

# PUBLICATION

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## Navigating PPP, Employer Tax Deferral, and Tax Credits Under the FFCRA and CARES Act

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**The President, Congress, the Treasury Department, the SBA and the IRS have been busy enacting and interpreting legislation intended to provide assistance to employers during the coronavirus pandemic, including the much-discussed Paycheck Protection Program (PPP).**

Employers have received an abundance of information and guidance regarding the application of the PPP and related tax credits. It is likely that such information and guidance will continue to be modified and supplemented over the coming weeks, so please be on the alert for updates from us.

This abundance of otherwise helpful information can be confusing in determining how the PPP and the various tax credits can be best utilized. We thought it would be helpful to explain the opportunities that may be available depending on specific circumstances, including the reporting of these matters on a business's federal employment tax returns beginning with the second quarter 2020 Form 941. Employers who were unable to take advantage of the PPP will particularly be interested in the application of the tax deferral and credits as well as the most interesting set of IRS notices that have been recently released.

### **FFCRA – Tax Credits**

The Family First Coronavirus Response Act (the FFCRA), signed by President Trump on March 18, 2020, provides small and mid-size employers (businesses and tax-exempt organizations with fewer than 500 employees) refundable tax credits that reimburse employers, dollar for dollar, for the cost for providing paid sick and family leave wages to their employees, plus allocable qualified health plan expenses and the employer's share of Medicare tax imposed on such wages, which can be applied against payroll taxes, for leave related to COVID-19. The employer is not subject to the employer portion of Social Security tax imposed on those wages. If the federal employment taxes yet to be deposited are not sufficient to cover the employer's cost of qualified leave wages, plus the allocable qualified health plan expense and the amount of the employer's share of Medicare tax on such wages, the employer will be able to file a request for an advance payment from the IRS by filing IRS Form 7200. The IRS has issued [FAQs providing guidance on the FFCRA tax credits](#). See [more detailed discussion regarding the FFCRA](#).

### **CARES Act – PPP Loans**

The President signed the Coronavirus, Aid, Relief, and Economic Security Act (the CARES Act) on March 27, 2020, which provided, among other things, forgivable loans made under the PPP to reimburse employers for payroll costs, rent and utilities incurred during the COVID-19 period. That period was originally eight weeks and is now extended under the Paycheck Protection Program Flexibility Act (PPPFA) signed by the President on June 5, 2020 (see [article](#)) for up to twenty-four weeks, or December 31, 2020, whichever occurs earlier. PPP loan forgiveness does not generate taxable income to the borrower. However, the IRS has issued guidance in [Notice 2020-32](#) that the expenses for which forgiveness is received are not deductible. Congress is considering legislation to allow the borrowers a deduction for PPP-funded expenses but such legislation has not yet been enacted. This is one of the matters we are continuing to monitor and will provide an update as it becomes relevant. See [previous discussions on the CARES Act and PPPFA](#).

## **CARES Act – Employer Payroll Tax Deferral**

The CARES Act allows employers to defer the deposit and payment of the employer's share of Social Security tax (6.2 percent percent of wages up to \$137,700 for 2020) and self-employed individuals to defer payment of certain self-employment taxes beginning on March 27, 2020 and ending on December 31, 2020, as follows:

50 percent percent until December 31, 2021; and

remainder until December 31, 2022.

Taking the FFCRA paid leave or the Employee Retention Credit does not disqualify an employer from the payroll tax deferral and there is no special election required to make the deferral. The IRS has issued [FAQ guidance on the payroll tax deferral](#). See also the [draft instructions](#) and [2020 Form 941, Employment Tax Return IRS](#) recently circulated by the IRS, for the second quarter 2020 time period and thereafter.

## **CARES Act – Employee Retention Credit (ERC)**

The CARES Act allows a fully-refundable tax credit for eligible employers (eligible employers are those employers who had (i) a partial or full suspension of operations or (ii) greater than 50 percent reduction in gross receipts as a result of a COVID-19-related order) equal to 50 percent of qualified wages (including allocable qualified health plan expenses) that eligible employers pay their employees after March 12, 2020 and before January 1, 2021. The ERC is available to all eligible employers regardless of size, including for-profit and not-for-profit organizations, tax-exempt organizations, but excluding state, local and federal governments and their agencies and instrumentalities. The maximum ERC credit is up to \$5,000 (or up to 50 percent of the first \$10,000) of qualified wages paid per employee. There are different rules applicable to businesses that have more than 100 full-time employees (based on the average number of the business's employees in 2019) that have been addressed in prior Tax Alerts, "[Coronavirus: Significant Tax Provisions in the CARES Act for Businesses and Individuals](#)" as the ERC is allowed only for qualified wages paid to employers for time they are not performing services. See also [FAQs](#). See further discussion regarding the ERC below as well as the [draft instructions](#) and [2020 Form 941, Employment Tax Return IRS](#) recently circulated by the IRS for the second quarter 2020 time period and thereafter.

## **Employers Receiving PPP Loans are Eligible for the Employer Tax Deferral Through December 31, 2020**

Unlike the ERC, the payroll tax deferral provided under the CARES Act is available to employers who have received a PPP loan. Originally the CARES Act restricted borrowers from continuing to receive a payroll tax deferral after forgiveness. However, under the PPPFA, employers are now able to continue to defer the deposit and payment of the employer's share of the Social Security tax and self-employment tax until December 31, 2020, even if the employer has received loan forgiveness under the CARES Act.

