

The Employee Retention Credit and the Credit for Qualified Leave Wages (IRS Form 7200)

by

David S. De Jong, LLM, CPA

Stein Sperling Bennett

De Jong Driscoll PC

25 West Middle Lane

Rockville, Maryland 20850

301-340-2020

ddejong@steinsperling.com

Employee retention credit – the title

The most beneficial provision for business in P.L. 116-136, the CARES Act, is Section 2301 entitled:

**EMPLOYEE RETENTION CREDIT FOR
EMPLOYERS SUBJECT TO CLOSURE DUE
TO COVID-19**

Employee retention credit – in general

“In the case of an eligible employer, there shall be allowed as a credit against applicable employment taxes for each calendar quarter an amount equal to 50 percent of the qualified wages with respect to each employee of such employer for such calendar quarter.”

Employee retention credit

– key words

- Eligible employer
- Credit against applicable employment taxes
- Each calendar quarter
- Qualified wages

Employee retention credit – eligible employer in general

An eligible employer is one:

Whose business is fully or partially suspended due to order from Governmental authorities limiting commerce, travel or group meetings.

OR

Who for any quarter in 2019 had gross receipts less than 50 percent of the same 2018 quarter and ceasing at the end of the calendar quarter following reaching the 80 percent threshold.

Employee retention credit

– eligible employer nuances

- Tax exempt organizations may qualify only based on the first test.
- Federal and state government or instrumentalities do not qualify.
- Attribution rules, generally under Code section 1563, are applicable.
- An employer taking a Paycheck Protection Program (PPP) loan is ineligible for the credit.

Employee retention credit – credit against applicable employment taxes in general

Credit is applied against OASDI tax but not against Medicare tax.

If credit reduces tax below zero, the excess is refundable.

Employee retention credit

– nuances

- No deduction is available to extent of the credit.
- No credit is available under this section to extent getting a Credit for Paid Family & Medical Leave or Work Opportunity Credit on a participating employee.
- A business can elect not to have this credit apply.

Employee retention credit – each calendar quarter

Per IRS instructions, add first quarter wages after March 12, 2020 to second quarter wages.

Employee retention credit – qualified wages

Qualified wages are the first \$10,000 paid to each employee after March 12, 2020 including health insurance excluding required sick and family leave payments under the Families First Coronavirus Response Act.

- Health insurance must be employer paid under a group health plan and excludible from employee income.
- Payments to independent contractors do not qualify.

Employee retention credit – qualified wages by size of employer

For businesses with more than 100 full time employees – credit is applied only to wages when employee is not providing services.

For businesses with 100 or less full time employees – credit is applied to all wages.

Credit for qualified sick and family leave wages – in general

P.L. 116-127, the Families First Coronavirus Response Act created a significant tax credit against the employer OASDI portion for employers of less than 500 employees who make required paid leave payments from April 1, 2020 through December 31, 2020 due to quarantine, seeking medical diagnosis or caring for another.

- Self-employed individuals can claim the credit against income tax.

Credit for qualified sick and family leave wages – in general

- Generally 100 percent of pay up to \$511 per day for 10 days
- 2/3 of pay up to \$200 per day for 10 days if to care for another due to the virus
- 2/3 of pay up to \$200 per day for 60 days if to care for another due to school or day care closing due to the virus (after 10 days taken as refundable child care credit)

Form 7200

Advance Payment of Employer Credits Due to COVID-19

March 2020
Department of the Treasury
Internal Revenue Service

Go to www.irs.gov/Form7200 for instructions and the latest information.

OMB No. 1545-0029

Name (not your trade name)		Employer identification number (EIN)
Trade name (if any)	Applicable calendar quarter (check one)	
Number, street, and apt. or suite no. If a P.O. box, see instructions.	<input type="checkbox"/> (1) April, May, June <input type="checkbox"/> (2) July, August, September <input type="checkbox"/> (3) October, November, December <input type="checkbox"/> (4)	
City or town, state, and ZIP code. If a foreign address, also complete spaces below. (See instructions.)		
Foreign country name	Foreign province/county	Foreign postal code
Does a third-party payer file your employment tax return? (See instructions.) If "Yes," enter its name.		Third-party payer's EIN (if applicable)

Tip: File Form 7200 if you can't reduce your employment tax deposits to fully account for these credits that you expect to claim on your employment tax return for the applicable quarter. Don't reduce your employment tax deposits and request advanced credits for the same expected credits. You will need to reconcile your advanced credits and reduced deposits on your employment tax return. You can't request an advance payment of the credit for sick and family leave for self-employed individuals.

