

The purpose of this memo is to provide a summary of tax relief programs available to businesses during the COVID-19 pandemic.

- I. The Coronavirus Aid, Relief, and Economic Security Act (CARES Act), enacted on March 27, 2020, is designed to encourage Eligible Employers to keep employees on their payroll, despite experiencing economic hardship related to COVID-19, with an employee retention tax credit (Employee Retention Credit) (Section 2302).

- II. Section 2302 of the CARES Act allows employers to defer the deposit of certain employment taxes for as much as two years.

- III. The Families First Coronavirus Relief Act (FFCRA) requires certain employers to pay sick or family leave wages to employees who are unable to work or telework due to certain circumstances related to COVID-19. Employers are entitled to a refundable tax credit for the required leave paid, up to specified limits. The same wages cannot be counted for both FFCRA and Employee Retention Credit.

Employee Retention Credit

1. Employee Retention Credit Overview

1.1 The Employee Retention Credit is a fully refundable tax credit for employers equal to 50 percent of qualified wages (including allocable qualified health plan expenses) that Eligible Employers pay their employees. This Employee Retention Credit applies to qualified wages paid after March 12, 2020, and before January 1, 2021. The maximum amount of qualified wages taken into account with respect to each employee for all calendar quarters is \$10,000, so that the maximum credit for an Eligible Employer for qualified wages paid to any employee is \$5,000.

2. Eligible Employers

2.1 Eligible Employers for the purposes of the Employee Retention Credit are those that carry on a trade or business during calendar year 2020¹, that either:

2.1.1 Fully or partially suspends operation during any calendar quarter in 2020 due to orders from an appropriate governmental authority limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to COVID-19²; or

¹ The credit is available to corporations as well as pass-through entities, such as LLCs, S corporations, partnerships, and sole proprietors. The credit also is available to most tax-exempt organizations.

² The operation of a trade or business may be partially suspended if an appropriate governmental authority imposes restrictions upon the business operations by limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to COVID-19 such that the operation can still continue to operate but not at its normal capacity.

2.1.2 Experiences a significant decline in gross receipts during the calendar quarter³.

2.2 Governmental employers are not Eligible Employers for the Employee Retention Credit. Also, Self-employed individuals are not eligible for this credit for their self-employment services or earnings.

2.3 An Eligible Employer may not receive the Employee Retention Credit if the Eligible Employer receives a Small Business Interruption Loan under the Paycheck Protection Program that is authorized under the CARES Act (“Paycheck Protection Loan”). An Eligible Employer that receives a paycheck protection loan should not claim Employee Retention Credits.

3. Maximum amount of the Employee Retention Credit Available to Eligible Employers

3.1 The credit equals 50 percent of the qualified wages (including qualified health plan expenses) that an Eligible Employer pays in a calendar quarter. The maximum amount of qualified wages taken into account with respect to each employee for all calendar quarters is \$10,000, so that the maximum credit for qualified wages paid to any employee is \$5,000.

4. Qualified Wages

4.1 Qualified wages are wages (as defined in section 3121(a) of the Internal Revenue Code (the “Code”)) and compensation (as defined in section 3231(e) of the Code) paid by an Eligible Employer to employees after March 12, 2020, and before January 1, 2021. Qualified wages include the Eligible Employer’s qualified health plan expenses that are properly allocable to the wages.

4.2 The definition of qualified wages depends, in part, on the average number of full-time employees (as defined in section 4980H of the Code) employed by the Eligible Employer during 2019.

4.2.1 If the Eligible Employer averaged more than 100 full-time employees in 2019, qualified wages are the wages paid to an employee for time that the employee is **not providing services** due to either (1) a full or partial suspension of operations by order of a governmental authority due to COVID-19, or (2) a significant decline in gross receipts. For these employers, qualified wages taken into account for an employee may not exceed what the employee would have been paid for working an equivalent duration during the 30 days immediately preceding the period of economic hardship.

4.2.2 If the Eligible Employer averaged 100 or fewer full-time employees in 2019, qualified wages are the wages paid to **any employee** during any period of economic hardship described in (1) and (2) above.

