Have You Heard the Latest? What You Need to Know About the Changes to FFCRA and the ERC

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Tracking COVID credits often feels like aiming at a moving target. But at Viventium, we keep the goal in your sights. That's why we want to update you on the two latest COVID credit developments. The IRS released guidance on new qualifying reasons for federal paid time off (FFCRA) credits and a newly clarified restriction on employee retention credits that may force you to amend prior quarters to reduce the ERC you claimed. So first, the good news . . . On July 29, the IRS announced additional reasons for which you can choose (if you have less than 500 employees) to grant your employees paid leave and receive refundable payroll tax credits. You may recall that under FFCRA (as extended by ARPA), employers who provide paid leave for the following six reasons can claim a dollar-for-dollar payroll tax credit (up to statutory limits):

1.
    1. The employee is quarantined due to government order
    2. The employee is quarantined due to health provider recommendation
    3. The employee:

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    - has COVID symptoms and is seeking a diagnosis
    - has been exposed to COVID and is seeking or waiting for the results of a test
    - has been asked by the employer to get a test or diagnosis
    - is getting the vaccine
    - is recovering from the vaccine

1.
    1. The employee is caring for a quarantined individual
    2. The employee is caring for a child whose school or day care is closed due to the pandemic
    3. Any substantially equivalent reason, to be announced

Well, nearly a year and a half later, the day has come that the IRS has announced some substantially equivalent reasons (drumroll please . . .), and they are: The employee takes leave:

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    - To accompany someone to get a vaccine
    - To care for someone recovering from the vaccine

Does “someone” mean “anyone”? No, only qualifying “someones”:

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    - An immediate family member
    - Someone who regularly resides in the employee’s home, or
    - A similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person
    - But not someone with whom the employee has no personal relationship

These new reasons apply to both paid sick leave and paid family leave. Just a reminder – there’s no obligation to pay this leave, but if you choose to do so, you can claim the credits. The credits are set to expire on September 30, 2021. Now the not-so-great news: On August 4, the IRS released Notice 2021-49 with clarifications regarding the Employee Retention Credit, including guidance that wages paid to a more-than-50% owner of a corporation (and that owner’s spouse) are not eligible for ERC credits, retroactive to the beginning of the ERC in the second quarter of 2020. Can you repeat that? Sure. The IRS just clarified the answer to a question that the American Institute of CPAs (AICPA) had been asking for a while: If an employee owns more than 50% of the corporation, can payroll paid

to them or their spouse be counted toward ERC credits? The answer is no. Low, threatening drum sounds. What does that mean about employers who have already taken the ERC for such wages? Well, first they should consult with their CPAs, as there are some exceptions to this new clarification. For example, if the majority owner has no living relatives (other than their spouse), they and their spouse's wages may still be eligible for the credit. But if their CPA concludes that the wages indeed cannot be counted, those employers will need to file amended tax returns for all of the quarters in which they claimed ERC credits for the wages to "unclaim" the credits and deposit the resulting additional tax liabilities. What about penalties for the now-late deposits? The IRS has said that any penalties charged will be eligible for abatement under the reasonable cause doctrine, as they were not due to willful neglect. **Action item:** If you have a more-than-50% owner and/or their spouse on payroll, check if you counted their wages toward ERC credits, and if so:

1.
    1. Consult with your CPA to determine if amendments are needed, and
    2. Reach out to your payroll provider to explain the situation, request the amendments, and deposit the additional liabilities.

As always, count on Viventium to keep you up to date with the latest COVID relief developments and be sure not to miss our webinar Finishing with Forgiveness: A Hands-On PPP Workshop.

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