

Employee Retention Credit and Other New Payroll Tax Incentives

Tony Nitti, CPA, MST

Partner-In-Charge, National Tax

CERTIFIED PUBLIC ACCOUNTANTS
& BUSINESS CONSULTANTS



Disclosure

- FOR INTERNAL USE ONLY - FOR DISCUSSION PURPOSES ONLY
- To highlight the complexities, risk and challenges with the evolving role out of recent legislation, specifically related to:
 - Payroll tax credits created by the Families First Coronavirus Relief Act
 - Section 2301 of the CARES Act– Employee retention credit for employers subject to closure or significant reduction in gross receipts due to COVID–19.
 - Section 2302 of the CARES Act– Deferral of employer’s share of Social Security taxes and certain self-employment taxes.
 - This is not official guidance and should not be shared, represented or presented as official guidance from RubinBrown LLP

Items to Cover

- Family/Sick Leave Credits
- Employee Retention Credit (ERC)
- Payroll Tax Deferral
- PPP Loans Update

Paid Emergency Family & Medical Leave

- These rules simply expand on the Family and Medical Leave Act of 1993. If you want to understand them, you'll have to understand the 1993 Act as well as the underlying regulations.
- Link to original [Family and Medical Leave Act](#); [FAQ on the provisions](#)
- Section 102(a)(1) of the 1993 Act provided that an “eligible employee” was entitled to 12 weeks of leave for various reasons (birth of a child, serious health condition, etc...) This leave could be unpaid.
- The Coronavirus Relief Act added a new “reason” for 12 weeks of leave for any period beginning April 1, 2020 and ending December 31, 2020, you are eligible if you have a “qualifying need” related to a “public health emergency” described in Section 110, which was added to the 1993 Act by the new legislation.

Paid Emergency Family & Medical Leave

- **New Section 110, Public Health Emergency Leave**
- Who is an “eligible employer?”
 - Unlike the 1993 Act general rules, this applies not to an employer with 50 or more employees, but rather less than 500.
 - You have fewer than 500 employees if, at the time the employee’s leave is to be taken, you employ fewer than 500 full-time and part-time employees within the US, DC or any territory. You should include employees on leave, temporary employees, and day laborers supplied by a temporary agency.
 - Do NOT count any independent contractors.
 - Typically, a corporation is considered to be a single employer. When a corporation has an ownership interest in another corporation, the two corporations are separate employers unless they are joint employers under the FLSA with respect to certain employees. If they are joint employers, both employers must count the employees.

Paid Emergency Family & Medical Leave

- In general, two or more entities are separate employers unless they meet the integrated employer test under the Family and Medical Leave Act of 1993 (FMLA). If two entities are an integrated employer under the FMLA, then employees of all entities making up the integrated employer will be counted in determining employer coverage for purposes of expanded family and medical leave. Factors to be considered in determining if separate businesses are an integrated employer include:
 - Common management,
 - Interrelation between operations,
 - Centralized control of labor relations, and
 - Degree of common ownership or financial control.

For purposes of determining employer coverage under the FMLA, the employees of all entities making up the integrated employer must be counted.

Paid Emergency Family & Medical Leave

- Businesses with fewer than 50 employees can argue that paying the leave will jeopardize the viability of their business as a going concern and avoid paying the leave. They should document why their business meets the criteria set out by the DOL. A small business may claim this exemption if an authorized officer of the business has determined that:
 - The provision of paid sick leave or expanded family and medical leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
 - The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
 - There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

Paid Emergency Family & Medical Leave

- Who is an “eligible employee?”
 - Section 110 provides that for COVID-19 purposes, an eligible employee is any employee who has been employed for at least 30 calendar days before leave is requested.
 - You are considered to have been employed by your employer for at least 30 calendar days if your employer had you on its payroll for the 30 calendar days immediately prior to the day your leave would begin. For example, if you want to take leave on April 1, 2020, you would need to have been on your employer’s payroll as of March 2, 2020.
 - If you have been working for a company as a temporary employee, and the company subsequently hires you on a full-time basis, you may count any days you previously worked as a temporary employee toward this 30-day eligibility period.

Paid Emergency Family & Medical Leave

- What is a “qualifying need related to a public health emergency?”
 - Public health emergency: An emergency with respect to COVID-19 declared by a Federal, state or local authority.
 - Qualifying need for leave: An employee is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or if the child care provider of such son or daughter is unavailable, due to a public health emergency.
 - Thus, you are not entitled to paid leave because your business closed its doors, voluntarily or involuntarily. It has to be because you need to stay home to care for a child.

Paid Emergency Family & Medical Leave

- How does the leave work?
 - Of the 12 weeks, the first two can be unpaid. We'll see that you can possibly claim sick leave for those two weeks. The next ten MUST be paid.
 - For the first two weeks of unpaid leave, the employee can elect to use paid vacation or sick leave.
 - For the next ten weeks, the employer must pay the employee based on:
 - At least 2/3 of the employees regular pay (this must be above the federal minimum wage or the applicable state or local minimum wage), and
 - The number of hours the employee would otherwise be normally scheduled to work. (You must factor in overtime hours into this computation. In addition, a part-time employee is subject to a separate calculation)
 - The leave pay is not required to exceed \$200/day or \$10,000 in the aggregate to any one employee.
 - Family leave is not subject to the 6.2% employer Social Security tax.

Paid Emergency Family & Medical Leave

- What is your regular rate of pay?
 - For purposes of the FFCRA, the regular rate of pay used to calculate your paid leave is the average of your "regular rate" over a period of up to six months prior to the date on which you take leave. If you have not worked for your current employer for six months, the regular rate used to calculate your paid leave is the average of your regular rate of pay for each week you have worked for your current employer.
- "Regular rate" pursuant to the FLSA is at least the federal minimum wage for all hours worked and overtime pay at not less than time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek.
- If you are paid with commissions, tips, or piece rates, these amounts will be incorporated into the above calculation to the same extent they are included in the calculation of the regular rate under the FLSA.
- You can also compute this amount for each employee by adding all compensation that is part of the regular rate over the above period and divide that sum by all hours actually worked in the same period.

Paid Sick Leave

- An eligible employee is entitled to up to 80 hours of paid sick leave (over a two week period) for any of the following six reasons:
 1. Subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
 2. Advised by a health care provider to self-quarantine due to concerns related to COVID-19.
 3. Experiencing symptoms of COVID-19 and seeking a medical diagnosis.
 4. Caring for an individual who is subject to quarantine or has been advised to self-quarantine. The person must generally need your care (a family member or someone who resides in your home).
 5. Caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions.
 1. Place of care: day care, school, preschools, summer camps, etc...
 2. Child care provider: includes babysitters, grandparents, etc...
 6. Experiencing any other substantially similar condition.

Paid Sick Leave

- Who is an “eligible employer?”
 - Same as in the previous slides for emergency medical leave.
- Who is an “eligible employee?”
 - Any employee, regardless of how long they have been employed (different from the family leave rules requiring 30 days).

