

# COVID-19-Related Tax Credits; Deferral of Payment of Employer Social Security Tax

April 10, 2020

The Families First Coronavirus Relief Act (FFCRA) and the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) make two separate, but related, tax credits available to employers, including tax-exempt organizations, whose business is affected by the COVID-19 crisis.

*FFCRA Leave Tax Credit.* The FFCRA provides a tax credit to employers to cover the costs on a dollar-for-dollar basis of providing the FFCRA-required qualified sick leave and family leave wages. In addition, the tax credit includes health plan expenses paid by the employer in connection with the qualified leave wages. Eligible employers can claim these tax credits based on qualifying leave wages paid for the period between April 1, 2020, and December 31, 2020.

*CARES Act Employee Retention Tax Credit.* The CARES Act provides a tax credit to employers whose operations are suspended or reduced due to COVID-19 equal to 50% of qualified wages (up to \$10,000) paid to employees after March 12, 2020, and before January 1, 2021. Employers who receive a Small Business Interruption Loan under the CARES Act cannot claim the Employee Retention Tax Credit.

Both tax credits are applied against the employer portion of the Social Security tax that normally would have to be paid by the employer on W-2 wages paid to all employees. Employers can use the tax credits immediately by reducing the federal employment tax deposits they otherwise are required to make to the IRS. If the total amount of the tax credits exceeds an employer's Social Security tax liability, the employer can receive a refund of the excess tax credit amount or request an advance payment from the IRS.

## FFCRA Leave Tax Credit

Businesses or tax-exempt organizations that (i) have fewer than 500 employees (as determined under the Department of Labor rules), *and* (ii) are required under the FFCRA to pay "qualified sick leave wages" and/or "qualified family leave wages," are entitled to claim the FFCRA Leave Tax Credit. (Governmental employers cannot claim tax credits for required leave.)

An Eligible Employer is entitled to receive a tax credit equal to the total of the following:

1. The full amount of the Qualified Sick Leave or Family Leave Wages paid for leave that is taken during the *period beginning April 1, 2020, and ending December 31, 2020;*

*plus*

2. The amount of the Eligible Employer's share of the Medicare tax imposed on the Qualified Sick Leave or Family Leave Wages;

*plus*

3. Qualified "health plan expenses" that are paid by an employer to provide group health benefits for employees receiving Qualified Sick or Family Leave Wages. This includes both the portion of the health plan expenses paid by the Eligible Employer and the portion of the cost paid by the employee through pre-tax salary reduction contributions.

The amount of FFCRA Leave Tax Credit applies against the employer portion of the Social Security tax that normally would have to be paid on W-2 wages paid to all employees during a calendar quarter.

## CARES Act Employee Retention Tax Credit

An employer, including a tax-exempt organization, is eligible for the tax credit if they operate a trade or business during calendar year 2020 and experience either:

1. The full or partial suspension of its operations during any calendar quarter in 2020 because of governmental orders limiting commerce, travel, or group meetings due to COVID-19. (The operation of a

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trade or business is “partially suspended” if a governmental authority imposes restrictions upon the business operations by limiting commerce, travel, or group meetings due to COVID-19 such that the operation still can continue to operate but not at its normal capacity.)

or

2. A “significant decline in gross receipts” during the calendar quarter in comparison to the same calendar quarter in 2019.

- A “significant decline in gross receipts” *begins* on the first day of the first calendar quarter of 2020 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.
- The significant decline in gross receipts *ends* on the first day of the first calendar quarter following the calendar quarter in which the employer’s 2020 gross receipts *greater than* 80% of its gross receipts for the same calendar quarter during 2019.

The definition of “qualified wages” depends on the average number of employees an eligible employer had during 2019. (The average number of full-time employees is determined using the same rules for determining whether an employer is a large employer within the meaning of the health coverage requirements of the Affordable Care Act, as defined at Section 4980H of the Internal Revenue Code.)

More than 100. If the average number of full-time employees during 2019 was *greater than 100*, then qualified wages *only* are the W-2 wages and qualified health plan expenses that are paid to employees for the time that the employee is *not providing services* because the employer’s operations were fully or partially suspended or because of the significant decline of the employer’s gross receipts.

100 or Less. If the average number of full-time employees during 2019 was *100 or less*, then qualified wages are paid to *any employee* during a COVID-19 suspension of business operations or the significant decline in gross receipts, *regardless of whether or not the employee is providing services* during that period.

Currently, none of the CARES Act or the IRS FAQs or the guidance and forms posted on the IRS website to date provide a clear answer as to whether payments made to an employee will be treated as *qualified wages* only if the employee is not providing any services at all *or* whether additional payments for non-worked hours while an employee still is working on a reduced partial schedule can be treated as *qualified wages* eligible for the tax credit.