5. Is an Employer required to pay qualified wages to its employees under the CARES Act?

5.1 No. The CARES Act does not require employers to pay qualified wages. In addition, Eligible Employers may elect to not claim the credit for the Employee Retention Credit. (The FFCRA does require certain employers to pay sick or family leave wages to employees who are unable to work or telework due to a

³ A significant decline in gross receipts begins with the first quarter in which an employer’s gross receipts for a calendar quarter in 2020 are less than 50 percent of its gross receipts for the same calendar quarter in 2019. The significant decline in gross receipts ends with the first calendar quarter that follows the first calendar quarter for which the employer’s 2020 gross receipts for the quarter are greater than 80 percent of its gross receipts for the same calendar quarter during 2019.

COVID-19 circumstance. These employers may be entitled to a refundable tax credit for those wages paid, although the employers may elect not to claim the credit.)

6. Timespan an Eligible Employer can claim the Employee Retention Credit for Qualified Wages

6.1 Eligible Employers may claim the Employee Retention Credit for qualified wages that they pay after March 12, 2020, and before January 1, 2021. Therefore, an Eligible Employer may be able to claim the credit for qualified wages paid as early as March 13, 2020.

7. Against what employment taxes does the Employee Retention Credit apply?

7.1 The credit is allowed against the employer portion of social security taxes under section 3111(a) of the Internal Revenue Code (the “Code”), and the portion of taxes imposed on railroad employers under section 3221(a) of the Railroad Retirement Tax Act (RRTA) that corresponds to the social security taxes under section 3111(a) of the Code.

8. “Fully Refundable” Credit

8.1 The credits are fully refundable because the Eligible Employer may get a refund if the amount of the credit is more than certain federal employment taxes the Eligible Employer owes. Consistent with its treatment as an overpayment, the excess will be applied to offset any remaining tax liability on the employment tax return and the amount of any remaining excess will be reflected as an overpayment on the return. Like other overpayments of federal taxes, the overpayment will be subject to offset under section 6402(a) of the Code prior to being refunded to the employer.

9. How does an Eligible Employer claim the refundable tax credit for qualified wages?

9.1 Eligible Employers will report their total qualified wages and the related credits for each calendar quarter on their federal employment tax returns, usually Form 941, Employer's Quarterly Federal Tax Return.

9.2 In anticipation of receiving the credits, Eligible Employers can fund qualified wages by accessing federal employment taxes, including withheld taxes, that are required to be deposited with the IRS or by requesting an advance of the credit from the IRS.

10. Can an Eligible Employer fund its payments of qualified wages before receiving the credits by reducing its federal employment tax deposits?

10.1 Yes. An Eligible Employer may fund the qualified wages by accessing federal employment taxes, including those that the Eligible Employer already withheld, that are set aside for deposit with the IRS, for other wage payments made during the same quarter as the qualified wages.

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

11.1 Yes. An Eligible Employer will not be subject to a penalty under section 6656 of the Code for failing to deposit federal employment taxes relating to qualified wages in a calendar quarter if:

11.1.1 the Eligible Employer paid qualified wages to its employees in the calendar quarter before the required deposit,

11.1.2 the amount of federal employment taxes that the Eligible Employer does not timely deposit, reduced by any amount of federal employment taxes not deposited in anticipation of the paid sick or family leave credits claimed under the FFCRA, is less than or equal to the amount of the Eligible Employer's anticipated Employee Retention Credit for the qualified wages for the calendar quarter as of the time of the required deposit, and

11.1.3 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.

12. How can an Eligible Employer fund the payment of these wages if the Eligible Employer does not have sufficient federal employment taxes set aside for deposit to cover those payments? Can the employer get an advance of the credits?

12.1 Yes. Because quarterly returns are not filed until after qualified wages are paid, some Eligible Employers may not have sufficient federal employment taxes set aside for deposit to the IRS to fund their qualified wages. Accordingly, the IRS has established a procedure for obtaining an advance of the refundable credits.

12.2 The Eligible Employer should first reduce its remaining federal employment tax deposits for wages paid in the same calendar quarter by the maximum allowable amount. If the anticipated credit for the qualified wages exceeds the remaining federal employment tax deposits for that quarter, the Eligible Employer can file a [Form 7200, Advance Payment of Employer Credits Due to COVID-19](#), to claim an advance refund for the full amount of the anticipated credit for which it did not have sufficient federal employment tax deposits.

