

## Summary of Coronavirus Aid, Relief and Economic Security (CARES) Act and Families First Coronavirus Response Act (FFCRA) Tax Credit and Payroll Tax Relief<sup>1</sup>

This chart is a high-level overview of the various payroll and tax credit programs under the CARES Act and FFCRA and does not include the eligibility and technical requirements of each program, which are highly complex. Employers should consult counsel to help navigate these complex and technical requirements and to keep informed of future guidance.

| Current as of<br>May 15, 2020  | Paycheck Protection<br>Program (PPP)  | Economic Injury<br>Disaster Loans<br>(EIDL) and<br>Emergency<br>Grants | Loan Assistance for<br>Mid-Sized<br>Businesses | Payroll Tax<br>Credit for<br>Emergency<br>Sick and<br>Family Leave<br>(FFCRA) | Delay of<br>Payment of<br>Employer<br>Payroll Taxes  | Employee<br>Retention Tax<br>Credit<br>(ERTC)  |
|--|---|--|--|---|--|--|
| <a href="#"><u>Coronavirus Aid, Relief and Economic Security (CARES) Act Section</u></a> | 1102 (PPP)<br>1106 (Loan Forgiveness)   | 1110   | 4003(c)(3)(D)                                  | 3601, 3602, 5603 (amends FFCRA Sections 7001 and 7003)                        | 2302   | 2301   |
| <b>Loan or Credit</b>  | Unsecured loan <sup>2</sup> (possible forgiveness if loan used for “forgivable purposes” and employee and compensation levels maintained).<br><br>Forgiven loan not included in gross income. | Unsecured loan <sup>3</sup> and grant. <sup>4</sup>                    | Secured loan. <sup>5</sup>                     | Credit; excess refundable with possible advanced credit. <sup>6</sup>         | N/A – Deferred payment of employer portion of Social Security payroll taxes (6.2%).<br><br>(essentially a short-term, interest-free line of credit). | Credit against Form 941 payroll tax deposits; excess refundable with possible advanced credit.<br><br>(Credit recaptured if employer receives PPP loan in subsequent quarter). |

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| Current as of May 15, 2020 | Paycheck Protection Program (PPP)  | Economic Injury Disaster Loans (EIDL) and Emergency Grants  | Loan Assistance for Mid-Sized Businesses   | Payroll Tax Credit for Emergency Sick and Family Leave (FFCRA)   | Delay of Payment of Employer Payroll Taxes  | Employee Retention Tax Credit (ERTC)  |
|----------------------------|--|---|--|--|---|---|
| <b>Size Eligibility</b>    | <p>Small business<sup>7</sup> (together with its affiliates<sup>8</sup>) in operation on February 15, 2020 that either:</p> <ul style="list-style-type: none"> <li>• has 500 or fewer US employees;</li> <li>• is within an industry for which the SBA established a number of employee standard in excess of 500; or</li> <li>• is a “small business concern” with certain maximum tangible net worth.</li> </ul> | <p>Small businesses<sup>9</sup> in operation on January 31, 2020 that are located in a declared disaster area,<sup>10</sup> suffer a substantial economic injury due to COVID-19 and meet SBA size standards (including SBA affiliation rules).</p> | <p>Target businesses (and nonprofits) with between 500 and 10,000 employees and other businesses that have not received adequate economic relief under the CARES Act.</p> <p>US domiciled business with significant operations/employees in US.</p> <p>Not eligible if business is a debtor in bankruptcy.</p> | <p>Employers<sup>11</sup> with <u>fewer</u> than 500 employees are required to provide paid sick leave under the Emergency Paid Sick Leave Act and to provide paid family leave under the Expanded Family and Medical Leave Act.</p> | <p>All employers are eligible. However, an employer with a PPP loan will become ineligible once it receives a decision from its lender that its PPP loan is forgiven.</p> | <p>Any business<sup>12</sup> (regardless of size) that operates a trade or business during 2020 and either:</p> <ul style="list-style-type: none"> <li>• suspends operations due to COVID-19 during any calendar quarter; or</li> <li>• has gross receipts below 50% of the comparable quarter in 2019.<sup>13</sup></li> </ul> <p>Not eligible if employer (i) receives a Small Business Interruption Loan under the PPP or (ii) is a state and local government or instrumentality.</p> |
| <b>Covered Period</b>      | Application period: <sup>14</sup>  | January 31, 2020 - December 31, 2020.   | Loans must be made prior to December 31, 2020.   | April 1, 2020 - December 31, 2020.   | Employer’s portion of Social Security taxes   | Qualified wages paid after March 12,  |

