



KPMG TaxWatch

Employer Liquidity: Payroll Tax Deferrals & Employee Retention Credits

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Agenda



Legislative overview



Payroll tax deferral



Employee retention credit



Q&A



Legislative overview



CARES Act provisions

Payroll Tax Deferral

- 2020 payroll (employer social security) tax deferral
 - Half due December 31, 2021
 - Half due December 31, 2022

Employee Retention Credit

- Refundable employment tax credit, up to \$5,000 per impacted employee
 - \$5,000 = 50% of up to \$10,000 in qualified wages

The Coronavirus Aid, Relief, and Economic Security (CARES) Act was signed into law on March 27, 2020.





Payroll tax deferral



Payroll tax deferral



— Immediate impact on cash flow

Payment of applicable employment taxes for the payroll tax deferral period are deferred (effectively an interest-free loan from the government)

- Half due December 31, 2021
- Half due December 31, 2022

Payroll tax deferral period

- The period beginning on March 27, 2020 and ending on December 31, 2020

Applicable employment taxes are generally the employer share of social security taxes

- Also includes corresponding taxes imposed under the Railroad Retirement Act and on employee representatives, where applicable
- Applicable with respect to 50% SECA social security taxes (estimated taxes will not apply)

Payroll tax deferral – other considerations

Deferring payment of 2020 payroll taxes also defers deductibility

- The economic performance rules of section 461(h) generally do not permit taxpayers to deduct payroll taxes until actual payment

Reporting considerations

- Form 941 will be revised for the second calendar quarter of 2020 and additional guidance will be provided

Tip Credit

- Employers must pay social security taxes and Medicare taxes on certain tips received by their employees in connection with providing, delivering or serving food and beverages
- Employers are eligible for an income tax credit for a portion of the taxes remitted
- The credit is generally only available if such taxes are actually paid
- Employers who defer payroll taxes may have to defer eligibility for the tip credit

Note: Payroll deferral no longer available if and when SBA Paycheck Protection Program loan forgiven under sections 1106 and 1102 of the CARES Act





Employee retention credit



Employee retention credit

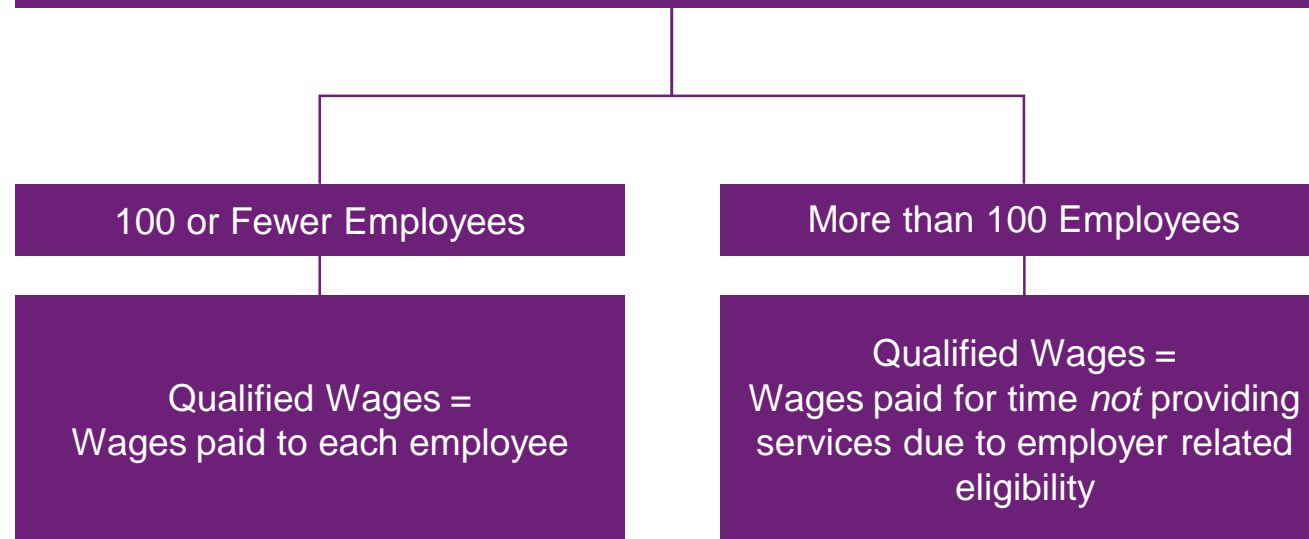
— Potential \$5,000 credit per employee

Eligible employers receive 50% credit for qualified wages up to \$10,000 per employee (\$5,000 maximum credit per employee)

