

# Employee Retention Credit Extended, Expanded and Available to PPP Loan Recipients

The 2020 CARES ACT created the Employee Retention Credit (ERC) to encourage employers to continue to retain employees during the ongoing COVID-19 pandemic. The ERC was originally available through December 31, 2020. The Taxpayer Certainty and Disaster Tax Relief Act of 2020 (the Disaster Relief Act), signed into law by President Trump on December 27, 2020, extends the availability of the ERC to wages paid before July 1, 2021, expands certain eligibility requirements and the amount of the credit for 2021 and retroactively allows employers who receive Payroll Protection Program (PPP) loans in 2020 to be eligible for the credit. This alert provides a summary of the expanded ERC and includes a comparison chart highlighting the differences between the credit available to employers in 2020 and 2021.

## Eligibility

The ERC is a refundable credit available to employers against the 6.2 percent employer portion of payroll tax (Social Security and Railroad Retirement tax) on "qualifying wages." To qualify for the credit, an employer must experience either:

- (1) A full or partial suspension of business operations due to a government order in response to COVID-19; or
- (2) A significant decline in gross receipts as compared to the same quarter in 2019.

For specifics as to what qualifies as "fully or partially suspended due to a governmental order," see our summary of IRS guidance [here](#). For 2021, the threshold for an employer to experience a "significant decline in gross receipts" decreases from 50 percent to 20 percent as compared with the same calendar quarter of 2019. To determine whether the 20 percent threshold is met, employers may alternatively elect to use the immediately preceding quarter's gross receipts compared to the corresponding 2019 quarter. If an employer does not make the alternative election for the first quarter of 2021, but does make the election for the second quarter of 2021, it appears an employer could qualify for the credit in both 2021 quarters based on experiencing a 20 percent decline of gross receipts only in the first quarter of 2021. We expect the IRS to address whether the alternative election (if used) would have to be made consistently for

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both quarters in 2021.

## **Qualifying Wages**

Beginning in 2021, the threshold for small business employers is increased from 100 to 500 employees. This means, "qualifying wages" for businesses with less than 500 employees now includes all wages paid to employees. For employers with more than 500 full-time employees, "qualifying wages" are limited to wages paid to employees when they are not working. Qualifying wages for 2021 were also expanded from an annual cap to a cap of \$10,000 per employee per quarter.

## **Amount of the Credit**

The amount of the credit for 2021 increases from 50 percent to 70 percent of qualifying wages. Accordingly, employers will be eligible for a per quarter, per employee credit of \$7,000 (70 percent x \$10,000), or \$14,000 in the aggregate for 2021. To illustrate the impact, consider an employer with 450 employees who experiences a significant decline in gross receipts. That employer could qualify for a credit of up to \$6.3 million.

## **Retroactive Applicability for PPP Loan Recipients**

The ERC is retroactively available to qualified employers who receive PPP loans, provided that the credit is not claimed for wages paid with forgiven PPP loan proceeds (no double dipping).

Employers whose PPP loans did not cover all payroll costs during 2020 could see a significant benefit from this expansion. To retroactively "catch up" on claiming the previously unavailable credit, the Disaster Relief Act instructs employers to claim the qualified wages on their 2020 fourth quarter payroll tax return (IRS Form 941, due January 31, 2021). Alternatively, an employer may file amended 2020 payroll tax returns (IRS Form 941-X) to claim the credit.

## **How to Claim the Employee Retention Credit**

Employers may withhold payroll tax deposits in an amount equal to the estimated ERC for a quarter and, if such estimated credit exceeds the required quarterly deposit, the employer may be able to request an advance payment on IRS Form 7200 for the difference. Each quarter, the employer then reports a "true up" on its quarterly payroll tax return to reconcile the actual ERC with the withheld deposits and advance payments received.