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|   | <p>April 3, 2020 – June 30, 2020, or until the funds made available for this purpose are exhausted.</p> <p>Begins April 10, 2020 for independent contractors/self-employed.</p>   |  |  |  | <p>that are otherwise due during the period beginning March 27, 2020 and ending December 31, 2020.<sup>15</sup></p> | <p>2020, and before January 1, 2021.</p> |
| <p><b>Employee Retention Requirements</b></p>       | <p>Yes, for loan to be fully forgiven. Loan forgiveness will be reduced if full-time headcount declines. See below.</p> <p>Layoffs/terminations between February 15 and April 26, 2020 are not counted if rehired by June 30, 2020.</p> | <p>No</p>  | <p>Yes, until September 30, 2020, must maintain employment levels as of February 1, 2020, to the extent practicable, and retain no less than 90% of employees as of that date.</p>                         | <p>No</p>  | <p>No</p>   | <p>No</p>                                |
| <p><b>Required Employee Compensation Levels</b></p> | <p>Yes, for full loan to be forgiven. Loan forgiveness will be reduced if compensation decreases. See below.</p>  | <p>No</p>  | <p>Yes.<sup>16</sup> During loan term and for one year after the loan is no longer outstanding,</p> <ul style="list-style-type: none"> <li>officers and employees whose total 2019 compensation</li> </ul> | <p>No</p>  | <p>No</p>   | <p>No</p>                                |

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|                            |  |  | <p>exceeded \$425,000 are subject to compensation caps and any severance pay and benefits may not exceed 2 times the maximum total 2019 compensation.</p> <ul style="list-style-type: none"> <li>officers and employees making greater than \$3 million are subject to compensation reductions.<sup>17</sup></li> </ul> |  |  |   |
| <b>Permitted Uses</b>      | <ul style="list-style-type: none"> <li>Payroll costs.<sup>18</sup></li> <li>Interest on mortgage obligation incurred prior to February 15, 2020.</li> <li>Rent under leases dated prior to February 15, 2020.</li> <li>Utilities for service agreements dated</li> </ul> | <p>EIDL and grants may be used to:</p> <ul style="list-style-type: none"> <li>Provide paid sick leave to employees.</li> <li>Maintain payroll.</li> <li>Meet increased costs due to</li> </ul> | <p>Funds must be used to retain 90% of workforce at full compensation and benefits through September 30, 2020.</p>  | <p>Credit in the full amount of the qualified sick leave wages and qualified family leave wages, plus allocable qualified health plan expenses</p> | <p>Deferred deposit and payment of employer's portion of Social Security taxes that are otherwise due during the period beginning March 27, 2020 and</p> | <p>Credit against Form 941 deposits, excess refundable.</p> |

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|                            | <p>prior to February 15, 2020.</p> <ul style="list-style-type: none"> <li>• Refinance of an EIDL loan made between January 31, 2020 and April 3, 2020.</li> </ul> <p>At least 75% of PPP loan proceeds must be used for payroll costs.<sup>19</sup></p> <p>Misuse of PPP funds may result in additional liability such as fraud charges.</p> | <p>supply chain disruptions.</p> <ul style="list-style-type: none"> <li>• Make rent and mortgage payments.</li> <li>• Repay obligations that cannot be met due to revenue loss.</li> </ul> |   | <p>and the employer's share of Medicare tax.</p>  | <p>ending December 31, 2020.</p>  |   |
| <b>Limits</b>              | <p>PPP loan amount is limited to lesser of</p> <ul style="list-style-type: none"> <li>• 2.5x average monthly payroll costs from the last year,<sup>20</sup> or</li> <li>• \$10 million</li> </ul> <p>Only one PPP loan permissible, so businesses should consider applying for the maximum amount.<sup>21</sup></p>                          | <p>The grant is limited to \$10,000.</p> <p>An EIDL is limited to \$2 million.</p>   | <p>Loan amount determined by Treasury.</p> <p>The employer is prohibited from making stock buybacks and paying dividends (unless contractually obligated) during the term of the loan plus one year after the</p> | <p>100% credit for required qualified sick leave wages and qualified family leave wages paid under FFCRA, subject to caps. Amounts paid in excess of required amounts not</p> | <p>No, other than the normal Social Security wage base (which caps wages subject to Social Security tax for 2020 at \$137,700).</p> | <p>Credit of 50% of "qualifying wages" (which varies based on number of employees)<sup>22</sup> paid up to \$10,000 total per employee (maximum credit of \$5,000 per employee).</p> <p>No ERTC for employees for which</p> |

