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CARES Act Includes Employee Retention Credit

UPDATE: COVID-19-Related Employee Retention Credit: Updated IRS Guidance

The CARES Act, signed into law by President Trump on March 27, 2020, includes an unexpected employee retention credit that is available to employers.

The Employee Retention Credit (the ERC) is a credit against an employer's portion of payroll tax for an eligible business that is forced to suspend or close operations due to COVID-19, or otherwise has a significant revenue decrease, and continues to pay its employees while not currently working.

How the Credit Works

For each quarter that a business is eligible, the business will receive a refundable credit against its 6.2 percent (Social Security and Railroad Retirement) employer portion of the payroll tax equal to 50 percent of "qualified wages" paid.

The amount of qualified wages per employee for all quarters cannot not exceed $10,000. The amount of qualified wages will depend on the business and its size.

- If the business had more than 100 employees in 2019, the qualified wages are limited to only those wages paid to employees not working during the quarter for the period of time when the business was fully or partially shut down or there was a sharp decline in year-over-year receipts (as described below).
- If the business had fewer than 100 employees in 2019, the qualified wages include all wages paid, whether the employee is working or not, when the business was fully or partially shut down but also wages paid during each quarter where there was a sharp decline in year-over-year receipts (as described below).

For purposes of determining the number of employees, aggregation rules apply such that an employer will include entities under common control under sections 52(a) or (b) of the Tax Code or otherwise affiliated under sections 414(m) or (o) of the Tax Code. Qualified wages include the value of health plan benefits.

The ERC is only available for wages paid after March 12, 2020, and before January 1, 2021, and is refundable to the extent it exceeds the business's payroll tax liability.

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Eligible Businesses

To be considered an eligible business, employers must have carried on a trade or business during 2020 and satisfy one of the following two tests:

- Business operations were fully or partially suspended during any quarter of 2020 due to orders from a governmental authority that limited commerce, travel or group meetings in response to COVID-19; or
- The business remained open but during any quarter in 2020 experienced a year-over-year (comparing calendar quarters) reduction in gross receipts of at least 50 percent. The business is entitled to the credit for each quarter until gross receipts for a quarter exceed 80 percent of receipts from the same quarter in 2019.

Tax-exempt organizations may also qualify for the ERC based on the tests outlined above.

An eligible employer's ability to claim the ERC is impacted by other credit and relief provisions as follows:

- If an employer receives a Small Business Interruption Loan under the Paycheck Protection Program, authorized under the CARES Act (PPP Loan), the employer is not eligible for the ERC.
- Wages for the ERC do not include wages for which the employer received a tax credit for paid sick and family leave under the Families First Coronavirus Response Act.
- Wages counted for the ERC can't be counted for the credit for paid family and medical leave under section 45S of the Internal Revenue Code.
- Employees are not counted for the ERC if the employer is allowed a Work Opportunity Tax Credit under section 51 of the Internal Revenue Code for the employee.

For more information about how to claim the ERC, see [How to Claim COVID-19-Related Payroll Tax Credits].

Delay of Employer Payroll Taxes

The CARES Act postpones the due date for the employer’s share of payroll taxes (6.2 percent) related to Social Security and Railroad Retirement for businesses. The deferred amounts would be payable over the next two years, with 50 percent due on December 31, 2021, and the remaining 50 percent due on December 31, 2022.

On June 5, 2020, President Trump signed into law the Payroll Protection Program Flexibility Act, which allows employers that receive a PPP Loan to defer deposit and payment of the employer's share of social security taxes even if the loan is forgiven. Previously, employers that received a PPP Loan were not able to defer the tax after the employer received a decision from the lender that the loan was forgiven.

Pursuant to IRS guidance, employers will not be required to make a special election to be able to defer the payments of these employment taxes. The Form 941, Employer’s Quarterly Federal Tax Return is expected be revised and instructions released to further instruct employers on how to reflect the deferred deposits and payments.

For more information, please contact your Reinhart attorney.