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HEALS Act Safe and Healthy Workplace Tax Credit Guide for Employers

The July 27, 2020, Senate draft of the Health, Economic Assistance, Liability Protection and Schools ("HEALS") Act provides a tax credit for employers who incur certain expenses in response to COVID-19. Referred to as the Safe and Healthy Workplace Tax Credit ("SHWTC"), the credit is available to employers who incur qualified employee protection expenses, qualified workplace reconfiguration expenses and qualified workplace technology expenses. This question-and-answer format guide summarizes the SHWTC, explains how businesses can claim the credit, sets forth the limitations on using the SHWTC when other relief has been claimed, and addresses other outstanding questions regarding the credit, all in a question-and-answer format.

For more information on any of these provisions, please contact any of the Brownstein National Tax Policy Group attorneys listed on the last page.

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I. General Rules of the Safe and Healthy Workplace Tax Credit (“SHWTC”)

A. What is the amount of the SHWTC?

Subject to a limitation (*see question I. C.*), the HEALS Act provides a refundable tax credit, capped each calendar quarter at: (i) $1,000 for each of an employer’s first 500 employees, (ii) $750 for employees 501 to 1,000, and (iii) $500 for each employee that exceeds 1,000, based on the average number of employees for such quarter.

The credit is available for 50% of the sum of the business’s (1) qualified employee protection expenses, (2) qualified workplace reconfiguration expenses, and (3) qualified workplace technology expenses paid or incurred during such quarter, from March 13, 2020, through Dec. 31, 2020. For self-employed individuals, the credit is limited to $500 for the year.

> **Example:** Employer averaged 50 employees and incurred $120,000 in qualified expenses in Q3 2020. The SHWTC available to Employer for the Q3 qualified expenses is $50,000 (50 employees x $1,000 per employee = $50,000 cap; $120,000 x 50% = $60,000).
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> **Example:** Same facts as above but Employer incurred $80,000 of qualified expenses. The SHWTC available to Employer for the Q2 qualified expenses is $40,000 ($80,000 x 50% = $40,000).
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> **Example:** New facts. Employer averaged 50,000 employees and incurred $120,000,000 in qualified expenses in Q3 2020. The SHWTC available to Employer for the Q3 qualified expenses is $25,375,000.

Cap on Credit: $120,000,000 x 50% = $60,000,000		
Employee Range	**Value of Credit per Employee**	**Credit Allowed**
500 employees	$1,000	$50,000
500 employees	$750	$37,500
49,000 employees	$500	$24,500,000
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B. Who is eligible?

With a few exceptions, most employers that incur qualified expenses are eligible. Self-employed and nonprofit organizations are also eligible.

However, the SHWTC is not available to the government of the United States, the government of any state or political subdivision thereof, or any agency or instrumentality of any of the foregoing.

For certified Professional Employment Organizations (PEO), the credit with respect to a work site employee performing services for a customer applies to the customer, not to the certified PEO.

Employers are subject to aggregation rules—all persons treated as a single employer for the purposes of IRC §§ 52(a) or (b) or 414(m) or (o) are treated as one employer for the purposes of this credit.

C. How does the SHWTC employee limitation work?

The credit allowed with respect to any calendar quarter cannot exceed the excess of:

(i) the applicable dollar limit (quarterly average number of employees multiplied by $1,000, $750, or $500, as applicable), less
(ii) the aggregate SHWTC credits the employer has taken for prior quarters.

Example: Employer averaged 50 employees and incurred $120,000 in qualified expenses in Q3 2020. The SHWTC available to Employer for the Q3 qualified expenses is $50,000. Employer averaged 50 employees and incurred $120,000 in qualified expenses in Q4 2020. For Q4, the limitation is applied as follows:

- 50 average employees x $1,000 = $50,000 applicable dollar limit.
- $50,000 applicable dollar limit less aggregate SHWTC credits of $50,000 taken in prior quarters = $10,000.

Thus, Employer is not eligible for any SHWTC for Q4.

Example: Employer averaged 50 employees and incurred $80,000 in qualified expenses in Q3 2020. The SHWTC available to Employer for the Q3 qualified expenses is $40,000. Employer averaged 50 employees and incurred $80,000 in qualified expenses in Q4 2020. For Q4, the limitation is applied as follows:

- 50 average employees x $1,000 = $50,000 applicable dollar limit.
- $50,000 applicable dollar limit less aggregate SHWTC credits of $40,000 taken in prior quarters = $10,000.

