

To: Clients and Colleagues
From: Chimento & Webb, P.C.
Date: [UPDATED] April 24, 2020
Re: The COVID-19 Economy: Employer Guide to Federal Assistance

***Note:** This article has been updated to reflect the passage of the Paycheck Protection Program and Health Care Enhancement Act, a piece of legislation designed to revive the depleted Paycheck Protection Program as originally created by the CARES Act. See Section 5.*

1. Background..... 1
2. Getting fast payment through the tax system 2
3. CARES Act Employee Retention Credits 4
4. Families First Act paid leave credits 5
5. SBA loans under the Paycheck Protection Program (the “PPP”)..... 6
6. Deferring payment of FICA and SECA taxes 9
7. Rules against double dipping..... 9
8. Laying people off..... 10
9. Aggregation rules 12
10. Anticipated future guidance..... 13

1. Background

This article discusses the new Federal programs to assist employers in maintaining payrolls and providing paid leave in the COVID-19 era. There are four major forms of employer relief, two of them provided through tax credits, a third through forgivable loans administered by the SBA, and a fourth through deferred payment of certain employment taxes. Congress has also approved an enhanced unemployment system for laid off employees with which employers should be familiar.

The CARES Act¹ applies to all employers, regardless of size, and is primarily focused on helping employers to keep people on the payroll, even when not providing services. The payroll tax credit available under the CARES Act, referred to as the “Employee Retention Credit,” is

¹Coronavirus Aid, Relief, and Economic Security Act

equal to 50 percent of qualified wages paid to employees from March 13, 2020 through December 31, 2020, with significant dollar limits. Employers with 100 or more full-time employees² in 2019 may only claim credits for employees who are being paid while not providing services. Employers with fewer than 100 full-time employees in 2019 may also claim credits for working employees. See Section 3.

The Families First Act³ applies only to employers with fewer than 500 employees and allows a 100 percent payroll tax credit for required paid leave (up to 12 weeks) which these smaller employers must provide for COVID-19 reasons. See Section 4.

The SBA Paycheck Protection Program is part of the CARES Act and provides for forgivable loans (“PPP Loans”) to employers with 500 or fewer employees, provided that at least 75 percent of the proceeds are used for payroll and related benefits. In dollar terms, this is generally the best program for smaller employers. Employers who missed their opportunity to receive a PPP Loan before the initial \$349 billion allocated by Congress was exhausted on April 16 have another opportunity to apply for relief. On April 24, President Trump signed into law new legislation providing additional funding to the SBA. Employer hoping to take advantage of this program should make arrangements to speak with an SBA lender immediately. Despite the fact the new legislation commits an **additional \$310 billion** for qualifying PPP Loans, it is likely that these funds will be exhausted in a matter of weeks. See Section 5.

Employment tax deferral is available for all employers, including the self-employed. Employers may defer payment of the amount they owe (not what employees owe) for the retirement portion of social security and SECA taxes. The deferral amount is the 6.2 percent (up to the \$137,700 wage base) owed on wages and self-employment earnings from March 27, 2020 through December 31, 2020. See Section 6.

No double dipping is allowed when credits can be claimed under more than one program. See Section 7 for a guide to those rules.

2. **Getting fast payment through the tax system**

Before getting into the specifics of each program and the amounts allowed, let’s first discuss the startling and fast way that employers will get their relief for credits under the Families First Act and the CARES Act⁴:

² “Full-time employee” means, with respect to any month, an employee who is employed on average at least 30 hours per week.

³ Families First Coronavirus Response Act of 2020.

⁴ Families First Act, Section 7001; CARES Act, Section 2302.

MEMORANDUM

A. Employers get to keep money they would normally have paid to the IRS

(a) Employers will still withhold from employees. They just do not have to pay it to IRS. The employment taxes that do not have to be paid are:

- (1) Federal income tax withholding from employee wages.
- (2) Social Security⁵ or Medicare taxes (employer and employee).

(b) The employer simply subtracts its credit amount from its quarterly obligation, without regard to which employees form the basis for the relief.

B. No employee will be affected

Employees will get the same credit for FICA and income tax withholding as if the amounts had been paid to the IRS.

C. The Employer will reconcile this on its 941 Forms⁶

(a) The 1st quarter 941 does not need to be amended. This applies to the 2nd quarter 941 and 941s for the balance of the calendar year.

(b) Some of the new relief applies to 1st quarter wages after March 12, 2020; that relief will be claimed on the 2nd quarter 941.