12.3 If an Eligible Employer fully reduces its required deposits of federal employment taxes otherwise due on wages paid in the same calendar quarter to its employees in anticipation of receiving the credits, and it has not paid qualified wages in excess of this amount, it should not file the Form 7200. If it files the Form 7200, it will need to reconcile this advance credit and its deposits with the qualified wages on Form 941 (or other applicable federal employment tax return such as Form 944 or Form CT-1), and it may have an underpayment of federal employment taxes for the quarter.

13. May an Eligible Employer receive both the tax credits for the qualified leave wages under the FFCRA and the Employee Retention Credit under the CARES ACT?

13.1 Yes, but not for the same wages. The amount of qualified wages for which an Eligible Employer may claim the Employee Retention Credit does not include the amount of qualified sick and family leave wages for which the employer received tax credits under the FFCRA.

Employer Payroll Tax Deferral

14. Employer Payroll Tax Deferral Overview

14.1 The Coronavirus, Aid, Relief and Economic Security Act (CARES Act) allows employers to defer the deposit and payment of the employer's share of Social Security taxes and self-employed individuals to defer payment of certain self-employment taxes.

15. Deposits and Payments of Employment Taxes that Employers Are Entitled to Defer

15.1 Section 2302 of the CARES Act provides that employers may defer the deposit and payment of the employer's portion of Social Security taxes and certain railroad retirement taxes. These are the taxes imposed under section 3111(a) of the Internal Revenue Code (the "Code") and, for Railroad employers, so much of the taxes imposed under section 3221(a) of the Code as are attributable to the rate in effect under section 3111(a) of the Code (collectively referred to as the "employer's share of Social Security tax"). Employers that received a Paycheck Protection Program loan may not defer the deposit and payment of the employer's share of Social Security tax that is otherwise due after the employer receives a decision from the lender that the loan was forgiven.

16. When can employers begin deferring deposit and payment of the employer's share of Social Security tax without incurring failure to deposit and failure to pay penalties?

16.1 The deferral applies to deposits and payments of the employer's share of Social Security tax that would otherwise be required to be made during the period beginning on March 27, 2020, and ending December 31, 2020. (Section 2302 of the CARES Act calls this period the "payroll tax deferral period.")

16.2 The Form 941, Employer's QUARTERLY Federal Tax Return, will be revised for the second calendar quarter of 2020 (April - June, 2020). Information will be provided in the near future to instruct employers how to reflect the deferred deposits and payments otherwise due on or after March 27, 2020 for the first quarter of 2020 (January - March 2020). In no case will Employers be required to make a special election to be able to defer deposits and payments of these employment taxes.

17. Which employers may defer deposit and payment of the employer's share of Social Security tax without incurring failure to deposit and failure to pay penalties?

17.1 All employers may defer the deposit and payment of the employer's share of Social Security tax. However, employers that receive a loan under the Small Business Administration Act, as provided in section 1102 of the CARES Act (the Paycheck Protection Program (PPP)), may not defer the deposit and payment of the employer's share of Social Security tax due after the employer receives a decision from the lender that the PPP loan is forgiven under the CARES Act.

18. Can an employer that has applied for and received a PPP loan that is not yet forgiven defer deposit and payment of the employer's share of Social Security tax without incurring failure to deposit and failure to pay penalties?

18.1 Yes. Employers who have received a PPP loan may defer deposit and 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 in accordance with paragraph (g) of section 1106 of the CARES Act, without incurring failure to deposit and failure to pay penalties. Once an employer receives a decision from its lender that its PPP loan is forgiven, the employer is no longer eligible to defer deposit and 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," as described below.

19. Is this ability to defer deposits of the employer's share of Social Security tax in addition to the relief provided in Notice 2020-22 for deposit of employment taxes in anticipation of the Families First Coronavirus Relief Act (FFCRA) paid leave credits and the CARES Act employee retention credit?

