CPAS BEWARE:

SOME CARES ACT AND FFCRA INCENTIVES DON'T PLAY WELL TOGETHER

The landmark CARES Act, signed into law by the President on March 27, provides many employers with several options to increase liquidity and cash flow during the time of the COVID-19 pandemic. And only 9 days before that legislation was enacted, the Families First Coronavirus Response Act (FFCRA) also created two other payroll tax-related incentives for certain employers, and to self-employed individuals.

The incentive receiving the most attention, both here in Alabama and across the country, has been the Paycheck Protection Program (PPP) administered by the SBA in cooperation with private banks. As our friend Tom Zoebelein points out in his thorough article beginning on page 9, these loans can become (federally) tax-free *grants* if the borrower expends a certain percentage of the loan funds on qualifying expenses, particularly payroll, maintains good documentation, and then applies for and receives written forgiveness from the lending bank.

But not everyone qualifies or desires to apply for a PPP loan, or the criteria for forgiveness of the loan may be too strict as applied to their business operations (e.g., a restaurant that has essentially shut down), so their tax advisers are called on to quickly find alternatives.

The CARES Act provides what can be a substantial "employee retention tax credit" (ERTC) against the first $10,000 of each employee's "qualifying wages" (see below). The ERTC is limited to $5,000 per eligible employee, but there is *no limit on the number of eligible employees.*[1] The Act also gives qualifying employers the option to defer their share (6.2% of employee wages) of Social Security payroll taxes that would have otherwise been owed for the period between March 27 and December 31, 2020. Electing employers must repay one-half of what is in effect an interest-free loan from the federal government by December 31, 2021, with the remainder to be repaid by December 31, 2022. This has reportedly become a popular option but *remember it's still a loan*-- with potential personal liability attached if not repaid when due.

Also, the FFCRA provides two refundable payroll tax credits for employees on paid leave, one based on the Family Medical Leave Act but focused on children and the unavailability of child care ("qualified family leave tax credit") and a more lucrative credit based on wages paid to employees who were diagnosed with COVID-19 or who were isolated under a federal, state or local quarantine order ("qualified sick leave credit")[2].

The common theme among these incentives? They're all designed to encourage employers to keep their employees on the payroll, at least for a limited period of time, in anticipation of the state or local quarantine order being lifted. We provided further explanation of these payroll tax incentives in our previous "Connections" column and in two separate Tax Alerts that are available on our firm's COVID-19 resource page: https://www.bradley.com/practices-and-industries/practices/coronavirus-disease-2019-covid-19. Also, please refer to Tom's detailed article.

But let's focus on how these potentially lucrative payroll tax incentives interact with each other and with the PPP:

- If an employer receives a PPP loan (even if not one dollar is forgiven), the employer cannot claim the ERTC for any of its employees [CARES Act section 2301(j)], but it can claim one or both FFCRA refundable payroll tax credits, if they apply.
- Conversely, if the employer claims the ERTC, it's ineligible to borrow from the SBA under the PPP [CARES Act section 2301(h)(1)].
- If the employer receives a PPP loan that's forgiven even in small part, once forgiveness is granted, the employer may not elect to defer its share of payroll tax liability for the period from that date through December 31. [CARES Act section 2302(a)(3)].
- If the employer claims the ERTC, it cannot claim the same employees as eligible for the existing Work Opportunity Tax Credit (WOTC) [CARES Act section 2301(h)(1)].
- Finally, if the employer claims the ERTC for the wages of any of its employees, it cannot claim either of the FFCRA payroll tax credits mentioned above on those same employees except to the extent that it paid each of its eligible employees more than $10,000 in "qualifying wages" this year (which includes health insurance benefits it paid on their behalf). Thus, if the employer paid wages to a large group of employees, say $75,000 each this year, including payment of Blue Cross health insurance premiums, it could claim one or both refundable FFCRA payroll tax credits, assuming the criteria are met, for the $65,000 per employee increment.

We've heard the warning about the need for "modeling" every time we've either presented or listened to a webinar on the various CARES Act and FFCRA tax incentives, and that's spot-on. The client would be extremely wise to involve their tax advisers early in the process!

 We asked Bruce and Will to provide this special article for our members, outlining how these unique tax incentives interact, based on current guidance. This column is not meant to provide tax or legal advice as to the reader's or your client's specific situation. Readers are urged to consult their own tax advisers and attorneys and the many available guides and information resources before taking any action involving any of these tax incentives or applying for a loan under the PPP.

[1] The IRS issued a revised set of 94 FAQs on the ERTC on April 30. They are well worth reading if your client is interested in claiming this credit.

[2] The IRS issued a draft Form 941 and instructions on April 29, delineating how wages subject to the Sick Leave tax credit, the Family Leave tax credit, and the ERTC are to be reported. We also encourage our readers to review the form and instructions.