D. Form 7200: when the Federal relief is more than the 941 withholding relief

(a) The IRS has just released new optional [Form 7200](#) with [instructions](#). The IRS website for these key materials [is at this link](#).

(b) This optional form can be used if an employer's relief amount exceeds what it has obtained by reducing its withholding obligations. Form 7200 is filed by FAX: 855-248-0552.

(c) Form 7200 can be filed more than once during a quarter. Once filed, it cannot be amended, so any mistakes will have to be reconciled on the quarterly 941.

Note: Unless the employer is in desperate need, Form 7200 is not necessary because any credits for the quarter that exceed what the employer has retained are supposed to be refunded by IRS after the quarterly 941 filing which claims this additional credit.

⁵ The employer remains responsible for FUTA.

⁶ Very small employers that file an annual Form 944, and employers in US territories filing 941 equivalents, use those forms.

E. Coordinating with your payroll service

Employers using third party services need to coordinate with them.

3. CARES Act Employee Retention Credits⁷

This is the primary assistance for employers which are too large (more than 500 full and part-time employees) to get a PPP Loan. Smaller employers that fail to obtain a PPP Loan can also claim. These are 50 percent payroll tax credits, with significant per employee limits, for employers who keep employees on the payroll when their business is impacted by COVID-19.

Note: Families First paid absence credits are limited to employees whose paid absence is due to individual or family COVID -19 reasons.

CARES Act credits require instead that the paid absence be due to the employer's COVID-19 business reasons and can be claimed for healthy persons.

A. Eligible employers

Any employer, including tax-exempt organizations, may claim CARES Act credits for any calendar quarter in 2020 in which:

- it had to fully or partially suspend business operations due to governmental orders related to COVID-19, or
- it had a 50 percent decline in gross receipts as compared to the same quarter a year before, with continued eligibility until the quarter following the first quarter in which gross receipts are greater than 80 percent of gross receipts for the same quarter in the prior year.

Employers who obtain a PPA loan are ineligible for CARES Act credits.

Compensation that is taken into account for the 100 percent paid absence credits under the Families First Act (see Section 4) cannot be taken into account for these optional CARES Act credits. Credits cannot be applied to self-employment income.

B. Only small employers can claim credits for their working employees.

CARES Act credits are limited to paid non-working employees unless the employer had less than 100 full-time employees in 2019. The CARES Act uses the same definition of “full-time” as the Affordable Care Act, presumably with the use of the “look-back” calculation for those employers that use that method for ACA reporting.

⁷ CARES Act, Section 2301 *et seq.*

MEMORANDUM

For purposes of counting whether there are 100 employees, related employers are aggregated under controlled group and affiliated service group rules that apply to qualified retirement plans, with a stricter definition of parent-subsidiary controlled group. See Section 9 for the aggregation rules.

C. If the eligible employer had 100 or more “full-time” employees in 2019:

The per employee 50 percent credits are limited to those employees who are not providing any services to an employer impacted by COVID-19. In an age of computer access from home, it is unclear whether IRS will announce a de minimis exception, but there is none in the law itself. The 50 percent CARES Act credits are calculated as follows:

(a) Calculate “Qualified Wages” for the non-working employee’s absence.

(1) Qualified Wages include salary, bonuses, commission, etc., and a prorated employer contribution for the employer cost of health insurance.⁸

(2) The Qualified Wages for the period of non-working absence cannot be more than the Qualified Wages paid for an equivalent period in the 30 days prior to the start of the non-working period.

(3) There is a \$10,000 cap on the Qualified Wages in 2020 that can be eligible for the 50 percent credit.

(4) Only Qualified Wages paid from March 13, 2020 through December 31, 2020 can be eligible for the 50 percent credit.

(b) The allowable credit is 50 percent of wages paid to the employee for time when not providing services.

(c) Do not count any wages that are the basis for tax credits under the Families First Act. See Section 7 for rules that prevent double dipping of credits under the CARES Act and other Federal programs.

If the eligible employer had fewer than 100 full-time employees in 2019:

Smaller employers can apply the limited 50 percent credit to active employee wages as well as wages of non-working persons. In other respects, the rules are the same.

4. Families First Act paid leave credits

This Section 4 describes the financial credits that small and midsize employers (fewer than 500 employees) can obtain for the paid leave they are required to provide to employees under the Families First Act for individual and family COVID-19 reasons. Check the grids and

⁸ Taxable employer costs for health insurance are not included, but these costs are rarely taxable, except for discriminatory self-insured health plans.

