

# Tax Controversy May Arise for Those Claiming Relief Under the FFCRA and CARES Act

By Kathryn Keneally, Frank J. Jackson, and Michael J. Scarduzio

*Kathryn Keneally, Frank J. Jackson, and Michael J. Scarduzio look at key provisions of the FFCRA and CARES Act in anticipation of potential litigation over certain ambiguities in the language and implementation of the legislation, as well as the steps that the IRS may take as it seeks to prevent potential abuse of the tax relief provisions.*



Congress's response to the economic impact of the COVID-19 pandemic is unprecedented, including the broad tax relief provided to businesses and individuals. While this tax relief has been welcomed by taxpayers experiencing financial turmoil, IRS scrutiny will also follow for years to come. Tax controversy professionals should not wait, but should be thinking now about the issues that likely will arise in future examinations. These issues will range from the interpretation of rapidly enacted legislation, to ensuring that there is adequate substantiation to support the steps that taxpayers are taking to avail themselves of relief offered by that legislation.

As of this writing, Congress has enacted two key pieces of legislation—Families First Coronavirus Response Act (“FFCRA”), enacted on March 18, 2020,<sup>1</sup> and the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act, on March 27, 2020.<sup>2</sup> It is worth looking now at key provisions of these statutes, both in anticipation of potential litigation over certain ambiguities in the language and implementation of the legislation, as well as the steps that the IRS may take as it seeks to prevent potential abuse of the tax relief provisions.

In particular, the FFCRA provided employers with a payroll tax credit to offset a portion of the costs of new sick and family paid leave. As discussed below, the IRS may seek to disallow those credits if employers fail to comply with document retention requirements, including obtaining information from employees.

**KATHRYN KENEALLY** is the former Assistant Attorney General for the Tax Division of the U.S. Department of Justice, and currently a partner in the New York office of Jones Day.

**FRANK J. JACKSON**, a former Attorney with the IRS Office of Chief Counsel, is a tax controversy and litigation partner in the New York office of Jones Day. **MICHAEL J. SCARDUZIO** is an associate in the New York office of Jones Day.

The CARES Act included a payroll credit for eligible employers that retain their workforce. To date, the IRS has narrowly interpreted key eligibility requirements to limit applicability of the credit, arguably in conflict with the plain language of the statute. The CARES Act also allowed employers to defer payroll tax for the remainder of 2020, with payments due at the end of 2021 and 2022. Employers that fail to repay the deferred amounts will face IRS Collections. The Service may also impose penalties and interest, and use the Trust Fund Recovery Penalty to assess and collect the tax against responsible persons. Additionally, the CARES Act expanded the availability of net operating losses (“NOLs”), which has already had a significant impact on corporate tax planning, and is a likely target for future IRS examination.

The IRS quickly issued guidance intended to clarify certain aspects of these provisions. In some instances, however, parts of guidance created confusion over the meaning of key provisions, and have already been identified by lawmakers as setting up a potential conflict with legislative intent. Much of the guidance was published on the IRS’s website in the form of FAQs, which are being revised, supplemented, and expanded weekly. This type of guidance is not given heightened deference by courts. The IRS stated that it will not formally publish the FAQs, and some practitioners fear the FAQs could be removed from the IRS’s website at any time. Taxpayers and their advisors should take care to monitor the guidance closely as it develops.<sup>3</sup>

The IRS separately took steps to provide relief to taxpayers. In March 2020, it announced the “IRS People First Initiative” which changed how the agency approached enforcement and collection in light of the challenges stemming from the pandemic. At the same time, the IRS has been encouraging those that are outside of the tax system to take this opportunity to become compliant. Again, tax controversy practitioners need to give careful consideration of the implications for their clients.