Paid Sick Leave

- Rate of pay for sick leave
 - If you are taking sick leave for reasons 1, 2 or 3 (the EMPLOYEE is sick)
 - The employee is paid based on the number of hours they would normally work, and
 - The greater of:
 - The employee's regular rate of pay,
 - The federal minimum wage, or
 - A state or local minimum wage.
 - Total pay is capped at \$511/day or \$5,110 in the aggregate
 - If you are taking sick leave for reasons 4, 5 or 6 (the employee is caring for someone else)
 - The employee is paid based on the number of hours they would normally work, and
 - 2/3 of the greater of the three amounts listed above.
 - Total pay is capped at \$200 per day and \$2,000 in the aggregate.
- Sick leave is not subject to the 6.2% employer Social Security tax.

Emergency Medical Leave & Paid Sick Leave

- The two can work together if an employee is taking care of a child because school is closed or child care isn't available (reason 5 of the sick pay rules)
- In that case, the first two weeks (80 hours) could be paid sick time (maximum of \$2,000).
- The next ten weeks would be paid medical leave time (maximum payment of \$10,000).
- Thus, total payment would be \$12,000.

Emergency Medical Leave & Paid Sick Leave

- A part-time employee is entitled to leave for his or her average number of work hours in a two-week period. Therefore, you calculate hours of leave based on the number of hours the employee is normally scheduled to work. If the normal hours scheduled are unknown, or if the part-time employee's schedule varies, you may use a six-month average to calculate the average daily hours.
- Such a part-time employee may take paid sick leave for this number of hours per day for up to a two-week period, and may take expanded family and medical leave for the same number of hours per day up to ten weeks after that.
- If this calculation cannot be made because the employee has not been employed for at least six months, use the number of hours that the employer and employee agreed that the employee would work upon hiring. And if there is no such agreement, you may calculate the appropriate number of hours of leave based on the average hours per day the employee was scheduled to work over the entire term of his or her employment.

Emergency Medical Leave & Paid Sick Leave

- You are required to pay an employee for hours the employee would have been normally scheduled to work even if that is more than 40 hours in a week. However, the Emergency Paid Sick Leave Act requires that paid sick leave be paid only up to 80 hours over a two-week period. For example, an employee who is scheduled to work 50 hours a week may take 50 hours of paid sick leave in the first week and 30 hours of paid sick leave in the second week. In any event, the total number of hours paid under the Emergency Paid Sick Leave Act is capped at 80.

Emergency Medical Leave & Paid Sick Leave

- Required records:
 - Regardless of whether you grant or deny a request for paid sick leave or expanded family and medical leave, you must document the following:
 - The name of your employee requesting leave;
 - The date(s) for which leave is requested;
 - The reason for leave; and
 - A statement from the employee that he or she is unable to work because of the reason.

- If your employee requests leave because he or she is subject to a quarantine or isolation order or to care for an individual subject to such an order, you should additionally document the name of the government entity that issued the order. If your employee requests leave to self-quarantine based on the advice of a health care provider or to care for an individual who is self-quarantining based on such advice, you should additionally document the name of the health care provider who gave advice.

Emergency Medical Leave & Paid Sick Leave

- If your employee requests leave to care for his or her child whose school or place of care is closed, or child care provider is unavailable, you must also document:
 - The name of the child being cared for;
 - The name of the school, place of care, or child care provider that has closed or become unavailable; and
 - A statement from the employee that no other suitable person is available to care for the child.
- Private sector employers that provide paid sick leave and expanded family and medical leave required by the FFCRA are eligible for reimbursement of the costs of that leave through refundable tax credits. If you intend to claim a tax credit under the FFCRA for your payment of the sick leave or expanded family and medical leave wages, you should retain appropriate documentation in your records. You should consult Internal Revenue Service (IRS) applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit, including any needed substantiation to be retained to support the credit. You are not required to provide leave if materials sufficient to support the applicable tax credit have not been provided.

Tax Credits

- Employers who pay family or sick leave as required under the previous slides will get a separate credit based off each payment that will reduce the employer's 6.2% share of the Social Security tax (but see IR-2020-57).
 - Self-employed taxpayers are eligible for a credit against 50% of self-employment tax.
 - The credits are INCREASED by the employer's 1.45% Medicare tax that is imposed on qualified family leave or sick pay wages.
 - The credits are INCREASED by the employee's share of allocable health care costs.
 - Any excess credit is refundable.
- No credit is available if:
 - You are required to pay family/sick leave, but pay in excess of the required amounts, or
 - You are NOT required to pay family/sick leave (> 500 employees, but choose to anyway).

Tax Credits

- **Family Leave Credit**

- Equal to 100% of “qualified family medical leave wages” that are paid by an employer for each calendar quarter from April 1, 2020 through December 31, 2020.
- Qualified paid family medical leave wages:
 - Capped at \$200/day per employee or \$10,000 in the aggregate.
 - The wages are increased by the employee’s allocable share of costs incurred to provide group health insurance.
- Gross income of the employer is increased by any credit allowed against payroll taxes.

Tax Credits

- **Family Leave Credit: Self-Employed Taxpayers**
 - Self-employed taxpayers claim a credit for their “qualified family leave equivalent” amount
 - The # of days the individual is unable to perform their business for reasons (but not more than 50) giving rise to eligible sick leave had they been an employee multiplied by the lesser of:
 - \$200, or
 - 67% of the taxpayer’s net earnings from self-employment divided by 260.
 - These credits will be claimed on the taxpayer’s income tax return and will reduce required estimated tax payments.

Tax Credits

■ Sick Leave Credit

- Equal to 100% of “qualified paid sick leave wages” that are paid by an employer for each calendar quarter from April 1, 2020 through December 31, 2020.
- Qualified paid sick leave wages:
 - Capped at \$511/day per employee or \$5,110 in the aggregate (for reasons 1-3, EMPLOYEE is sick)
 - And \$200/day per employee or \$2,000 in the aggregate (for reasons 4-6, employee is taking care of someone else)
 - The wages are increased by the employee’s allocable share of costs incurred to provide group health insurance.
- Gross income of the employer is increased by any credit allowed against payroll taxes.

Tax Credits

- **Sick Leave Credit: Self-Employed Taxpayers**
 - Self-employed taxpayers claim a credit for their “qualified sick leave equivalent” amount
 - The # of days the individual is unable to perform their business for reasons (but not more than 10) giving rise to eligible sick leave had they been an employee multiplied by the lesser of:
 - \$511 (if the taxpayer is sick; \$211 if the taxpayer is taking care of someone else) or
 - 100% (67% if the taxpayer is taking care of someone else) of the net earnings from self-employment divided by 260.
 - These credits will be claimed on the taxpayer’s income tax return and will reduce required estimated tax payments.

Tax Credits

- **IR-2020-57: IRS Gives Guidance**

- The IRS guidance is very friendly. It wants employers to have cash available to pay sick wages, so you get an instant reduction of the amount necessary to pay federal income tax withholding and the employer and employee's share of payroll taxes.
- In other words, don't deposit the amount with the IRS and then file a Form 941 claiming a credit; rather, reduce your deposits in real time and use the funds to pay the sick and emergency leave wages.
- If your credit is greater than the sum of federal income tax withholding and the employer's and employee's share of payroll taxes, you can apply for an instant refund that will be paid within 2 weeks or less.

