

# You Didn't Get Your PPP Loan – What Now?

## Labor & Employment Law Update

By Kelly Haab-Tallitsch on April 22, 2020

The Small Business Administration stopped accepting applications for loans under the Payroll Protection Program (PPP) late last week after quickly reaching the program's \$349 billion limit. Congress is debating appropriating additional funds for the program and businesses shut out last week may get another chance. But in the meantime, employers should consider the other options under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, as discussed below.

### **Employee Retention Tax Credit**

An Employee Retention Tax Credit of up to \$5,000 per employee is available to an eligible employer whose business has been financially impacted by COVID-19. The refundable payroll tax credit is equal to 50% of up to \$10,000 in "qualified wages" paid per employee. The credit is available for wages paid from March 13 to December 31, 2020.

An employer may be eligible for the tax credit for a calendar quarter if the employer has not taken an SBA loan under the CARES Act (i.e., a PPP loan, Economic Injury Disaster loan or other SBA loan) and:

- the employer's business is fully or partially suspended by government limiting commerce, travel or group meetings order due to COVID-19 during the quarter, or
- the employer's gross receipts are below 50 percent of the comparable quarter in 2019.

The "qualified wages" used to calculate the tax credit differ based on whether the employer has 100 or more full-time employees. If the eligible employer averaged more than 100 full-time employees in 2019, only wages paid to an employee for time that the employee is **not providing services** due to a full or partial suspension of operations by order of a governmental authority, or a significant decline in gross receipts qualify for the credit. But for employers with less than 100 full-time employees, wages paid to **any employees** during the period of economic hardship qualify for the credit. "Qualified wages" include cash payments plus the employer portion of health insurance premiums.

Any paid sick leave or paid FMLA under the Families First Coronavirus Response Act (FFCRA) is specifically excluded from “qualified wages” for the Employee Retention Tax Credit, as employers receive a separate tax credit for such paid leave wages.

Employers can be immediately reimbursed for the Employee Retention Tax Credit by reducing their required deposits of payroll taxes by the amount of the credit for the quarter. Eligible employers may also request an advance of the Employee Retention Credit by submitting Form 7200, Advance Payment of Employer Credits Due to COVID-19.

### **Payroll Tax Deferral**

All employers are eligible to defer the payment of the employer’s portion of social security taxes that otherwise would be due between March 27, 2020 and Dec. 31, 2020, with no penalties or interest. Fifty percent (50%) of the deferred amount must be paid by December 31, 2021 and the remainder paid by December 31, 2022. There is no dollar cap on the wages that are counted in calculating the taxes that may be deferred.

This payroll tax deferral is available to all employers, regardless of size, and there is no requirement to show any specific COVID-19-related impact. However, employers that receive a PPP loan may not defer taxes due after a PPP loan is forgiven.

### **Tax Credits for Paid Sick Leave and Expanded FMLA**

Don’t forget that a tax credit is available to employers with less than 500 employees that provide paid leave to employees as required by the Families First Coronavirus Response Act (FFCRA). These refundable payroll tax credits are available to fully reimburse employers for the costs related to providing qualifying paid leave for reasons related to COVID-19 under the FFCRA.

An employer may claim a tax credit against the employer portion of Social Security taxes equal to 100% of the amount of paid leave provided under the FFCRA. If the amount of the tax credit exceeds the employer portion of the Social Security taxes, then the excess is treated as an overpayment and refunded to the employer. Employers claiming the tax credit will be able to retain an amount of federal employment taxes equal to the amount of the qualified leave wages paid, rather than depositing them with the IRS. An employer may claim the tax credits when filing its quarterly federal employment tax return or request an advance of the tax credits using Form 7200, Advance Payment of Employer Credits Due to COVID-19. Employers must retain records supporting each employee’s leave to substantiate the tax credit.

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