

January 19, 2020

Tax Credit for Businesses Open During COVID-19

The Coronavirus Aid, Relief, and Economic Security Act of 2019 (**CARES Act**) contained a provision for the Employee Retention Credit (**ERC**), a tax credit for businesses that continued to pay employees despite closures or decreased revenue due to the COVID-19 pandemic. The Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act (**Economic Aid Act**) signed by the President on December 27, 2020 made several changes that may make this available to more businesses.

What are the Changes to the ERC?

PPP Borrower Eligibility: The most significant change to this program is that businesses that borrowed money through the Paycheck Protection Program (PPP) may now **also** claim the ERC. Prior to the Economic Aid Act, any business that took a PPP loan, as well as any business with more than 50% common ownership with a business that received a PPP loan, was ineligible for the ERC. Now, all wages paid during the applicable period, minus amounts forgiven under the PPP loan (so as to avoid double dipping), are eligible for the credit. **Businesses that did not take the credit due to the earlier restrictions (both PPP borrowers and their affiliates) may file amended employment tax returns to take the restrictions.**

Period of Credit Availability: The credit is now available for all wages paid from March 12, 2020 to July 1, 2021, instead of ending on January 1, 2021 per the CARES Act.

Credit Amount: Under the CARES Act, the ERC was limited to a total of \$5,000 per employee for qualified wages paid during 2020 at a 50% credit rate. This means that \$10,000 of qualified wages per employee was required to claim the full credit. Businesses may claim an **additional \$7,000 per quarter per employee** at a 70% credit rate for qualified wages paid during each of the first two quarters of 2021.

Also, the CARES Act did not permit the credit for pay rate increases. The Economic Aid Act repealed this restriction, citing the need for businesses to pay hazard pay for employees.

Other Eligibility Changes: Originally, the credit was only available for businesses that either fully or partially suspended operations due to the COVID-19 lockdown orders **OR** businesses that saw a quarter with 50% reduction in gross receipts compared to a comparable quarter in the prior year. *This revenue reduction requirement was reduced from 50% to 20% under the Economic Aid Act.*

Additionally, for businesses with more than 100 employees, the credit was not available for wages paid to employees that were still working for the company (including telecommuting employees and employees working at reduced capacity). Business with 100 employees or fewer could claim the credit regardless of whether the employees were working or not. For the additional credits in 2021, this restriction now only applies to businesses with more than 500 employees. Note that multiple entities with more than 50% common ownership will have their employees aggregated for determine whether this restriction applies.

Finally, the additional credit for the first two quarters of 2021 is now available for state and local colleges, universities, and organizations providing medical or hospital care, as well certain organizations chartered by Congress.

Advance Payments: Unlike the earlier program under the CARES Act, the Treasury Department will allow businesses with under 500 employees to claim and receive the credit **before** it pays qualified wages. The Treasury Department still needs to issue guidance on how this will work, but the advanced payments will be based on 70% of the average quarterly payroll for the same quarter in 2019. If the actual credit claimed is less than the advanced payment, the business will need to repay the excess to the government.

How to Claim the ERC

Businesses claim the ERC on Form 941 – Employer’s Quarterly Federal Tax Return. Most business have a payroll vendor prepare and file Form 941, so they will need to reach out to their payroll vendors to claim this credit. Businesses that prepare their own Forms 941 (or have an accountant prepare it rather than a payroll vendor) should familiarize themselves on how to claim the ERC. As always, FisherBroyles is available to advise clients as to whether they are able to

claim the ERC and collaborate with payroll vendors, accountants, or internal preparers to ensure that this credit is properly taken.

For additional information, please contact the following with any questions or more specific situations:

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*Special thanks given to our paralegal professional, Adam Gluntz

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