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|                               |                                      |  | <p>date the loan is no longer outstanding.</p> <p>Not in bankruptcy.</p> <p>No outsourcing or offshoring of jobs during loan term and two years thereafter.</p> <p>Receipt will not abrogate CBAs for term of loan and two years thereafter. Must remain neutral in union organizing efforts for term of loan.</p> <p>Compensation limits.</p> | <p>subject to credit.</p> <p>Sick leave credit capped at employer obligation – up to \$511 per day (\$5,110 total) or up to \$200 per day (\$2,000 total) for up to 10 days depending on the reason for leave.</p> <p>Family leave credit capped at employer obligation – 2/3 of employee’s regular pay capped at \$200 per day (\$10,000 total) for up to 10 days.</p> |   | <p>employer receives a Work Opportunity Tax Credit.</p> <p>No ERTC with respect to wages for which employer received FFCRA tax credit or under the existing tax credit for paid family medical leave.</p> |

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|                            |   |   |  | Additional credit for costs to maintain health insurance during leave obligation. |  |  |
| <b>Loan Forgiveness</b>    | If used to cover qualified payroll costs, mortgage interest, rent, and utilities payments over the 8 week period beginning on the date the lender makes the first disbursement of the PPP loan, and employee and compensation levels maintained.<br><br>Loan forgiveness will be reduced upon certain conditions. <sup>23</sup> | No. An eligible employer may refinance its EIDLs (taken between January 1, 2020 and April 3, 2020) under the PPP to take advantage of the PPP's loan forgiveness provisions.<br><br>The grant does not have to be repaid, even if the loan application is denied. | No                                       | N/A   | N/A  | N/A  |
| <b>Refundable Credit</b>   | N/A   | N/A   | N/A                                      | Yes, to the extent the credit exceeds the employer portion of the federal         | N/A  | Yes, to the extent the credit exceeds the employer's Social Security payroll tax liability for the calendar quarter. |

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|                            |   |   |   | employment taxes.<br><br>Advanced credit refund available by filing Form 7200.                                    |  | Immediate reimbursement by reducing Form 941 deposit <sup>24</sup> or obtain refund of excess. Advanced credit refund available by filing Form 7200. |
| <b>Due Date</b>            | Loan payments deferred for first 6 months, but interest accrues. <sup>25</sup><br><br>2-year maturity date. <sup>26</sup> | The first loan payment is due 12 months after loan issued. Terms of up to 30 years are available. | Loan payments are automatically deferred for at least 6 months (or longer at the discretion of the Treasury).<br><br>5 year maximum term. | N/A   | 50% of the liability is due by December 31, 2021, and the remaining 50% is due by December 31, 2022. | N/A  |
| <b>Form to File</b>        | Applicant submits SBA Form 2483 with payroll documentation.<br><br>Lender submits SBA Form 2484.                          | Application available on the SBA's website <a href="#">here</a> .                                 | The Treasury Secretary will release regulations and procedures describing the application process.  | Form 941 series – reduce deposit for credits.<br><br>If requesting advanced refund, file Form 7200. <sup>27</sup> | Form 941 series. <sup>28</sup> No special election required to defer deposits and payments.          | Form 941 series – reduce deposit for credits.<br><br>If requesting advanced refund, file Form 7200.  |