## New Payroll Tax Credits

The FFCRA required certain employers to provide paid sick leave<sup>4</sup> or family and medical leave<sup>5</sup> for specified reasons related to COVID-19. The FFCRA provided covered employers<sup>6</sup> with a payroll tax credit for qualifying wages.<sup>7</sup> Employers can claim the credit on leave wages paid until the end of 2020.<sup>8</sup>

Employers claiming the credit must maintain the following documentation for four years:

- Certain records and documents supporting each employee’s leave, including the reason the leave was

requested and a statement that employee was unable to work;

- Forms 941, *Employer’s Quarterly Federal Tax Return*;
- Forms 7200, *Advance Payment of Employer Credits Due to COVID-19*; and
- Any other filings made with the IRS requesting the credit.<sup>9</sup>

Employers should anticipate that those records will be requested immediately in an exam. As such, employers should maintain the records separately from all other workpapers, tax opinions, and any other confidential or privileged materials, in a form that can be easily provided to the IRS. The IRS may attempt to disallow the credit on the basis that the employer failed to maintain the records in a sufficiently useable form and detail.

## Additional Tax Relief Under The CARES Act

The CARES Act provided nearly two trillion dollars in aid and relief to individuals, businesses, and other entities in response to COVID-19.<sup>10</sup> The CARES Act also provided broad tax relief, including:

- A payroll tax credit (the “retention credit”);
- A payroll tax holiday that allows employers to defer their portion of Social Security taxes due in 2020; and
- Temporary repeal of certain portions of the 2017 Tax Cuts and Jobs Act, including expanding the availability of net operating losses (“NOLs”).

As discussed below, certain key parts of these provisions remain unclear. That uncertainty will need to be resolved, including through possible litigation with the IRS as it seeks to prevent what it may view as misapplication or abuse of the relief provisions. Taxpayers and practitioners need to prepare now to defend their positions.

The CARES Act also included a loan program for small businesses, referred to as the Payroll Protection Program (“PPP”). Recipients of PPP loans may have a portion of the loan forgiven equal to two months of payroll expenses, plus two months of rent, mortgage interest, and utilities.<sup>11</sup>

The legislation—which has already been amended once—specifically provided that the forgiveness of a PPP loan does not create cancellation of indebtedness (COD) income to the recipient.<sup>12</sup> However, the IRS announced that no deductions will be allowed for the expenses paid with the forgiven loan.<sup>13</sup> In other words, under the IRS’s interpretation, taxpayers are effectively in a net zero position, with no COD income inclusion, but also no ability to deduct the expenses. A bipartisan group of lawmakers

announced their disagreement with the IRS's guidance, and introduced legislation to enable taxpayers to deduct their expenses even if they received a PPP loan that was later forgiven.<sup>14</sup> The CARES Act is silent on whether or not taxpayers may deduct such expenses. Unless this issue is resolved by subsequent legislation or a change in the IRS's position, taxpayers who avail themselves of PPP loan forgiveness may need to litigate the availability of true relief under the statute.

Additionally, as discussed below, a taxpayer who received a PPP loan will be disqualified from other tax relief in the CARES Act.<sup>15</sup>

## A. The Retention Credit

The CARES Act made the retention credit available for employers that were forced to close or suspend operations, or that experienced a significant decline in gross receipts but continued to pay their employees. The credit, designed to encourage businesses to keep employees on their payroll, is fully refundable against the employer's portion of Social Security taxes.<sup>16</sup> The amount of the credit is equal to 50% of "qualified wages" paid by an "eligible employer," up to \$10,000 of wages per employee.<sup>17</sup> Employers may claim the credit in connection with wages paid until the end of 2020.<sup>18</sup>

Determining eligibility for the credit is complex, and the IRS has narrowly interpreted key provisions with the potential to limit applicability of the credit. As a result, taxpayers will be challenged to claim the credit in light of the guidance. This tension may lead to litigation with the IRS as it scrutinizes the eligibility of those who take positions inconsistent with its guidance.

### 1. Eligibility for the Retention Credit

An employer is eligible for the credit if during a calendar quarter, its business was:

- Fully or partially suspended due to governmental orders in response to COVID-19 limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes); or
- Suffered a 50% or more decline in gross receipts in the relevant calendar quarter as compared to the same calendar quarter in 2019.<sup>19</sup>

It is uncertain as to what orders qualify as a "governmental order" causing an employer to "fully or partially suspend its operations." The statute provided that qualifying orders include those issued by "an appropriate governmental authority" that "limit commerce, travel, or group meetings" due to COVID-19.<sup>20</sup> The IRS stated that a stay-at-home order or an order limiting the activity of

non-essential businesses from a state legislature or governor is an "appropriate order."<sup>21</sup> A potential source of dispute is whether a more limited order will qualify.

