

CORONAVIRUS INFORMATION & UPDATES

April 1, 2020

IRS Issues Initial Tax Guidance for Advance Payment of Employee Retention Credits and Families First Credits

HEADLINE: On March 31, 2020, the IRS and the Treasury Department issued guidance for businesses, to implement the refundable employment tax credits for qualified sick and family leave wages provided for by the Families First Coronavirus Response Act (FFCRA, commonly known as Phase 2), and for employee retention wages under the CARES Act (commonly known as Phase 3). This new guidance expands on the IRS's March 20, 2020 press release IR-2020-57, by providing concrete steps for eligible employers to immediately benefit from anticipated credits. ([Ropes & Gray Alert](#)).

The newly published employer tax credit guidance includes:

- [Form 7200 and instructions](#)
 - This is a new form the IRS released in draft on March 31, 2020, and finalized on April 1, 2020.
- [Treasury Press Release](#)
- [Notice 2020-22](#)
- [IRS FAQs re: Employer Retention Credits](#)

Taken as a whole, the employer tax credit guidance makes two main points clear:

1. Employers eligible for tax credits under the FFCRA (Phase 2) and the CARES Act (Phase 3) may — instead of paying these amounts to IRS — retain both (i) withheld federal **income** tax and (ii) Social Security and Medicare taxes (both employee and employer share).
2. If available tax credits exceed retained amounts, eligible employers would then file Form 7200 for advance payment of tax credits.

IRS Form 7200 and Instructions

Eligible employers can use Form 7200 to request advance payment of tax credits for qualified sick and family leave wages, under the FFCRA (Phase 2), and advance payment of tax credit for employee retention, under the CARES Act (Phase 3). Eligible employers can use Form 7200 to request advance payment of tax credits that are otherwise paid on Form 941, Form 941-SS, Form 943, Form 943-PR, Form 944, and Form CT-1.

In contrast, Form 7200 **cannot** be used by self-employed individuals for credits available to them, because self-employed individuals are not eligible for advance credits.

There are two types of eligible employers: employers eligible under the FFCRA and employers eligible under the CARES Act. Under the FFCRA, eligible employers generally are businesses and tax-exempt organizations that have

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fewer than 500 employees and that are required to pay sick and family leave wages under the FFCRA. Under the CARES Act, employers are eligible if the employer's operations were fully or partially suspended by a governmental authority due to COVID-19 or if gross receipts are less than 50% of gross receipts for the same calendar quarter in the prior year.

Under the FFCRA (Phase 2):

- qualified sick and family leave wages apply for wages paid from April 1–December 31, 2020;
- credit is permitted for 100% of
 - sick leave wages paid under the FFCRA up to a maximum of:
 - \$5,110 per employee for quarantine or self-care (\$511 per day for two weeks), or
 - \$2,000 per employee for care for others (\$200 per day for two weeks); and
 - family leave wages are a maximum of \$10,000 per employee (\$200 per day for ten weeks).

For the CARES Act (Phase 3):

- qualified employee retention wages are wages paid from March 13–December 31, 2020,
- for a maximum of \$10,000 per employee; and
- the maximum employee retention tax credit is 50% of qualified wages, or \$5,000 per employee.

Eligible employers can request advanced credits using Form 7200 at any time before the end of the month following the quarter in which the qualified wages were paid. For example, most immediately, eligible employers paying employee retention wages in March 2020 under the CARES Act may file Form 7200 for 2020 Q1 any time before May 1, 2020.

Next year, when eligible employers file their 2020 employment tax returns, they will have to reconcile both reduced deposits and advance credits received. Form 7200's instructions specify that employers must retain "documentation" for their FFCRA and CARES Act credit calculations, without specifying further what type of documentation is sufficient. Eligible employers that use a third-party payer for payroll payments will have to provide any filed Form 7200s to the third-party payer.

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Notice 2020-22

Notice 2020-22 provides that employers eligible for tax credits under the FFCRA (Phase 2) and CARES Act (Phase 3) will not be subject to a penalty under section 6656 of the Internal Revenue Code of 1986 (the Code) for failing to deposit employment taxes relating to qualified sick leave, family leave, or employee retention wages in a calendar quarter. The types of employment tax for which penalties will be waived include:

- deposits of withheld income taxes,
- taxes under the Federal Insurance Contributions Act (FICA), and
- taxes under the Railroad Retirement Tax Act (RTTA).

In order to receive the relief contemplated by Notice 2020-22, eligible employers must have paid qualified sick leave, family leave, or employee retention wages to employees in the calendar quarter prior to the time of the required deposit. In order for penalties to be waived, the amount of employment taxes retained must be equal to or less than the amount of the employer's anticipated credits under the FFCRA and the CARES Act.