Tax Credits

- **IR-2020-57: IRS Gives Guidance**

- *Example. X Co. paid \$5,000 in qualified sick leave during Q1 2020. X Co. has \$8,000 of total payment due on Form 941, including income and payroll taxes withheld from employees. X Co. is required to remit only \$3,000. The other \$5,000 can be used to pay the sick leave wages.*
- *Example. Y Co. paid \$10,000 in sick leave for Q2 2020 and was required to deposit \$8,000 in total taxes with Form 941. Y Co. can use the entire \$8,000 to pay sick leave wages and file a request for an accelerated credit of \$2,000.*

- [Additional Resources](#)

CARES Act Employee Retention Credit

- **Section 2301. Employee retention credit for employers subject to closure due to COVID-19**
 - The credit is to encourage employers to retain employees and maintain salary
 - The credit is against the employer's share of the Social Security tax, so 6.2% of wages paid. (but as we'll see, it ends up being a credit against all *payroll deposits*).
 - The credit reduces payroll taxes AFTER any qualified family/sick leave credit.
- Fully refundable tax credit for employers equal to 50% of “qualified wages” (including allocable qualified health plan expenses) that Eligible Employers pay their employees.
 - 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.
 - Qualified wages paid after March 12, 2020, and before January 1, 2021.
- **An employer may NOT claim the ERC if it has received – and does not return – a PPP loan prior to May 14, 2020.**

Eligible Employer

- **Who is an Eligible Employer**

- Employers that carry on a trade or business during calendar year 2020, including tax-exempt organizations, that **EITHER**:
 - Fully or partially suspend operations during any calendar quarter in 2020 due to orders from an appropriate governmental authority limiting commerce, travel, or group meetings due to COVID-19; or
 - Experience a significant decline in gross receipts during the calendar quarter
- The Employee Retention Credit is available to employers of any size. The number of employees an employer has does not affect whether it is an Eligible Employer that may claim the credit. (It will however, determine the amount of eligible wages).
- Both for-profit businesses and tax-exempt organizations can claim the payroll tax credit.

Trade Or Business

- The term "trade or business" has the same meaning as when used in section 162 of the Code other than the trade or business of performing services as an employee. An activity does not qualify as a Section 162 trade or business unless its primary purpose is to make a profit and it is conducted on a regular, continuous, and substantial basis.
- The IRS does not deem a household “employer” as conducting a “trade or business” and you can not claim the ERC with respect to household employees.
- Self-employed individuals are not eligible for the Employee Retention Credit with respect to their own self-employment earnings. However, a self-employed individual who employs individuals in its trade or business and who otherwise meets the requirements to be an Eligible Employer may be eligible for the Employee Retention Credit with respect to qualified wages paid to the employees.
- A tax-exempt organization is deemed to be engaged in a “trade or business” with respect to all operations of the organization.

Eligibility Of Other Employers

- **Governmental Entities:** Federal government, state governments or political subdivision thereof, and any agency or instrumentality of those governments are not Eligible Employers and are not entitled to receive the Employee Retention Credit. There is a six factor test for determining an “instrumentality” of a government.
- **Tribes and Tribal Entities:** They may be an Eligible Employer for purposes of the Employee Retention Credit , if they otherwise meet the requirements of the Employee Retention Credit. Additional information is forthcoming.
- **Tax Exempt Entities:** For purposes of the Employee Retention Credit, a tax-exempt organization described in section 501(c) of the Code that is exempt from tax under section 501(a) of the Code is deemed to be engaged in a "trade or business" with respect to all operations of the organization and eligible for the credit.
- **US Territories:** Employers may claim the Employee Retention Credit for payments of "qualified wages." Section 2301(c)(5) of the CARES Act provides that qualified wages are wages as defined in section 3121(a) of the Code for purposes of the Federal Insurance Contributions Act ("FICA") tax. Under section 3121(b) of the Code, payments of wages by employers in U.S. Territories are subject to FICA. Accordingly, Eligible Employers include employers in the U.S. Territories that pay qualified wages and otherwise meet the requirements for the credit.

Two Scenarios Giving Rise To The Credit

- The key: to be eligible for the ERC, during a calendar quarter in 2020, an employer must satisfy one of the two scenarios:
 1. Scenario 1: The employer was required to fully or partially suspend operations during any calendar quarter in 2020 due to orders from an appropriate governmental authority limiting commerce, travel, or group meetings due to COVID-19; or
 2. Scenario 2: The employer experienced a significant decline in gross receipts during the calendar quarter when compared to the same quarter in 2019.

Fully Or Partially Suspending Operations

- Operations partially suspended for purposes of the Employee Retention Credit:
 - The operation of a trade or business is partially suspended if:
 1. An appropriate governmental authority imposes restrictions on the employer's operations
 2. The orders limit commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to COVID-19 and
 3. The orders affect an employer's operations of its typical operations.
 - All three of the above tests must be met.

Orders From An Appropriate Governmental Authority

- Governmental orders include:
 - An order from the city's mayor stating that all non-essential businesses must close for a specified period;
 - A State's emergency proclamation that residents must shelter in place for a specified period, other than residents who are employed by an essential business and may travel to and work at the workplace location;
 - An order from a local official imposing a curfew on residents that impacts the operating hours of a trade or business for a specified period.
- Statements from a governmental official, including comments during press conferences or in interviews with the media, do not rise to the level of a governmental order for purposes of the Employee Retention Credit.
- Additionally, the declaration of a state of emergency by a governmental authority is not sufficient to rise to the level of governmental order if it does not limit commerce, travel, or group meetings in any manner. Further, such a declaration that limits commerce, travel, or group meetings, but does so in a manner that does not affect the employer's operation of its trade or business does not rise to the level of a governmental order.

Governmental Orders

- Shutting down voluntarily for a period of time to protect your employees does not qualify as there has been no government order affecting your business.
- If a government order requires you to reduce your hours, you have been partially suspended.
- An essential business's loss of customers due to a government order requiring non-essential businesses to close does not mean your business has been partially suspended. If your business loses enough customers however, you may still be eligible for the credit if you experience a significant decline in gross receipts.
- An employer with an essential business may be considered to have a full or partial suspension of operations if the business's suppliers are unable to make deliveries of critical goods or materials due to government orders that cause the supplier to suspend its operations.
- If an employer's workplace is closed by government order but the employer is able to continue operations *comparable to its operations prior to the closure by requiring its employees to telework*, the employer's operations are not considered to have been fully or partially suspended.
- If an employer's workplace is closed by government order for certain purposes but may remain open for other purposes the operations would be considered partially suspended.

Government Orders Example

- **Example:** Governor of State Y issues an order that all non-essential businesses must close from March 20, 2020 until April 30, 2020. The order provides a list of non-essential businesses, including gyms, spas, nightclubs, barber shops, hair salons, tattoo parlors, physical therapy offices, waxing salons, fitness centers, bowling alleys, arcades, racetracks, indoor children's play areas, theaters, chiropractors, planetariums, museums, and performing arts centers. Employers that provide essential services may remain open.
 - This satisfies all three tests for a non-essential business. There has been:
 1. An order from a an appropriate government authority, that
 2. Limits commerce, and that
 3. Affects the operations of the employer's trade or business.

Thus, these businesses have an eligible quarter in both Q1 and Q2 of 2020.

- **Example :** Mayor of City Y holds a press conference in which she encourages residents to practice social distancing to prevent the spread of COVID-19. The statement during the press conference is not an order limiting commerce, travel, or group meetings. Accordingly, the mayor's statement would not be a governmental order for purposes of the ERC.