Another potential source of controversy will be what constitutes a "partial suspension" of operations sufficient to trigger eligibility. The IRS guidance on this point is in the form of two FAQs. In the first FAQ, the IRS provided an example in which a hypothetical restaurant closed its dining room due to the order of its state's governor. The restaurant is permitted to remain open for delivery and takeout.<sup>22</sup> In that example, the IRS concluded that the restaurant would be eligible for the retention credit because its business was partially suspended as a result of the closure of its dining room.<sup>23</sup> In a second FAQ, the IRS further clarified its position on partial suspension, stating that an employer is not considered to have a partial suspension of operations if its workplace is closed by government order but "the employer is able to continue operations comparable to its operations prior to the closure by requiring its employees to telework."<sup>24</sup> The IRS, however, has not defined what is meant by "comparable operations."

The IRS's guidance on the partial suspension requirement appears to be contrary to the plain language of the statute and the policy underlying the CARES Act. The statute provided that any order that limits "group meetings for commercial purposes" is a partial suspension.<sup>25</sup> An office space facilitates such meetings, and an order closing that workplace will arguably limit the ability of employees to meet. As a result, employers are left to decide which employees are eligible for the retention credit under the statute knowing that the IRS may disagree. An employer that claimed the credit under ambiguous circumstances should be prepared to litigate both its statutory interpretation of eligibility as well as its particular facts and circumstances of partial suspension.

Caution must also be given to relying on the FAQs. The IRS has chosen not to publish the FAQs in the Internal Revenue Bulletin, stating that the FAQs "may not be relied upon as legal authority" and that "the information cannot be used to support a legal argument in a court case." Courts have not accorded such guidance heightened deference, and even those taxpayers who comply with the FAQs are on fair notice that they may need to defend their position under the plain language of the statute.<sup>26</sup>

As with the FFCRA credit, an employer should prepare now to support its position concerning any credits that it claims. To the extent possible, employers should consider whether they can prepare to rely on both eligibility requirements. They should be ready to point to the government order on which they relied to establish how that order negatively affected their operations, and be prepared to

substantiate their determination as to which (if not all) employees the credit was claimed, and how the decline in its gross receipts was computed.

## 2. Limitations on the Retention Credit

The retention credit was subject to two limitations that may result in controversy with the IRS:

1. In addition to satisfying the eligibility requirements stated above, for an employer with more than “100 full-time employees”<sup>27</sup> to be eligible, it must pay wages to employees who are not providing services.<sup>28</sup>
2. An employer is ineligible for the retention credit if it has received a PPP loan.<sup>29</sup>

Both limitations must be analyzed by applying aggregation rules that cause certain related entities to be treated as a single employer.<sup>30</sup> The number of employees for purposes of the 100-employee threshold is determined by counting all of the full-time employees in an aggregate group of related employers. Additionally, if any employer in the aggregated group received a PPP loan, all the employers in that group are ineligible for the retention credit.<sup>31</sup>

The aggregation rules are complex and the IRS may dispute whether and how the limitations apply.<sup>32</sup> Employers should be careful to document how they determined the number of full-time employees, what entities were determined to be in an aggregated group and which received a PPP loan, and how the aggregation rules impacted their determinations. Employers should reassess their calculations at least on a quarterly basis in the event their workforce changes overtime.