MEMORANDUM

explanation in our more detailed memorandum on the [Families First Act at this link](#) for more detail on the paid leave requirements.

(a) Families First Act credits are 100 percent for required payments, subject to dollar limits, and are obtained under the procedures in Section 2.

(b) In general, employers with fewer than 500 employees are required:

(1) to provide paid leave for the first two weeks of absence due to an employee's individual or family COVID-19 reasons, and not to deduct that from other leave or PTO time⁹;

(2) to consider COVID-19 reasons as permissible under their FMLA policies for the balance of the calendar year. (This does not expand the 12 week period allowed for FMLA leaves or require use of a different measuring method for those leaves.);

(3) to continue pay during the FMLA period for up to 10 weeks of the FMLA period in 2020;

(4) to expand FMLA for this purpose of paid COVID-19 leave to employers of less than 50 who are normally not subject to FMLA; and

(5) to provide employment protection for employees on COVID-19 leave, with special hardship exceptions for employers of less than 50.

5. SBA loans under the Paycheck Protection Program (the "PPP")

The PPA Loan program, administered through SBA lenders and procedures, provides forgivable loans to assist employers in maintaining payrolls and recalling employees.¹⁰ Certain permitted business costs that are not payroll costs, up to 25% of the loan, are also permitted. [The SBA site with resources for PPP Loans is at this link.](#)

A. Larger employers are not eligible.

An employer with 500 or fewer employees (full and part-time combined) during the period beginning on February 15, 2020 and ending on June 30, 2020, including a tax-exempt employer, can apply for a forgivable PPP loan through an SBA-authorized lender, such as a bank. Self-employed and independent contractors apply on their own behalf and not through the companies/clients to which they provide their services.

⁹ Families First Act, Section 5101 *et seq.*

¹⁰ CARES Act, Sections 1101, 1102 and 1106.

B. Fresh injection of money from Congress

On April 24, 2020, President Trump signed into law the Paycheck Protection Program and Health Care Enhancement Act. The new legislation commits an additional \$310 billion in Federal funding to the SBA's PPP Loan program, with \$60 billion set aside for smaller community banks and credit unions.¹¹ The legislation also authorizes an additional \$10 billion for Emergency EIDL grants as described under the CARES Act.

Employers who failed to secure a PPP Loan after the initial passage of the CARES Act now have "another bite at the apple," but the window for opportunity will likely close within a few weeks, as eligible employers have been positioning themselves to apply with the SBA even before this latest bill. However, the provisions securing \$60 billion for community lenders offer hope to small employers and their ability to secure PPP Loans, as many reported difficulties in navigating the PPP Loan process with some of the larger financial institutions. Employers should move **quickly** to communicate with an SBA lender in order to submit their application ASAP.

C. Loan terms and amounts

Loans are for a two-year term at 1 percent interest, with no payments required for the first six months. Collateral and personal guaranties are not required. The loan amount can be as large as 250 percent of monthly "payroll costs" (as defined below) but not more than \$10 million.¹²

D. Loans are forgivable

The principal amount is 100 percent forgivable, provided that at least 75 percent is used for "payroll costs" in the eight weeks following the loan, and that the remaining amount is used for other "permitted costs" (as defined below). Employers will have to restore employee headcount within the same month of receiving the loan in order to get full forgiveness, but may hire new employees rather than rehiring those previously terminated. Detailed rules about forgiveness are yet to be issued. It seems clear at this point that it will not be necessary to segregate loan funds from other funds in order to trace their use. Applications for forgiveness will be to the lenders, who will have 60 days to administer the application, meaning it is likely that most loans (except for minor interest) will actually be forgiven well prior to the 2-year maturity date.

¹¹ \$30 billion is reserved for community banks and credit unions with assets between \$10 billion and \$50 billion, and \$30 billion is reserved for community banks and credit unions with assets less than \$10 billion.

¹² An employer with a forgivable Economic Injury Disaster Loan ("EIDL") made between January 31, 2020 and April 3, 2020 can consolidate by adding undrawn amounts on the EIDL loan to the PPP Loan application. If a purpose of the EIDL loan was for employee costs, consolidation is required.

E. Payroll costs and permitted costs: key terms

“Payroll Costs” is the key term, both for loan application and for monitoring the 75 percent requirement in the 8 weeks following the loan. Generally, payroll costs are determined over the 12 months preceding the loan, with special rules for new and seasonal employers.

