



Understanding the Federal Employee Retention Credit and Recent Changes to the Program

As part of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Congress provided the Employee Retention Credit (“ERC”), which provides a refundable credit by means of reducing payroll tax liability for employers who retained payroll throughout the pandemic. As initially enacted, the ERC could be claimed against qualified wages paid after March 12, 2020, and before January 1, 2021. However, the ERC has since been amended to expand eligibility and extended to account for qualifying wages through December 31, 2021.

Overview of Qualification Requirements

In order to qualify for the ERC for 2021, a company must either be subject to a full or partial government-mandated suspension due to COVID or experience a 20% decline in gross receipts during a calendar quarter when compared to the same quarter of the 2019 tax year or a previous quarter. This is a marked difference from the 50% decline in gross receipts initially required under the CARES Act when claiming the ERC for 2020.

A critical component to calculating the credit relies on identifying qualified wages, the amount of which depends on whether a company would be classified as a “small” or “large” employer, where the criteria differs for 2020 and 2021:

Employer Type	Qualifying Wages	Definition – Q2-Q4 2020	Definition – 2021
Large Employer	Only Qualified Health Plan Expenses and wages paid for employees for periods that the employees did not work or provide services for the employer.	The employer averaged more than 100 full-time employees (average 30 hours per week or 130 hours per month) in the year 2019.	The employer averaged more than 500 full-time employees in the year 2019. The definition of full-time has not changed.
Small Employer	All Qualified Health Plan Expenses and wages paid for all employees for the applicable quarter.	The employer averaged 100 or fewer full-time employees in the year 2019.	The employer averaged 500 or fewer full-time employees in the year 2019.

The law defines qualified health plan expenses to include amounts paid by an employer to maintain a group health plan. If health plan coverages are provided but no wages are paid, the expense is eligible for the ERC.

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Notable Changes to the Employee Retention Credit

- **Amount of Credit Available.**
 - **2020:** The maximum ERC available for 2020 is \$5,000 per qualified employee. An employer can receive a credit of 50% for the first \$10,000 of Qualified Wages paid per employee for all qualified quarters.
 - **2021:** The maximum ERC available for 2021 is \$28,000 per qualified employee. An employer can receive 70% of the first \$10,000 of Qualified Wages paid per employee in each qualified quarter. This sets the maximum credit at \$7,000 per employee, per quarter.
- **Recipients of PPP Loans.** When the ERC was created, employers were not permitted to utilize both the PPP loan offering and the Employee Retention Credit. As amended, an employer may claim an ERC for qualified wages so long as they do not use the same wages to qualify for forgiveness of a PPP loan. Essentially, to benefit from the ERC and utilize PPP forgiveness, an employer will need to have enough wages to cover both. All wages paid to employees can be claimed; this includes qualified healthcare expenses.
- **New Businesses.** The American Rescue Plan Act of 2021 (Rescue Act) allows new businesses, or businesses that did not exist prior to February 16, 2020, to claim the ERC. These employers are called a “recovery startup business,” whereby an employer who began carrying on any trade or business after February 15, 2020, and their annual gross receipts for the up-to-three-year period before the applicable quarter did not exceed \$1,000,000.
- **Interplay with Research & Development (“R&D”) Tax Credit.** For the 2021 tax year, the ERC specifically excludes any wages used to calculate the ERC from being treated as qualified wages for the R&D tax credit. As such, if claiming both credits, taxpayers need to ensure that there is not an overlap in wages used to calculate the ERC and R&D tax credit.

What Does This Mean?

A qualifying employer may claim up to a \$5,000 ERC per employee for 2020 and up to \$28,000 per employee for 2021. The amendments to the ERCs under both the Consolidated Appropriations Act and the Rescue Act help promote the spirit of the original ERC legislation, which is to incentivize employers to retain employees and continue to pay these employees while the business is not operating at full capacity.

We expect further guidance will be forthcoming. It is important for employers to be cognizant of the impact these legislative changes will have on eligibility for the credit as well as how the ERC interacts with other federal credit and incentive programs.



We're Here to Help

If you would like to discuss how your business may be impacted by these changes or for more information about Bennett Thrasher's [Credits & Incentives practice](#), contact [Betsi Barrett](#) or [Nina Desai](#) by calling 770.396.2200.