RESTAURANT DIVE

# Shutdown-impacted businesses taking PPP loans may risk losing CARES Act tax benefits

Until rules are out, it's not clear paying expenses with stimulus loan funds will help your business come tax time.

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The federal government's $2 trillion stimulus includes several provisions to ease your tax burden if your company is hit by mandatory coronavirus shutdowns. However, you might lose those benefits if you take out a loan under the $350 billion fund administered by the Small Business Administration.

Under the stimulus, called the "Coronavirus Aid, Relief, and. Economic Security Act," (CARES Act) you're given a deferral on your payroll taxes and a tax credit for retaining employees during the shutdown, among other tax benefits.

The payroll tax deferral amounts to an interest-free loan; you don't have to pay the employer portion of your employees' 2020 social security tax for up to two years. You pay half the taxes at the end of 2021 and the remaining half at the end of 2022.

The benefit lets you keep much-needed cash in hand during the downturn without having to pay for your use of the money —

unless you fail to make your 2021 and 2022 payments; then you effectively have to pay interest on it.

The benefit of the other employee retention benefit — the tax credit — is the reduced hit you take when you file your taxes. The credit is fully refundable and worth up to 50% of the qualified wages you pay, up to $10,000 per employee.

Exactly how much you can take depends on the number of employees you have. If you have fewer than 100, you take the credit for all of your employees, regardless of whether you furloughed them while keeping them on the payroll. If you have more than 100 employees, you only take the credit for those you actually furlough.

The family leave law Congress passed a few weeks prior to the stimulus, called the "Family First Coronavirus Response Act," also includes a tax credit, and it's even more generous. The credit is a dollar-for-dollar refundable credit designed to help offset payroll costs when employees take leave because either they contract the virus or they care for a family member who does.

You can't take both credits for any wages that overlap. If you have an employee who's eligible for the employee retention tax credit for, say, three months, but part of that period includes two weeks of paid sick leave, you have to separate out that two week sick-leave period for the dollar-for-dollar credit and use the 50% credit for the rest of the period.

## Uncertain impact

However, all of these benefits may go away if you've received a loan under the $350 billion pot of money the stimulus created to help businesses cover their operating expenses during the downturn. That loan program, called the Payroll Protection Program (PPP), lets you receive a loan that's forgivable if you keep the same number of employees on your payroll throughout the downturn.

Loan funds are intended for paying rent, vendors and meeting other expenses such as wages while your revenues are down because of mandatory stay-at-home directives.

Tax specialists say the exact interplay between the forgivable loans, which are available to companies with 500 employees or fewer, and the tax benefits, which are for all employers, big and small, won’t be known until the IRS and Small Business Administration (SBA) put rules out. But based on statutory language, the two programs don’t fit well together in some respects.

In an analysis by Lewis Horowitz and other tax specialists at Lane Powell, taking the payroll tax deferral amounts to a "trap for the unwary" if you’re also interested in applying for a forgivable loan.

"Getting a PPP loan may prevent or limit a taxpayer from availing themselves of these delayed payroll tax provisions," he says. "This interest-free loan for the employer portion of social security taxes is not available to any taxpayer that 'has had indebtedness forgiven' under CARES Act Section 1106 with respect to a Payroll Protection Program."

Rules are needed because there's a timing issue that makes how the two programs work together ambiguous, Horowitz says.

If you apply for a forgivable loan, he says, SBA can't know whether you're eligible to have it forgiven until after your company has established it has met the employee retention stipulation and other requirements. By that time, you could have taken the payroll tax deferral, a decision you would have potentially made before knowing whether you were eligible for loan forgiveness.

"Entitlement to forgiveness of a PPP loan depends on the ability of the taxpayer to establish that it has deployed the funds on covered expenses and that can't happen until sometime in the future — making it hard for taxpayers to make an informed decision," he says.

There's a similar ambiguity with the employee retention tax credit. On its face it appears the loan program and tax credit don't work together, but Stacey Bowman and Craig Kovarik of Husch Blackwell in an analysis say it's not clear.

The limitation might only apply if you seek multiple forms of relief simultaneously; if you apply for forms of relief consecutively, there's a possibility they will work together.

"If an employer seeks an Employee Retention Credit with respect to qualified wages paid in April and determines in May to obtain a PPP loan, would the employer be required to disgorge the prior Employee Retention Credit?" the analysts say. "Further guidance is needed."

Bottom line: if you're thinking of applying for an SBA loan, be aware that it might impede your ability to take some of the tax benefits the federal government is offering in the stimulus.

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