- Wages paid March 13, 2020 through and including December 31, 2020 (including allocable health expenses)
- Credit against payroll taxes (including income tax withholding) with excess refunded
 - Controlled group under IRC sections 52 and 414, applying ACA definition of employee
 - Precludes double benefits under work-opportunity tax and leave credits
- Look to each organization for certain IRC section 501(c)(3) tax-exempts

Eligible Employer

- Fully or partially suspends operation during any calendar quarter in 2020 due to orders from an appropriate government authority limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to COVID-19, *or*
- Over 50% reduction in quarterly receipts measured year over year



Note: Employer ineligible if receiving SBA Paycheck Protection Program loan

Coordination with other tax credits

Employee retention credit is coordinated with other tax credits, including:

Work Opportunity Tax Credit (WOTC)

- The CARES Act states that an employee cannot be included in determining employee retention credit if the employer is allowed a WOTC with respect to that employee in the same period
- There is no requirement that eligible WOTC wages are the first wages paid to that employee – only that they be first-year wages
- Depending on the individual facts and circumstances, the ERC may be available in one “period,” and the WOTC may be available in a different “period”

Research and Development Credit

- Qualified small businesses (QSB) are eligible to claim the research credit against payroll taxes
- The credit is not otherwise refundable against payroll taxes
- The research credit can be used to reduce payroll taxes first and then the refundable ERC can be claimed
- There is no prohibition against claiming both credits in the same period
- If the QSB research credit is more than the applicable payroll taxes, the excess can be carried forward to the next calendar quarter

Families First Coronavirus Response Act (FFCRA) Credits

- Paid Sick Leave
- FMLA Plus

(details on following slides)

FFCRA: Paid leave provisions

Applies to:

- Private employer with fewer than 500 employees,
- Public agency
- (For EPSL only) any other entity that is not private

Note: Count number of employees on date of leave

Where required to provide the benefit, there's an offsetting credit.

DOL guidance exempted certain employers

Note that an employer may receive an advanced credit prior to the expense

Emergency Paid Sick Leave (EPSL)

- Employees eligible day one
- Up to 80 hours (basically, first 10 days)
- Six triggers
- Full or 2/3rd pay depending on trigger
 - Full pay capped at \$511 daily and \$5,110 in aggregate, or
 - 2/3rd pay capped at \$200 and \$2,000 in aggregate



Emergency Paid FMLA (FMLA +)

- Employees eligible with 30 calendar days on payroll
- Up to 12 weeks
 - First two weeks may be unpaid
- One trigger
- 2/3rd pay capped at \$200 and \$10,000 in aggregate

FFCRA: Paid leave provisions – Triggers

The following reasons trigger paid leave provisions to apply to employers with fewer than 500 employees:

EPSL = Employee unable to work (or telework) because:

Employee subject to quarantine or isolation order related to COVID-19

Employee advised by healthcare provider to self-quarantine because of COVID-19

Employee experiencing symptoms of COVID-19 and seeking a diagnosis

The employee is caring for an individual subject to or advised to quarantine or isolate

The employee is caring for a son or daughter whose school or place of care is closed or unavailable due to COVID-19 precautions

The employee is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury

FMLA+ = Employee unable to work (or telework) because:

Employee is unavailable to work or telework to care for a minor child if the child's school or place of child care has been closed or is unavailable due to a public health emergency

Blue triggers = Full pay trigger capped at \$511 and 10 days (\$5,110)

