

CARES Act: Employee Retention Credit and Deferral of Payroll Taxes

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INTRODUCTION

In addition to the expansion of SBA Section 7(a) loans available to subsidize payroll expenses, as provided in Section 1102, the CARES Act contains provisions (a) that allow eligible employers carrying on a trade or business to receive a refundable tax credit against Social Security taxes imposed under section 3111(a) of the Internal Revenue Code (the “Code”) or Railroad Retirement Tax Act taxes imposed under section 3221(a) of the Code, and (b) permit employers to defer payment of certain payroll taxes for up to two years. Set forth below is a summary of those provisions.

EMPLOYEE RETENTION CREDIT FOR EMPLOYERS

Section 2301 of the CARES Act grants employers a credit against Social Security taxes for the expenses of retained employees. In general, (i) employers whose operations were fully or partially suspended due to a COVID-19 government-mandated shut-down order, or (ii) employers whose gross receipts have declined by greater than 50 percent when compared to the corresponding calendar quarter of the prior year, are eligible for a credit against payroll taxes.

- **Relevant time period:** The refundable credit is applicable for all wages paid between March 12, 2020, and before January 1, 2021. Eligibility for the credit begins with the first 2020 calendar quarter in which the employer’s gross receipts declined by greater than 50 percent of the corresponding calendar quarter of the prior year, and ends with the calendar quarter following the calendar quarter in which the gross receipts exceed 80 percent of the corresponding calendar quarter of the prior year. This last qualification will have no practical effect on any company that qualifies for the credit.
- **Wages taken into account:** The credit is computed on a calendar-quarter basis and equals 50 percent of qualified wages up to \$10,000 paid to each employee or \$5,000 in actual credit. For purposes of computing the credit, qualified wages paid to an employee during the relevant period may not exceed an amount that would have been paid to such an employee within the preceding 30 days. Qualified wages also include expenses related to an employee’s health plan which would be allocable to the employee as qualified wages under an employer-sponsored health plan.
- **Eligible Employers:**
 - The credit can be claimed if (i) the employer’s business is fully or partially suspended due to an order of an appropriate governmental authority, or (ii) the employer’s gross receipts are less than five percent for the same calendar quarter in the prior year.

- Greater than 100 employees - The credit can be claimed by an employer with an average of more than 100 employees for all employees who are retained by the employer, but not currently working, as a result of COVID-19.
- 100 or fewer employees - The credit can be claimed by an employer of 100 or fewer employees for all wages paid, so long as the employer meets other requirements related to suspension of business or reduction in gross receipts.
- In the case of non-profit organizations described in Code §501(c) and exempt from taxes pursuant to §501(a), the credit applies irrespective of number of employees.
- **Interplay with other parts of the CARES Act or FFCRA:**
 - An otherwise eligible employer that receives a covered loan under the expanded SBA §7(a) loan program (Paycheck Protection Program), as provided in §1102 of the CARES Act, is not be eligible for the credit provided under §2301.
 - The credit provided under §2301 is reduced by any credit taken under §7001 and §7003 of the Families First Coronavirus Response Act (FFCRA) in connection with the provision of sick leave or family and medical leave.
- **Opt-out and exceptions:**
 - An eligible employer may elect not to take the credit for any calendar quarter.
 - This credit is not available to Federal or State governmental employers.

DELAY OF PAYMENT OF EMPLOYER PAYROLL TAXES

Section 2302(a)(1) allows taxpayers—both employers and self-employed individuals—to defer paying the employer portion of the Social Security taxes through the end of 2020.

- **Applicable Taxes:** The deferral applies only to the employer portion of Social Security, and not to Medicare payments.
- **Deferral Period:** Half of the deferred taxes must be paid by December 31, 2021, and half must be paid by December 31, 2022.

Exception: This deferral does not apply to any taxpayer who (i) secured a SBA §7(a) loan pursuant to CARES Act §1102, and (ii) had its indebtedness forgiven in accordance with CARES Act §1106.

If you have questions about the CARES Act, please contact your Lawrence Kamin attorney.

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