

Employee Retention Credit Expanded

The Employee Retention Credit (ERC) is a refundable payroll tax credit that was established by the Coronavirus Aid, Relief, and Economic Security (CARES) Act for the purpose of retaining employees and continuing to pay employee compensation during the pandemic. The credit had previously not been permitted for employers who had elected to receive a Paycheck Protection Program (PPP) loan. Now the ERC is available regardless of PPP status and increased in amount, as further described below. Our previous article on the ERC can be found [here](#).

In late December, the ERC was expanded dramatically by the Consolidated Appropriations Act of 2021 (the CCA). Beginning Jan. 1, 2021 and extending through June 30, 2021, the ERC now provides a credit against employment taxes on 70% of qualified wages up to \$10,000 per quarter. As a result, the maximum ERC per employee in 2021 is **\$14,000** (70% of maximum qualified wages of \$10,000 per quarter times two quarters in 2021). Previously the maximum credit per employee was \$5,000 per year.

Example: Employee A was paid qualified wages of \$5,000 for quarter ended 03/31/2021, and \$20,000 for quarter ended 06/30/2021. The ERC for the first quarter is \$3,500 (70% of 5,000) and for the second quarter is \$7,000 (70% of maximum \$10,000).

To be eligible to claim the credit, an employer must be carrying on a trade or business during a quarter for which it is seeking the credit and must have experienced either:

- the full or partial business suspension because of a government order limiting commerce, travel or the size of group meeting due to COVID-19 restrictions; or
- a significant decline in gross receipts in comparison with the same calendar quarter in 2019 (i.e., the employer's gross receipts were less than 50% of its gross receipts for the same relative calendar quarter in 2019).

The CCA also expands the eligibility for the credit from Jan. 1, 2021 through June 30, 2021 by reducing the required year-over-year gross receipts decline from 50% to 20% compared to the same relative 2019 calendar quarter. In other words, for 2021, if an employer's gross receipts for a calendar quarter are less than 80% of its gross receipts for the same relative calendar quarter in 2019, the employer would be eligible for the ERC for that quarter. The CCA also provides a new safe harbor for employers to use the immediately preceding calendar quarter gross receipts compared to the corresponding 2019 calendar quarter to determine eligibility.

The determination of qualified wages for purposes of the ERC differs between large and small employers. Originally, the CARES Act provided that a large employer was an employer with over 100 full-time employees. Qualified wages for large employers include only wages the employer pays to employees not performing services during the pandemic, while small employers may include all wages paid during the pandemic as qualified wages even if the employee continues to provide services. For 2021, the CCA increased the limitation on the number of employees from 100 to 500 employees for purposes of determining the amount of qualified wages eligible for the ERC and includes wages paid to both working and non-working employees.

The CARES Act originally prohibited employers from claiming the ERC if the employer acquired a loan through the PPP. The CCA retroactively removes this mutually exclusive prohibition and permits employers who receive a PPP loan to claim the ERC for qualified wages that are not paid for with forgiven PPP proceeds. So, no double dipping. But, the permitted uses of forgiven PPP proceeds have been significantly expanded, and with careful planning this is a significant benefit.

In January, the Internal Revenue Service issued guidance that employers who received a PPP loan that included wages paid in the second or third quarter of 2020 as payroll costs that were not forgiven may claim the ERC related to those qualified wages on the employer's fourth quarter 2020 Form 941. Employers are not required to use this fourth quarter procedure to claim the 2020 ERC in this situation; they may opt to file amended payroll returns for the second and/or third quarter of 2020 instead.

Finally, the ERC was originally not available to federal, state or local government employers; however, under the CCA from Jan. 1, 2021 through June 30, 2021, the ERC is available to government employers if the employer is described in Internal Revenue Code (IRC) Section 501(c)(1) as exempt under IRC Section 501(a), or the employer is a college or university or an organization whose principal purpose or function is providing medical or hospital care.

If you have any questions or concerns regarding ERC, please contact any of the [attorneys](#) in our [Tax Law practice](#), or the attorney in the firm with whom you are regularly in contact.



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