Sea Grant
Law Center

Q&A from CARES Act 101 Part 2 Webinar on April 22, 2020

Does ERC apply to businesses that use independent contractors, i.e., most commercial fishing businesses?

Employers may claim the ERC for qualified wages of employees - individuals to whom an employer issues a W-2. Independent contractors would not be included in qualified wages.

Fishers that are independent contractors make wages on shares of production. How is unemployment figured for them?

According to a Department of Labor Unemployment Insurance Program letter issued on April 5, 2020, the Pandemic Unemployment Weekly Benefit is to be calculated as set forth in 20 C.F.R. 625.6 and is increased by the $600 Federal Pandemic Unemployment Compensation (FPUC) payment. 20 C.F.R. 625.6(a)(2) states that "The self-employment income to be treated as wages for the purposes of computing the weekly amount … shall be the net income reported on the tax return of the individual as income from all self-employment that was dependent upon the performance of services by the individual." If the individual has insufficient wages from employment or no net income from self-employment, they are entitled to a weekly amount equal to 50% of the average weekly payment of regular compensation in the state.

Regarding assistance for independent contractors - are they eligible to receive a tax credit for missed work if such missed work is voluntary due to physician-confirmed status of "high risk"?

Self-employed individuals may not claim the Employee Retention Credit (ERC) for themselves, but their business may be eligible to claim the credit if they have employees.

Self-employed individuals may claim the sick leave tax credit created by the Families First Coronavirus Relief Act (FFCRA) if they would be entitled to receive qualified sick leave wages or qualified family leave wages under the FFCRA if they were the employees of an Eligible Employer. The FFCRA provides that an employee of an Eligible Employer is entitled to paid sick leave if, among other reasons, "the employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19." Self-employed individuals, including independent contractors, who are unable to work due to a legitimate medical diagnosis as "high risk" likely meet this criterion, so they may claim the FFCRA's paid sick leave tax credit for the self-employed.

What documentation do you recommend employers gather during the year ahead of filing their taxes next year?

Regardless of the program, businesses will likely have to document how their income or operations were negatively impacted by COVID-19. Records that might prove helpful include:

- Financial statements and tax returns.
- Monthly bank statements, invoices, purchase orders, inventory reports, and payroll records from before and after the pandemic.
- Documentation of cancelled orders, supply chain interruptions, or extra expenses which might include emails, receipts, and invoices.

Employers claiming tax credits for either the qualified leave provisions under FFCRA or the Employee Retention Credit (ERC) under the CARES Act can seek payment of an advance credit by filing a Form 7200: Advanced Payment of Employer Credits due to COVID-19 (https://www.irs.gov/pub/irs-pdf/i7200.pdf). This form provides some guidance on what information records should include:

- Documentation to show how you figured the amount of qualified sick and family leave wages eligible for the credit.
- Documentation to show how you figured the amount of the ERC.
- Documentation to show how you figured the amount of qualified health plan expenses that you allocated to wages.
- Documentation to show how you determined that the employees were qualified to receive sick and family leave wages, including any additional information set out in Frequently Asked Questions or other guidance on IRS.gov.
- Documentation to show your eligibility for the ERC based on suspension of operations or a significant decline in gross receipts.
- Copies of completed Form(s) 7200 you filed with the IRS.

An employee must provide his or her employer documentation in support of paid sick leave or expanded family and medical leave under the FFCRA. These can be found in Section J (page 14) of the Department of Labor regulations issued on April 6 and available at: https://www.govinfo.gov/content/pkg/FR-2020-04-06/pdf/2020-07237.pdf

It seems a self-employed individual has the option of either using the Payroll Protection Program or applying for unemployment. Which would be the better strategy?

This can only be determined on a case-by-case basis. The PPP has some significant limitations. First, it has a very short coverage period (loan funds must be spent within 8 weeks), and is only through June 2020. Second, the program is underfunded. Even if Congress authorizes additional funds for the program, the money is likely to go very quickly. Third, it is not designed for businesses with minimal payroll costs. A PPP loan may not be helpful for a business that needs funds to cover non-payroll costs. Finally, it is important to remember that with the PPP, the funding is provided as a loan. Some, but not necessarily all, of the loan can be forgiven depending on how the funds are used.

With unemployment, states are setting up new programs, so there is a delay in processing claims in some instances. It may also take some time for individuals to navigate the process and determine the benefit amount. However, benefits will be retroactive and are potentially available for a much longer timeframe than the PPP.

Do you know if one program [PPP or unemployment] moves faster than the other? That might be a tipping point for some if they have immediate cash needs.

Neither program is likely to move quickly enough for an individual with an immediate cash flow need. In addition, the initial funds for the PPP were exhausted on April 14. Congress is negotiating a second round of funding which may pass this week, but that funding is likely to go quickly as well. Individuals should discuss other funding options with their lenders, including SBA Express Bridge Loans, traditional emergency loans or business lines of credit, or state small business programs.

And the PPP is out of money, right?

New funding is coming soon from Congress, but may go quickly too. Because many applications were already in the pipeline before the funding ran out, those may be processed before new applications are accepted. There may also be some restrictions on who the funding goes to.