More employers will qualify for the ERC for the first time in 2021 based on the



broadened provisions. All employers, and particularly those who have or will receive a PPP loan, should assess eligibility under the expanded rules for claiming the ERC. We will continue to monitor additional guidance from the IRS on the implementation of all of the Disaster Relief Act changes to the ERC.

If you have questions regarding the 2021 changes or retroactive eligibility for the ERC, please contact your Reinhart attorney.

## COMPARISON OF EMPLOYEE RETENTION CREDIT CHANGES

*Note: All text bolded below is information that has changed with the extension of the ERC.*

Employee Retention Credit	2020	2021
Eligible Dates	Qualified Wages paid March 13, 2020-December 31, 2020	Qualified Wages paid <b>January 1, 2021-June 30, 2021</b>
Qualified Employers	Employers that operate a trade or business who experience one of the following: <ul style="list-style-type: none"><li>• A full or partial suspension of operations by a governmental order due to COVID-19; or</li><li>• A 50 percent decline in gross receipts during any quarter of 2020 compared to same quarter in 2019.</li></ul>	Employers that operate a trade or business who experience one of the following: <ul style="list-style-type: none"><li>• A full or partial suspension of operations by a governmental order due to COVID-19; or</li><li>• <b>A 20 percent decline in gross receipts during the current quarter of 2021 compared to the same quarter in 2019; or a 20 percent decline in the previous quarter's gross receipts compared with the corresponding 2019 quarter.</b></li></ul>

Employee Retention Credit	2020	2021
Qualified Wages	<p>Businesses that average:</p> <p>&gt;100 full-time employees in 2019: wages paid only for employees not working; or</p> <p>100 or less full-time employees in 2019: all wages paid to employees.</p>	<p>Businesses that average:</p> <p><b>&gt;500 full-time employees</b> in 2019: wages paid only for employees not working; or</p> <p><b>500 or less full-time employees</b> in 2019: all wages paid to employees whether the employee is working or not</p>
Amount of Credit	50 percent of Qualified Wages	<b>70 percent</b> of Qualified Wages
Credit Maximum	\$5,000 total per employee for all of 2020	<b>\$7,000 per employee per quarter of 2021; \$14,000 maximum per employee through June 30, 2021</b>
Available to Payroll Protection Program Loan Recipients?	<b>Yes. All Employers who otherwise qualify and receive a PPP loan are eligible retroactively so long as the credit is not claimed for wages paid with forgiven PPP loan proceeds.</b>	<b>Yes. All Employers who otherwise qualify and receive a PPP loan are eligible so long as the credit is not claimed for wages paid with forgiven PPP loan proceeds.</b>

Employee Retention Credit	2020	2021
Advance Payments	All eligible employers may reduce federal employment tax deposits, and file IRS Form 7200 for advance payments of the credit and/or claim a refund on quarterly Form 941.	<p><b>Employers with more than 500 full-time employees in 2019 are no longer eligible to claim advance payments.</b></p> <p><b>Employers with less than 500 full-time employees may request each quarter a maximum advance payment of 70 percent of the average quarterly wages paid in 2019.</b></p>
Are Governmental Entities eligible for the credit?	No. Federal, State, or Local governmental entities are not eligible.	<p><b>Yes. The following public entities are eligible if they otherwise qualify:</b></p> <ul style="list-style-type: none"> <li>· colleges and universities;</li> <li>· medical facilities and hospitals;</li> <li>· certain tax-exempt corporations organized as an instrumentality of the United States</li> </ul>
Are Health Expenses included in the Credit?	Yes	Yes
Is Medicare Tax included in the Credit?	No	No

Employee Retention Credit	2020	2021
Should the credit be included in gross income of the Employer?	No, the credit is not included in gross income. However, the amount of the qualified wages that would otherwise be deductible as “ordinary and necessary business expenses” must be reduced by the credit amount claimed.	No, the credit is not included in gross income. However, the amount of the qualified wages that would otherwise be deductible as “ordinary and necessary business expenses” must be reduced by the credit amount claimed.

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