Thus, Employer is eligible for a $10,000 SHWTC for Q4.

Note: The SHWTC limitation serves as an indirect hiring incentive for employers.

Example: Employer averaged 50 employees and incurred $120,000 in qualified employee protection expenses in Q3 2020. The SHWTC available to Employer for the Q3 qualified employee protection expenses is $50,000. Employer averaged 70 employees and incurred $120,000 in qualified employee protection expenses in Q4 2020. For Q4, the limitation is applied as follows:

- 70 average employees x $1,000 = $70,000 applicable dollar limit. • $70,000 applicable dollar limit less aggregate SHWTC credits of $50,000 taken in prior quarters =$20,000.

Thus, Employer is eligible for $20,000 SHWTC for Q4 as a result of averaging 20 more employees in Q4 than Q3.

D. What about qualified expenses incurred in calendar quarters before the HEALS Act's enactment?

The HEALS Act provides that if qualifying expenses are paid or incurred after March 12, 2020, and on or before Dec. 31, 2020, and on or before the last day of the calendar quarter ending before the date of the HEALS Act enactment date, shall be treated as paid or incurred on the enactment date—i.e., if the HEALS Act is enacted in Q3 2020, all qualified expenses paid or incurred in Q1 and Q2 will be deemed paid or incurred in Q3.

Example: Assume the HEALS Act is enacted on Aug. 10, 2020. Assume in 2020, Employer had average employees and qualified expenses as follows:

- Q1 (after March 12, 2020): 50 employees and $80,000 qualified expenses;
- Q2: 50 employees and $70,000 qualified expenses;
- Q3: 70 employees and $90,000 qualified expenses; and
- Q4: 100 employees and $100,000 qualified expenses.

Since the HEALS Act is enacted in calendar quarter Q3, both the $80,000 of qualified expenses from Q1 and $70,000 of qualified expenses from Q2 are all treated as having been paid or incurred on Aug. 3, 2020, in Q3.

Q3:

- $240,000 of qualified expenses ($80,000 + $70,000 + $90,000)
- 70 average employees x $1,000 = $70,000 applicable dollar limit
- The SHWTC available to Employer for the Q3 qualified employee protection expenses is $70,000.

Q4:

- $100,000 of qualified expenses
- 100 average employees x $1,000 = $100,000 applicable dollar limit
- $100,000 applicable dollar limit - $70,000 prior credits = $30,000 limit.

The SHWTC available to Employer for the Q4 qualified employee protection expenses is $30,000.

E. Are there other timing issues to consider?

Yes. For employers that anticipate a fluctuating average number of employees from quarter to quarter, the timing of when qualifying expenses are paid or incurred can result in meaningful differences in the SHWTC's benefits.

Example: Employer has an average of 10 employees and $90,000 qualified expenses in Q3, and an average of 100 employees and $10,000 qualified expenses in Q4.

Q3:

- $90,000 of qualified expenses
- 10 average employees x $1,000 = $10,000 applicable dollar limit
- The SHWTC available to Employer for the Q3 qualified employee protection expenses is $10,000.

Q4:

- $10,000 of qualified expenses
- 100 average employees x $1,000 = $100,000 applicable dollar limit
- $100,000 applicable dollar limit - $10,000 prior credits = $90,000 limit.
- The SHWTC available to Employer for the Q4 qualified employee protection expenses is $10,000.

Employer would have a total SHWTC credit for the year of $20,000.

Example: Same facts as above but spend the $10,000 in Q3 and $90,000 in Q4.

Q3:

- $10,000 of qualified expenses
- 10 average employees x $1,000 = $10,000 applicable dollar limit
- The SHWTC available to Employer for the Q3 qualified employee protection expenses is $5,000 (50% of qualified expenses).

Q4:

- $90,000 of qualified expenses
- 100 average employees x $1,000 = $100,000 applicable dollar limit
- $100,000 applicable dollar limit - $5,000 prior credits = $95,000 limit.
- The SHWTC available to Employer for the Q4 qualified employee protection expenses is $45,000 (50% of qualified expenses).