## B. Payroll Tax Deferral

Under the CARES Act, employers (and self-employed individuals) were allowed to defer payment of the 6.2% employer portion of Social Security taxes for 2020.<sup>33</sup> Any amount deferred is required to be repaid over the next two years, with 50% of the deferred taxes paid by December 31, 2021, and the remaining amount by December 31, 2022.<sup>34</sup>

Employers who claim the deferral will not be subject to deposit or payment penalties provided that the required payments are paid by the extended due dates.<sup>35</sup> However, a business that claims the deferral but continues to struggle, goes under, or otherwise cannot or does not make the deferred payments may face serious consequences. In the April 2020 FAQs, the IRS indicated that it may impose the failure to deposit penalty<sup>36</sup> and interest to the extent that deferred payroll taxes are not repaid.<sup>37</sup> Additionally,

pursuant to the Trust Fund Recovery Penalty, responsible persons can be held personally liable for the payroll taxes that are not paid to the IRS if it is determined that such failure was willful.<sup>38</sup>

Civil and criminal enforcement of employment taxes is one of the government’s highest priorities. The Department of Justice and the IRS have worked together to seek permanent civil injunctions and criminal convictions for those who willfully fail to comply with their employment tax obligations. Employers who cannot pay the deferred amount by the 2021 and 2022 deadlines should consider approaching the IRS to seek collection alternatives in an effort to avoid the assessment of the Trust Fund Recovery Penalty against officers or directors.

## C. Expansion of Net Operating Losses

The TCJA made changes to how taxpayers can deduct net operating losses (“NOLs”). Specifically, the TCJA:

- Limited corporate taxpayers to using post-2017 NOL carryforwards to offset only 80% of their taxable income; and
- Eliminated NOL carrybacks, prohibiting taxpayers from using NOLs to claim refunds for prior year taxes.<sup>39</sup>

The CARES Act provided temporary relief from both of these changes. Subject to certain limitations, corporate taxpayers may carryback NOLs from 2018, 2019, and 2020, up to five years.<sup>40</sup> The 80% limitation was removed for those same years.<sup>41</sup> This relief provision will result in cash refunds for corporations that amend prior year returns to carryback an NOL. It may also completely eliminate tax in 2020 and generate additional refunds in prior years from the carryback of a 2020 NOL.

Taxpayers who are able to file an application for tentative refund should expect to receive a refund within 45 to 90 days.<sup>42</sup> After an application for refund is submitted, the IRS has 90 days in which it may perform a “limited examination of the application.”<sup>43</sup> The IRS may in the ordinary course open examinations of the tax years in which the NOL was generated and carried back, including closed tax years. If the IRS determines that a refund was issued in error, the agency may make an immediate assessment and begin collections.<sup>44</sup> Because a notice of deficiency is not required, taxpayers may not petition the Tax Court to redetermine such assessment. Instead, the taxpayer will be forced to pay the assessment, file a refund claim, and sue for a refund in federal court, or alternatively, challenge the IRS collection actions by filing a request for a Collection Due Process Hearing.<sup>45</sup>

A taxpayer that seeks to avoid this risk could instead file an amended return for the carryback years. Refund claims above a certain amount will be reviewed by the Joint Committee on Taxation.<sup>46</sup> This process will result in additional layers of review by both the IRS and the Joint Committees. It will also result in a significant delay in the issuance of the refund.<sup>47</sup>

## The IRS's Response

The IRS took extraordinary steps in response to COVID-19. It has remained open, with employees working remotely. Agents worked on and settled ongoing examinations, remaining available to practitioners by phone and email. Notably, the IRS increased its ability to communicate through email, using encryption software to protect taxpayer information.<sup>48</sup> The IRS directed taxpayers under exam to respond to outstanding requests for information so that examinations continued to proceed.<sup>49</sup> IRS Appeals conducted appeals conferences telephonically or by video.<sup>50</sup>

The IRS also acted quickly to provide broad relief to taxpayers, including in an initiative entitled the "IRS People First Initiative." The changes in the initiative are wide-ranging, from extending payments under installment agreements, to delaying collection activities, to limiting new enforcement action. IRS Commissioner Charles P. Rettig stated that the purpose of the initiative is to take "unprecedented actions to ease the burden on people facing tax issues."<sup>51</sup> At the same time, the IRS warned nonfilers to file delinquent returns and take this "opportunity to resolve any outstanding liabilities" by seeking collection alternatives.<sup>52</sup>

### A. Extended Deadlines

Section 7508A of the Code provides the Secretary of the Treasury, or a delegate, with the authority to extend certain statutory deadlines for performing acts under the Code, including the deadline to file tax returns and pay tax, for taxpayers affected by a federal declared disaster as defined in Code Sec. 165(i)(5)(A). Pursuant to that emergency authority, those deadlines may be extended for up to one year.<sup>53</sup> The IRS has used such authority in regional disasters, for example, in the aftermath of a hurricane or flood.<sup>54</sup> On March 13, 2020, the federal government declared COVID-19 a federal disaster across the entire country, and directed the Treasury Secretary to provide broad tax relief to Americans, including extending deadlines.

