Employer COVID-19 Cost-Recovery Options

A side-by side comparison of the tax credits for the E-PSL and E-FMLA leaves as mandated by the FFCRA and the Employee Retention Credits and Payroll Protection Program Loans available under the CARES Act

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Big-picture interplay:

- Employee Retention Tax Credits *cannot* be used with PPP Loans; in fact, obtaining a PPP Loan disqualifies the employer from claiming the Employee Retention Tax Credits. What is not clear yet is whether a business can disgorge Employee Retention Tax Credits applied in Q2 of 2020, if it later obtains a PPP Loan.
- Employee Retention Tax Credits *can* be used simultaneously with FFCRA Tax Credits, although no double-dipping is allowed: wages for purposes of CARES credits do not include FFCRA paid leave.
- PPP Loans *cannot* be used to pay FFCRA Emergency Leave—presumably based on the fact that costs were already captured by tax credit/refund available immediately.

	FFCRA Emergency Leave—Tax Credits	Employee Retention Credit via CARES	PPP Loan via CARES
Covered Employers	All private employers in U.S. with fewer than 500 employees. Most public employers likewise subject to leave mandates, but not eligible for tax credits. While still covered, and otherwise subject to the FFCRA leave mandates, including posting requirements, limited exceptions are available to small businesses (those with fewer than 50 employees) and employers of health care providers, which will excuse leave obligations in certain circumstances.	Employers that have experienced either: 1. A full or partial suspension of operations as a result of COVID-related government order; or 2. A "significant decline" in gross receipts, meaning a decline of at least 50 percent during a 2020 calendar quarter as compared to the same calendar quarter in 2019. The significant decline is deemed to end when gross receipts during a calendar quarter reach 80 percent of gross receipts for that same calendar quarter in 2019.	Employers that: 1. Were operational as of February 15, 2020 2. Paid employees or independent contractors on Form 1099-MISC in 2019, and 3. Have fewer than 500 employees whose principal place of residence is the United States.[1] 501(c)(3) charities and religious organizations, 501(c)(19) veterans organizations, tribal businesses, sole proprietors, independent contractors, and self-employed individuals are also eligible.
Qualifying Expenses	Emergency paid leave used by eligible employees for COVID-related reasons, up to daily and total caps. Two kinds are required, both Emergency Paid Sick Leave (E-PSL) and Emergency Family and Medical Leave (E-FMLA), which depend on the individual qualifying reason. See MNG&D Comparison Chart. Also includes allocable costs for group health care coverage continuance while employee is on FFCRA leave.	Depends on number of employees:[2] • If employer is > 100 employees, only wages paid to those employees who weren't working as a result of either reason above. • If employer is < 100 employees, all wages included, if employer can establish #1 or #2 above.	For calculating the base loan amount, a borrower can receive up to 2.5 times the borrower's average monthly payroll costs[3] for 2019. Qualifying expenditures of PPP Loan funds include: • Payroll costs: wages, commissions, etc. • Employee benefits. Mortgage, lease payments, and utilities, if they were obligations that existed before February 15, 2020.

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	FFCRA Emergency Leave—Tax Credits	Employee Retention Credit via CARES	PPP Loan via CARES
Relevant Period	April 1, 2020 to December 31, 2020	March 12, 2020 to December 31, 2020	PPP Loans have a two-year term, but only qualifying expenditures over the first eight weeks are eligible for forgiveness.
How?	Employer pays the required leave amounts to the employee, and applies a tax credit at the next quarterly tax filing. If the credit amount is more than the amount owed for payroll taxes, the IRS is facilitating refunds, currently promised within two weeks.	Same as FFCRA. In addition, the current IRS Guidance states: "*In anticipation of receiving the credits, Eligible Employers can fund qualified wages by accessing federal employment taxes, including withheld taxes, that are required to be deposited with the IRS or by requesting an advance of the credit from the IRS.*" And they can do so without incurring a "failure to deposit penalty" if done as prescribed. See here.	PPP Loan applications will be processed by existing SBA lenders and participating federally insured depository institutions and credit unions. A borrower can submit a request for forgiveness to the lender servicing the loan, which will include documents that verify the number of full-time equivalent employees and pay rates, as well as the payments on eligible mortgage, lease, and utility obligations. The lender is required to make a decision on forgiveness within 60 days.
What is Credited/ Subject to Forgiveness?	The amount of actual leave costs incurred for the specific leave event, subject to statutory caps. • For E-PSL used for an employee's own illness, quarantine, or time needed to obtain a diagnosis, employee's full pay up to $511 per day; total maximum of $5,110. • For E-PSL used by an employee to care for another individual or a child whose school or daycare is closed, 2/3 of employee's pay up to $200 per day; maximum of $2,000. • When an employee uses E-FMLA because the employee was unable to work (or telework) in order to care for a child whose school or daycare was closed for COVID reasons, that could be an additional $10,000, if the employee uses all 10 weeks of eligibility, which is a maximum of $12,000 if the employee uses both E-PSL and E FMLA for the same event and reason. Daily cap is 2/3 of employee's pay up to $200; maximum of $10,000.	Fifty (50) percent of all "qualified wages,"[4] with a maximum of $10,000/per employee; so $5,000 in credits per employee if triggered. See here.	Any amounts spent on the above-referenced qualifying expenditures during the first eight weeks following loan origination are forgivable, as long as not more than 25 percent of the forgiven amounts are used for nonpayroll costs. Loan forgiveness will be reduced if the borrower has: • Reduced full-time employee head count; or • Reduced salaries and wages by more than 25 percent for any employee who made less than $100,000 annualized in 2019. For purposes of the above, borrowers can elect to use one of two measurement periods: (1)February 15, 2019 to June 30, 2019, or (2) January 1, 2020 to February 29, 2020.[5] Borrowers have until 6/30/2020 to restore employee head count or wages for purposes of PPP Loan forgiveness.