Employer would have a SHWTC for the year of $50,000, resulting in an increased $30,000 benefit for the employer, solely based on the timing of when qualified expenses were incurred.

Employees	Limit Based on Employees	Q3 Qualified Expenses	SHWTC available to Employer	SHWTC claimed by the Employer
EMPLOYER SCENARIO 1				
10 (Q3)	10 average employees x $1,000 = $10,000 applicable dollar limit.	$90,000	$10,000	$10,000
100 (Q4)	100 average employees x $1,000 = $100,000 applicable dollar limit.	$10,000	$100,000 applicable dollar limit - $10,000 prior credits = $90,000 limit.	$10,000
Total credits claimed				$10,000 + $10,000 = $20,000 total credits clamed for the year
EMPLOYER SCENARIO 1				
10 (Q3)	10 average employees x $1,000 = $10,000 applicable dollar limit.	$10,000	$10,000 * 50% = $5,000	$5,000
100 (Q4)	100 average employees x $1,000 = $100,000 applicable dollar limit - $5,000 of prior credits = $95,000 limit	$90,000	$90,000 * 50% = $45,000	$45,000
Total credits claimed				$5,000 + $45,000 = $50,000 total credits clamed for the year

F. What are qualified employee protection expenses?

Qualified employee protection expenses means amounts paid or incurred for:

- One time or periodic testing of employees and customers for COVID-19 or COVID-19 antibodies,
- Equipment to protect employees and customers from contracting COVID-19, including masks, gloves and disinfectants, or
- Cleaning products or services related to preventing the spread of COVID-19.

Note: We are aware of employers hiring additional security personnel to help maintain social distancing. While within the intent and purpose of the SHWTC, it is unclear whether (and what amount of) such expenses would be qualify, as the security personnel will provide other services (general security) in addition to services related to preventing the spread of COVID-19.

We are also aware of employers hiring medical personnel to advise on how to implement best safety protocols. While medical personnel are often providing advice on how to reconfigure workspaces or adequately clean the premises, it is unclear whether this qualifies under the definition.

G. What are qualified workplace reconfiguration expenses?

Qualified workplace reconfiguration expenses means (must meet all elements):

- Amounts are paid or incurred to design and reconfigure retail space, work areas, break areas and other areas that employees or customers regularly use in the ordinary course of the employer's trade or business;
- The primary purpose of the expenditures must be to prevent the spread of COVID-19;
- The expenditures must be for tangible property (within the meaning of IRC §168) located in the United States leased or owned by the employer;
- The expenses incurred are commensurate with the risks faced by employers or customers, or are consistent with recommendations by the Centers for Disease Control and Prevention or the Occupational Safety and Health Administration;
- The expenditures are completed pursuant to a reconfiguration plan that was not in place before March 13, 2020; and
- The expenditures are completed before Jan. 1, 2021.

The Secretary is directed to prescribe guidance, including guidance defining "primary purpose" and "reconfiguration plan," but guidance also needs to be provided regarding: (i) whether expenses incurred are "commensurate with the risks," (ii) the sorts of CDC and OSHA guidance that may be relied on, and (iii) whether a reconfiguration plan is "completed" before Jan. 1, 2021.

H. What are qualified workplace technology expenses?

Qualified workplace technology expenses means amounts paid or incurred by the employer for (must meet all elements) technology systems (IRC §167(f)(1) computer software or IRC §168(i)(2) qualified technological equipment) that:

- employees or customers use in the ordinary course of the employer's trade or business;
- has a primary purpose of preventing the spread of COVID-19;
- is used for limiting physical contact between customers and employees in the United States;
- is commensurate with the risks faced by the employers or customers, or is consistent with recommendations by the Centers for Disease Control and Prevention or the Occupational Safety and Health Administration;
- is acquired by the employer on or after March 13, 2020;
- was not a planned expense before March 12, 2020; and
- is placed in service before Jan. 1, 2021.

The Secretary is directed to prescribe guidance, including guidance defining "primary purpose" and "plan."