The IRS extended to July 15, 2020, the deadlines for most tax-related filings and payments (including estimated tax payments) due between April 1, 2020 and the new deadline.<sup>55</sup> The extension covered Forms 1040, 1120, and 1065. It also covered the international informational returns (*e.g.*, Forms 5471, 5472, 3520, and 8938).<sup>56</sup> The IRS clarified that the extension applied to estimated tax payments for individuals and corporations due on April 15, 2020 and June 15, 2020.<sup>57</sup>

The IRS also extended to July 15, 2020, the deadline for taxpayers required to take certain "time-sensitive" actions, including:

- Filing a petition with the Tax Court;
- Filing for review of a Tax Court decision;
- Filing a claim for credit or refund of any tax;
- Filing a suit claiming a credit or refund of any tax;
- Making elections regarding certain carryback periods;
- Making contributions to Individual Retirement Accounts ("IRAs"); and
- Taking any other action specified in a revenue ruling, revenue procedure, notice, announcement, news release, or other guidance published in the Internal Revenue Bulletin.<sup>58</sup>

The notice is clear that such relief did not apply if the taxpayer was required to act before April 1, 2020.

The notice also provided IRS employees with a 30-day extension for various time-sensitive actions taken in connection with an exam or appeal for those actions that have a final date for performance falling between April 6, 2020 and July 15, 2020.<sup>59</sup> This extension obviated certain internal guidelines (not statutory deadlines), including extending the time for IRS employees to assess tax, allow a credit or refund of any tax, or collect any tax.<sup>60</sup>

The period from April 1, 2020, through July 15, 2020, is not includable in the computation of interest, penalty, or additions to tax for failure to file any of the forms or pay any of the payments extended by the notice.<sup>61</sup> Going forward, practitioners should confirm that IRS agents account for this exempted period.

The statutes of limitations on the IRS's ability to assess or collect tax have not been extended.<sup>62</sup> However, as discussed below, the Service announced that it will take necessary steps to protect such statutory deadlines, while at the same time attempting to limit enforcement and collections activity.

### B. Limiting Future Enforcement and Collections Activities

In connection with the People First Initiative, the IRS announced that it would not start new examinations

through at least July 15, 2020.<sup>63</sup> The IRS will seek statute extensions where its ability to assess is not in jeopardy. However, the IRS committed to continuing to pursue enforcement when necessary to protect the government's interests in preserving the statute of limitations.<sup>64</sup>

The IRS has also instructed its employees to suspend collection activities generally, except when (i) the United States risks a permanent loss due to the expiration of a statute of limitations, (ii) exigent circumstances exist (*e.g.*, when a taxpayer attempts to hide assets from the government), or (iii) the taxpayer has agreed to the collection action.<sup>65</sup> Additionally, the IRS announced that it was taking or delaying certain actions to suspend collections until July 15, 2020, including:

- Suspending payments under existing installment agreements, and not placing any installment agreements into a default status during that same time;
  - Suspending any liens or levies initiated by field revenue officers;
  - Suspending creation of automated liens and levies;
  - Allowing taxpayers with a pending Offer in Compromise ("OIC"), to provide additional requested information;
  - Not closing any pending OIC requests, without the taxpayer's consent; and
  - Not defaulting an OIC for delinquent 2018 returns.<sup>66</sup>
- The IRS also announced that it would suspend new certifications to the State Department that would otherwise prevent taxpayers from receiving or renewing

their passport, and would also forbear from forwarding delinquent accounts to private debt collection agencies.<sup>67</sup>

In the interim, the IRS is encouraging nonfilers to take this time to file delinquent returns and to seek collection alternatives for outstanding tax liabilities. In connection with distributing the stimulus payments, nonfilers were directed to the IRS's website to provide information so that they could receive rebate checks. Individual nonfilers, who may be financially struggling and in need of the stimulus check, faced an obvious dilemma: by providing this information to the IRS, these individuals have put themselves on the IRS's radar screen for future enforcement.

