Employment Retention Credit and Families First Coronavirus Response Credit

The bill extends and expands the ERC and the paid leave credit under the Families First Coronavirus Response Act (FFCRA).

ERC

The ERC, introduced under the CARES Act, is a refundable tax credit equal to 50% of up to $10,000 in qualified wages (i.e., a total of $5,000 per employee) paid by an eligible employer whose operations were suspended due to a COVID-19-related governmental order or whose gross receipts for any 2020 calendar quarter were less than 50% of its gross receipts for the same quarter in 2019.

The bill makes the following changes to the ERC, which will apply from January 1 to June 30, 2021:

- The credit rate is increased from 50% to 70% of qualified wages and the limit on per-employee wages is increased from $10,000 for the year to $10,000 per quarter.
- The gross receipts eligibility threshold for employers is reduced from a 50% decline to a 20% decline in gross receipts for the same calendar quarter in 2019, a safe harbor is provided allowing employers to use prior quarter gross receipts to determine eligibility and the ERC is available to employers that were not in existence during any quarter in 2019. The 100-employee threshold for determining "qualified wages" based on all wages is increased to 500 or fewer employees.
- The credit is available to certain government instrumentalities.
- The bill clarifies the determination of gross receipts for certain tax-exempt organizations and that group health plan expenses can be considered qualified wages even when no wages are paid to the employee.
- New, expansive provisions regarding advance payments of the ERC to small employers are included, such as special rules for seasonal employers and employers that were not in existence in 2019. The bill also provides reconciliation rules and provides that excess advance payments of the credit during a calendar quarter will be subject to tax that is the amount of the excess.
- Treasury and the SBA will issue guidance providing that payroll costs paid during the PPP covered period can be treated as qualified wages to the extent that such wages were not paid from the proceeds of a forgiven PPP loan. Further, the bill strikes the limitation that qualified wages paid or incurred by an eligible employer with respect to an employee may not exceed the amount that employee would have been paid for working during the 30 days immediately preceding that period (which, for example, allows employers to take the ERC for bonuses paid to essential workers).

The bill makes three retroactive changes that are effective as if they were included the CARES Act. Employers that received PPP loans may still qualify for the ERC with respect to wages that are not paid for with proceeds from a forgiven PPP loan. The bill also clarifies how tax-exempt organizations determine “gross receipts” and that group health care expenses can be considered “qualified wages” even when no other wages are paid to the employee.

FFCRA

The FFCRA paid emergency sick and child-care leave and related tax credits are extended through March 31, 2021 on a voluntary basis. In other words, FFCRA leave is no longer mandatory, but employers that provide FFCRA leave from January 1 to March 31, 2021 may take a federal tax credit for providing such leave. Some clarifications have been made for self-employed individuals as if they were included in the FFCRA.