Payroll Costs are the sum of payments of any compensation with respect to employees that is: salary, wage, commission, or similar compensation; payment of cash tip or equivalent; payment for vacation, parental, family, medical, or sick leave; allowances for dismissal or separation; payments required for the provisions of group health care benefits, including insurance premiums; payment¹³ of any retirement benefit; and payment of State or local tax assessed on the compensation of employees.

Payroll Costs do not include: individual salary amounts in excess of \$100,000, prorated for the “covered period,” which is the period between February 15, 2020 through June 30, 2020; taxes imposed or withheld under chapters 21, 22, or 24 of the Internal Revenue Code of 1986 during the covered period; sick leave and family leave for COVID-19 reasons for which credits are allowed under the Families First Act; any compensation to an employee whose principal place of residence is outside of the United States.¹⁴

Note: Working partners with guaranteed payments from LLCs and partnerships should not submit a separate PPP Loan application as a self-employed individual. Instead, the self-employment income of partners may be reported as a payroll cost, up to the \$100,000 annualized limit, on a PPP Loan application filed by or on behalf of the partnership. This is a logical decision by the SBA, as allowing partners to apply as self-employed individuals would create unnecessary confusion and delay.

“Permitted Costs” which are not payroll costs would include business related rent, lease payments, mortgage interest (not principal), and utilities. Permitted costs do not include expenses for debts and leases first entered into after February 14, 2020 or new utility services first started after that date. Reminder: PPP Loans are not fully forgivable if more than 25% is used for these Permitted Costs that are not payroll costs.¹⁵

¹³ Payroll costs would not include payments from qualified retirement plans and, without further clarification, even the costs to fund qualified plans, such as 401(k) matches.

¹⁴ There are additional considerations in the SBA rules that will not be relevant for most employers.

¹⁵ Additional rules apply for self-employed persons in [interim SBA guidance](#).

6. **Deferring payment of FICA and SECA taxes**

Except for employers who receive forgiveness of a PPP Loan, employers of any size may defer payment (without interest) of some of their employment and self-employment taxes.

A. **Deferred amount**

The deferral applies to 100 percent of the employer portion of OASDI and SECA taxes owed for the period March 27, 2020 through December 31, 2020.

That is 6.2 percent for wages and self-employment earnings up to the social security wage base, which is \$137,700 in 2020.

B. **Deferred payment dates:**

- 50 percent of the deferred amount can be paid as late as December 31, 2021
- the remaining 50 percent will not be owed until December 31, 2022.

7. **Rules against double dipping**

There are rules to prevent double (or triple) dipping when employers are eligible for both Families First and CARES Act credits and obtaining PPP Loans.

A. **Large employers (those with 500 or more employees)**

If they employ more than 500 employees (both full and part-time) during the period beginning on February 15, 2020 and ending on June 30, 2020, there is no double dipping concern. Their sole recourse is the limited 50 percent CARES Act Employee Retention Credit program for the paid leave they provide to non-working employees. See Section 3. They are too large for PPP Loans and too large to be subject to the paid leave requirements of Families First Act.

B. **For smaller employers (500 or less) who obtain PPP Loans:**

(a) Paid leave that is used for 100 percent credits under the Families First Act is not a “Payroll Cost” for PPP purposes.

(b) CARES Act 50 percent credits are not allowed.

C. **For smaller employers (500 or less) who do not obtain PPP Loans:**

(a) Paid leave that is used for 100 percent credits under the Families First Act cannot be the basis for 50 percent credits under the CARES Act.

MEMORANDUM

(b) Claiming CARES Act credits is optional.

D. Other double dipping prevention rules

For all employers, additional double dipping rules apply to prevent using the same pay for multiple credits. This applies to credits for:

(a) Paid family leave that is not required by state law¹⁶ and meets other requirements of IRC 45S;

(b) Periods of employment when the employer is also claiming a Work Opportunity Credit.

(c) Other types of paid leave or employment that the IRS determines should not be the basis for double crediting.

8. Laying people off

This is a serious and painful decision. However, some employers are not going to be on their feet for the foreseeable future. For them (and their employees) it is helpful to know that a good portion of the CARES Act includes enhanced unemployment benefits. States are expected to enter into Federal agreements so that the states get 100 percent reimbursement.