Examples

- An essential business's loss of customers due to a government order requiring non-essential businesses to close does not mean your business has been partially suspended. If your business loses enough customers however, you may still be eligible for the credit if you experience a significant decline in gross receipts
- **Example:** Employer B, an automobile repair service business, is an essential business and is not required to close its locations or suspend its operations. Due to a governmental order that limits travel and requires members of the community to stay at home except for certain essential travel, such as going to the grocery store, Employer B's business has declined significantly. Employer B is not considered to have a full or partial suspension of operations due to a governmental order. However, Employer B may be considered an Eligible Employer if it has a significant decline in gross receipts.

Examples

- If an employer's workplace is closed by government order but the employer is able to continue operations *comparable to its operations prior to the closure by requiring its employees to telework*, the employer's operations are not considered to have been fully or partially suspended.
- **Example:** Employer C, a software development company maintains an office in a city where the mayor has ordered that only essential businesses may operate. Employer C's business is not essential under the mayor's order and must close its office. Prior to the order, all employees at the company teleworked once or twice per week, and business meetings were held at various locations. Following the order, the company ordered mandatory telework for all employees and limited client meetings to telephone or video conferences. Employer C's business operations are not considered to be fully or partially suspended by the governmental order because its employees may continue to conduct its business operations by teleworking.
- But what is comparable?

Examples – Cont.

- If an employer's workplace is closed by government order for certain purposes but may remain open for other purposes the operations would be considered partially suspended.
- **Example:** Employer D, a restaurant business, must close its restaurant locations to in-room dining due to a governmental order closing all restaurants, bars, and similar establishments for sit-down service. Employer D is allowed to continue food or beverage sales to the public on a carry-out, drive-through, or delivery basis. Employer D's business operations are considered to be partially suspended due to the governmental order closing all restaurants, bars, and similar establishments to sit-down service.
- **Example:** Employer E, a retail business, is forced to close its retail storefront locations due to a governmental order. The retail business also maintains a website through which it continues to fulfill on line orders; the retailer's online ordering and fulfillment system is unaffected by the governmental order. Employer E's business operations would be considered to have been partially suspended due to the governmental order requiring it to close its retail store locations.

National Or Regional Trades Or Businesses

- Employers that operate a trade or business in multiple locations and are subject to State and local governmental orders limiting operations in some, but not all, jurisdictions are considered to have a partial suspension of operations. Employers that operate a trade or business on a national or regional basis may be subject to governmental orders requiring closure of their locations in certain jurisdictions, but may not be subject to such a governmental order in other jurisdictions, including because it may be an essential business in some of those jurisdictions.
- **Example:** Employer F is a national retail store chain with operations in every state in the United States. In some jurisdictions, Employer F is subject to a governmental order to close its stores, but it is permitted to provide customers with curbside service to pick up items ordered on line or by phone. In other jurisdictions, Employer F is not subject to any governmental order to close its stores or is considered an essential business permitting its stores to remain open. Employer F establishes a company-wide policy, in compliance with the local governmental orders and consistent with the CDC and DHS recommendations and guidance, requiring the closure all stores and operating with curbside pick-up only, even in those jurisdictions where the business was not subject to a governmental order. As a result of the governmental orders requiring closure of Employer F's stores in certain jurisdictions, Employer F has a partial suspension of operations of its trade or business. The partial suspension results in Employer F being an Eligible Employer nationwide.

Subsequently Lifted Governmental Orders

- Important!
 - Once an employer has an “eligible quarter,” the ENTIRE quarter is eligible, but qualified wages can only be paid during the periods during the calendar quarters in which the trade or business operations were fully or partially suspended.
 - If the order was effective for a portion of the calendar quarter, then the employer is an Eligible Employer for the entire calendar quarter but can only claim a credit for wages paid during the period the order is in force.
 - **Example:** State Y issued a governmental order for all non-essential businesses to close from March 10 through April 30 and the governmental order was not extended. Pursuant to the order, Employer H, which operates a non-essential business in State Y, closes from March 10 through April 30. Employer H is an Eligible Employer in the first quarter (for wages paid from March 13, the effective date of section 2301 of the CARES Act, through March 31) and the second quarter (for wages paid from April 1 through April 30).

Gross Receipts

- "Gross receipts" for purposes of the ERC for an employer other than a tax-exempt organization has the same meaning as when used under Section 448(c) of the Code. Under the Section 448(c) regulations
 - Receipts include total sales (less returns and allowances) and income from services provided (IRC Sec. 448(c))
 - Receipts also include interest, dividends, rents and royalties and sale of assets (reduced by the basis of such assets).
 - Gross receipts are NOT reduced by cost of goods sold.
- The CARES Act does not require that the significant decline in gross receipts be related to COVID-19. However, employers should keep records for the relevant calendar quarters in 2019 and 2020 to document the significant decline in gross receipts. The records should be available for IRS review for at least four years.
- We still don't know how to determine gross receipts for a tax-exempt taxpayer.

Significant Decline In Gross Receipts

- A significant decline in gross receipts is calculated by determining the first calendar quarter in 2020 (if any) in which an employer's gross receipts are less than 50% of its gross receipts for the same calendar quarter in 2019. If the gross receipts drop by more than 50%, you count that quarter as a quarter eligible for the credit.
- Each quarter in 2020 after that counts as a significant decline until the end of the first quarter in which gross receipts are greater than 80% of its gross receipts for the same calendar quarter in 2020.

Significant Decline In Gross Receipts Cont'd

- **Example:** Employer I's gross receipts were \$100,000, \$190,000, and \$230,000 in the first, second, and third calendar quarters of 2020, respectively. Its gross receipts were \$210,000, \$230,000, and \$250,000 in the first, second, and third calendar quarters of 2019, respectively.
- Thus, Employer I's 2020 first, second, and third quarter gross receipts were approximately 48%, 83%, and 92% of its 2019 first, second, and third quarter gross receipts, respectively. Accordingly, Employer I had a significant decline in gross receipts commencing on the first day of the first calendar quarter of 2020 (the calendar quarter in which gross receipts were less than 50% of the same quarter in 2019) and ending on the first day of the third calendar quarter of 2020 (the quarter following the quarter for which the gross receipts were more than 80% of the same quarter in 2019). Thus, Employer I is entitled to a retention credit with respect to the first and second calendar quarters.

Significant Decline In Gross Receipts Cont'd

- What if an employer wasn't in business for all of 2019?
 - If you started in the first quarter of 2019, use the first quarter 2019 receipts, and compare it to Q1 2020. If you started in the second quarter of 2019, use that quarter to compare to BOTH the 1st and 2nd quarters of 2020. If you started in the third quarter of 2019, use that quarter to compare to quarters 1, 2 and 3 of 2020. If you started in the fourth quarter of 2019, use that quarter to compare to all quarters in 2020.
 - For any quarter in 2019, if business started part-way through the quarter, extrapolate the receipts to what they would have been for a full quarter. So if you started midway through Q1 of 2019 and had \$100,000 of receipts, use \$200,000 for Q1 2019.

