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OVERVIEW OF TAX CREDIT PROVISIONS IN THE CARES ACT

The recently enacted Coronavirus Aid, Relief, and Economic Securities (“CARES”) Act (Pub. L. No. 116-136) provides certain employers who retained employees despite a recent suspension of business operations or decline in gross receipts the ability to claim the refundable Employee Retention Credit for wages paid after March 12, 2020, and before January 1, 2021 (*see* Section 2301). The credit is applied against quarterly employment taxes with eligibility determined on a quarterly basis. If the amount of the credit exceeds the employment taxes paid for a particular quarter, the excess will be refunded to the taxpayer. On March 31, 2020, both the Internal Revenue Service and the United States Senate Finance Committee released guidance further clarifying the implementation of the Employee Retention Credit.¹

The CARES Act also permits a delay of payment of employer payroll taxes (*see* Section 2302) as well as an advance on payroll tax credits provided in the Families First Coronavirus Response Act (“FFCRA”) (*see* Section 3606). The Employee Retention Credit, delay of payment of employer payroll taxes, and advance on payroll tax credits in the FFCRA are discussed below.

1. Employee Retention Credit

Who Qualifies?

There are two ways for an employer to qualify:

- (1) Employers who in a calendar quarter in 2020 fully or partially suspended business operations due to a government order issued in response to the coronavirus. Tax-exempt organizations with employees can qualify under this subsection.

If qualifying based on this provision, the credit may only be claimed in the calendar quarter(s) that an employer suspends its business operations due to a coronavirus-related government order. (Governor Cuomo’s “New York State on PAUSE” executive order is an example.)

- (2) Employers who experience a “significant decline in gross receipts,” i.e., gross receipts in a calendar quarter in 2020 that are less than 50% of gross receipts for the same calendar quarter in the prior year.

If eligible based on a decline in gross receipts, an employer may claim the credit beginning with the first calendar quarter in 2020 that gross receipts are 50% less than gross receipts for the same calendar quarter in the prior year, and ending with the calendar quarter following the first calendar quarter that gross receipts exceed 80% of gross receipts for the same calendar quarter in the prior year.

¹ See Internal Revenue Service “FAQs: Employee Retention Credit Under the CARES Act,” *available at* <https://www.irs.gov/newsroom/faqs-employee-retention-credit-under-the-cares-act>; Senate Finance Committee, “CARES Act: Employee Retention Credit FAQ,” *available at* <https://www.finance.senate.gov/chairmans-news/cares-act-employee-retention-credit-faq>.

Is There an Employee Cap?

No. There is no cap on the number of employees an employer may include in calculating the amount for credit. Similarly, eligibility for the credit does not depend on the number of employees.

What is the Amount of the Credit?

Eligible employers can claim a refundable payroll tax credit (Social Security and Medicare) for 50 percent of qualified wages paid to employees between March 12, 2020 and December 31, 2020, for the first \$10,000 of compensation, including health benefits, paid to an eligible employee. The \$10,000 cap creates a \$5,000 total cap on the credit per employee for the 2020 tax year.

What are “Qualified Wages”?

The definition of qualified wages depends, in part, on the average number of full-time employees employed by the employer during 2019.

- Employers with 100 or More Employees

For employers who average more than 100 full-time employees in 2019, qualified wages are the wages paid to an employee for time that the employee is not providing service due to either:

- (1) A full or partial suspension of operations by order of a governmental authority due to COVID-19;
or
- (2) A significant decline in gross receipts.

For these employers, qualified wages taken into account for an employee may not exceed what the employee would have been paid for working an equivalent duration during the 30 days immediately preceding the period of economic hardship.

- Amount of Credit for Employers with 100 or Fewer Employees

For employers who averages 100 or fewer full-time employees in 2019, qualified wages are the wages paid to any employee due to either:

- (1) A full or partial suspension of operations by order of a governmental authority due to COVID-19;
or
- (2) A significant decline in gross receipts.

Note: qualified wages for both sizes of employer include “qualified health plan expenses,” which is defined as the amounts paid by the employer for a group health plan, “but only to the extent that such amounts are excluded from the gross income of employees.”

What are the Aggregation Rules for Multiple Entities for Purposes of Determining the Number of Employees?

Section 2301(d) provides that all persons treated as a single employer for purposes of Internal Revenue Code Section 52(a) and (b) will be treated as one employer for purposes of the employee retention credit. Section 52(a) provides that in the case of a controlled group of corporations, the entities will be treated as a single entity based on an aggregated percentage of stock ownership. Section 52(b) provides that “all employees of trades or business (whether or not incorporated) which are under

common control shall be treated as employed by a single employer.” Further guidance from the IRS is needed to determine how these aggregation rules will apply to religious entities.

Is It a Refundable Credit?

Yes. If the amount of credit exceeds quarterly employment taxes, the excess will be treated as a refundable overpayment. The IRS is expected to provide guidance regarding the process for claiming the credit and receiving the refund.

The credit is reduced by any credit taken under subsections (e) and (f) of section 3111 of the Internal Revenue Code (related to credit for employment of qualified veterans and credit for research expenditures of qualified small businesses) and by any credit taken under sections 7001 and 7003 of the Families First Coronavirus Response Act (related to credits available for certain employers that provide paid sick leave and paid family and medical leave).

Are There Any Limitations?

This credit will not be available to any eligible employer that receives a loan under the Small Business Administration program pursuant to section 7(a) of the Small Business Act.

If an employer claims the FFCRA credit for mandatory sick leave and/or family leave, the wages associated with the FFCRA credit are not eligible as qualified wages for the Employee Retention Credit. This prevents both credits from applying to the same wages paid by an employer.

If an employer is allowed the Work Opportunity Credit for wages of a particular employee, the employer may not include those wages in calculating the Employee Retention Credit.

How does an Eligible Employer Claim the Credit?

Eligible employers will report their total qualified wages and the related credits for each calendar quarter on their federal employment tax returns, usually Form 941, *Employer’s Quarterly Federal Tax Return*, which employers use to report income and Social Security and Medicare taxes withheld by the employer from employee wages, as well as the employer’s portion of Social Security and Medicare tax.

Is There Penalty Relief?

Any employer that fails to pay the relevant payroll taxes based on reasonable anticipation of the credit may be relieved of penalties under Section 6656 of the Code.

2. Delay of Employer Payroll Tax Payments

An employer is responsible for paying its share (6.2 percent) of Social Security taxes and its share (1.45 percent) of Medicare taxes for each employee’s covered wages. Generally, an employer must deposit such amounts into the U.S. Treasury electronically either semi-weekly or monthly. The CARES Act allows employers (and self-employed individuals), to defer paying their portion of the Social Security payroll tax (6.2 percent) otherwise due with respect to wages accrued between March 27, 2020 and December 31, 2020. The deferred amounts will ultimately have to be paid to the U.S. Treasury in two installments. Half of the deferred amount of payroll taxes from 2020 will be due December 31, 2021, with the remaining half due December 31, 2022.

The above delay provisions apply to all employers regardless of size. However, employers who receive Small Business Act loans that are forgiven under the CARES Act (so that the Federal government effectively gave them cash—that they did not have to repay—to fund as much as eight weeks of their payroll costs) are not eligible for this payroll tax deferral.

3. Advance Refunding of Credits Allowed Under the FFCRA

Section 3606 of the CARES Act amends the FFCRA to allow for advances of payroll tax credits available under the FFCRA for sick leave and expanded family leave wages mandated under the FFCRA. That section also provides penalty relief for failure to deposit payroll tax amounts in anticipation of those credits.