

More troubles for PPP loans and the employee retention credit

No one ever said the paycheck protection program loans and the employee retention credit would be easy to implement. That's what happens when Congress pushes through a 335-page disaster relief law in a scant two days. Questions and problems keep turning up like bad pennies.

Employee retention credit

The employee retention credit offers you a 50% credit on your share of Social Security taxes, up to \$5,000 per employee, if you continue to pay and provide health benefits to employees. But many employers have concluded that continuing to pay employees isn't realistic right now. They are, however, willing to continue their health benefits.

According to an IRS FAQ, you're not eligible for the credit if you just continue to provide health benefits. Technically, the IRS is correct. Section 2301 of the Coronavirus Aid, Relief, and Economic Security Act says employers must pay wages and a proportionate amount of health benefits.

Sen. Chuck Grassley (R.-Iowa), who's chairman of the Senate Finance Committee, along with Finance Committee ranking member Ron Wyden (D.-Ore.) and House Ways and Means Committee Chair Richard E. Neal (D.-Mass.) beg to differ with the IRS's interpretation.

In a May 4 letter to Treasury Secretary Steven Mnuchin, they stated, "In drafting the provision, qualified wages were explicitly expanded to incorporate certain qualified health benefits, with the intent to provide an incentive for employers to continue providing health benefits to their employees, even if the employer was otherwise unable to continue paying regular wages because of the coronavirus pandemic."

Either the IRS will update its FAQ or new legislation will conform to the tax writers' intent.

Employers with more than 100 employees can take the credit only for wages paid and health benefits provided to employees who aren't working. The question is: How can you determine the hours employees aren't working if they work irregular hours to begin with?

According to the IRS, you may use any reasonable method to make this determination. Reasonable methods include:

- The method (or methods) you use to measure employees' entitlement to intermittent leave under the FMLA
- The method you use to measure employees' entitlement to paid leave under your usual practices.

PPP loans

The controversy swirling around the retention credit pales in comparison to the paycheck protection program loans and for a lot of the same reasons—loan recipients have concluded that it's not reasonable to continue to pay employees for eight weeks when there's no work available.

The IRS and the SBA now say you can return the loan by May 14, no questions asked. If you return your loan, you can qualify for the employee retention credit, or, more importantly, you can defer your 6.2% share of Social Security taxes through the end of the year.

Another FAQ clarifies that your loan forgiveness won't be reduced if you laid off employees, made a written offer to rehire them at the same salary/wages and same number of hours and they declined your offer. Added twist: These employees may no longer be eligible for unemployment benefits.

A new wrinkle with PPP loans

As per IRS Notice 2020-32, if your PPP loan is forgiven, you can't also take a corporate deduction for the same wages and benefits. Although this is Tax Law 101 (no double dips), Grassley and Wyden are asking the IRS to reconsider its conclusion and again, are threatening legislation to undue it.

And then there's the issue of exactly who's getting these PPP loans. We're all aware that big restaurant chains got loans and then returned them. How about strip clubs in Wisconsin?

Several Wisconsin strip clubs were denied PPP loans, based on a 1996 SBA regulation denying assistance to small businesses that present live performances of a prurient sexual nature. The clubs sued the SBA to enjoin it from enforcing this regulation. A federal trial court agreed with the clubs. Court: The plaintiffs correctly note that no provision of the CARES Act relating to the PPP creates classifications of small businesses or provides that certain kinds of small businesses are not within the scope of the PPP. (*Camelot Banquet Rooms LLC et al. v. U.S. Small Business Administration*, No. 2:20-cv-00601, D.C., Wis., 2020)

The clubs, therefore, can go ahead and apply for PPP loans, but the tax writers may have something to say about this, too.