## Conclusion

The government's response to COVID-19 is unprecedented in size, scope, and speed. Many taxpayers will use the tax relief to overcome the challenges that they now face. However, taxpayers cannot lose sight of compliance in a rush to resolve their financial struggles. Crisis resulting in emergency legislation is often followed by close scrutiny and oversight of the relief provided. This scrutiny is likely to come in future years. Taxpayers should take the necessary steps now so that they are ready to defend their positions later. Taxpayers should claim any relief for which they are eligible, but be wary of the adverse consequences of receiving those benefits if they cannot later prove their case.

## ENDNOTES

<sup>1</sup> Families First Coronavirus Response Act, P.L. 116-127 (2020) [hereinafter FFCRA].

<sup>2</sup> Coronavirus Aid, Relief, and Economic Security Act, P.L. 116-136 (2020). Congress enacted the Paycheck Protection Program and Health Care Enhancement Act on April 24, 2020, to appropriate additional funds for loan programs under the CARES Act, and provide emergency funds for hospitals and for COVID-19 testing. The PPP provisions of the CARES Act have already been amended once by the Paycheck Protection Program Flexibility Act, enacted on June 5, 2020.

<sup>3</sup> States have also provided relief, largely conforming to the federal changes to tax filing and payment deadlines. However, states are still working out how much they will conform to major tax provisions of the CARES Act, with some states, including California and New York, publicly announcing their intention not to conform with changes, allowing taxpayers to take inconsistent positions at the federal and state levels.

<sup>4</sup> Specifically, under the FFCRA's new emergency paid sick leave program, covered employers

with less than 500 employees are required to provide two weeks of paid leave to employees affected by the COVID-19 and unable to work. FFCRA §5102.

<sup>5</sup> The expansion of FMLA leave requires those same-sized employers to provide two weeks of unpaid leave to employees who cannot work because they need to care for a child whose school or place of care has been closed due to COVID-19. *Id.* §7005. Following the two unpaid weeks, employers must provide up to 10 weeks of paid leave.

<sup>6</sup> Public employers, including the federal government, state governments, and any subdivision, agency, or instrumentality of those governments, must provide paid leave under the FFCRA, but are not eligible to receive the tax credits available to non-public employers.

<sup>7</sup> FFCRA §§7001-7005. For sick leave wages, the credit is limited to \$511 per day per employee (\$200 per day if the employee is caring for a family member). *Id.* §7001(b)(1). For leave wages under the expanded FMLA, the credit is limited

to \$200 per day per employee (\$10,000 in the aggregate per employee). *Id.* §7003(b)(1). The credit also includes both allocable qualified health plan expenses, and the employer's share of Medicare tax that are paid under the FFCRA paid leave provisions.

<sup>8</sup> *Id.* at §§7001-7005; IRS Notice 2020-21.

<sup>9</sup> IRS FAQ on FFCRA, at "How Should an Employer Substantiate Eligibility for Tax Credits for Qualified Leave Wages?", available at [www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs](http://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs).

<sup>10</sup> The estimated total cost is between \$1.8 trillion and \$2 trillion. Congressional Budget Office, *Preliminary Estimate of the Effects of H.R. 748, the CARES Act, Public Law 116-136, Revised, with a Correction to the Revenue Effect of the Employee Retention Credit* (2020).

<sup>11</sup> CARES Act §1106.

<sup>12</sup> CARES Act §1106(i).

<sup>13</sup> IRS Notice 2020-32.

