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Employment Question of the Day: April 20, 2020

Legal Update
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Question

My company was either ineligible for, or did not receive, a loan under the Small Business Administration's Paycheck Protection Program (PPP). Is there other financial relief we may be overlooking under the CARES Act?

Answer

The CARES Act provides several forms of relief for businesses affected by COVID-19. For employers that do not receive a loan under the PPP, they may be eligible for other forms of relief under the CARES Act. I will address two of those here: the Employee Retention Credit and the payroll tax deferral.

Employee Retention Credit

Eligibility. The Employee Retention Credit is a credit that is available to employers carrying on a trade or business, including tax-exempt organizations, that either (1) fully or partially suspended operations in 2020 as a result of an order by a governmental authority limiting commerce, travel or group meetings due to COVID-19, or (2) that experienced a significant decline in gross receipts during a calendar quarter in 2020. A significant decline in gross receipts for purposes of these rules occurs when an employer's gross receipts are less than 50 percent of its gross receipts for the same calendar quarter in 2019.

Relationship to PPP. An employer that receives funds under the PPP is not eligible to receive the Employee Retention Credit. However, an employer that is not eligible for a loan under the PPP may be eligible for the Employee Retention Credit if the employer otherwise meets the criteria for the Employee Retention Credit. For example, an employer that does not meet the SBA's size standard to qualify for a PPP loan may be eligible for the Employee Retention Credit.

Nature and Amount of Credits. The Employee Retention Credit is a credit that is applied against the employer's portion of social security taxes (i.e., 6.2 percent of wages). The Employee Retention Credit is fully refundable, which means that if the credit exceeds the employer's portion of social security taxes that are otherwise due, the employer may receive a refund of such excess.

An eligible employer's Employee Retention Credit is equal to 50 percent of certain "qualified wages," including certain qualified health care expenses, paid to employees after March 12, 2020, and before January 1, 2021. Qualified wages are capped at $10,000 per employee for purposes of these rules, resulting in a maximum credit of $5,000 per employee.

Qualified Wages. The determination of "qualified wages" for purposes of the credit depends on whether the employer averaged more than 100 full-time employees during 2019. If so, qualified wages are wages paid to employees who are not providing services due to a full or partial suspension of operations or a significant decline in gross receipts. On the other hand, if the employer averaged 100 or fewer full-time employees in 2019, qualified wages are wages paid to any employee, including employees providing services during the period of economic hardship. Certain affiliated employers are aggregated for purposes of determining the number of full-time employees.

An employer may not include in qualified wages for purposes of the Employee Retention Credit wages that are taken into account for purposes of the work opportunity credit or the required paid leave credit under the FFCRA.

Eligible employers can claim the Employee Retention Credit when they file their quarterly payroll tax returns (IRS Form 941) beginning with the payroll tax return for the second quarter of 2020. In addition, if the Employee Retention Credit exceeds the employer's federal tax deposits for a quarter, the employer can file an IRS Form 7200, *Advance Payment of Employer Credits Due to COVID-19*, to claim a refund.

Deferral of Payroll Taxes

The CARES Act allows employers to delay the deposit and payment of the employer's share of social security taxes (i.e., 6.2 percent of wages) for the period between March 27, 2020, and December 31, 2020. For employers that take advantage of this rule, 50 percent of such taxes is due by December 31, 2021, and the remaining balance is due by December 31, 2022.

The eligibility requirements for the payroll tax deferral are different from the Employee Retention Tax Credit. First, unlike the Employee Retention Credit, an employer is not required to have experienced a significant reduction in gross receipts or a suspension in operations to be eligible for the payroll tax deferral, and the payroll tax deferral is not capped at a certain amount of qualifying wages.

In addition, unlike the Employee Retention Credit, the payroll tax deferral may be available to an employer that has applied for and has received a PPP loan until such time as a decision regarding the forgiveness of the PPP loan has been made. However, once the employer has received a decision from its lender that the PPP loan has been forgiven, the employer is no longer eligible to defer payroll taxes under the CARES Act.

Based on recent guidance issued by the IRS, it appears that employers may utilize the payroll tax deferral in conjunction with the Employee Retention Credit. Employers would take advantage of the payroll tax deferral when they file their quarterly payroll tax returns (IRS Form 941).

Takeaways

While loans under the SBA's PPP may provide an important source of relief for many employers, for those employers that do not receive a loan under the PPP, the Employee Retention Credit and the payroll tax deferral may provide significant relief.

Please contact your Fredrikson & Byron attorney if you need help regarding the Employee Retention Credit, the payroll tax deferral or any issues regarding the CARES Act.