Qualified Wages

- Qualified Wages
 - Qualified wages are wages (as defined in Section 3121(a)) and compensation (as defined in Section 3231(e)) paid by an Eligible Employer.
 - Qualified wages include the Eligible Employer's qualified health plan expenses that are properly allocable to the wages.
 - The definition of qualified wages depends, in part, on the average number of full-time employees (as defined in Section 4980H) employed by the Eligible Employer during 2019.
- Qualified wages for any employee cannot exceed the amount the employee would have been paid for working the same duration during the 30 days preceding the period
- Qualified wages are capped for each employee at \$10,000 TOTAL, for all quarters.

Qualified Wages

- X Co. has eligible quarter in Q2, Q3 and Q4 of 2020. X Co. has fewer than 100 FTEs, and during those quarter, paid salary to employees in the following sums:

	Q2	Q3	Q4
A	\$8,000	\$7,000	\$10,000
B	\$12,000	\$10,000	\$11,000
C	\$4,000	\$,4,000	\$4,000
D	\$2,000	\$2,000	\$2,000

- In Q2, X Co. has \$24,000 in qualified wages ($\$8,000 + \$10,000 + \$4,000 + \$2,000$). B is topped out and disqualified for the rest of 2020.
- In Q3, X Co. has \$8,000 in qualified wages ($\$2,000 + \$0 + \$4,000 + \$2,000$). A is now topped out and disqualified for the rest of 2020.
- In Q4, X Co. has \$4,000 in qualified wages ($\$0 + \$0 + \$2,000 + \$2,000$).

Qualified Wages Cont'd

- The determination of an employer's full-time equivalent employees is critical in computing the ERC. The key is: is it 1) 100 or fewer, or 2) over 100?
- The term "full-time employee" (FTE) means an employee who, with respect to any calendar month in 2019, had an average of at least 30 hours of service per week or 130 hours of service in the month (130 hours of service in a month is treated as the monthly equivalent of at least 30 hours of service per week), as determined in accordance with section 4980H of the Internal Revenue Code.
- An employer that operated its business for the entire 2019 calendar year determines the number of its full-time employees by taking the sum of the number of full-time employees in each calendar month in 2019 during which it was in business and dividing that number by the number of months.
- An employer that started its business operations during 2020 determines the number of its full-time employees by taking the sum of the number of full-time employees in each full calendar month in 2020 in which the employer operated its business and dividing by that number of months, consistent with the approach discussed above for employers that began business operations during 2019.

Qualified Wages Cont'd

- If the Eligible Employer averaged more than 100 FTEs in 2019, qualified wages are the wages paid to an employee for time that the employee is **not providing services** due to an economic hardship, specifically, 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. In simpler terms, if you have more than 100 FTEs in 2019, you have to be paying people NOT TO WORK during an eligible quarter.
- For employers with more than 100 FTEs, 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 qualifying quarter.
- An eligible employer that averaged more than 100 FTEs in 2019 may not treat as qualified wages amounts paid to employees for paid time off for vacations, holidays, sick days or other days off. These amounts were accrued prior to the eligible quarter.

Qualified Wages Cont'd

- If the Eligible Employer averaged 100 or fewer FTEs in 2019, qualified wages are all wages paid to any employee during any quarter described in Scenario 1 or 2.

Qualified Wages Cont'd

- This is the big difference when determining the ERC:
 - More than 100 FTEs in 2019: you only include wages paid to people NOT TO WORK;
 - Less than or equal to 100 FTEs in 2019, you include wages paid to ALL EMPLOYEES, regardless of whether they are working or not.

Qualified Wages Cont'd

- **Example:** Employer P is a local chain of full service restaurants in State X that averaged more than 100 FTEs in 2019. State X forced P to discontinue sit-down service to customers for Q2 and Q3 of 2020. P continues to pay its kitchen staff to come in a prepare food every day. It also pays its wait staff to stay at home and not work. Even though P had its operations partially suspended, because P has more than 100 FTEs for 2019, only those wages paid to employees NOT TO WORK are eligible for the credit. The amount P pays its kitchen staff to cook are not eligible for the ERC. The wages paid to the wait staff, however, are eligible wages.
- **Example.** In the example above, if P had less than 100 average monthly FTEs in 2019, ALL wages paid during Q2 and Q3 to ALL employees would be eligible for the credit.
- **Example:** If Employer P in the above example averaged more than 100 FTEs in 2019 and was forced to discontinue sit-down service for Q2 and Q3 and cut all employees hours to 20% of normal but still paid them 100% of normal pay, the 20% paid to provide services is NOT eligible for the credit but the 80% P continued to pay them to NOT work is eligible for the credit.

Qualified Wages Cont'd

- For an employer with more than 100 FTEs, a reduction in work hours in excess of a reduction in pay rate will give rise to eligible wages:
- **Example:** Employer T, a manufacturing business, that averaged more than 100 full-time employees in 2019, has several locations that are closed during the second quarter of 2020 due to a governmental order. Employer T continues to pay hourly employees who are not providing services at the closed locations 50% of their normal hourly wage rates. Employer T also reduced headquarters' administrative staff hours by 40%, but continues to pay them at 100% of their normal hourly wage rates.
- For employees who are not providing services due to the closure of their location, but are receiving 50% of their normal hourly wage rates, Employer T may treat the wages paid as qualified wages for purposes of the Employee Retention Credit.
- For the administrative staff whose hours were reduced by 40%, but who are paid for 100% of the normal wage rate, Employer T may treat the 40% of wages paid for time that these employees are not providing services as qualified wages for purposes of the Employee Retention Credit. The 60% of wages that Employer T pays the administrative staff for hours during which the employees are actually providing services is not considered qualified wages for purposes of the Employee Retention Credit.

Other Limits On Qualified Wages

- Family/Sick leave wages: An eligible employer can receive both these credits and the Employee Retention Credits 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 receive tax credits under the FFCRA.
- Rules similar to those of Section 51(i)(1) apply. As a result, you can't count wages paid to: A child, sibling or step-sibling, parent, step-parent, niece or nephew, aunt or uncle or in-law of anyone who owns more than 50% of the stock of a corporation or 50% of the capital or profits interest in a partnership (after applying the attribution rules of Section 267).
- Qualified wages are reduced by any wages for which a work opportunity credit is taken.
- Payments, including severance payments, made to a FORMER EMPLOYEE are not eligible wages.

What Are Qualified Health Plan Expenses?

- **Qualified health plan expenses**

- Qualified health plan expenses are amounts paid or incurred by an Eligible Employer that are properly allocable to employees' qualified wages to provide and maintain a group health plan, but only to the extent that these amounts are excluded from the employees' gross income.
- Qualified health plan expenses generally include 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.
- An eligible employer that averaged more than 100 FTEs in 2019 that pays wages to its employees for hours that the employees are not providing services may treat the portion of the health plan expenses allocated to the time that the employees are being paid, but not providing services, as qualified wages.
- Qualified health plan expenses do not include contributions to HSA's or Archer Medical Saving Accounts.

What Are Qualified Health Plan Expenses?

- **Qualified health plan expenses: OLD**

- If an Eligible Employer lays off or furloughs its employees and continues the employees' health care coverage, but does not pay the employees any wages for the time they are not working, the employer may not treat any portion of the health plan expenses as qualified wages because no portion of the health plan expenses would be allocable to wages paid to the employees.

- **Qualified health plan expenses: NEW**

- Eligible Employers may treat health plan expenses allocable to the applicable periods as qualified wages even if the employees are not working and the Eligible Employer does not pay the employees any wages for the time they are not working.