<sup>14</sup> Hon. Charles Grassley, Hon. Richard E. Neal, Hon. Ron Wyden, Letter to Hon. Steven Mnuchin (May

5, 2020), available at [www.grassley.senate.gov/sites/default/files/2020-05-05%20CEG%2c%20RW%2c%20RN%20to%20Treasury%20%28PPP%20Business%20Deductions%29.pdf](http://www.grassley.senate.gov/sites/default/files/2020-05-05%20CEG%2c%20RW%2c%20RN%20to%20Treasury%20%28PPP%20Business%20Deductions%29.pdf).

<sup>15</sup> The CARES Act also provides for tax-free rebate payments to individual taxpayers. Single taxpayers, and those married filing separately, are eligible to receive up to \$1,200 (\$2,400 for married persons filing jointly) and an additional \$500 for each qualifying child, subject to phase out. CARES Act §2301.

<sup>16</sup> *Id.* at §2301(b).

<sup>17</sup> *Id.* at §2301(a).

<sup>18</sup> *Id.* at §2301(m).

<sup>19</sup> *Id.* at §2301(c)(2).

<sup>20</sup> *Id.* at §2301(c)(2)(A)(ii)(I).

<sup>21</sup> FAQs: *Employee Retention Credit under the CARES Act*, IRS, [www.irs.gov/newsroom/faqs-employee-retention-credit-under-the-cares-act](http://www.irs.gov/newsroom/faqs-employee-retention-credit-under-the-cares-act), at “When Is the Operation of a Trade or Business Partially Suspended for the Purposes of the Employee Retention Credit?” [hereinafter *Retention Credit FAQ I*].

<sup>22</sup> *Retention Credit FAQ I*.

<sup>23</sup> *Id.*

<sup>24</sup> See *COVID-19-Related Employee Retention Credits: Determining When an Employer’s Trade or Business Operations Are Considered to Be Fully or Partially Suspended Due to a Governmental Order FAQs*, IRS, [www.irs.gov/newsroom/covid-19-related-employee-retention-credits-determining-when-an-employers-trade-or-business-operations-are-considered-to-be-fully-or-partially-suspended-due-to-a-governmental-order-faqs](http://www.irs.gov/newsroom/covid-19-related-employee-retention-credits-determining-when-an-employers-trade-or-business-operations-are-considered-to-be-fully-or-partially-suspended-due-to-a-governmental-order-faqs) (April 29, 2020).

<sup>25</sup> CARES Act at §2301(c)(2)(A)(ii)(I).

<sup>26</sup> *Exxon Mobil Corp.*, CA-2, 2012-2 USTC ¶15,511, 689 F3d 191, 200-201; *Tualatin Valley Builders Supply, Inc.*, CA-9, 2008-1 USTC ¶15,280, 522 F3d 937; *Federal Nat. Mortg. Ass’n*, CA-FC, 2005-1 USTC ¶15,335, 379 F3d 1303, 1307-1308.

<sup>27</sup> A fulltime employee is an employee that works on average at least 30 hours per week. See Code Sec. 4980H.

<sup>28</sup> CARES Act §2301(c)(3)(A)(i).

<sup>29</sup> *Id.* at §2301(j).

<sup>30</sup> *Id.* at §2301(d).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at §2301(d); Code Sec. 52(a); Code Sec. 52(b); Code Sec. 414(m); Code Sec. 414(o).

<sup>33</sup> CARES Act §2302.

<sup>34</sup> *Id.* at §2302(d).

<sup>35</sup> *Id.* at §2302(b).

<sup>36</sup> See Code Sec. 6656. The failure to deposit penalty is a tiered penalty system ranging from 2% (for deposits one to five days late) up to 10% (for deposits more than 15 days late) or 15% (for deposits more than 15 days late that remain unpaid more than 10 days after the first notice or demand requesting payment).

<sup>37</sup> *Deferral of Employment Tax Deposits and Payments through December 31, 2020*, IRS, [www.irs.gov/newsroom/deferral-of-employment-tax-deposits-and-payments-through-december-31-2020](http://www.irs.gov/newsroom/deferral-of-employment-tax-deposits-and-payments-through-december-31-2020).

<sup>38</sup> Code Sec. 6672(a).

