

# CARES Act Payroll Tax Provisions\*

## Payroll Tax Payment Deferral

- What is deferred? Beginning March 27, 2020, payments of the employer portion of FICA (6.2%) are deferred without penalty.
- When are they due? Payment of 50% of the liability will be due 12/31/2021 and the remainder will be due 12/31/2022.
- Exclusions- Employers who receive loan forgiveness for an SBA loan are not eligible for this deferral.
- Agents and PEOs – To the extent that an employer has engaged a professional employer organization (PEO) or agent to perform payment services or other tasks normally performed by an employer, and that employer directs that third party to delay payment pursuant to the Act, the employer and not the third party will be solely liable for the eventual payment of the deferred taxes.

## Employment Tax Credit

- Secretary Mnuchin promoted the credit on March 31, 2020, saying “We encourage businesses to take full advantage of the Employee Retention Credit to keep employees on their payroll during these challenging times. This new credit is available to all employers, regardless of size of business, and covers up to 50 percent of up to \$10,000 in wages.”
- Which employers qualify- Employers may qualify for the credit regardless of size, or organizational structure. In order to qualify, an employer must have been operating a business in 2020 that (1) was fully or partially suspended due to a government order that restricted commerce, travel, or group meetings as a result of Covid-19, OR (2) suffered a decline in gross receipts of over 50% in a calendar quarter as compared to the same calendar quarter 2019 (IRS guidance on businesses that were not operational in 2019 forthcoming).
  - Tax Exempt Entities – IRC 501(c) entities that are tax exempt under 501(a) are qualified employers if their operations were fully or partially suspended pursuant to government order.
- Time period
  - Government order- Any calendar quarter during which operations are fully or partially suspended due to government order as defined above.
  - Decline in gross receipts- Starts first calendar quarter 2020 in which gross receipts were under 50% of gross receipts from same quarter 2019, and ends first calendar quarter that follows in which gross receipts are more than 80% of gross receipts for same quarter 2019.

- Which wages qualify-
  - “Qualified wages”
    - Employers with average number of full-time employees of 100 or more in 2019 – wages paid to employee with respect to which that employee is not providing services because of government order or decline in gross receipts as defined above.
    - Employers with an average number of full-time employees of under 100 in 2019 – wages paid to an employee during any period covered by a government order, and wages paid during any quarter during the decline in gross receipts period defined above.
    - “Wages”- includes all wages as defined in IRC § 3121(a) and 3231(e).
    - Generally, this definition includes all remuneration for employment, unless specifically excluded such as sick leave, employer 401(k) contributions, and death benefits.
  - “Qualified wages” for purposes of calculating the credit includes qualified health plan expenses to the extent properly allocable to wages. Health plan expenses are those paid or incurred by employer to provide and maintain a qualified group health plan. Unless otherwise prescribed in later regulations, allocations are reasonable where they made on a pro rata per employee and per period covered basis.
  - Provision applies only to wages paid after March 12, 2020, and before January 1, 2021.
  - Cap- Qualified wages up to \$10,000 per employee for all covered quarters. May not exceed amount employee would have been paid for working an equivalent amount during the 30 days immediately preceding the period.
  - Exclusions-
    - Families First- Wages paid under Families First Act are excluded from “qualified wages.”
    - Double counting- Employers may not take a credit under this provision based on an employee for whom they receive another wage credit such as a work opportunity credit under IRC § 51. Wages that are eligible for a credit for paid family and medical leave under IRC §45S, are not “qualified wages.”
    - Paycheck Protection Program- If employers get loan under the expedited SBA 7(a) program under CARES, they are not eligible for this credit.
  - Aggregation rules- For the purposes of determining whether an employer had a 2019 average full-time employee count of over or under 100, the aggregation rules of controlled groups and affiliated service groups will govern. IRC §§ 52(a) & (b); 414(m) & (o).

- How do we get the credit?
  - The IRS issued Notice 2020-22, FAQs, and new Form 7200 on March 31, 2020, providing instructions on how to receive the benefits of the credit immediately.
    - Taxes related to wages include employer and employee portions of social security, Medicare, and income tax withholdings.
    - While employment taxes are typically reported on Form 941 and paid quarterly, deposits of employment taxes are made by employers on a monthly, bi-weekly, or daily basis.
    - First, Section 2302 of the CARES Act delayed employers' obligation to pay the employer portion of social security taxes due on wages paid from March 27, 2020 to December 31, 2020 until December 31, 2021 (50%) and December 31, 2022 (remainder). Taxes paid on those dates will be considered timely paid and timely deposited. Employers can therefore stop deposits of employer portion FICA (6.2%) on wages for the remainder of 2020.
    - Second, under Notice 2020-22, the IRS issued guidance to allow employers to reduce their employment tax deposits in anticipation of the credits.
      - Employers who paid qualified wages under CARES or Families First during a particular quarter may reduce the amount of their federal employment tax deposits for that quarter by the amount of qualified wages paid for that quarter, so long as that amount does not exceed the anticipated credits under the CARES payroll tax credit, and the Families First Qualified Leave credit for the quarter.
      - If the amount not deposited is less than or equal to the amount of reasonably anticipated credit, the employer will not be subject to a failure to deposit penalty under IRC 6656.
    - If the amount of anticipated credit exceeds the remaining federal employment tax deposits for the quarter, employers may file Form 7200 to apply for an advance of the credit.
      - Employers should only seek advance payment of amounts that exceed the reduction in deposits possible for a particular quarter. For example, if an employer paid \$10,000 in qualified wages for a quarter, and is anticipating a credit of \$5,000, but is only able to reduce its employment tax deposits by \$3,000, it may apply for advance payment of \$2,000 (not the full \$5,000). An employer must not fully reduce deposits if it has not paid qualified wages during that quarter. Doing so could result in penalties.
    - Employers then will report the qualified wages, applicable credits, and reduced deposits on the form on which it reports federal employment taxes, usually

quarterly Form 941, starting with the second quarter filing. Credits for qualified wages will be applied to employment taxes due on all employees, even those whose wages do not qualify for the credit. Any credit that exceeds the employment taxes due will be treated as an overpayment and applied to any remaining employment tax reported on that return, or any other outstanding tax liabilities. Any remaining amounts will be refunded to taxpayer per usual refund procedures.

- Third Party Payers- The Act makes clear that the credit belongs to the worksite employer (“customer”) and not the PEO. IRC § 3511(d)(1)(C) requires the PEO to furnish the information needed to claim the credit to both the customer and the IRS. The Act directs the IRS to issue guidance on the application of the credit to third party payers, so more information on this is expected.

**For more information contact**

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