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| <p><b>Considerations</b></p> | <p>Applicant must certify in good faith that PPP loan is necessary.<sup>29</sup></p> <p>Obtaining PPP loan disqualifies the business from ERTC, unless PPP loan fully repaid by May 18, 2020.</p> <p>Forgiveness of PPP loan disqualifies the business from delayed payment of employer payroll taxes relief.</p> <p>Per IRS, expenses paid with proceeds of a PPP loan that is forgiven are not deductible to employer.<sup>30</sup></p> <p>Employers who received a PPP loan cannot use an EIDL for the same purposes as the PPP loan.<sup>31</sup></p> | <p>Not eligible for an EIDL for the same costs that are covered by a PPP loan.</p> | <p>If considering furloughs or layoffs, employee retention and compensation requirements may make this relief unattractive.</p> | <p>Cannot be used for the same wages under the ERTC.</p>       | <p>No deferral of future Social Security taxes due after date lender issues notice of PPP loan forgiveness.<sup>32</sup></p> | <p>Not eligible if employer obtained PPP Loan.</p> <p>Cannot claim the same employee for this credit and the Work Opportunity Tax Credit, employer credit in Section 45S for FMLA, tax credit for Sick and Family Leave under the FFCRA, or if a related person as defined in Section 51 of the Code for the same period.</p> |

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## How to Determine Which Program is Best for Your Business

Businesses should carefully consider the eligibility requirements, limitations and potential value of each program to determine which relief is the most beneficial for the business' own circumstances. Seeking relief under certain of the programs may disqualify the employer for other programs. For example, a small business employer that obtains a PPP loan is not eligible for the ERTC, and an employer who has a PPP loan forgiven is not eligible for deferred payment of employer payroll taxes.

Depending upon the level of salaries, a forgivable PPP loan may be more lucrative. For example, a small business employer employs 75 employees with an average annual salary of \$60,000 (\$5,000 average monthly salary). The employer could obtain a PPP loan in a maximum amount of \$937,500 (2.5 times monthly payroll of \$375,000 (\$5,000 average monthly salary x 75 employees)). If the employer maintains employment and compensation levels, the \$937,500 PPP loan can be forgiven (to the extent the funds are used for covered expenses during the first 8 weeks of the loan). If the business chose the ERTC instead of the PPP loan, it would be entitled to a refundable payroll tax credit of \$375,000 (50% of wages, with wages capped at \$10,000 per employee). PPP loans contain stipulations on the use of the funds, including a requirement that at least 75% of the funds be used for payroll costs and the remaining for other permitted costs.

Conversely, a small business employer with lower salaries may be better off with the ERTC instead of a PPP loan. For example, an employer employs 75 employees with an average annual salary of \$20,000 (\$1,666 average monthly salary). The employer could obtain a PPP loan in a maximum amount of \$312,500 (2.5 times monthly payroll of \$125,000 (\$1,667 average monthly salary x 75 employees)). If the employer maintains employment and compensation levels, the \$312,500 PPP loan can be forgiven (to the extent the funds are used for covered expenses during the first 8 weeks of the loan). If the employer chose the ERTC instead of the PPP, it would be entitled to a refundable payroll tax credit of \$375,000.

It may be advantageous to certain employers who received payroll tax credits for emergency sick and family leave or an ERTC due to COVID-19 to request an advance of their employer credits. The following examples illustrate how this advance would work:

Example 1: Assume an employer is entitled to a tax credit of \$5,000 for qualified sick leave wages, certain related health plan expenses, and the employer's share of Medicare tax on the leave wages due to COVID-19. If the employer is required to deposit \$8,000 in employment taxes, the employer could offset its federal employment tax deposits by \$5,000. The employer would then only be required to deposit the remaining \$3,000 on its next regular deposit date.

Example 2: Assume an employer is entitled to an ERTC of \$10,000 and is required to deposit \$8,000 in employment taxes. Under the CARES Act, the employer could retain the entire \$8,000 of taxes as a portion of the refundable tax credit it is entitled to and file a request for an advance payment for the remaining \$2,000 using Form 7200.

Other considerations include requirements to maintain employee and compensation levels, which may not be feasible over the long term, depending upon the business' circumstances.

Please contact any member of the Troutman Sanders or Pepper Hamilton Employee Benefits, Labor & Employment, or Tax practice groups to discuss how we can help you determine which relief is best for the unique circumstances of your business.