Part I Tell Us About Your Employment Tax Return

- A** Check the box to indicate which employment tax return form you file (or will file for 2020):
 (1) 941, 941-PR, or 941-SS (2) 943 or 943-PR (3) 944 or 944(SP) (4) CT-1
- B** Is this a new business started on or after January 1, 2020? Yes No
 If "Yes," skip line C unless you've already filed Form 941, Form 941-PR, or Form 941-SS for at least one quarter of 2020.
- C** Amount reported on line 2 of your most recently filed Form 941 (or wages reported on Schedule R (Form 941), column (c), by your third-party payer (see instructions)). If you file a different employment tax return, see instructions
- D** Enter the total number of employees you have. See instructions

Part II Enter Your Credits and Advance Requested

1 Total employee retention credit for the quarter. See instructions	1
2 Total qualified sick leave wages eligible for the credit and paid this quarter. See instructions	2
3 Total qualified family leave wages eligible for the credit and paid this quarter. See instructions	3
4 Add lines 1, 2, and 3	4
5 Total amount by which you have already reduced your federal employment tax deposits for these credits for this quarter	5
6 Total advanced credits requested on previous filings of this form for this quarter	6
7 Add lines 5 and 6	7
8 Advance requested. Subtract line 7 from line 4. If zero or less, don't file this form	8

Third-Party Designee Do you want to allow an employee, a paid tax preparer, or another person to discuss this return with the IRS? See the instructions for details. Yes. Complete below. No

Designee's name ▶ and phone number ▶
 Select a 5-digit personal identification number (PIN) to use when talking to the IRS ▶

Sign Here Under penalties of perjury, I declare that I have examined this form, including any accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

Your signature	Date	Printed title
----------------	------	---------------

Printed name	Best daytime phone	
--------------	--------------------	--

Paid Preparer Use Only

Print/type preparer's name	Preparer's signature	Date	PIN	Check <input type="checkbox"/> if self-employed
Firm's name ▶	Firm's EIN ▶			
Firm's address ▶	Phone no.			

How To File Fax your completed form to 855-248-0552.

Advance payments of credits on Form 7200

Line 1 Employee retention credits at 50 percent

Line 2 + Qualified sick leave wages eligible for
credit

Line 3 + Qualified family leave wages eligible for credit
(not child care)

Line 4 = Total credits

Line 5 – Reduced deposits already claimed

Line 6 – Advance credits previously requested

...

Line 8 = Advance requested

About Stein Sperling

Stein Sperling, founded in 1978, provides a broad range of services to meet the business and personal needs of a broad range of clients. Our focus is on a team approach and our flexible and dynamic organizational structure offers our clients the benefit of our full range of legal resources in the following practice areas:

Business Law

Estates & Trusts

Civil Litigation

Family Law

Construction Law

Injury Law

Criminal Litigation

Real Estate Law

Employment Law

Tax Law

US News and World Report awarded Stein Sperling a Tier 1 National rating for 2020 for Tax Litigation and Controversy, one of only 34 Firms nationally to receive this designation. Stein Sperling is also nationally ranked in Tax Law and in Trusts and Estate Law.

About the Speaker

David S. De Jong, LLM, CPA, practices law with the Rockville, Maryland, firm of Stein Sperling Bennett De Jong Driscoll PC, concentrating his practice in tax planning and controversy, estate planning, business transactions and valuations. An adjunct professor for over 30 years at five universities, he currently teaches part-time at the Washington and Lee University School of Law. For 16 years he coauthored J. K. Lasser's annual tax planning book. Mr. De Jong has litigated cases in each federal tax forum and has testified as an expert witness over 50 times in court, arbitrations and before disciplinary panels. Active in many professional groups, Mr. De Jong is a Past President of the American Academy of Attorney-Certified Public Accountants. In 2006, he was listed as one of the Top 100 Attorneys in the United States by Worth magazine; he has received additional accolades from Washingtonian Magazine, Bethesda Magazine, Washington Smart CEO, Best Lawyers in America, Super Lawyers and CPA Magazine. Mr. De Jong received his BA from the University of Maryland, his JD from Washington and Lee University, and his LLM in Taxation from Georgetown University.