

NIESAR & VESTAL LLP

## Law Alert

April 2, 2020

### **Participating in the Tax Deferral Program or Employee Retention Tax Credit**

We have issued two law alerts this week informing you about the Paycheck Protection Program available to coronavirus-impacted small businesses.

The Paycheck Protection Program is just one of the many provisions aimed to help small businesses in The Coronavirus Aid, Relief, and Economic Security Act passed on March 27, 2020 (the “Cares Act”). The Cares Act also includes other available assistance programs. We would like to inform you today about the Payroll Tax Deferral and Employee Retention Credit.

#### **Payroll Tax Deferral**

Typically, a small business employer collects the 6.2% of its employees’ wages for Social Security Tax as part of FICA withholdings up to a maximum wage base limit. Then, the employer matches each employee’s contribution dollar-for-dollar as part of the payroll taxes.

The Cares Act allows employers and self-employed individuals to postpone the due date for the employer’s share of payroll taxes for the period from March 27, 2020, through December 31, 2020.

The deferred amounts would be payable over the next two years, with 50 percent due on December 31, 2021, and the remaining 50 percent due on December 31, 2022.

It seems to be, essentially, an interest-free loan from the Government for small business employers. However, importantly, employers whose loans are forgiven under the Paycheck Protection Program are not eligible for deferral of payroll taxes.

It does not appear clear to us what happens if the employer hopes to get loan forgiveness under the Paycheck Protection Program, but the lender has up to 60 days to issue a decision on loan forgiveness from the date of receipt of the complete application. Can the employer still defer payroll taxes until receipt of the decision on loan forgiveness or will the employer be in violation of the law for failing to pay payroll taxes? It would appear that the employer could either (1) decide to be on the safe side and not defer payroll taxes until they receive the loan forgiveness decision; or (2) decide to defer payroll taxes until they receive the loan forgiveness decision and then try to explain to the IRS that they did not know that they had indebtedness forgiven until they received the loan forgiveness decision from the lender.

In any case, this a fluid area and new or more explicit regulations and guidance may be issued in the near future. Businesses should be alert to the evolving situation, and clarity may appear out of future guidance the authorities issue in the near future.

## **Employee Retention Credit**

The Cares Act also offers the Employee Retention Credit for wages paid from March 13, 2020 to December 31, 2020. This is a credit against an employer's portion of payroll tax for an eligible business that is forced to suspend or close operations due to COVID-19, and continues to pay its employees while not currently working.

For each quarter that a business is eligible, the business will receive a refundable credit against its 6.2% employer portion of the payroll tax equal to 50 percent of qualified wages paid. The amount of qualified wages per employee for all quarters cannot exceed \$10,000. The amount of qualified wages will depend on the business and its size.

Employers receiving covered small business loans are not eligible for the Employee Retention Credit. Certain other rules prevent the double counting of credits.

IRS has recently issued very useful [guidelines](#) and [FAQs](#) regarding the Employee Retention Credit. Treasury has also published a [press release](#) with useful information, and encouraging businesses impacted by COVID-19 to use Employee Retention Credit.

Updates on the implementation of this credit, a fact sheet and other useful tax information can be found on the [Coronavirus page](#) of IRS.gov.

If you have any questions regarding Payroll Tax Deferral or Employee Retention Credit, please feel free to contact Carolina Aricu ([caricu@nvlawllp.com](mailto:caricu@nvlawllp.com)).

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