Significantly:

- Employers may claim the tax credit for qualified wages that they pay *after March 12, 2020, and before January 1, 2021*. Accordingly, an employer may be able to claim the credit for qualified wages paid as early as March 13, 2020.
- The maximum amount of qualified wages taken into account with respect to each employee is \$10,000, so that the maximum credit for qualified wages paid to any employee from March 13, 2020, to December 31, 2020, is \$5,000.
- If an employer received tax credits for FFCRA leave wages, those same wages cannot be included as *qualified wages* for purposes of the Employee Retention Tax Credit.
- An employer cannot receive the Employee Retention Tax Credit if the employer receives a Small Business Interruption Loan under the Paycheck Protection Program that is authorized under the CARES Act (Paycheck Protection Loan).

## How to Claim the Tax Credits

Under the preliminary guidance issued by the IRS, the procedures for claiming the FFCRA Leave Tax Credit and Employee Retention Tax Credit are the same.

Employers will report their total Qualified Sick Leave or Family Leave Wages and the related credits, and total Qualified Wages for each quarter on IRS Form 941, *Employer’s Quarterly Federal Tax Return* — the regular form used 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 (which the IRS promises to update).

An employer that pays Qualified Sick Leave or Family Leave Wages and/or 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 the amount of:

1. The Qualified Sick Leave or Family Leave Wages (and allocable qualified health plan expenses and the employer’s share of Medicare tax on the Qualified Sick Leave or Family Leave Wages) paid in that calendar quarter, and
2. The Qualified Wages paid in the calendar quarter.

An employer that reduces its federal employment tax deposits to fund Qualified Sick Leave or Family Leave Wages and/or Qualified Wages that it has paid will not be subject to penalty for failing to timely deposit

federal employment taxes. The IRS will issue additional information on proper reporting.

The total amount of the FFCRA Tax Leave Credit and the Employee Retention Credit in excess of the Social Security tax the Eligible Employer owes for the quarter is refundable. If the amount of the tax credits for a calendar quarter exceeds the Social Security tax the Eligible Employer owes for the quarter, then the excess is treated as an overpayment that can be applied to offset any remaining tax liability on the Form 941 prior to being refunded to the employer.

Instead of waiting on the regular refund procedures, an employer can request an advance payment of the refund by filing IRS Form 7200, *Advance Payments of Employer Credits due to COVID-19*.

### Deferral of Payment of Employer Portion of 2020 Social Security Tax

The CARES Act permits *any* employer to defer payment of the employer portion of Social Security taxes *regardless* of whether the employer is affected by COVID-19. The statute does *not* impose any terms and conditions for the deferral and does have any employer size requirements. *All* employers are eligible to use the deferral. The deferral can apply to the employer Social Security tax payable at any time beginning as March 27, 2020 (date of enactment of the CARES Act), and ending before January 1, 2021.

The deferral applies only to the employer portion of Social Security taxes. The deferral does *not* apply to the employer portion of Medicare taxes.

The deferred employer Social Security taxes must be paid in two installments by the following dates (the “applicable dates”):

- 50% by December 31, 2021.
- Remaining 50% by December 31, 2022.

No interest or penalties apply to the deferred Social Security tax payments.

*Limitation:* Employers who have received an SBA Paycheck Protection Program (PPP) loan may defer payment of the employer’s share of Social Security tax that otherwise would be required to be made beginning on March 27, 2020, through the date the lender issues a decision to forgive the loan. Once an employer receives a decision from its lender that its PPP loan is forgiven, the employer is no longer eligible to defer payment of the employer’s share of social security tax due after that date. However, the amount of the deposit and payment of the employer’s share of Social Security tax that was deferred through the date that the PPP loan is forgiven continues to be deferred and will be due on the “applicable dates,” described above.

### How FFCRA Qualified Leave Wages and CARES Act Qualified Employees are Treated for Tax and Benefit Purposes

FFCRA Qualified Leave Wages and CARES Act *qualified wages* are taxable as W-2 wages to employees and subject to FICA (Social Security and Medicare) tax withholding and federal income tax withholding. The FFCRA did *not* add any special exceptions.

The same rules that generally apply to an employee’s regular wages also apply to FFCRA Qualified Leave Wages and CARES Act *qualified wages*. That means, subject to the terms and conditions of the particular benefit plan, that:

- To the extent that an employee has a salary reduction agreement in place with the Eligible Employer, the FFCRA does not include any provisions that expressly prohibits taking salary reduction contributions for any plan from FFCRA Qualified Leave Wages and CARES Act *qualified wages*.
- FFCRA Qualified Leave Wages and CARES Act *qualified wages* also are considered wages for purposes of other benefits that the Eligible Employer provides, such as contributions to 401(k) plans.

For additional guidance, please contact a Jackson Lewis attorney.

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