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<sup>1</sup> Although not addressed in this chart, the CARES Act provides for certain other relief, including direct loans to certain businesses that are critical to maintaining national security and certain small business debt relief for non-disaster loans. This chart provides a high level summary as of May 15, 2020 and is not intended to cover all intricacies of the CARES Act or constitute legal advice. The state of the law is changing at a rapid pace, and government agencies are expected to continue issuing guidance in the near future, so businesses should seek advice of counsel prior to seeking relief.

<sup>2</sup> PPP loans carry a 1% interest rate and 2-year term and do not require personal guarantees or collateral.

<sup>3</sup> EIDLs carry a 3.75% interest rate for small businesses and 2.75% interest rate for nonprofits and up to a 30-year term.

<sup>4</sup> This grant serves as an advance while the SBA is processing the employer's EIDL application.

<sup>5</sup> Loans to mid-sized businesses carry a maximum interest rate of not higher than 2% per year.

<sup>6</sup> See IRS FAQs [here](#) for special issues for employers regarding taxation, deductibility and interaction of FFCRA tax credits with other tax credits.

<sup>7</sup> Includes corporations, partnerships, limited liability companies, nonprofits, veterans' organizations, tribal business concerns, sole proprietorships, self-employed individuals, and independent contractors. SBA FAQs clarify that small agricultural cooperatives and other cooperatives are included if all PPP loan requirements are met. See SBA FAQ 35. Certain small businesses are ineligible, for example, businesses owned or controlled by the business or its owners that have ever obtained a direct or guaranteed loan from SBA or any other federal agency that is delinquent or has defaulted within the last seven years and caused a loss to the government. See [SBA Interim Final Rule](#).

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<sup>8</sup> For an analysis of the SBA affiliation regulations and the impact on PPP Section 7(a), see Troutman/Pepper Alert [here](#) and Interim Final Rule on Affiliation [here](#). The eligibility and affiliation rules for a PPP loan are complex and care should be taken before applying.

<sup>9</sup> The CARES Act expands eligibility to include businesses, sole proprietorships, independent contractors, cooperatives, employee stock ownership plans, and tribal business concerns in each case with fewer than 500 employees. The SBA has instructed that it will begin accepting EIDL loan applications from agricultural business on a limited basis. For more details, see [SBA Notice of Agricultural Business Eligibility for EIDL](#). Private nonprofits are also eligible.

<sup>10</sup> The CARES Act expands the declared disaster area to include each State and subdivision.

<sup>11</sup> In determining whether the 500-employee threshold is met, employers must consider the total number of employees at the time a particular employee seeks to take FFCRA leave. As a result, employers may be subject to the FFCRA at one moment in time but not subject to it at a different time. Complex rules apply for determining whether the 500 employee threshold is met. See Troutman/Pepper Alert [here](#), and Department of Labor Temporary Regulations [here](#) and [FAQs here](#). Department of Labor Temporary Regulations provide that small employers with fewer than 50 employees may qualify for an exemption from the requirement to provide paid leave due to school, place of care, or child care provider closings or unavailability, if the leave payments would jeopardize the viability of their business as a going concern.

<sup>12</sup> For-profit and non-profits are eligible.

<sup>13</sup> Under the second scenario, once gross receipts exceed 80% of the comparable calendar quarter in 2019, the employer is no longer eligible for ERTC as of the end of that quarter.

<sup>14</sup> Applications must be submitted with required documentation to an approved lender. Loans are granted on a first come, first serve basis, so interested businesses are encouraged to apply quickly because there is a funding cap.

<sup>15</sup> Also applies to one-half of SECA tax for self-employed individuals.

<sup>16</sup> The CARES Act contains certain internal inconsistencies which call into question whether the compensation limits described in Section 4004 apply to the mid-sized business lending program. Section 4004 expressly applies the compensation restrictions to the lending programs under Sections 4003(b)(1), (b)(2) and (b)(3), but notably does not mention Section 4003(b)(4). Section 4003(c)(3)(D) which provides for the implementation of the mid-sized business lending program also does not mention any compensation restrictions. However, the restrictions set forth in Section 4003(c)(3)(A)(ii)(III), which include the compensation restrictions, arguably apply to all lending programs established under Section 4003(b)(4), including the mid-sized business lending program. As such, until further guidance is issued that provides otherwise, the conservative approach is for eligible businesses to proceed on the basis that the compensation restrictions will apply.