A. Unemployment Benefits are the following:

(a) Federal Pandemic Unemployment Compensation. For weeks of unemployment through July 31, 2020, weekly payments will be increased by \$600.¹⁷

(b) Pandemic Emergency Unemployment Compensation. Thirteen-week extension of unemployment benefits with extensions not payable for any week of unemployment ending after December 31, 2020. In states where the week of unemployment ends on a Saturday, the last week that Pandemic Emergency Unemployment Compensation benefits may be paid is the week of December 26, 2020. In states where the week of unemployment ends on a Sunday, the last week that Pandemic Emergency Unemployment Compensation benefits may be paid is the week of December 27, 2020.¹⁸

(c) Pandemic Unemployment Assistance. Further extension of unemployment benefits through December 31, 2020 for those who self-certify inability to work due to “COVID-19 reasons” and who have exhausted all unemployment and paid leave benefits (including

¹⁶ IRC Section 45S.

¹⁷ Families First Act, Section 2104.

¹⁸ Unemployment Insurance Program Letter No. 17-20.

Pandemic Emergency Unemployment Compensation).¹⁹ This special relief is also available to those who do not otherwise qualify for unemployment, such as the self-employed or those without sufficient work history to qualify for unemployment.

(1) Pandemic Unemployment Assistance is only available for those who have not already received 39 weeks of unemployment compensation through any combination of state law and the Act.

(2) In NH, with a general limit of 20 weeks and an extended 13 weeks of Pandemic Emergency Unemployment Compensation, this Pandemic Unemployment Assistance would add an additional 6 weeks.

(3) In MA, with a general limit of 30 weeks before the crisis, and with 13 weeks added, the benefit of Pandemic Unemployment Assistance is mainly for those who would not otherwise have qualified for MA unemployment due to insufficient work history.

B. Taxability

These enhanced unemployment benefits are taxable, just like other unemployment. However, the \$600 weekly supplements are not considered income for purposes of Medicaid or CHIP eligibility.

C. Qualification

The requirements to be actively seeking work are relaxed for those with COVID-19 conditions, and enforcement of this requirement will be left to the states and to the self-certification process they design. There are penalties for fraudulent applications.

For Pandemic Unemployment Assistance, COVID-19 reasons are similar to reasons for paid leave under the Families First Act:

- The individual or member of household has been diagnosed with, or is experiencing symptoms of, COVID-19, or is providing care for a family member or household member who has been diagnosed with COVID-19;
- A child or other household member for whom the individual has primary caregiving responsibility is unable to attend school or another facility that is closed because of the COVID-19 public health emergency;
- The individual is unable to attend work because of a quarantine imposed by a COVID-19 public health emergency, or because of self-quarantine at the advice of a health care provider;

¹⁹ Families First Act, Section 2102.

- The individual was scheduled to commence employment and does not have a job or is unable to reach the job because of the COVID-19 public health emergency;
- The individual has become the breadwinner for a household because the head of the household has died as a direct result of COVID-19;
- The individual has to quit his or her job as a direct result of COVID-19;
- The individual's place of employment is closed as a direct result of the COVID-19 public health emergency; or
- The individual meets any additional criteria established by the Department of Labor.

9. Aggregation rules

A. CARES Act Employee Retention Credits

For purposes of determining whether an employer had less than 100 full-time employees in 2019, related employers are aggregated under controlled group and affiliated service group rules that apply to qualified retirement plans, with a stricter definition of parent-subsidiary controlled group. A common parent corporation is found in instances where it possesses more than 50 percent – as opposed to 80 percent or more – of the total combined voting power of all classes of stock of the other corporation(s). In such cases, all such subsidiaries, along with the parent, are considered as a single employer for purposes of determining full-time employee count.

The test for brother-sister controlled group is unchanged – five or fewer individuals owning 80 percent or more of the companies.

B. PPP Loans

The PPP Loan program uses a different set of rules for determining whether separate entities are considered a single employer for purposes of determining whether an applicant has the 500 or fewer employees as required for eligibility. The “Affiliation Rules” rely on four tests focused on the amount of control an entity has over others: (1) affiliation based on ownership; (2) affiliation arising under stock options, convertible securities, and agreements to merge; (3) affiliation based on management; and (4) affiliation based on identity of interest. For a more detailed explanation of the SBA’s Affiliation Rules, [click here](#) to read the latest regulations promulgated by the SBA. In addition, there is more information on the SBA’s PPP website, which can be found by [clicking here](#).

10. **Anticipated future guidance**

This article is a preliminary attempt to consolidate rules under the Families First Act and the CARES Act. There will be a lot of guidance from government agencies in the upcoming weeks. Although we may keep this article up to date, we cannot assure readers that the most recent rules will be included, or that we have interpreted correctly everything written to date. There is no substitute for individual consultation, based on an employer's actual facts.

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