19.1 Yes. Notice 2020-22 provides relief from the failure to deposit penalty under section 6656 of the Code for not making deposits of employment taxes, including taxes withheld from employees, in anticipation of the FFCRA paid leave credits and the CARES Act employee retention credit. The ability to defer deposit and

payment of the employer's share of Social Security tax under section 2302 of the CARES Act applies to all employers, not just employers entitled to paid leave credits and employee retention credits. (But see the limit described in FAQ 4 for employers that have a PPP loan forgiven.)

20. Can an employer that is eligible to claim refundable paid leave tax credits or the employee retention credit defer its deposit and payment of the employer's share of Social Security tax prior to determining the amount of employment tax deposits that it may retain in anticipation of these credits, the amount of any advance payments of these credits, or the amount of any refunds with respect to these credits?

20.1 Yes. An employer is entitled to defer deposit and payment of the employer's share of Social Security tax prior to determining whether the employer is entitled to the paid leave credits under sections 7001 or 7003 of FFCRA or the employee retention credit under section 2301 of the CARES Act, and prior to determining the amount of employment tax deposits that it may retain in anticipation of these credits, the amount of any advance payments of these credits, or the amount of any refunds with respect to these credits.

21. What are the applicable dates by which deferred deposits of the employer's share of Social Security tax must be deposited to be treated as timely (and avoid a failure to deposit penalty)?

21.1 The deferred deposits of the employer's share of Social Security tax must be deposited by the following dates (referred to as the "applicable dates") to be treated as timely (and avoid a failure to deposit penalty):

21.1.1 On December 31, 2021, 50 percent of the deferred amount; and

21.1.2 On December 31, 2022, the remaining amount.

22. Are self-employed individuals eligible to defer payment of self-employment tax on net earnings from self-employment income?

22.1 Yes. Self-employed individuals may defer the payment of 50 percent of the Social Security tax on net earnings from self-employment income imposed under section 1401(a) of the Code for the period beginning on March 27, 2020, and ending December 31, 2020. ("payroll tax deferral period.")

23. Is there a penalty for failure to make estimated tax payments for 50 percent of Social Security tax on net earnings from self-employment income during the payroll tax deferral period?

23.1 No. For any taxable year that includes any part of the payroll tax deferral period, 50 percent of the Social Security tax imposed on net earnings from self-employment income during that payroll tax deferral period is not used to calculate the installments of estimated tax due under section 6654 of the Code.

Credits for FFCRA Leave

1. The FFCRA gives businesses with fewer than 500 employees ("Eligible Employers")⁴ funds to provide employees with paid sick and family and medical leave for reasons related to COVID-19, either for the employee's own health needs or to care for family members.

⁴ Eligible Employers are businesses and tax-exempt organizations with fewer than 500 employees that are required to provide paid sick leave under the EPSLA and to provide paid family leave under the Expanded FMLA (note that although the FFCRA requires most government employers to provide paid leave, it does not entitle those governmental employers to tax credits for this leave).

2. The FFCRA requires employers to provide paid leave through two separate provisions: (i) the Emergency Paid Sick Leave Act (EPSLA), which entitles workers to up to 80 hours of paid sick time when they are unable to work for certain reasons related to COVID-19, and (ii) the Emergency Family and Medical Leave Expansion Act (Expanded FMLA), which entitles workers to certain paid family and medical leave. The FFCRA provides that employers subject to the EPSLA and the Expanded FMLA paid leave requirements are entitled to fully refundable tax credits to cover the cost of the leave required to be paid for these periods of time during which employees are unable to work (which for purposes of these rules, includes telework). Certain self-employed persons in similar circumstances are entitled to similar credits.

3. More detailed information on the program and how to apply can be found here: <https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs#basic>.

For more information, contact Shuchee Shah at (714) 549-6200 or sshah@tocounsel.com.

THEODORA ORINGER PC

Century City

1840 Century Park East, Suite 500
Los Angeles, California 90067
310.557.2009

Orange County

535 Anton Boulevard, Ninth Floor
Costa Mesa, California 92626
714.549.6200

Los Angeles

633 West Fifth Street, 26th Floor
Los Angeles, California 90071
310.557.2009

tocounsel.com