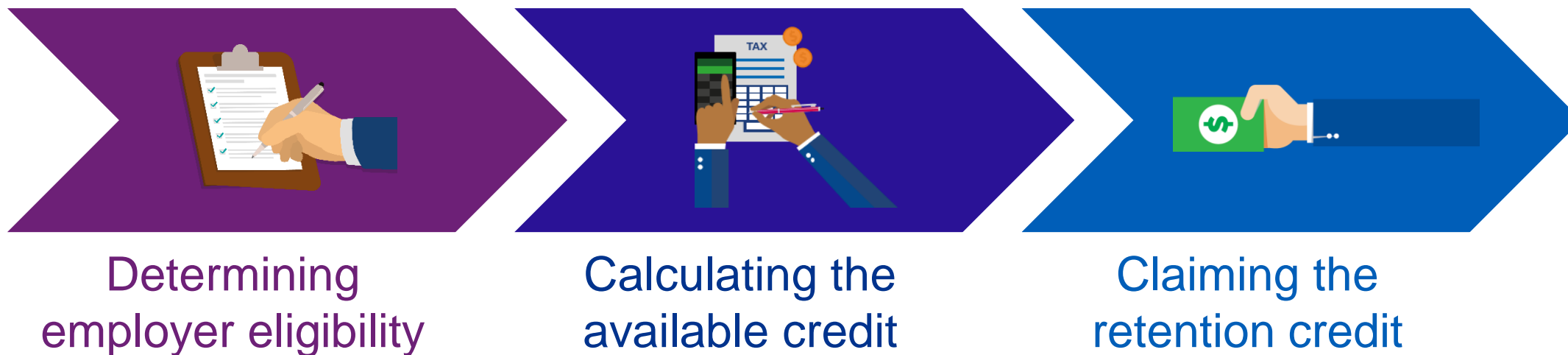
Other triggers = 2/3rd pay capped at \$200 per day for the paid benefit period

Other rules for consideration



- **SBA PPP Loans** – No credit is available under the provision to any employer that receives a small business interruption loan
- **Family** – Rules similar to sections 51(i)(1) apply such that an employee retention credit may not be generated by an individual employer hiring his or her children
- **Deductions** – 280C(a) apply such that the credit is taken into account for purposes of determining any amount allowable as a payroll tax deduction or deduction for qualified wages (or any amount capitalizable to basis)
 - For example, assume an employer pays \$2,500 of qualified wages for the quarter and claims an employee retention credit of \$1,250 for qualified wages paid during the quarter. The employer's resulting OASDI tax liability (under section 3111(a)) for the quarter is \$155. Under the provision, the employer reduces its payroll tax expense by \$155 and may deduct only \$1,405 of qualified wages (assuming such wages are not subject to capitalization)
- **Elect** – An eligible employer can also elect not to have the credit apply

Employee retention credit – The process



Employer eligibility



Step 1: Evaluate qualification as an “eligible employer”

- Employers may be eligible for the employee retention credit if:
 - Fully or partially suspends operation during any calendar quarter in 2020 due to orders from an appropriate government authority limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to COVID-19, or
 - Over 50% reduction in quarterly receipts measured year over year
- IRC section 501(c) tax-exempts to consider all operations without regard to “trade or business” requirement
- Controlled group under IRC sections 52(a) or (b) and 414(m) or (o)

Note: Employer ineligible if receiving SBA Paycheck Protection Program loan

Employer eligibility



Partial suspension of operations

- IRS FAQs address whether a partial suspension of a trade or business exists, including in situations where:
 - A governmental order causes the suppliers to an essential business to suspend their operations
 - A governmental order causes the customers of an essential business to stay at home
 - A governmental order requires an employer to close its workplace, but the employer is able to continue operations comparable to its operations prior to the closure by requiring employees to telework
 - A governmental order requires an employer to close its workplace for certain purposes, but the workplace may remain operational for limited purposes
 - An employer that operates a trade or business in multiple locations and is subject to a governmental order requiring full or partial suspension of its operations in some jurisdictions, but not in others
- The operations of a trade or business of one member of an aggregated group are suspended by a governmental order
- Joint Committee on Taxation also provided examples in their description of tax provisions of the CARES Act (which preceded the updated IRS FAQs), including:
 - Restaurants in a state under statewide order that restaurants offer only take-out service
 - Concert venues in a state under statewide order limiting gatherings to no more than 10 people
 - Accounting firm in a county where accounting firms are among businesses subject to directive from public health authorities to cease all activities other than minimum basic operations and that closes its offices and does not require employees who cannot work from home (e.g., custodial and mail room employees) to work