	FFCRA Emergency Leave—Tax Credits	Employee Retention Credit via CARES	PPP Loan via CARES
Documentation	IRS Form 7200, as well as the appropriate supporting documentation. See MNG&D Alert.	IRS Form 941[6]	Determined by loan providers, and dependent on type of business. Documentation may include payroll processor records, payroll tax filings, Form 1099-MISCs, and bank records.
Exclusions/ Disqualifiers	Employers may opt to pay more than the statutory caps (e.g., paying full pay rather than 2/3 pay), or to allow employees to supplement E-FMLA with employer PTO, but may seek credit only for cap amounts actually expended in the relevant tax quarter.		Participation in the PPP loan program may disqualify employers from other CARES Act benefits. For example: • Obtaining a PPP disqualifies the recipient from claiming the Employee Retention Credit; and • Receiving forgiveness of a PPP loan disqualifies the recipient from being eligible for deferral of SSN Taxes under CARES § 2302.[7] In addition to the limited purposes outlined above, PPP Loans also cannot be used: • For payment of FFCRA leaves, although other employer-funded leaves and benefits may be included. • To pay payroll costs in excess of $100,000 on an annualized basis for any employee.[8] • To pay employees working outside the U.S.

[1] An employer must provide a good-faith certification that current economic uncertainty makes the PPP Loan request necessary to support ongoing operations. Additionally, a business can qualify as a small business concern if it met both tests in SBA's "alternative size standard" as of March 27, 2020: (1) maximum tangible net worth of the business is not more than $15 million; and (2) the average net income after Federal income taxes (excluding any carry-over losses) of the business for the two full fiscal years before the date of the application is not more than $5 million. Larger businesses may also qualify if they meet higher standards applicable to particular industries under regulations published by the SBA. For businesses in the dining and hospitality industries, franchises, and small-business investment companies covered by Section 301 of the Small Business Investment Act of 1958, the size limit above is per location rather than entity wide.

[2] Total number of employees for this purpose is based on average number of full-time employees in 2019. There are alternative tests for seasonal workforces and those not in operation in 2019.

[3] SBA guidance suggests that payroll costs consist of: (1) salary, wages, commissions, or similar compensation; (2) tips (based on employer records of past tips or, in the absence of such records, a reasonable, good-faith employer estimate); (3) payment for vacation, parental, family, medical, or sick leave (but not FFCRA emergency paid leave); (4) separation/severance pay; (5) employee benefits costs, including group health care coverage (including insurance premiums) and retirement contributions; and (6) payment of state and local payroll-related taxes. Payroll costs do not include employer (FICA) taxes or costs for independent contractors/consultants, since they are independent businesses that are likely eligible for their own PPP Loans (see Covered Employers section).

[4] "Qualified wages" for this credit includes wages, commissions, and related compensation, as well as the employer's portion of health care expenses. But qualified wages paid may not exceed the amount that the employee would have been paid for working an equivalent duration during the 30 days immediately preceding the period (i.e., before March 12, 2020).

[5] Loan forgiveness will be reduced by multiplying (1) the forgivable costs by (2) the quotient obtained by dividing (a) the average number of full-time equivalent employees per month during the covered period by (b) at the election of the borrower, (i) the average number of full-time equivalent employees per month from February 15, 2019 to June 30, 2019 or (ii) the average number of full-time equivalent employees per month from January 1, 2020 to February 29, 2020. The amount of loan forgiveness will also be reduced by the amount of any reduction in total salary or wages of any employee during the covered period that is in excess of 25 percent of the total salary or wages during the most recent full quarter during which the employee was employed before the covered period.

[6] Additional guidance re Form 941 available here.

[7] Based on current guidance, deferring payroll taxes does not disqualify an employer from obtaining a PPP loan or receiving forgiveness, and employers may defer payroll tax up to the date of loan forgiveness without penalty. See IRS guidance here.

[8] According to IRS guidance, the exclusion of compensation in excess of $100,000 annually applies only to cash compensation, not to non-cash benefits, including: employer contributions to defined-benefit or defined-contribution retirement plans; payment for the provision of employee benefits consisting of group health care coverage, including insurance premiums; and payment of state and local taxes assessed on compensation of employees.