<sup>17</sup> Officers and employees whose total 2019 compensation exceeded \$425,000 may not receive total compensation during any 12 consecutive months in excess of the total compensation received in 2019 (other than an employee whose compensation is determined through a collective bargaining agreement entered into prior to March 1, 2020). Officers and employees whose total 2019 compensation exceeded \$3 million may not receive total compensation during any 12 consecutive months in excess of the sum of \$3 million plus 50% of the 2019 compensation that exceeded \$3 million.

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<sup>18</sup> Payroll costs include compensation to employees (whose principal place of residence is in the US) in the following forms: salary, wages commissions, cash tips or the equivalent (the sum of which is capped at \$100,000 on an annualized basis for each employee); employee benefits including, vacation payments, parental, family, medical, or sick leave; allowance for separation or dismissal; payments required for the provisions of group health care benefits including insurance premiums; and payment of any retirement benefit; State and local taxes assessed on compensation. An employer does not include amounts paid to independent contractors as payroll costs. For a sole proprietor or independent contractor, payroll costs include wages, commissions, income, or net earnings from self-employment, capped at \$100,000 on an annualized basis for each employee. The following are excluded from payroll costs: (i) any compensation of an employee whose principal place of residence is outside the United States; (ii) compensation of an employee in excess of annual salary of \$100,000 (prorated as necessary); (iii) Federal employment taxes imposed or withheld between February 15 and June 30, 2020; and (iv) qualified sick and family leave wages for which a credit is allowed under sections 7001 and 7003 of the FFCRA.

<sup>19</sup> See [SBA Interim Final Rule](#). SBA will issue additional guidance on loan forgiveness.

<sup>20</sup> Compensation paid to an employee in excess of \$100,000 annualized is not included in the calculation of the average monthly payroll. For step-by-step instructions for calculating the maximum loan amount (including calculation of the average monthly payroll costs), see the SBC Interim Final Rule. After calculating the average monthly payroll costs, the outstanding amount of an EIDL made between January 31, 2020 less the amount of any EIDL emergency grant (because it does not have to be repaid) is added to total the maximum loan amount.

<sup>21</sup> See [SBA Interim Final Rule](#).

<sup>22</sup> The definition of “qualifying wages” varies depending on whether the employer averaged more than 100 full-time employees during 2019. For this determination, the CARES Act refers to “full-time employee” “within the meaning of Internal Revenue Code Section 4980H.” There is some uncertainty and inconsistency among informal guidance as to whether full-time equivalent employees are counted as full-time employees for this purpose. Compare [IRS FAQ 49](#) (providing that a full-time employee is an employee who works at least 30 hours per week or 130 hours in the month (which is treated as equivalent to 30 hours per week), which is the method for determining assessable penalties under Code Section 4980H) with the [Joint Committee on Taxation Description of Tax Provisions in CARES Act](#) at page 40 (referring to full-time employees and “full-time equivalent employees,” as defined in Code Section 4980H(c)(2)(E), for purposes of determining applicable large employer status under the Affordable Care Act). Employers should contact legal counsel before making this determination.

100 or Fewer. If the employer’s average number of full-time employees in 2019 was 100 or fewer, qualified wages will include (1) wages paid during a shutdown; or (2) wages paid during a significant decline in gross receipts, ***without regard to whether the employee provided services*** to the employer during the calendar quarter. IRS FAQs [available [here](#)] which are informal, non-binding guidance that indicates the IRS’s likely position on an issue, provide that a large employer may use any reasonable method in determining the hours for which an employee is not providing services. The IRS FAQs provide examples of reasonable methods for making this determination, which vary depending on whether the employee in question is an hourly or a salaried employee. Although there is some uncertainty as to exempt salaried employees and part-time employees. Employers are encouraged to seek advice from legal counsel to determine whether wages constitute “qualified wages” for purposes of the ERTC.

Greater than 100. If the employer’s average number of full-time employees in 2019 was greater than 100, qualified wages will include (1) wages paid during a shutdown; or (2) wages paid during a significant decline in gross receipts, but only for wages paid while the employee ***was not providing services*** to the employer during the calendar quarter in either circumstance.

