

Employment Law *Trending Now*

IRS Releases Information About a New Employee Retention Credit and Further Guidance to Substantiate the FFCRA Tax Credit

On March 31, 2020, the IRS released information about a new Employee Retention Credit available to many employers. The IRS also issued guidance in the form of several FAQs relating to tax credits available to employers who provide paid sick and FMLA leave under the Families First Coronavirus Response Act (“FFCRA”). Importantly, the IRS outlined the documentation necessary to substantiate the credit. [CLICK HERE](#) and [HERE](#) for the news releases from the IRS.

Employee Retention Credit

With many employers considering layoffs or furloughing their workforce, the Treasury Department and IRS have launched the Employee Retention Credit (“ERC”), which is a payroll credit geared toward encouraging employers to keep employees on their payroll. If qualified, an employer whose business has been impacted by COVID-19 will be eligible for a 50 percent tax credit for up to a total of \$10,000 in qualifying wages paid to employees. Below are some of the key elements of the credit:

- Who can claim the credit? The credit is available to all employers regardless of size, including tax exempt organizations.
- Are there any exceptions? Yes. One exception is for small businesses that take out a small business loan.

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- What are the qualifications? In order to qualify:
 - (1) the business must be partially or fully suspended by government order due to COVID-19 during the calendar quarter (note that this could disqualify businesses who have been deemed “essential” under various shelter in place orders if those businesses have not partially or fully shut down); and
 - (2) the gross receipts for the business must be below 50 percent comparable to the same quarter in 2019 and, once gross receipts amount to 80 percent, the business no longer qualifies for the ERC.
- What are qualifying wages? Wages paid between March 12, 2020, and Jan. 1, 2021, including a portion of the cost of employer-provided healthcare. Qualifying wages are based on:
 - For employers with less than 100 employees: If the employer had fewer than 100 employees on average during 2019, the credit is based upon wages paid to all employees, regardless of whether they worked from March 12, 2020, through Jan. 1, 2021.
 - For employers with more than 100 employees: If the employer had more than 100 employees on average during 2019, the credit is based upon wages paid only to those employees who did not work from March 12, 2020, through Jan. 1, 2021.
- How can employers claim the credit? Employers can be immediately reimbursed for the credit by reducing their required deposits of payroll taxes that have been withheld from employees’ wages. This is similar to the credit provided by the FFCRA. If the tax deposits are not sufficient to cover the credit, the employer may receive an advance payment from the IRS by submitting form 7200, which can be found [HERE](#).

Key FFCRA FAQs Relating to Documents Required to Substantiate a Tax Credit

The IRS issued new guidance relating to the tax credits available under the FFCRA for employers that pay wages for sick or FMLA leave. One key question that the IRS answered is how an employer should substantiate eligibility for tax credits for qualified leave wages. See FAQ #44-46.

An employer should substantiate eligibility with a written request for such leave from the employee in which the employee provides:

- a. The employee’s name;
- b. The date or dates for which leave is requested;
- c. A statement of the COVID-19 related reason the employee is requesting leave and written support for such reason (See (e) and (f) below);
- d. A statement that the employee is unable to work, including by means of telework, for such reason;
- e. In the case of a leave request based on a quarantine order or self-quarantine advice, the name of the governmental entity ordering quarantine or the name of the health care professional

advising self-quarantine, and, if the person subject to quarantine or advised to self-quarantine is not the employee, that person's name and relation to the employee;

- f. In the case of a leave request based on a school closing or child care provider unavailability, the name and age of the child (or children) to be cared for, the name of the school that has closed or place of care that is unavailable, and a representation that no other person will be providing care for the child during the period for which the employee is receiving family medical leave. And, with respect to the employee's inability to work or telework because of a need to provide care for a child older than 14 during daylight hours, a statement that special circumstances exist requiring the employee to provide care.

The employer should also create and maintain records that include the following information:

- a. Documentation to show how the employer determined the amount of qualified sick and family leave wages paid to employees who are eligible for the credit, including records of work, telework, and qualified sick leave and qualified family leave.
- b. Documentation to show how the employer determined the amount of qualified health plan expenses that the employer allocated to wages.
- c. Copies of any completed Forms 7200, Advance of Employer Credits Due To COVID-19 (see above), that the employer submitted to the IRS.
- d. Copies of the completed Forms 941, Employer's Quarterly Federal Tax Return, that the employer submitted to the IRS.

These records must be maintained by the employer for at least four years after the date the tax becomes due or is paid, whichever is later.

Please note that employers may not be eligible for the credits provided under the FFCRA if they claim a credit for other types of leave provided by the Internal Revenue Code or under certain sections of the CARES Act.

We encourage you to contact the author listed below or the [attorney with whom you work at Aronberg Goldgehn](#) to discuss whether your business may qualify for the ERC and if you have any questions about the documentation necessary to support a credit under the FFCRA.

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