the FFCRA) and the Employee Retention Credit created by the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act), together with new IRS Form 7200, Advance Payment of Employer Credits Due to COVID-19, to be used by employers requesting advance payments of these credits.

The FFCRA aims to help businesses and their employees combat COVID-19 by requiring certain eligible businesses to provide paid leave to workers who are unable to work or telework due to circumstances related to COVID-19. The FFCRA offsets the costs of this required paid leave by providing employers with a refundable tax credit against employment taxes. The paid leave credits are generally available to businesses and tax-exempt organizations with fewer than 500 employees that are required to provide qualified sick leave wages and qualified family leave wages under the FFCRA. A complete summary of the FFCRA and paid leave credits can be [found here](#).

The CARES Act supports businesses whose operations have been interrupted as a result of COVID-19 but who nonetheless retain employees

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with a refundable credit (the Employee Retention Credit). The Employee Retention Credit provides a refundable credit to employers who either (1) have had to fully or partially suspend operation of businesses because of governmental orders relating to COVID-19, or (2) had had more than a 50% decline in gross receipts compared to the same quarter last year. A complete summary of the tax provisions in the CARES Act, including the Employer Retention Credit, is [here](#).

The recent IRS guidance helps eliminate confusion regarding the interplay of the FFCRA and the CARES Act, and clarifies eligibility requirements for claiming the refundable tax credits created under the legislation. The issuance of Form 7200 also creates an avenue for employers to quickly access relief funds.

New Form 7200, Advance Payment of Employer Credits Due to COVID-19

The IRS announced a new Form 7200, Advance Payment of Employer Credits Due to COVID-19, to make it easier for employers to access the refundable credits enacted by the FFCRA and the CARES Act. The form can be used to request an advance payment of the tax credits for qualified sick and qualified family leave wages and the employee retention credit.

The form is available only for eligible employers and cannot be used by self-employed individuals (despite the fact that such individuals may be eligible for the credits). Form 7200 is optional, but if the employer elects to file the form, it must reconcile any advance credit payments and reduced deposits on its employment tax returns filed for 2020.

FAQs on COVID-19 Related Tax Credits for Required Paid Leave Provided by Small and Midsize Businesses

On March 31st, the IRS issued extensive guidance in the form of frequently asked questions (FAQs) regarding the FFCRA paid leave credits. The FAQs provide much needed clarity to employers on the availability and operation of the credits, including helpful examples regarding their implementation.

The FAQs confirm that eligible employers may claim the benefit immediately (rather than waiting to file their employment tax returns) by reducing their employment tax deposits or by requesting advance payment of the credits on Form 7200, as discussed above. An eligible employer can also fund qualified leave wages with funds that it previously withheld and set aside for deposit with the IRS. There are no penalties for reducing deposits in anticipation of the credits. The FAQs also provide detailed guidance on computing the credits for qualified sick leave wages and qualified family leave wages and determining eligibility of employees for benefits. The FAQs also clarify the treatment of qualified health plan expenses in computing the credits.

Also of note, the FAQs address the interplay of the credits with other provisions of the Code and other legislative relief. For instance:

- Payments of qualified leave wages for which credits are received are generally deductible by the eligible employer, if the eligible employer is otherwise eligible for the deduction.
- The deductible amount of social security taxes for an eligible employer is the federal employment tax before reduction by the credits.
- Eligible employers may qualify for credits under both the FFCRA and the CARES Act, but employers may not receive the credit for leave wages and the credit provided under Section 45S of the Code.
- Employers should withhold employment taxes on qualified leave wages and employees will be taxed on their qualified leave wages.

- These wages do not qualify as disaster relief payments under Section 139 of the Code.

FAQs on the Employee Retention Credit under the CARES Act

On March 31st, the IRS also released FAQs regarding the Employee Retention Credit implemented under the CARES Act. The FAQs provide helpful explanations, including several examples, for the computation of the Employer Retention Credit. The Employee Retention Credit is a fully refundable credit against employment taxes for eligible employers equal to 50% of qualified wages (including allocable qualified health plan expenses). The Employee Retention Credit applies to qualified wages paid after March 12, 2020, and before January 1, 2021.

