

IRS Guidance on Recapturing Excess Employment Tax Credits

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The Internal Revenue Service has issued a [temporary regulation](#) and a [proposed regulation](#) (pursuant to authority granted in the Families First Act and the CARES Act) to allow the agency to administratively recapture any excess amounts that employers may have received as refundable employment tax credits rather than being forced to file suit to recover those excess amounts. The interplay of the refundable employment tax credits and advance payments of these credits may result in employers receiving more credits than they are entitled to receive. The temporary regulation applies to all employment tax credit refunds under the Families First Coronavirus Response Act (Families First Act), as modified by the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), advanced or paid on or after April 1, 2020, and all credit refunds under the CARES Act advanced or paid on or after March 13, 2020.

The Families First Act and the CARES Act provide relief to taxpayers from economic hardships resulting from the Coronavirus Disease 2019 (COVID-19). This relief is provided through a combination of (1) a mandate to provide paid leave to employees due to certain circumstances related to COVID-19 on employers with fewer than 500 employees, and (2) fully refundable tax credits to employers to cover the cost of the mandated paid leave.

The CARES Act also provides a credit for employers experiencing economic hardship related to COVID-19. Certain employers who pay qualified wages to their employees are eligible for a fully-refundable employee retention credit equal to 50 percent of certain qualified wages.

To assist employers with cash flow, the CARES Act amends the Families First Act to provide that, in anticipation of the paid sick and family leave credits, including any refundable portions, these credits may be advanced up to the total allowable amount and subject to applicable limits for the calendar quarter. To implement the advance payment provisions of the Families First Act and the CARES Act, the IRS has created [Form 7200](#), Advance Payment of Employer Credits Due To COVID-19, which employers may use to request an advance of the paid sick or family leave credits under the Families First Act, and/or the employee retention credit under the CARES Act. Employers are required to reconcile any advance payments claimed on Form 7200 with total credits claimed and total taxes due on their employment tax returns. A refund, a credit, or an advance of any portion of these credits to a taxpayer in excess of the amount to which the taxpayer is entitled is an erroneous refund for which the IRS must seek repayment.

The temporary regulations provide that erroneous refunds of these credits are treated as underpayments of the taxes imposed and authorize the IRS to assess any portion of the credits erroneously credited, paid, or refunded in excess of the amount allowed as if those amounts were employment tax liabilities.

Reach out to one of the authors or any member of McGlinchey's Tax and Labor and Employment teams for help or questions.

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