



April 17, 2020

The Honorable David J. Kautter  
Assistant Secretary for Tax Policy  
Department of the Treasury  
1500 Pennsylvania Avenue, NW  
Washington, DC 20220

The Honorable Charles P. Rettig  
Commissioner  
Internal Revenue Service  
1111 Constitution Avenue, NW  
Washington, DC 20224

**Re: Request Guidance Related to the Employee Retention Credit Provisions of the Coronavirus Aid, Relief, and Economic Security (CARES) Act**

Dear Messrs. Kautter and Rettig:

The American Institute of CPAs (AICPA) appreciates the efforts by the Department of the Treasury (“Treasury”) and the Internal Revenue Service (IRS) to provide guidance to taxpayers affected by the Coronavirus Disease 2019 pandemic (commonly known as “Coronavirus” or “COVID-19”) through various notices, news releases, and accompanying frequently asked questions (FAQs).

In response to the pandemic, Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act. The AICPA has identified the following areas in need of additional clarity and guidance related to the employee retention credit provisions of the CARES Act:

1. Section 2301(e) of the CARES Act related to the employee retention credit states that rules similar to section 280C(a)<sup>1</sup> of the Internal Revenue Code (IRC or Code) shall apply.
  - a. Provide guidance on the application of rules similar to section 280C(a).
  - b. Provide guidance related to an employer’s deduction for payroll taxes reduced by the credit. It is unclear if an employer is allowed to take a deduction for the total amount of payroll taxes incurred or the total amount of payroll taxes paid after application of the credit.

We recommend allowing the deduction for an employer’s social security tax obligation *before* applying the credit. Under section 41(h), certain small businesses may elect to take a credit against the Federal Insurance Contribution Act (FICA) taxes instead of income taxes for certain research expenses. Even though section 280C applies to reduce a company’s deduction for the research expenses by the amount of the credit, Congress also enacted section 3111(f)(4) to reduce the employer’s payroll tax

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<sup>1</sup> Unless otherwise indicated, hereinafter, all section references are to the Internal Revenue Code of 1986, as amended, or to the Treasury Regulations promulgated thereunder.

- deduction by the amount of the credit. A provision similar to section 3111(f)(4) is not included in Section 2301 of the CARES Act.
- c. Clarify whether wages for which an employee retention credit is claimed are deductible or if section 265 precludes such a deduction.
2. Provide guidance related to the deferral of the payment of social security taxes.
    - a. Clarify that Section 2302 of the Act allows employers to defer payments of social security taxes originally due on or after March 27, 2020, regardless of when the compensation was earned.

For example, an employer has a payroll period beginning on March 15, 2020 and ending on March 30, 2020. The employer was required to pay its share of social security taxes on March 31, 2020 with respect to the wages paid on that date. The employer is allowed to defer payment of the full amount of the social security tax obligation even though some of the wages were earned prior to March 27, 2020.
    - b. Clarify the same question for self-employed individuals. The Self-Employment Contribution Act (SECA) portion of estimated taxes is not due until April 15, 2020 (before the current extension). Clarify the calculation for the SECA accrued in the 1<sup>st</sup> quarter but that would generally have been deposited as part of estimated taxes after the law changed in late March.
    - c. Provide a mechanism to calculate net earnings from self-employment occurring before March 27, 2020 when Net Earnings from Self-Employment (NESE) is earned: (a) through a partnership, and/or; (b) as Schedule C income. Also clarify if the closing of books is required.
  3. Clarify in situations when an employee works a reduced schedule, but continues to be paid their regular wage, if a portion of the employee's wages and qualified health care costs can be claimed as a credit. This treatment would be consistent with guidance issued by the Department of Labor (DOL) related to the Families First Coronavirus Response Act (FFCRA).
  4. Provide additional guidance regarding the definition of a "partial" suspension of operations for purposes of Section 2301 of the Act.

The FAQs published by the IRS refers to a situation where "operation can still continue to operate but not at its normal capacity." Please provide a definition of the term "normal capacity". The example in the FAQ refers to a restaurant that previously allowed seating for customers but after a COVID-19 related governmental order, the restaurant could only serve food through carry-out, delivery or take-out. We agree with the example that the restaurant has had a partial suspension of operations.

- a. Expand the example to address the suppliers of the restaurant. For example, a wholesaler that provides food to the restaurant will affect the business operations of the restaurant because it cannot supply as much food due to the governmental order. The trucking company that delivers the food from the wholesaler to the restaurant will ship less food because of the governmental order even though the trucking company is still in operations because it is an essential operation. This guidance is especially important for businesses that are not forced to change or stop business operations because they are an essential business, but their operations have been affected because their customers cannot operate or their clientele is under a “stay at home” order.
  - b. Expand the example to apply to a business that is in operation as an essential business, but one of its suppliers is subject to a governmental shutdown order. As a result of the supplier being ordered to shut down, the restaurant will be affected because they will have less food to sell.
5. Define the term “trade or business” for purposes of Section 2301 of the Act. An employer may have one division suspended per a government order, while other parts of the business remain open. It is unclear if the suspension test is applied to each trade or business in which the employer operates or if the situation constitutes a partial suspension. It is clear that the gross receipts test applies to all activities but use of the term “trade or business” with the suspension language is unclear.
  6. Clarify whether an employer aggregated under the aggregation rules under Section 2301 of the Act is barred from utilizing the retention credit if another related entity (under the section 52 rules) receives an SBA loan.
  7. Clarify whether a not-for-profit organization which has not been fully or partially suspended can use the gross receipts test to qualify for payment of retention pay. Section 2301(c)(2)(C) of the statute implies that it cannot however, FAQ #2 implies that it can.

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The AICPA is the world’s largest member association representing the CPA profession, with more than 429,000 members in the United States and worldwide, and a history of serving the public interest since 1887. Our members advise clients on federal, state and international tax matters and prepare income and other tax returns for millions of Americans. Our members provide services to individuals, not-for-profit organizations, small and medium-sized businesses, as well as America’s largest businesses.

We appreciate your consideration of these comments and welcome the opportunity to discuss these issues further. If you have any questions, please feel free to contact Kristin Esposito, AICPA Senior Manager – Tax Policy & Advocacy, at (202) 434-9241 or [kristin.esposito@aicpacima.com](mailto:kristin.esposito@aicpacima.com); or me at (612) 397-3071 or [chris.hesse@CLAconnect.com](mailto:chris.hesse@CLAconnect.com).

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The Honorable Charles P. Rettig  
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Sincerely,

A handwritten signature in blue ink that reads "Christopher W. Hesse".

Christopher W. Hesse, CPA  
Chair, AICPA Tax Executive Committee

cc: The Honorable Michael J. Desmond, Chief Counsel, Internal Revenue Service  
Ms. Amber Soletto, Attorney Advisor, Department of the Treasury  
Ms. Victoria Judson, Associate Chief Counsel, Office of Chief Counsel, Employee Benefits,  
Exempt Organizations, and Employment Taxes, Internal Revenue Service  
Mr. William McNally, Associate Chief Counsel, Office of Chief Counsel, Employee Benefits,  
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