What Are Qualified Health Plan Expenses?

- **Example:** Employer Y averaged 100 or fewer employees in 2019. Employer Y is subject to a governmental order that partially suspends the operation of its trade or business. In response to the governmental order, Employer Y reduces all employees' hours by 50%. It pays wages to the employees only for the time the employees are providing services, but Employer Y continues to provide the employees with full health care coverage. Employer Y's health plan expenses allocable to wages paid during the period its operations were partially suspended may be treated as qualified wages for purposes of the Employee Retention Credit.
- **Example:** Employer Z averaged 100 or fewer employees in 2019. Employer Z is subject to a governmental order that suspends the operation of its trade or business. In response to the governmental order, Employer Z lays off or furloughs all of its employees. It does not pay wages to its employees for the time they are laid off or furloughed and not working, but it continues the employees' health care coverage. Employer Z's health plan expenses allocable to the period its operations were partially suspended may be treated as qualified wages for purposes of the Employee Retention Credit.

What Are Qualified Health Plan Expenses?

- An Eligible Employer that averaged more than 100 full-time employees in 2019 may treat its health plan expenses paid or incurred, after March 12, 2020, and before January 1, 2021, allocable to the time that the employees are not providing services during any period in a calendar quarter in which the employer's business operations are fully or partially suspended due to a governmental order or a calendar quarter in which the employer experiences a significant decline in gross receipts as qualified wages, subject to the maximum of \$10,000 per employee for all calendar quarters for all qualified wages.
- However, an Eligible Employer may not treat health plan expenses allocable to the time for which the employees are receiving wages for providing services as qualified wages; only the portion of health plan expenses allocable to the time that the employees are not providing services are treated as qualified wages.

What Are Qualified Health Plan Expenses?

- **Example:** Employer A averaged more than 100 full-time employees in 2019. Employer A is subject to a governmental order that partially suspends the operation of its trade or business. In response to the governmental order, Employer A reduces all employees' hours by 50% and pays wages to its employees only for the time that the employees are providing services, but Employer A continues to provide the employees with full health care coverage. Employer A's health plan expenses allocable to the time that employees are not providing services may be treated as qualified wages. However, Employer A may not treat health plan expenses allocable to the time for which the employees are receiving wages for providing services as qualified wages.
- **Example:** Employer B averaged more than 100 full-time employees in 2019. Employer B is subject to a governmental order that partially suspends the operations of its trade or business. In response to the governmental order, Employer B reduces its employees' hours by 50%, but it reduces its employees' wages by only 40%, so that the employees receive 60% of their wages for 50% of their normal hours. Employer B continues to cover 100% of the employees' health plan expenses. In this case, Employer X may treat as qualified wages: (i) the 10% of the wages that it pays employees for time the employees are not providing services, plus (ii) 50% of the health plan expenses, because the health plan expenses are allocable to the time that employees were not providing services.

What Are Qualified Health Plan Expenses?

- **Example:** Employer C is subject to a governmental order that fully suspends the operations of its trade or business. Employer C lays off or furloughs its employees and does not pay wages to the employees, but does continue to cover 100% of the employees' health plan expenses. In this case, Employer C may treat as qualified wages the health plan expenses that are allocable to the time that the employees are not providing services.

What Are Qualified Health Plan Expenses?

- An Eligible Employer who sponsors a fully-insured group health plan may use any reasonable method to determine and allocate the plan expenses, including (1) the COBRA applicable premium for the employee typically available from the insurer, (2) one average premium rate for all employees, or (3) a substantially similar method that takes into account the average premium rate determined separately for employees with self-only and other than self-only coverage.
- If an Eligible Employer chooses to use one average premium rate for all employees, the allocable amount for each day an employee covered by the insured group health plan is entitled to qualified wages could be determined using the following steps:
 - The Eligible Employer's overall annual premium for the employees covered by the policy is divided by the number of employees covered by the policy to determine the average annual premium per employee.
 - The average annual premium per employee is divided by the average number of work days during the year by all covered employees (treating days of paid leave as a work day and a work day as including any day on which work is performed) to determine the average daily premium per employee. Calculations for part-time and seasonal employees who participate in the plan should be adjusted as appropriate. Eligible Employers may use any reasonable method for calculating part-time employee work days.
 - The resulting premium should be adjusted to reflect any portion that employees contribute after-tax.
 - The resulting amount is the amount allocated to each day of qualified wages.

What Are Qualified Health Plan Expenses?

- **Example:** Employer D sponsors an insured group health plan that covers 400 employees, some with self-only coverage and some with family coverage. Each employee is expected to have 260 work days a year. (Five days a week for 52 weeks.) The employees contribute a portion of their premium by pre-tax salary reduction, with different amounts for self-only and family. The total annual premium for the 400 employees is \$5.2 million. (This includes both the amount paid by the Eligible Employer and the amounts paid by employees through salary reduction.)
- For an Eligible Employer using one average premium rate for all employees, the average annual premium rate is \$5.2 million divided by 400, or \$13,000. For each employee expected to have 260 work days a year, this results in a daily average premium rate equal to \$13,000 divided by 260, or \$50. That \$50 is the amount of qualified health plan expenses allocated to each day of qualified wages per employee.

What Are Qualified Health Plan Expenses?

- An Eligible Employer who sponsors a self-insured group health plan may use any reasonable method to determine and allocate the health plan expenses, including (1) the COBRA applicable premium for the employee typically available from the administrator, or (2) any reasonable actuarial method to determine the estimated annual expenses of the plan.
- The amount of qualified health plan expenses does not include Eligible Employer contributions to HSAs or Archer MSAs.
- Wages for which an Eligible Employer may claim the Employee Retention Credit do not include the qualified sick leave and qualified family leave wages for which it claims credit under the FFCRA. This exclusion also applies to the qualified health plan expenses that are allocable to these qualified leave wages.

Third Party Payroll Providers

- If a common law employer is otherwise eligible to receive the ERC, it is entitled to the credit, regardless of whether it uses a third party payer (such as a reporting agent, payroll service provider, PEO, CPEO, or agent) to report and pay its federal employment taxes.
- The third party payer is not entitled to the ERC with respect to the wages it remits on the employer's behalf (regardless of whether the third party is considered an "employer" for other purposes of the Code. If an Eligible Employer uses a reporting agent to file the Form 941, Employer's Quarterly Federal Tax Return, the reporting agent will need to reflect the Employee Retention Credit on the Form 941 it files on the employer's behalf.
- If an Eligible Employer uses a CPEO or a 3504 agent to report its federal employment taxes on an aggregate Form 941, the CPEO or 3504 agent will report the Employee Retention Credit on its aggregate Form 941 and Schedule R, Allocation Schedule for Aggregate Form 941 Filers, that it already files. An Eligible Employer can submit its own [Form 7200, Advance Payment of Employer Credits Due to COVID-19](#), to claim the advance credit. The Eligible Employer will need to provide a copy of the Form 7200 to the CPEO or 3504 agent so the CPEO or 3504 agent can properly report the Employee Retention Credit on the Form 941.

