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COVID-19
SPECIAL PUBLICATION

Employee Benefits

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Staying a Step Ahead – Employee Retention and COVID-19

The Department of Labor recently released its seasonally adjusted data on jobless claims. Over 30 million Americans have filed for unemployment since COVID-19 began to spread throughout the country. Employers who are able to preserve their talent pool during COVID-19 will be well positioned as the economy turns the corner. If you are looking for ways to retain valued employees, the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act") and Families First Coronavirus Response Act ("FFCRA") offer several tax credits.

CARES Act Employee Retention Tax Credits

With certain limitations, this employee retention tax credit ("ERTC") is available to almost all employers, regardless of size, including tax-exempt organizations. It is *not* available to state and local governments, or small businesses that take loans from the Paycheck Protection Program unless the loan is repaid by May 14, 2020.

Eligible Employers

The ERTC applies to qualified wages paid during each calendar quarter the employer's business remains "eligible." An employer's business is eligible if the employer's business has fully or partially suspended because of COVID-19 during the quarter, or if their gross receipts decline by more than 50%.

- A fully suspended business is one where a government order has declared that all non-essential businesses must close, and the employer's business is non-essential.
- A partially suspended business is a retail business that has its brick and mortar store closed due to COVID-19, but online ordering and fulfilment system are unaffected, or a restaurant has closed for dine-in purposes but still operates take-out and delivery.
  - If employers operate in multiple locations and are subject to governmental orders limiting operations in some, but not all jurisdictions, then that employer's business is considered partially suspended.

If employees are teleworking despite the closure of the business, the business is not fully or partially suspended, but it may still be eligible for ERTC depending on whether its gross receipts have declined.

- Gross receipts decline by more than 50% during the 2020 calendar quarter when compared to the same 2019 quarter.
  - If gross receipts reach more than 80% of the same 2019 calendar quarter, the business no longer qualifies for the ERTC *after* that quarter.

Credit for Qualified Wages

Eligible employers may take a credit for 50% of the qualified wages paid to retained employees, both full-time and part-time, from March 13, 2020 through December 31, 2020 (up to $5,000 per employee).

- Eligible employers that averaged more than 100 full-time employees in 2019 may claim a credit only for those employees paid who are *not providing services*, such as furloughed employees.

    - An employer that furloughs employees and does not pay wages while the employees are not providing service but continues to pay health plan expenses for those employees may take a credit for those health plan expenses.
- Those employers with 100 or fewer employees during 2019 may claim credits for *any* employees retained in 2020.

All entities within a controlled group of corporations are considered one employer. Wages paid under the aforementioned circumstances are considered "qualified wages."

- A "full-time employee" is any employee who has, on average, 30 hours of service per week or 130 hours per month.
- "Wages" generally means all cash compensation and includes the employer's health plan expenses paid for the employee.
    - If employees are working reduced hours, but the employer is paying full-time wages, the employer is entitled to a credit for the wages paid while the employee is not working.
- The ERTC is fully refundable.
    - If the employer is entitled to an ERTC in the calendar quarter and it exceeds the Social Security payroll taxes paid in that quarter, the employer can apply for a refund by filing Form 7200; or
    - An employer may reduce its federal employment tax deposit by the qualified wages paid without incurring a failure to deposit penalty.

Limitations

The ERTC must be reduced by tax credits taken for wages paid toward expanded FMLA or emergency paid sick leave under the FFCRA.

FFCRA Paid Sick Leave Credits

The FFCRA requires certain employers to provide employees with two types of COVID-19-related leave. You can learn more about the aspects and requirements of the leave in our COVID-19 summary chart of paid sick leave laws.

Employers can relieve the burden FFCRA paid leave places on their business through a reimbursable tax credit.

- Leave tax credits are refundable against the 6.2% Social Security payroll tax imposed on employers; if the credit exceeds an employer's payroll tax obligations, the employer may seek an expedited refund.
- Tax credits are capped at $200 or $511 per day, depending on the reason for the leave.

Eligible employers may apply for an expedited refund for these tax credits by using the same Form 7200 used to receive the ERTC.

If you have any questions or need assistance, please contact a member of the Kutak Rock Employee Benefits Practice Group.

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