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FEBRUARY 26, 2021



Employee Retention Tax Credit, then and now

By Patrick M. Cox and Vincent J. Tennant

The Employee Retention Credit was introduced in March 2020 by the Coronavirus, Aid, Relief, and Economic Security Act (CARES Act). We discussed this original iteration (the “Old ERC”) in a [prior alert](#). The Consolidated Appropriations Act, 2021 (“CAA”), both retroactively modified the Old ERC and introduced a new ERC (the “New ERC”), effective January 1, 2021. These changes increase the amount of relief available and the types of eligible businesses.

While these changes present greater benefits to more employers, and better planning opportunities, it is important to remember that we still have no formal guidance in this area. Rather, the Internal Revenue Service (“IRS”) has only issued Frequently Asked Questions (“FAQs”), which not only do not have precedential value, but are not binding on the IRS and, as we have seen over the past year, are subject to frequent changes. Thus tax planning involving these provisions should be done with caution and with experienced tax counsel.

ERC — Then

The Old ERC was made available by the CARES Act to employers whose businesses either were (a) fully or partially suspended, or (b) had significant reductions in gross receipts. The Old ERC can be up to \$5,000 per employee for qualified wages paid during the period from March 12, 2020, through the end of 2020. The Old ERC is economically realized by reducing quarterly tax deposits, and to the extent this reduction is not sufficient, the employer can file a Form 7200 and request a tax refund, or amend its Form 941 by filing a Form 941-X.

ERC — Now

Retroactive to March 13, 2020, the effective date of the Old ERC:

- Employers who receive Paycheck Protection Program (“PPP”) loans may now also qualify for the Old ERC, even if such PPP loans were forgiven, as long as those forgiven portions of the PPP loan were not used to qualify for the ERC. This prohibition against “double-dipping” also applies for the New ERC.
- Group health plan expenses can be considered qualified wages even when no other wages are paid to the employee. Again, this also applies for the New ERC.

The New ERC applies for wages paid beginning January 1, 2021, and ending June 30, 2021:

- The applicable credit percentage is increased from 50 percent to 70 percent of qualified wages.
- The limit on per-employee qualifying wages is increased from \$10,000 for the year to \$10,000 per quarter. Together with the previous bullet, the maximum credit for 2021 is therefore \$14,000 per employee.
- The eligibility threshold tied to revenue decline is decreased from 50 percent to 20 percent, and employers may now calculate that by comparing the quarter affected by the pandemic to the same calendar quarter of 2019.¹
- The Old ERC imposed a cap by limiting “qualified wages” to no more than the monthly amount earned during the prior 30-day period. The New ERC removes this cap and appears to allow employers to temporarily increase wages or pay bonuses in order to maximize the New ERC.
- The “large employer” threshold is increased to 500 employees, from 100 employees under the CARES Act.

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¹ Update, 2/26/2021: The new calculation of decline in business was incorrectly stated in a previous version. It is corrected in this version.