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## IRS Guidance on Tax Credits

The IRS published some guidance on the Families First Coronavirus Response Act (“FFCRA”) tax credit provisions. The FFCRA was effective as of April 1, 2020. The IRS also announced the Employee Retention Credit and provided some related information.

### **FFCRA Tax Credit**

Some of the FAQs are excerpted here, along with general information. The full list of FAQs can be found [here](#). We recommend employers read through all of the guidance.

#### **What tax credits does the FFCRA provide?**

The FFCRA provides businesses with tax credits to cover certain costs of providing employees with required paid sick leave and expanded family and medical leave for reasons related to COVID-19, from April 1, 2020, through December 31, 2020.

#### **May an Eligible Employer receive both the tax credits for qualified leave wages under the FFCRA and the Employee Retention Credit under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act)?**

Yes, if an Eligible Employer also meets the requirements for the employee retention credit, it may receive both credits, but not for the same wage payments.

Section 2301 of the CARES Act allows certain employers subject to a full or partial closure order due to COVID-19 or experiencing a significant decline in gross receipts a tax credit for retaining their employees. This employee retention credit is equal to 50% of qualified wages (including allocable qualified health plan expenses) paid to employees after March 12, 2020, and before January 1, 2021, up to \$10,000 in qualified wages for each employee for all calendar quarters. However, the qualified wages for the employee retention credit do not include the amount of qualified leave wages for which the employer received tax credits under the FFCRA.

**Note:** The IRS expects to issue Frequently Asked Questions on the employee retention credit under the CARES Act during April 2020.

#### **May an Eligible Employer receive both the tax credits for qualified leave wages under the FFCRA and a Small Business Interruption Loan under the CARES Act?**

Yes. However, if an Eligible Employer receives tax credits for qualified leave wages, those wages are not eligible as “payroll costs” for purposes of receiving loan forgiveness under section 1106 of the CARES Act.

## **May an Eligible Employer reduce its federal employment tax deposit by the qualified leave wages it has paid without incurring a failure to deposit penalty?**

Yes. An Eligible Employer will not be subject to a penalty under section 6656 of the Internal Revenue Code for failing to deposit federal employment taxes relating to qualified leave wages (and allocable qualified health plan expenses and the Eligible Employer's share of Medicare tax on the qualified leave wages) in a calendar quarter if:

1. the Eligible Employer paid qualified leave wages to its employees in the calendar quarter before the required deposit,
2. the amount of federal employment taxes that the Eligible Employer does not timely deposit is less than or equal to the amount of the Eligible Employer's anticipated tax credits for these qualified leave wages (and allocable qualified health plan expenses and the Eligible Employer's share of Medicare tax on the qualified leave wages) for the calendar quarter as of the time of the required deposit, and
3. the Eligible Employer did not seek payment of an advance credit by filing [Form 7200](#), Advance Payment of Employer Credits Due to COVID-19, with respect to any portion of the anticipated credits it relied upon to reduce its deposits.

For more information about the relief from the penalty for failure to deposit federal employment taxes on account of qualified leave wages, see [Notice 2020-22 \(PDF\)](#).

## **Does the amount of qualified health plan expenses include both the portion of the cost paid by the Eligible Employer and the portion of the cost paid by the Employee?**

The amount of qualified health plan expenses taken into account in determining the credits generally includes both the portion of the cost paid by the Eligible Employer and the portion of the cost paid by the employee with pre-tax salary reduction contributions. However, the qualified health plan expenses should not include amounts that the employee paid for with after-tax contributions.

## **What information should an Eligible Employer receive from an employee and maintain to substantiate eligibility for the sick leave or family leave credits?**

An Eligible Employer will substantiate eligibility for the sick leave or family leave credits if the employer receives a written request for such leave from the employee in which the employee provides:

1. The employee's name;
2. The date or dates for which leave is requested;
3. A statement of the COVID-19 related reason the employee is requesting leave and written support for such reason; and
4. A statement that the employee is unable to work, including by means of telework, for such reason.

In the case of a leave request based on a quarantine order or self-quarantine advice, the statement from the employee should include the name of the governmental entity ordering quarantine or the name of the health care professional advising self-quarantine, and, if the person

subject to quarantine or advised to self-quarantine is not the employee, that person's name and relation to the employee.

In the case of a leave request based on a school closing or child care provider unavailability, the statement from the employee should include the name and age of the child (or children) to be cared for, the name of the school that has closed or place of care that is unavailable, and a representation that no other person will be providing care for the child during the period for which the employee is receiving family medical leave and, with respect to the employee's inability to work or telework because of a need to provide care for a child older than fourteen during daylight hours, a statement that special circumstances exist requiring the employee to provide care.

### **What additional records should an Eligible Employer maintain to substantiate eligibility for the sick leave or family leave credit?**

An Eligible Employer will substantiate eligibility for the sick leave or family leave credits if, in addition to the information set forth in FAQ 44 ("What information should an Eligible Employer receive from an employee and maintain to substantiate eligibility for the sick leave or family leave credits?"), the employer creates and maintains records that include the following information:

1. Documentation to show how the employer determined the amount of qualified sick and family leave wages paid to employees that are eligible for the credit, including records of work, telework and qualified sick leave and qualified family leave.
2. Documentation to show how the employer determined the amount of qualified health plan expenses that the employer allocated to wages. See [FAQ 31](#) ("Determining the Amount of Allocable Qualified Health Plan Expenses") for methods to compute this allocation.
3. Copies of any completed Forms 7200, Advance of Employer Credits Due To COVID-19, that the employer submitted to the IRS.
4. Copies of the completed Forms 941, Employer's Quarterly Federal Tax Return, that the employer submitted to the IRS (or, for employers that use third party payers to meet their employment tax obligations, records of information provided to the third party payer regarding the employer's entitlement to the credit claimed on Form 941).

### **How long should an Eligible Employer maintain records to substantiate eligibility for the sick leave or family leave credit?**

An Eligible Employer should keep all records of employment taxes for at least 4 years after the date the tax becomes due or is paid, whichever comes later. These should be available for IRS review.

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### **Employee Retention Credit**

The IRS announced a tax credit will be available to employers who retain employees during the coronavirus crisis. The credit is available to employers of any size, provided that they are not recipients of small business loans. Qualifying employers can receive a maximum credit of 50 percent of \$10,000 in qualifying wages. An employer will qualify if (a) the employer's business is fully or partially suspended by government order due to COVID-19 during the calendar quarter, or (b) the employer's gross receipts are below 50 percent of the comparable quarter in 2019. Once the employer's gross receipts go above 80 percent of a comparable quarter in 2019, they no longer qualify after the end of that quarter.

The definition of qualified wages depends on the employer's number of employees. If an employer averaged more than 100 full-time employees during 2019, qualified wages are generally those wages, including certain health care costs, (up to \$10,000 per employee) paid to employees that are not providing services because operations were suspended or due to the decline in gross receipts. These employers can only count wages up to the amount that the employee would have been paid for working an equivalent duration during the 30 days immediately preceding the period of economic hardship.

If an employer averaged 100 or fewer full-time employees during 2019, qualified wages are those wages, including health care costs, (up to \$10,000 per employee) paid to any employee during the period operations were suspended or the period of the decline in gross receipts, regardless of whether or not its employees are providing services.

Employers who believe they may qualify for the Employee Retention Credit are advised to read the entire [IRS publication](#) on the subject.

If you have questions regarding tax credits, please contact [Adam Reid](mailto:reid@gill-law.com) at [reid@gill-law.com](mailto:reid@gill-law.com).