## **An Employer May Receive both the Tax Credits for Qualified Leave Wages under the FFCRA and the CARES Act**

If an eligible employer also meets the requirements for the ERC and the FFCRA qualified leave wages, it may receive both credits – but not for the same wage payment.

## **An Eligible Employer May Receive the Tax Credits for Qualified Leave Wages under the FFCRA and Receive a PPP Loan under the CARES Act**

However, if an eligible employer receives tax credits for qualified leave wages, those wages will not be eligible as "payroll costs" for purposes of receiving loan forgiveness under the CARES Act.

## **Employers Who Receive a PPP Loan are not Eligible for ERC**

An eligible employer may not receive the ERC if the eligible employer receives a PPP loan that is authorized under the CARES Act. Consequently, an eligible employer that receives a PPP loan should not claim ERC benefits, regardless of forgiveness. The only exception would be an employer who repaid the PPP loan by May 18, 2020. Under IRS guidance, if the loan was repaid by May 18, 2020, the employer will be treated as though it had not received a covered loan under the PPP for purposes of the ERC.

## ERC – FAQs Issued by the IRS

The IRS has recently released [94 FAQs interpreting Section 2301 of the CARES Act](#) (which is the ERC). While the FAQs do not have the force of the law, they are instructive on how the IRS will address various issues. We have listed a number, but certainly not all, of those issues addressed by the IRS below:

- An employer that operates an essential business is generally not considered to have a full or partial suspension of operations if the government order allows the employer to remain open, even though an order requiring non-essential businesses to close has an effect on the employer's operations, thus disqualifying use of ERC; however as noted below, some exceptions may apply.
- An essential business may be considered to have a full or partial suspension if the business's suppliers are unable to make deliveries of critical goods and materials due to a government order that causes the supplier to suspend operations, thus possibly qualifying for ERC; however, some exceptions may apply.
- An essential business is not considered to have a suspension of operations for the sole reason that its customers are subject to a government order requiring them to stay at home, thus being a factor adverse to ERC qualification.
- If an employer's workplace is closed by government order for certain purposes but the employer's workplace may remain open for other purposes, the employer's operation will be considered to be partially suspended, thus assisting with ERC qualification.
- Employers that operate in multiple locations that are subject to a government order limiting operations in some, but not all locations, are considered to have a partial suspension. This FAQ may present an interesting, hopefully positive, opportunity for certain businesses that are deemed to provide "essential services."
- All members of an aggregated group are treated as a single employer. Consequently, if the operations of one member are suspended by government order, then all members of the aggregated group are considered to have their operations partially suspended, thus assisting with ERC qualification.
- Health plan expenses paid for furloughed workers are eligible for the ERC regardless of whether the furloughed workers received other wages, which can certainly assist ERC qualification. Further, if an employer that averaged more than 100 full-time employees pays wages to its employees for hours that the employees are not providing services, the employer may treat the portion of the health plan expenses allocable to the time that the employees are being paid, but not providing services, as qualified wages.
- Eligible employers will report their total qualified wages for purposes of the ERC for each calendar quarter on their federal employment tax returns, usually IRS Form 941, and may claim the credit as discussed below in a manner similar to the sick and family leave credit. As mentioned above, the IRS has issued a [draft release of the revised Form 941](#) and [related instructions](#) to claim the ERC and sick

and family leave credits.

- Employers also report any qualified sick leave and qualified family leave wages for which they are entitled to a credit on IRS Form 941. In anticipation of receiving the credit, employers can fund qualified wages by accessing federal employment taxes, including withheld taxes that are required to be deposited with the IRS and requesting an advance of the credit from the IRS for the amount of the credit that is not funded by accessing the federal employment taxes by filing [IRS Form 7200](#).

ERC questions certainly may remain, such as to what extent an employer providing essential services can otherwise take advantage of the ERC. For example, financial institutions have been able to remain open during the coronavirus pandemic; however, their operations have been impacted as a result of complying with applicable CDC and state guidelines related to social distancing and limiting gatherings to small numbers. Many banks have closed their branches to customers or limited the ability of customers to access the branch lobbies, while keeping their drive-through operational to comply with social distancing and related CDC guidelines. Does this constitute a partial suspension?

Further guidance is also needed on how to calculate the qualified wages of employees who are available to work full-time but are working substantially reduced hours (although they are being paid full-time wages) as a result of the business interruption caused by COVID-19.

Separate and apart from the FAQs recently issued, [IRS Notice 2020-22](#) and [IRS Notice 2020-35](#) assure employers that subsequent adjustments to the claimed credit amounts would not trigger Federal Tax Deposit penalties nor interest on an inadvertent overstatement of the credit which is also an important factor for employers to consider. Of course, it is understood that any such positions taken on a tax return need to be attested to under Penalties of Perjury for which there must be a reasonable basis.

In the alternative, and separate and apart from claiming the credit on the respective Form 941, there also is the ability to separately claim a refund of a possible overpayment by virtue of the ERC, which also may help in defending an employer's analysis.

Baker Donelson's tax attorneys are highly experienced in all facets of IRS matters and are actively monitoring new directives from the IRS and analyzing ways to assist its clients with their tax issues during these unprecedented and trying times. If you need help with any tax matters or wish to discuss various tax opportunities during this time, please contact [David P. Webb](#), [Stuart M. Schabes](#), and [Carl E. Hartley](#). For more information and general guidance on how to address other legal issues related to COVID-19, please visit the [Coronavirus \(COVID-19\): Navigating the Path Ahead information page](#) on our Firm's website.