II. Administration of the SHWTC

A. How are the credits refundable?

Like the employee retention credit provided for in the CARES Act, the SHWTC is allowed against the employer's share of (1) old-age, survivors and disability insurance ("OASDI") taxes, and (2) Social Security and hospital insurance ("Medicare") portions under the Railroad Retirement Tax Act (after taking into account any credits allowed for the employment of qualified veterans and for research expenditures of a qualified small business as well as the credits allowed for required paid sick or family leave under the FFCRA, and further reduced by the credits for (i) employment of qualified veterans, (ii) research expenditures of a qualified small business, (iii) qualified sick and family leave under the FFCRA, and (iv) employee retention tax credits under the CARES Act. To the extent that the SHWTC for a calendar quarter exceeds the employer's share of OASDI taxes for that quarter (or Social Security and hospital insurance (Medicare) portions under the Railroad Retirement Tax Act), the excess is refundable to the employer.

While guidance for obtaining an SHWTC refund has not been released, it is expected to be similar to the processes for the CARES Act employee retention credit and FFCRA qualified sick and family leave credits. For such credits, the IRS provided guidance that amounts that are withheld by an employer from employees' wages for (1) the employees' share of OASDI taxes, (2) the employees' share of Medicare, and (3) federal income taxes as well as the employer's share of hospital insurance (Medicare) taxes that are required to be deposited can be retained by the employee as an advance payment of the refundable portion of the retention credit, provided that, to the extent such amounts exceed the refundable portion of the retention credit, the excess amount must be timely deposited by the employer in order to avoid any late deposit penalties.

B. How does an employer claim the credit?

It is anticipated that employers will report their total qualified expenses and the related credits for each calendar quarter on their federal employment tax returns, usually quarterly on Form 941 (though §6302 of the Code generally requires deposits of employment taxes to be made on a monthly or biweekly basis).

Form 941 is used to report income and Social Security and Medicare taxes withheld by the employer from employee wages, as well as the employer's portion of Social Security and Medicare tax.

In anticipation of receiving the credits, we expect that employers will be permitted to fund the credits in advance with federal employment taxes, including taxes withheld from employees' wages that are required to be deposited with the IRS or by requesting an advance of the credit from the IRS on Form 7200, like the employee retention credit and paid sick and family leave credits.

C. May an employer reduce its federal employment tax deposit in anticipation of the credit?

Yes, an employer may reduce its federal employment tax deposit by the amount of the credit based on the qualified expenses that it has paid. The employer will not be subject to a penalty under IRC §6656 for failing to deposit federal employment taxes if the Secretary determines that such failure was due to the reasonable anticipation of the credit.

III. Interaction of the SHWTC with Other Provisions

A. May an employer receive the SHWTC and other benefits or COVID-19-relief credits?

Yes, but no double benefit is allowed with respect to credits, deductions, basis or other tax benefits under the Internal Revenue Code. For example, if an employer purchases masks, that would be a qualified employee protection expense, but may also be deductible as an ordinary and necessary business expense. The HEALS Act provides that the deduction otherwise allowed shall be reduced by the amount of the credit with respect to such expense.

Note: Ordinary and necessary business expenses (e.g., disposable masks) are those used for less than one year and the cost is generally deductible in the year of purchase. Capital expenditures are assets that have a useful life of longer than one year (e.g., physical barriers to prevent spread of COVID-19) and generally must be capitalized and depreciated, so the cost is recovered over the useful life of the asset. **Example:** Employer reports its employment tax liability quarterly on Form 941, Employer's QUARTERLY Federal Tax Return. Employer is not required to make any deposits or payments with respect to its employment tax liability except at the end of each quarter when it files Form 941.

> **Example:** $100 mask expense could be a $50 credit (50% of the qualified expense) or $100 deduction. The HEALS Act allows the $50 credit, and a $50 deduction ($100 deduction less the $50 credit allowed).

Example: \$500 qualified reconfiguration expense is incurred with respect to depreciable property. Such property has an adjusted tax basis of \$2,000. The HEALS Act allows the \$250 credit (50% of the qualified expense), but the adjusted tax basis of the depreciable property must be reduced by the \$250 credit to \$1,750.

Note: In the example above, it is unclear what adjustments (if any) would be required by the employer in the event the adjusted tax basis of the depreciable property was \$0.

Note: The Paycheck Protection Program added personal protective equipment as a qualified expense (i.e., the expense could be forgiven). However, the SHWTC does not permit double benefits, so to the extent an employer receives forgiveness for personal protective equipment under the Paycheck Protection Program, such personal protective equipment costs would not also be eligible for the SHWTC.

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