Third Party Payroll Providers

- If an Eligible Employer uses a non-certified PEO to report and pay its federal employment taxes, the PEO will need to report the ERC on an aggregate Form 941 and separately report the ERC allocable to the employers for which it is filing the aggregate Form 941 on an accompanying schedule R. The PEO does not have to complete Schedule R with respect to employers for which it is not claiming an ERC.
- The Eligible Employer will need to provide a copy of any Form 7200 that it submitted for an advance to the PEO so the PEO can properly report the Employee Retention Credit on the Form 941. These rules are similar to the rules that apply with respect to the payroll tax election available under Section 41(h) of the Code for the credit for certain research and development expenses.

Third Party Payroll Providers

- A payroll reporting agent (RA) may sign Form 7200, Advance Payment of Employer Credits Due to COVID-19, for a client for which it has the authority, via Form 8655, Reporting Agent Authorization, to sign and file the employment tax return (e.g., Form 941, Employer's Quarterly Federal Tax Return).
- The signatory must be the Principal or Responsible Official listed on the RA's e-file application. The signatory may sign with ink on paper or may use the alternative signature method (rubber stamp, mechanical device, or computer software program; for details and required documentation, see Rev. Proc. 2005-39, 2005-28 I.R.B. 82). The RA will submit the form via fax to 855-248-0552.
- The RA must obtain written authorization from the client (paper, fax, or e-mail) to perform these actions regarding the Form 7200. The RA need not submit that authorization to the IRS, but should retain it in its files so that the RA can furnish it to the IRS upon request. For a client for which the RA does not have a Reporting Agent Authorization, the RA may complete and print the form, or it may provide the client a means to complete and print the form, but the client will have to sign it.

Third Party Payroll Providers

- If a third party payer (CPEO, PEO, or 3504 agent) is claiming the ERC on behalf of the client employer, it must collect from the client any information necessary to accurately claim the ERC on its client's behalf. This includes obtaining information with respect to the client's claims for credits under Section 45S and under the FFCRA, as well as whether the client has received a Paycheck Protection Program (PPP) loan authorized under the CARES Act.
- If a third party payer is claiming the ERC on behalf of the client employer, the third party payer may rely on the client employer's information regarding the client employer's eligibility to claim the Employee Retention Credit, and the client employer may maintain all records which substantiate the client's eligibility for the Employee Retention Credit.
- However, upon request by the IRS, the third party payer must obtain from the client employer and provide to the IRS records that substantiate the client's eligibility for the ERC. The client employer and the third party payer will be liable for employment taxes that are due in connection with any ERC that are improperly claimed in accordance with their liability for the employment taxes reported on the employment tax return.

Third Party Payroll Providers

- If a third party payer is claiming the ERC on behalf of the client employer, it must, at the IRS's request, be able to obtain from the client and provide to the IRS records that substantiate client's eligibility for the ERC.

Timing of Credits

- Eligible Employer may claim the Employee Retention Credit for qualified wages paid 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.
- The credit is allowed against the employer's share of Social Security taxes under Section 3111(a) of the Code. Or is it?
- Employers are required to withhold federal income tax and both the employer's and employee's shares of social security and Medicare taxes on the qualified wages.

What Does It Mean To Be Fully Refundable?

- “Fully Refundable”
 - The credit is 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.
 - That is, if for any calendar quarter the amount of the credit the Eligible Employer is entitled to exceeds the employer's share of the Social Security tax on all wages (or on all compensation for employers subject to RRTA) paid to all employees, then the excess is treated as an overpayment and refunded to the employer under Sections 6402(a) and 6413(a).
 - 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) prior to being refunded to the employer.

Claiming the Credit

- Claiming the credit
 - Under normal procedures, you would remit the federal income tax withholding and employer and employee share of payroll taxes as part of your ongoing payroll deposits before then truing up at the end of the quarter upon filing a Form 941, Employer's Quarterly Federal Tax Return.
 - In order to have the cash in hand now, REDUCE your deposits by the amount of the anticipated payroll tax credits.
 - Deposits that can be reduced include:
 - Federal income tax withholding
 - Employer's share of Social Security and Medicare
 - Employee's share of Social Security and Medicare
- Credit is fully refundable
 - If credit exceeds payroll tax liability, file Form 7200 to claim the excess as a refund.

Claiming the Credit

- **Example.** X Co. had an eligible quarter in Q2 of 2020. X Co had fewer than 100 FTEs in 2019. During the first pay period of Q2, X Co. paid \$100,000 of qualified wages. As part of its normal payroll tax deposits for the pay period, X Co. had the following obligations:
 - Federal income tax withholding: \$25,000
 - X Co share of Social Security tax: \$6,200
 - X Co share of Medicare tax: \$1,450
 - Employees' share of Social Security tax: \$6,200
 - Employees' share of Medicare tax: \$1,450
 - Total deposits: \$40,300.
- X Co anticipates an ERC of \$50,000 for this pay period ($\$100,000 \times 50\%$). As a result, X Co. is not required to remit ANY of its \$40,300 in required deposits.
- Instead, X Co. remits nothing, and can file a Form 7200 to claim a \$9,700 refund.

Advance Payment of Employer Credits Due to COVID-19

OMB No. 1545-0029

▶ Go to www.irs.gov/Form7200 for instructions and the latest information.

Name (not your trade name)		Employer identification number (EIN)
Trade name (if any)		Applicable calendar quarter (check one) (2) <input type="checkbox"/> April, May, June (3) <input type="checkbox"/> July, August, September (4) <input type="checkbox"/> October, November, December
Number, street, and apt. or suite no. If a P.O. box, see instructions.		
City or town, state, and ZIP code. If a foreign address, also complete spaces below. (See instructions.)		
Foreign country name	Foreign province/county	Foreign postal code
Does a third-party payer file your employment tax return? (See instructions.) If "Yes," enter its name.		Third-party payer's EIN (if applicable)

Tip: File Form 7200 if you can't reduce your employment tax deposits to fully account for these credits that you expect to claim on your employment tax return for the applicable quarter. Don't reduce your employment tax deposits and request advanced credits for the same expected credits. You will need to reconcile your advanced credits and reduced deposits on your employment tax return. You can't request an advance payment of the credit for sick and family leave for self-employed individuals.

Part I Tell Us About Your Employment Tax Return

- A** Check the box to indicate which employment tax return form you file (or will file for 2020):
 (1) 941, 941-PR, or 941-SS (2) 943 or 943-PR (3) 944 or 944(SP) (4) CT-1
- B** Is this a new business started on or after January 1, 2020? ▶ Yes No
 If "Yes," skip line C unless you've already filed Form 941, Form 941-PR, or Form 941-SS for at least one quarter of 2020.
- C** Amount reported on line 2 of your most recently filed Form 941 (or wages reported on Schedule R (Form 941), column (c), by your third-party payer (see instructions)). If you file a different employment tax return, see instructions ▶
- D** Enter the total number of employees you have. See instructions ▶

Part II Enter Your Credits and Advance Requested

1 Total employee retention credit for the quarter. See instructions	1	
2 Total qualified sick leave wages eligible for the credit and paid this quarter. See instructions	2	
3 Total qualified family leave wages eligible for the credit and paid this quarter. See instructions	3	
4 Add lines 1, 2, and 3	4	
5 Total amount by which you have already reduced your federal employment tax deposits for these credits for this quarter	5	
6 Total advanced credits requested on previous filings of this form for this quarter	6	
7 Add lines 5 and 6	7	
8 Advance requested. Subtract line 7 from line 4. If zero or less, don't file this form	8	

Claiming The Credit Cont'd

- The Q1 Form 941 for qualified wages paid March 12 – March 31 has already been filed. Should you amend?
 - The IRS asks these wages be reported on the Q2 Form 941 and claim the related credit with the Q2 qualified wages.
- Late Determination of Eligibility
 - The employer may claim the Employee Retention Credit on qualified wages paid in 2020 if it determines that a significant decline in gross receipts occurred in 2020 even if it does not make the determination until after January 1, 2021. In this case, the employer may claim the credit by filing the appropriate form to report adjustments to its employment taxes, typically Form 941-X, Adjusted Employer's Quarterly Federal Tax Return or Claim for Refund.

