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 Paycheck 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.
- 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[1] 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 or meet the alternative SBA industry size standard. Loan availability closed August 8, 2020.
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 ER is > 100 employees, only wages paid to those employees who weren't working as a result of either reason above. • If ER 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, employee benefits, etc. • Mortgage interest, lease payments, and utilities, if they were obligations that existed before February 15, 2020.

	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- or five-year term, depending on date of loan. Qualifying expenditures incurred or paid over an eight or 24 week period 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 and newly-qualified SBA lenders. A borrower must submit a loan forgiveness application to the lender servicing the loan on a SBA authorized form, which will include documents that verify the number of full-time equivalent employees (FTEs) and pay rates, as well as the payments on eligible mortgage, lease, and utility obligations. In general, the lender is required to make a decision on forgiveness within 60 days. The SBA then has 90 days to review the lender’s determination. Loans over $2,000,000 (and others, in the SBA’s discretion) are subject to additional review.

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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,"[5] 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 40% of the forgiven amounts are used for non-payroll costs. Loan forgiveness will be reduced if the borrower has: • Reduced salaries and wages by more than 25 percent for any employee who made less than $100,000 annualized in 2019; or • Reduced FTE head count, after taking into account certain exclusions provided in SBA regulations.[6] 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. Borrowers have until the earlier of the date of an application for loan forgiveness, or December 31, 2020 to restore employee wages or head count for purposes of PPP Loan forgiveness.
Documentation	IRS Form 7200, as well as the appropriate supporting documentation. See MNG&D Alert.	IRS Form 941[8]	Determined by SBA and individual lenders, and dependent on type of business. Documentation may include payroll processor records, payroll tax filings, Form 1099-MISCs, and bank records.

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	FFCRA Emergency Leave—Tax Credits	Employee Retention Credit via CARES	PPP Loan via CARES
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 Loan disqualifies the recipient from claiming the Employee Retention Credit. Following adoption of the PPP Flexibility Act, participants are once again eligible for deferral of SSN Taxes under CARES § 2302. In addition to the limitations above, PPP Loans also cannot be used: • For payment of FFCRA leaves, although other employer-funded leaves and benefits may be included. • To pay compensation in excess of $100K on an annualized basis for any employee.[9] • To pay employees working outside the U.S.

[1] Includes business concerns, small business concerns (as defined in regulations published by the SBA), 501(c)(3) charities and religious organizations, 501(c)(19) veterans organizations, and tribal businesses, among others. Sole proprietors and self-employed individuals are also eligible.
[2] Total number of employees for this purpose is based on average number of full-time equivalent employees (FTEs") in 2019 applying a 40-hour workweek. 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 annualized salaries greater than $100K, employer (FICA) taxes, or payments to independent contractors/consultants, since they are independent businesses eligible for their own PPP Loans (see Covered Employers section).
[4] The SBA has published both a standard and shorter Form EZ for eligible participants without reductions in salaries or FTEs, among other eligibility requirements.
[5] "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).
[6] SBA regulations exclude from the reduction in FTEs (1) former employees who reject a re-hire offer, (2) employees fired for cause or resigning voluntarily or requesting and receiving a reduction in hours, and (3) employees of participants that can in good faith document the inability to rehire individuals who were employees or similarly qualified individuals or to return to a pre-COVID level of business activity due to compliance with requirements related to COVID-19.
[7] Loan forgiveness will be reduced by multiplying (1) the forgivable costs by (2) the quotient obtained by dividing (a) the average number of FTE per month during the covered period by (b) at the election of the borrower, (i) the average number of FTE per month from February 15, 2019 to June 30, 2019 or (ii) the average number of FTE 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.
[8] Additional guidance re Form 941 available here.
[9] According to available guidance, the exclusion of compensation in excess of $100,000 annually applies only to cash compensation, not to non-cash benefits. Special rules apply to employee owners of corporations, partners in tax partnerships, and self-employed individuals that limit eligible compensation for such persons to 8/52 of 2019 total compensation (up to a maximum of $15,385), if using an 8-week period, and 2.5 months' worth of 2019 total compensation (up to a maximum of $20,833), if using 24-weeks.

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