<sup>39</sup> Tax Cuts and Jobs Act (P.L. 115-97), §13302; Code Sec. 172.

<sup>40</sup> CARES Act §2303.

<sup>41</sup> *Id.*

<sup>42</sup> The IRS granted a six-month extension of time to file applications for tentative refunds (on Forms 1045 or 1139) owing to the carryback of an NOL arising during a tax year that began in 2018 and ended on or before June 30, 2019. IRS Notice 2020-26.

<sup>43</sup> Code Sec. 6411(b).

<sup>44</sup> *Id.* at §6213(b)(3).

<sup>45</sup> *Id.* at §§6320, 6330.

<sup>46</sup> *Id.* at §6405(a).

<sup>47</sup> By statute, the IRS must allow the Joint Committee 30 days to review the report. *Id.* If the Joint Committee does not object within those 30 days, the IRS can issue the refund or credit. *Id.* However, it is IRS policy to wait until the Joint Committee finishes its review. IRM §4.36.1.4(4).

<sup>48</sup> Memorandum from Sunita Lough, *Memorandum for All Services and Enforcement Employees* (March 27, 2020).

<sup>49</sup> *IRS Operations During COVID-19: Mission-critical Functions Continue*, IRS, [www.irs.gov/newsroom/](http://www.irs.gov/newsroom/)

*irs-operations-during-covid-19-mission-critical-functions-continue*.

<sup>50</sup> *Id.*

<sup>51</sup> See IRS News Release IR-2020-59 (Mar. 25, 2020).

<sup>52</sup> *Id.*

<sup>53</sup> Code Sec. 7508A.

<sup>54</sup> See, e.g., *IRS Help for Victims of Hurricanes Irma and Maria*, available at [www.irs.gov/newsroom/help-for-victims-of-hurricanes-irma-and-maria](http://www.irs.gov/newsroom/help-for-victims-of-hurricanes-irma-and-maria).

<sup>55</sup> IRS Notice 2020-23; see also IRS Notice 2020-17; IRS Notice 2020-18; IRS Notice 2020-19; IRS News Release IR-2020-66 (April 9, 2020). The extended returns and forms include Forms 1040, Forms 1120, Form 1065, Form 1066, Forms 1041, Forms 706, Form 8971, Form 709, Form 990-T, Form 990-PF, Form 4720, all schedules, information returns, and forms filed as attachments with these returns and forms, payments associated with such returns and forms, quarterly estimated income tax payments calculated on or submitted with Form 990-W, Forms 1040-ES, and Form 1120-W, estate tax payments or recertifications due as a result of elections under Code Secs. 6166, 6161, or 6163, and installment payments under Code Sec. 965(h).

<sup>56</sup> IRS Notice 2020-23.

<sup>57</sup> IRS News Release IR 2020-66.

<sup>58</sup> IRS Notice 2020-23.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*; Reg. §301.7508A-1(c)(2).

<sup>61</sup> IRS Notice 2020-23.

<sup>62</sup> The Foreign Bank Account Report (FBAR), the annual disclosure of foreign financial accounts, has not been extended by the Financial Crimes Enforcement Network (FinCEN), but is subject to automatic extension in the ordinary course. The FBAR deadline is October 15, 2020, for filers who failed to file by the April 15, 2020 deadline.

<sup>63</sup> *Supra*, note 51.

<sup>64</sup> *Id.*

<sup>65</sup> IRS News Release IR-2020-59; Memorandum from Frederick W. Schindler, *Memorandum For All Collection Executives* (March 30, 2020).

<sup>66</sup> *Id.*

<sup>67</sup> IRS News Release IR-2020-59.

This article is reprinted with the publisher’s permission from the Journal of Tax Practice & Procedure, a quarterly journal published by Wolters Kluwer. Copying or distribution without the publisher’s permission is prohibited. To subscribe to the Journal of Tax Practice & Procedure or other Wolters Kluwer Journals please call 1-800-344-3734 or visit [taxna.wolterskluwer.com](http://taxna.wolterskluwer.com). All views expressed in the articles and columns are those of the author and not necessarily those of Wolters Kluwer or any other person.