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Client Alert: IRS Provides Guidance on Claiming Payroll Tax Credits

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The IRS has now provided employers with detailed guidance on how to take advantage of the refundable tax credits for qualified sick and family leave wages and the employee retention credits created by the Families First Coronavirus Response Act (the “Families First Act”) and the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”). As previously indicated by the IRS, this guidance is designed to allow qualifying employers to claim these credits as quickly as possible so that they will have immediate use of those funds.

Under the Families First Act, eligible employers paying qualified sick pay wages or extended family medical leave wages required by the Families First Act (also known as “Qualified Leave Wages”) are entitled to refundable tax credits. Similarly, certain employers experiencing a partial or full business suspension due to shelter in place orders from a state or governmental authority related to the COVID-19, epidemic or experiencing a specified material decline in business will be entitled to a refundable tax credit under the CARES Act for qualified wages paid to their employees (“Retention Wages”). Both tax credits may be adjusted to include a proportionate part of the employer’s group health plan expenses to maintain coverage for affected employees.

In Notice 2020-22, the IRS explains how an employer entitled to these refundable tax credits because it has paid Qualified Leave Wages or Retention Wages may use the tax credits to offset its required payroll tax deposits for payroll periods beginning after April 1, 2020. The employer may offset the payroll tax deposits it would otherwise be required to make, and will not be subject to any penalties for failure to deposit these payroll taxes, to the extent that:

- The employer paid Qualified Leave Wages or Retention Wages to its employees prior to the time of the required payroll tax deposit;
- The amount of the payroll tax the employer does not deposit is less than or equal to the amount of the employer’s refundable tax credits under the Families First Act and CARES Act; and
- The employer has not applied for an advance payment with respect to the anticipated refundable tax credits it relies upon to reduce the payroll tax deposit (see below).

Thus, the employer may reduce its payroll tax deposit for any pay period by the amount of Qualified Leave

Payments (and related group health plan expense) paid by the employer prior to the deposit date, and, if applicable, by the amount of any Retention Wages paid prior to the deposit date, as long as the employer has not already sought an advanced payment of those refundable tax credits.

IRS FORM 7200 – Advance Payment of Employer Credits Due to COVID-19

The IRS has also now issued draft Form 7200, Advance Payment of Employer Credits Due to COVID-19, along with instructions for completing the Form. Once finalized by the IRS, this Form 7200 is the form eligible employers will use to request an advance of the refundable tax credits for Qualified Leave Wages and the Retention Wages. Self-employed individuals can't request an advance payment of the credits against the self-employment tax for sick and family leave under the Families First Act and should not file Form 7200 for those credits.

Employers may file Form 7200 to request an advance of the refundable tax credits for the payment of Qualified Leave Wages and Retention Wages if the amount of the credits exceeds the amount of a required employment tax deposit. Employers are not required to file Form 7200, and may instead receive a refund of the excess credit when they file their employment tax return at the end of the quarter. Employers may file Form 7200 for advance credits anticipated for a quarter at any time before the due date of the Form 941 for the quarter in which the Qualified Leave Payments and Retention Wages are paid. If necessary, an employer may file Form 7200 several times during each quarter. An employer should not file a Form 7200 to request advance credits for any anticipated credit for which the employer has already reduced its deposits.

If an error is made on Form 7200, an employer may not file a corrected Form 7200. Instead, the employer should correct the error on the applicable employment tax return (Form 941 for most employers) when it is filed.

When an employer who has filed Form 7200 to claim an advance of the credits files its Form 941 (or other employment tax returns for the quarter), the employer will be required to reconcile its advanced credits and reduce deposits on Form 941 (or other returns), and must keep the following records:

- Documentation to show how the employer calculated the amount of Qualified Leave Wages eligible for the credit.
- Documentation to show how the employer calculated the amount of Retention Wages (if any) eligible for the employee retention credit.
- Documentation to show how the employer calculated the amount of qualified health plan expenses allocated to Qualified Leave Wages and Retention Wages.
- Documentation to show how the employer determined that employees were qualified to receive Qualified Leave wages, including any additional information set out in Frequently Asked Questions or other guidance on IRS.gov.
- Documentation to show the employer's eligibility for the employee retention credit based on suspension of operations or significant decline in gross receipts.
- Copies of completed Form(s) 7200 filed with the IRS.

Third-Party Payers

Employers that utilize a third-party payer, such as a payroll service provider, professional employer organization (PEO), certified professional employer organization (CPEO), or other payroll agent to report and pay federal employment taxes are entitled to the refundable tax credits for Qualified Leave Wages and Retention Wages. The third-party payer is not entitled to these credits even though the payer may be considered the "employer" for other purposes. An employer will need to provide the third-party payer with copies of the Form(s) 7200 that the employer filed so it can reconcile the credits on the employment tax return that it files.

Social Security Payroll Tax Deferral Option

As one more alternative, the CARES Act also permits certain employers to delay paying the employer share of the Social Security payroll tax (6.2 percent) otherwise due with respect to wages accrued between March 27, 2020 and December 31, 2020. The deferred payroll tax may be paid in two installments, with half due by December 2021, and the remaining half due December 31, 2022. However, this deferral option does not apply to the Medicare tax (1.45 percent) and employers that have had loans under the Small Business Administration Payroll Protection Program forgiven pursuant to the CARES Act will not be eligible for this relief.

Please do not hesitate to contact Tom Cotter at tcotter@shumaker.com or 419.321.1386, Eric Britton at ebritton@shumaker.com or 419.321.1348, or John Burgess at jburgess@shumaker.com or 813.227.2260, if you have questions.

For the most up-to-date legal and legislative information related to the coronavirus pandemic, please visit our Shumaker COVID-19 Client Resource Center at shumaker.com. We have also established a 24/7 Legal & Legislative Helpline at 1.800.427.1493 monitored by Shumaker lawyers around the clock.