The FAQs clarify the two categories of eligible employers for the Employee Retention Credit with helpful examples:

- The first category is employers whose business operations have been fully or partially suspended during any quarter in 2020 due to orders from an appropriate governmental authority limited commerce, travel, or group meetings (for commercial, social, religious or other purposes) due to COVID-19. The FAQs clarify that business operation is “partially suspended” if the business can continue to operate but at less than its normal capacity due to a COVID-19-related governmental order, such as an establishment that typically provides full sit-down restaurant service has its dining room closed due to an executive order, but the establishment continues to offer carry-out, drive-through, or delivery food service.
- A second category is employers who experience a significant decline in gross receipts during the calendar quarter. The FAQs confirm that a “significant decline” in gross receipts begins with the first quarter in which an employer’s gross

receipts for a calendar quarter in 2020 are less than 50% of its gross receipts for the same calendar quarter in 2019 and ends with the first calendar quarter that follows the first calendar quarter for which the employer's 2020 gross receipts for the quarter are greater than 80% of its gross receipts for the same calendar quarter during 2019. For instance, if an employer's gross receipts were \$210,000, \$230,000, and \$250,000 in Q1, Q2, and Q3 of 2019, respectively and \$100,000 (48%), \$190,000 (83%), and \$230,000 (92%) in the Q1, Q2, and Q3 of 2020, respectively, the employer had a significant decline in gross receipts commencing on the first day of Q1 of 2020 and ending on the first day of the Q3 of 2020. Thus the employer is entitled to the retention credit for Q1 and Q2.

The FAQs also discuss the computation of the available credit, and confirm that the maximum amount of the credit is computed in the aggregate for all calendar quarters.

The FAQs also highlight the elective nature of the Employee Retention Credit. Unlike the FFCRA, the CARES Act does not require employers to pay qualified wages. In addition, eligible employers may elect to not claim the credit for the Employee Retention Credit.

The FAQs address the requirements for claiming the Employee Retention Credit. The FAQs describe two ways eligible employers can fund qualified wages – by accessing federal employment taxes, including withheld taxes, that are required to be deposited with the IRS, or by requesting an advance of the credit from the IRS using newly released IRS Form 7200 (as discussed above). An eligible employer that pays qualified wages to its employees in a calendar quarter before it is required to deposit federal employment taxes with the IRS for that quarter may reduce the amount of federal employment taxes it deposits for that quarter by 50% of the qualified wages paid in that calendar quarter, provided the

employer accounts for the reduction in deposits on its Form 941.

Additionally, the FAQs confirm that penalty relief is available for failure to deposit federal employment taxes relating to qualified wages in a calendar quarter, in accordance with Notice 2020-22, discussed below.

Relief from Penalty for Failure to Deposit Employment Taxes

The IRS also released Notice 2020-22, 2020-17 IRB, which provides penalty relief from failure to make employment tax deposits for employers entitled to the new refundable tax credits provided under the FFCRA and the CARES Act.

Generally, § 6656 imposes a penalty for any failure to deposit amounts as required (including deposits for employment taxes), unless such failure is due to reasonable cause and not due to willful neglect. The FFCRA and the CARES Act instruct the Secretary of the Treasury to waive the § 6656 penalty for failure to deposit the employer share of social security tax in anticipation of the allowance of the refundable tax credits allowed thereunder.

According to Notice 2020-22, an employer will not be subject to a § 6656 penalty for failing to deposit employment taxes relating to qualified wages under the FFCRA or the CARES Act if:

1. The employer paid qualified wages to its employees in the calendar quarter prior to the time of the required deposit,
2. The amount of employment taxes that the employer does not timely deposit is less than or equal to the amount of the employer's anticipated credits for the qualified leave wages under the FFCRA for the calendar quarter as of the time of the required deposit, or qualified leave wages and employee retention credit under the CARES Act, and

3. The employer did not seek payment of an advance credit by filing Form 7200, with respect to the anticipated credits it relied upon to reduce its deposits.

While there will continue to be additional questions and uncertainty surrounding the implementation of these provisions, the IRS guidance offers a welcome explanatory tool for employers seeking to understand the relief options available to them.

This information is intended to inform firm clients and friends about legal developments, including recent decisions of various courts and administrative bodies. Nothing in this Practice Update should be construed as legal advice or a legal opinion, and readers should not act upon the information contained in this Practice Update without seeking the advice of legal counsel. Prior results do not guarantee a similar outcome.