Employer eligibility



Applying Controlled Group Rules

- Under Sections 52(a), 52(b), 414(m), or 414(o), entities are aggregated for purposes of determining eligibility, gross receipts, etc.
 - Section 52(a) – Relates to controlled groups that consist of corporations and ties to Code section 1563(a)
 - Section 52(b) – Relates to all other controlled groups and refers to the applicable regulations
 - Section 414(m) – An affiliated service group has 2 or more entities, one is a First Service Organization, which receives services from or shares them with:
 - A-Organization (A-Org) – IRC Section 414(m)(2)(A));
 - B-Organization (B-Org) - IRC Section 414(m)(2)(B)); or
 - Management Group
 - Section 414(o) – Provides for rules to prevent the avoidance of section 414(m) through the use of separate organizations, employee leasing, or other arrangements

Employer eligibility



Applying Controlled Group Rules

— Considerations for noncorporate entities such as portfolio companies:

- Consistency for purposes of Section 51 Work Opportunity Tax Credits
- Section 52(b) related regulations regarding one controlled group
- Consistency with qualified plans (aside from percentage of ownership, Section 52 general language similar to Section 414)

Calculating the credit



Step 2: Estimate the amount of any employee retention credit for the quarter

- Identify the amount of qualified wages
 - How the amount of qualified wages is determined depends on the average number of full-time employees during 2019 (applying ACA definitions)
 - 100 or fewer employees:
 - Qualified wages = wages paid to each employee
 - Greater than 100 employees:
 - Qualified wages = wages paid for time not providing services due to employer related eligibility
 - Qualified wages includes certain health plan expenses, IF the employee is also being paid wages (e.g. furlough and layoffs would render the health plan expenses as nonqualified)
- Precludes double benefits under work-opportunity and family leave tax credits

Assessing the benefit / Available documentation

- 1** Evaluate qualification as an “eligible employer”
- 2** Review sample communications to employees
- 3** Conduct high-level analysis of reductions to employment services by function, segment, or other means
- 4** Estimate credit by quarter
- 5** Determine Evaluation and Documentation approach
- 6** Consider procedural aspects of claiming the credit
- 7** Coordinate efforts with CARES Act loan programs and other employment tax credits

Evaluation and documentation

- 1 Data gathering and fact verification
- 2 Document "eligible employer" in technical questionnaire
- 3 Determine nexus of employees to impacted time/activities using least disruptive approach
- 4 Perform calculations and claim the credit
- 5 Technical & factual memoranda
- 6 Gather and analyze contemporaneous documentation
- 7 Prepare in an audit-ready format

Claiming the credit



Step 3: Claiming the employee retention credit

- Credit against employer portion of social security taxes
 - Offset against other payroll taxes (including income tax withholding) with excess refunded
- Forms 941 and 7200
 - Credit is claimed on Form 941, beginning with second calendar quarter
 - Request an advance payment using Form 7200

Claiming the credit



Interaction with payroll deferral

- Step 1: Determine total payroll tax deposit for the payroll period (disregarding deferrals and credits for the moment).
- Step 2: Calculate the deposit attributable to the employer share of Social Security taxes and reduce the required deposit by that amount, understanding that 50% of this amount must be deposited by December 31, 2021, and the remaining 50% must be deposited by December 31, 2022.
- Step 3: Determine the amount of the retention credit and reduce the remaining payroll tax deposit by that amount. If there are excess payroll taxes, timely deposit those taxes based on your usual deposit schedule.
- Step 4: If after applying employee retention credit (as well as other credits) the payroll deposit liability is reduced to zero, then decide whether to:
 - Fax Form 7200 to the IRS to get an advance payment of the amount you could not retain by reducing your deposit;
 - Roll the remaining credit forward to reduce your next payroll tax deposit; or
 - Wait for the refund of the payroll taxes through the reconciliation procedure of the Form 941.

Presenters' contact information

If you submitted a question, someone from KPMG may contact you via phone or email. Or, you may contact one of today's presenters directly:

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