



Attorneys at Law

## Corporate and Business Alert

### April 21, 2020

#### Business and Corporate COVID-19 Update

#### **Employer Tax Credits for Retention and Leave Payments under the FFCRA and CARES Act.**

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The Families First Coronavirus Relief Act (FFCRA) as well as the Coronavirus Aid, Relief, and Economic Security Act (CARES) have delivered some much needed relief to employers hit hard by the COVID-19 virus and associated work stoppages. These Acts allow employers to obtain relief from wage payments against the payroll taxes they otherwise owe.

#### ***EMPLOYEE RETENTION CREDIT UNDER THE CARES ACT***

Under the CARES Act, eligible employers can receive a credit against payroll taxes for fifty percent (50%) of the “qualified wages” paid to employees in a calendar quarter, up to a maximum of \$10,000 of qualified wages per employee (or a \$5000 credit, total per employee).

“Eligible employers” are defined in the Act as those employers in business during 2020, who: (a) had their business suspended because of COVID-19 government shutdown orders; or (b) suffered a “significant decline in gross receipts” during a quarter in 2020. A “significant decline” begins in a quarter where year-over-year quarterly receipts are less than 50% of the prior year’s total for the same calendar quarter, and ends with the first calendar quarter following the quarter for which receipts are more than 80% of the prior year’s total for the same calendar quarter. Governmental employers are not eligible for credit.

For eligible employers of more than one hundred (100) full-time equivalent employees (FTEs), “qualified wages” are furlough pay - *i.e.*, wages paid to idled employees, while for employers of one hundred or fewer (100) FTEs, *all* wages paid are eligible for the credit. Typically, the employer and employee share the cost of health coverage; an allocable share of an employee’s health plan expenses (employer and employee pre-tax contributions) are considered “qualified wages” and are counted towards credit.

If employers are entitled to more credit under the Act than they would be responsible for in payroll taxes, they can receive a refund of the excess, by claiming the same on a to-be-created new Form 941. Employers may offset amounts paid against their planned payroll tax deposits, and can claim the refund even before the quarterly 941 is due by filing a Form 7200. The IRS has stated that it will allow offsets against all owed payroll taxes, including employee withholding and employee Social Security and Medicare.

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The credit applies to “qualified wages” paid between March 12, 2020, and January 1, 2021.

For example, if an employer’s gross receipts were \$210,000, \$230,000, and \$250,000 in Q1-3 of 2019, and were \$100,000, \$190,000 and \$230,000 in Q1-3 of 2020, the employer’s year over year percentages are 48%, 82%, and 92%, respectively. The employer suffered a “significant decline” beginning with Q1, which ended in Q2 when the percentage of gross receipts were more than 80% of the prior year’s Q2 gross receipts (in this example, 82%). Thus, the employer is entitled to the credit for Q1 and Q2.

If, for example, the employer paid an employee \$8000 in Q1, and \$8000 in Q2, the employer is entitled to a \$4000 credit in Q1 (50% of \$8000) and a \$1000 credit in Q2 (\$5000 maximum with \$4000 having previously been paid). If an employer owed \$3000 in payroll taxes in Q1, including all employee withholding, the employer could (a) not deposit any payroll taxes, using the credit as an offset, and (b) file a Form 7200 to receive the extra \$1000 refunded to it.

**SICK AND FAMILY LEAVE CREDITS UNDER THE FFCRA**

*Qualified Sick Leave and Family Leave Wages*

Under the FFCRA, covered private employers can also receive payroll tax credits for the qualified sick leave and family leave wages they pay pursuant to the emergency paid sick and expanded family and medical leave provisions of the FFCRA. The credits are limited to the payout limits set forth in the FFCRA. For sick leave payments, the maximum credit per employee is \$200/\$511 per day up to an aggregate maximum credit of \$2000/\$5110, depending on the reason for the sick leave payments. For expanded family and medical leave, the maximum credit per employee is \$200 per day up to an aggregate maximum credit of \$10,000. Similar to the retention payments, shares of employee health costs are includable in the credit, as explained in more detail below. To be clear, according to the IRS, *both* the employer and employee (pre-tax) share of insurance, for example, are includable.

Just as for the retention credits mentioned above, governmental employers are not eligible for sick and family leave credits.

For income tax purposes, the employer’s gross income will include the amount of credits received under these provisions, and the employer will be allowed deductions for amounts paid in wages.

Similar to the retention credits, employers can offset amounts paid under the FFCRA against amounts to be deposited for all payroll taxes, (employee and employer share) and can request advance refunds of any excess using Form 7200.

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As an example, if an employer pays \$5000 in qualified sick leave, and is required to deposit \$8000 in payroll taxes (including employee withholdings), the employer need only deposit \$3000. If the employer paid \$5000 in sick leave and \$5000 in family leave in the same quarter, the employer could deposit \$0 and use Form 7200 to request a \$2000 refund.

*Health Insurance Allocation*

As mentioned above, employers are allowed to allocate a share of employee health expenses as wages for both the retention and FFCRA leave credits. Typically, this will mean the employer and employee pre-tax share of health insurance premiums. Employers are allowed to use “any reasonable method” to allocate these premiums for the purposes of leave or retention payments.

For example, if an employer’s insured health plan covers 400 employees, some with family coverage and some with individual coverage, and each employee averages 260 work days per year, with the total health insurance cost of \$5,200,000 per year for employer and employee contributions, the employer could allocate insurance costs as follows:

$$\$5,200,000/400 = \$13,000 \text{ (average annual premium).}$$

$$\$13,000/260=\$50 \text{ (amount of insurance to be allocated to each day of paid sick or family leave).}$$

See [https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs#allocable\\_qualified\\_health\\_plan\\_expenses](https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs#allocable_qualified_health_plan_expenses)

***DOCUMENT, DOCUMENT, DOCUMENT***

As is the case with all tax matters, employers should retain documentation to support their claims for these credits. Documentation of all leaves and all amounts paid to all employees in retention, wage, or leave payments, should be kept. This would include the information an employer may require to support an employee’s request for leave under the FFCRA, such as the name of the governmental entity or Health Care Provider ordering or advising quarantine or isolation, the name and relation of the quarantined person for whom the employee is providing care, the name of children to be cared for and the closed school or child care provider, as well as a statement that the employee is unable to work.

See [https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs#substantiate\\_eligibility](https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs#substantiate_eligibility)

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***INTERPLAY WITH SBA PAYCHECK PROTECTION LOANS***

Employers are not allowed to claim both retention payments *and* seek forgiveness for SBA Paycheck Protection Program loans. Additionally, employers who claim leave credits for the FFCRA cannot use the associated wages as “payroll costs” for purposes of seeking loan forgiveness of the SBA loans.

There are many business-driven concerns that contribute to the analysis of whether employers can retain employees and seek various retention and/or paid leave credits, when applicable, or alternatively layoff or furlough employees on a temporary or permanent basis. As demonstrated above, depending on the scenario, tax credits may or may not be available. Additionally, in the COVID-19 context, there are other considerations in the economic picture, not the least of which are enhanced unemployment benefits that may be available to workers laid off as a result of COVID-19. We can help employers navigate the recently-enacted laws as well as the regulations and guidance regulatory agencies are issuing on a continuous basis in order to develop the strategy most relevant to their workplace.

*This Client Alert was prepared by Cliff Rhodes and reviewed with Peter T. McNulty, Nan O'Neill, Kier Wachterhauser, Arthur Murphy, and Katherine Hesse. If you have any questions, please contact Peter T. McNulty or the attorney responsible for your account, or call (617) 479-5000.*

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