Claiming The Credit Cont'd

- If an Eligible Employer elected not to claim the ERC in one calendar quarter, the Eligible Employer is not prohibited from claiming the credit in a subsequent calendar quarter for qualified wages paid in that subsequent quarter provided it meets the requirements to claim the credit. In addition, an Eligible Employer can file a claim for refund and make an interest-free adjustment for a prior quarter to claim the Employee Retention Credit to which it was entitled in a prior quarter, following the rules and procedures for making such claims or adjustments. See the instructions to Form 941-X, Adjusted Employer's Quarterly Federal Tax Return or Claim for Refund. However, qualified wages paid during the first quarter of 2020 should be reported on the employer's second quarter Form 941, Employer's Quarterly Tax Return. Therefore, an employer should not file a Form 941-X to make an adjustment for qualified wages paid during the first quarter of 2020.
- **Example:** Employer H paid qualified wages during the second quarter of 2020 but did not claim an Employee Retention Credit on its second quarter 2020 Form 941, Employer's Quarterly Tax Return. If Employer H subsequently decides to claim the credit for the second quarter of 2020, Employer H should file a Form 941-X within the appropriate timeframe to make an adjustment. Employer H should not use its third quarter 2020 Form 941 to claim an Employee Retention Credit for qualified wages paid in the second quarter of 2020.

Income Tax Considerations

- Income Tax Impact
 - The Employee Retention Credit is not included in gross income.
 - Rules similar to Section 280C(a) apply, however. This means no deduction is allowed for wages equal to the amount of credit claimed. Thus, 50% of all qualified wages up to \$10,000 per employee will not be allowed as a deduction.
 - The amount of the credit must be included in the employer's taxable income. Therefore the net benefit of the credit is reduced by the entity's marginal tax rate.

Aggregated Groups

- An Eligible Employer, for purposes of the Employee Retention Credit, includes all members of an aggregated group that are treated as a single employer under Sections 52 or 414.
- As a result, these employers must be aggregated for purposes of the following rules applicable to the Employee Retention Credit:
 - Determining whether the employer has a trade or business operation that was fully or partially suspended due to orders related to COVID-19 from an appropriate governmental authority.
 - Determining whether the employer has a significant decline in gross receipts.
 - Determining whether the employer has more than 100 full-time employees
 - The application of the rules that preclude an employer from claiming the Employee Retention Credit if any member of the aggregated group received a PPP loan
- The amount of the Employee Retention Credit must be apportioned among members of the aggregated group on the basis of each member's proportionate share of the qualified wages giving rise to the credit.

Payroll Tax Deferral

Payroll Tax Deferral

- The CARES Act allows for employers to defer certain payroll taxes
- Employer share of social security tax (6.2%) can be deferred
 - Taxes eligible for deferral are those incurred from March 27, 2020 – December 31, 2020
 - Deferral period is two years
 - 50% due by December 31, 2021
 - 50% due by December 31, 2022

Eligibility

- Which employers are eligible?
 - All employers, including governmental entities who pay FICA.
 - Employers who receive forgiveness of Paycheck Protection Program (PPP) Loans are NOT eligible.
 - Employers may defer until such time as a decision on PPP forgiveness is provided by the lender
- Deferral of employer's share of Social Security is allowed BEFORE determining:
 - Paid leave credits under Families First Act
 - Employer Retention Credit under CARES Act

Quarterly Filing & Deposit Requirements

- Form 941 Employer's Quarterly Federal Tax Return will be revised beginning for Q2 2020 to reflect deferred deposits
 - Deposits for employee federal withholding, employee social security and employee/employer Medicare should still be made timely.
- As long as the taxes eligible for deferral are timely deposited by the deferred dates, taxes will be treated as timely deposited and therefore not subject to failure to deposit penalties
- When employer uses agents and Professional Employer Organizations (PEO) for payroll tax deposits, the employer retains the liability if taxes are not paid timely by the applicable deferral period.

Putting It All Together

Claiming The Credit

- **Example:** Employer F is an Eligible Employer. In its first payroll period of the second quarter of 2020, Employer F pays a total of \$17,000 in wages. Included in those wages are \$3,500 in qualified sick and family leave wages under the FFCRA and \$10,000 of qualified wages for the ERC. Employer F has a federal employment tax deposit obligation of \$9,000 for the first payroll period of the second quarter of 2020 (of which \$1,500 relates to the employer's share of social security tax) prior to (a) any deferral of the deposit of the employer's share of social security tax under section 2302 of the CARES Act and (b) any amount of federal employment taxes not deposited in anticipation of credits for qualified sick and family leave wages under the FFCRA.
- Employer F reasonably anticipates a \$5,000 Employee Retention Credit (50 percent of qualified wages) and a \$3,500 credit for paid sick and family leave (100 percent of qualified sick and family leave wages) thus far for the second quarter.

Claiming The Credit

- Employer F first defers deposit of the \$1,500 employer's share of social security tax under section 2302 of the CARES Act. This preliminarily results in a remaining federal employment tax deposit obligation of \$7,500 (\$9,000 - \$1,500).
- Employer F then reduces this federal employment tax deposit obligation by the \$3,500 anticipated credit for qualified sick and family leave wages, leaving a federal employment tax deposit obligation of \$4,000.
- Finally, Employer F further reduces the deposit of all remaining federal employment taxes by \$4,000 for the \$5,000 anticipated Employee Retention Credit for qualified wages. Employer F will not incur a failure to deposit penalty under Section 6656 of the Code for reducing its federal employment tax deposit for the first payroll period of the second quarter to \$0.

Claiming The Credit

- The amount of the excess \$1,000 in Employee Retention Credit available is refundable as an overpayment. Employer F may file a Form 7200 to request a credit or refund of this amount in advance of the close of the quarter (but not for any amount of the Employee Retention Credit that was already used to reduce the deposit obligation). If Employer F does not request an advance, it may request that the \$1,000 overpayment be credited or refunded when it files its second quarter Form 941, Employer's Quarterly Federal Tax Return.
- Employer F may defer payment of the \$1,500 employer's share of social security tax (along with any other employer social security tax imposed under section 3111(a) for the quarter) on its Form 941 for the second quarter of 2020. Employer F will not be required to pay any portion of the deferred amount until December 31, 2021, at which time 50 percent is due (\$750), with the remaining amount (\$750) due December 31, 2022. If Employer F fails to pay the required amounts at those times, Employer F's deferred deposits will lose their deferred status and may be subject to failure to deposit penalties from their original due dates. Employer F may also be subject to failure to pay penalties accruing from the deferred due date for payment.

Paycheck Protection Program (PPP) Loan Update