*The material in this publication was created as of 5/15/2020 and is based on laws, court decisions, administrative rulings and congressional materials that existed at that time, and should not be construed as legal advice or legal opinions on specific facts. The information in this publication is not intended to create, and the transmission and receipt of it does not constitute, a lawyer-client relationship.*

“Qualified wages” are wages (as defined in section 3121(a) of the Code) and compensation (as defined in section 3231(e) of the Code), and, according to IRS FAQs are determined without regard to the contribution and wage base (as determined under section 230 of the Social Security Act), paid by an Eligible Employer to some or all of its employees after March 12, 2020, and before January 1, 2021. Qualified wages also include the employer’s qualified health plan expenses (e.g., employer cost of providing health care) that are properly allocable to the wages, but there is some uncertainty as to whether such expenses qualify if no wages are paid to the employee. Qualified wages do not include paid sick or family leave for which the employer is reimbursed under the Families First Coronavirus Response Act. Further, qualified wages paid to an employee are limited to what the employee would have been paid for working an equivalent duration during the 30 days immediately preceding the commencement of the full or partial suspension of the operation of the trade or business due to a governmental order limiting commerce, travel or group meeting due to the coronavirus or the first day of the calendar quarter in which the employer experienced a significant decline in gross receipts.

<sup>23</sup> The forgivable amount of the loan is reduced if the employer: (i) decreases the average monthly full-time equivalent employee headcount during the 8-week period as compared to one of two lookback periods (lookback period chosen at the election of the borrower) or (ii) decreases salaries and wages by more than 25% for any employee who made less than \$100,000 annualized in 2019. The employer has until June 30, 2020 to restore its full-time employment and salary levels for any reductions made between February 15, 2020 and April 26, 2020. Layoffs after April 26, 2020 cannot be restored for purposes of calculating the amount of loan forgiveness. In its updated FAQs, the SBA noted that it and the Treasury intend to issue an interim final rule excluding laid-off employees whom the borrower offered to rehire (for the same salary/wages and same number of hours) from the loan forgiveness reduction calculation. It further noted that “the interim final rule will specify that, to qualify for this exception, the borrower must have made a good faith, written offer of rehire, and the employee’s rejection of that offer must be documented by the borrower. Employees and employers should be aware that employees who reject offers of re-employment may forfeit eligibility for continued unemployment compensation.” See [SBA FAQ 40](#).

<sup>24</sup> The IRS instructed that the ERTC should be included on the second quarter 2020 Form 941 series and should not be included on the first quarter return. See [IRS - ERTC](#).

<sup>25</sup> CARES Act authorized up to a one-year deferral; SBA determined 6-month deferment was appropriate. See [SBA Interim Final Rule](#).

<sup>26</sup> CARES Act authorized up to a maximum maturity of 10 years from the date of application for loan forgiveness; the SBA determined that a 2-year maturity date is sufficient. See [SBA Interim Final Rule](#).

<sup>27</sup> For more information see <https://www.irs.gov/forms-pubs/about-form-7200>.

<sup>28</sup> The IRS has indicated that it will issue further information about how to reflect the deferred payments and deposits.

<sup>29</sup> SBA FAQs clarify that a borrower must certify that “[c]urrent economic uncertainty makes [the PPP] loan request necessary to support the ongoing operations of the Applicant.” A borrower must make this certification in good faith, taking into account its current business activity and ability to obtain other sources of funding to support its ongoing operations in a manner that is not significantly detrimental to its business. The SBA noted that “it is unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith.” The SBA will deem PPP loans in an original principal amount under \$2 million to be in good faith; whereas, it will review all loan applications in amounts in excess of \$2 million. [SBA FAQ 46](#). A borrower that applied for a PPP loan prior to April 23, 2020 and repays the loan in full by May 18, 2020, will be deemed to have made the certification in good faith. [SBA FAQ 47](#). The SBA noted that it will amend its interim guidance.

<sup>30</sup> IRS Notice 2020-32; see also Troutman Alert [here](#).

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<sup>31</sup> For example, if an employer used its EIDL to cover payroll for certain employees in March, the employer could not use a PPP loan for those same workers in March, although it could use it for payroll in April or for different workers in March.

<sup>32</sup> Any amount of the deposit and payment of the employer's share of Social Security tax that was deferred through the date the PPP loan is forgiven will continue to be deferred and will not be due until December 31, 2021 (50% of the deferred amount) and December 31, 2022 (the remaining amount).