

**Insights**

## **U.S. CONGRESS GIVES EMPLOYERS AN INCENTIVE TO RETAIN EMPLOYEES IN CARES ACT**

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Section 2301 of the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”) , enacted on March 27, 2020, introduces an employee retention tax credit (the “ERC”) designed to incentivize employers affected by the COVID-19 crisis to retain employees. Subject to certain limitations outlined below, the amount of the credit is 50% of qualified wages paid by an eligible employer, up to a maximum of \$10,000 per employee. The ERC is applied against the employer portion of Social Security taxes (but not the employer portion of Medicare taxes) and is a refundable credit. Thus, to the extent the amount of the credit during any calendar quarter exceeds the employer’s applicable employment taxes for such quarter, the excess will be treated as a refundable overpayment under the Internal Revenue Code of 1986 (the “Code”). The ERC is applicable to wages paid after March 12, 2020 and before January 1, 2021 (the “Effective Period”).

As is the case with other wage-related credits under the Code, no deduction is allowed for the portion of qualified wages that is equal to the amount of the ERC received. An employer can elect for the credit not to apply.

### **Which Employers are Eligible to Claim the ERC?**

An “eligible employer” is an employer that has carried on a trade or business during the 2020 calendar year, and during any calendar quarter of the Effective Period:

- The operation of the employer’s trade or business has been fully or partially suspended because of a governmental order limiting commerce, travel, or group meetings due to COVID-19 (a “Limiting Government Order”); or
- The employer’s trade or business has experienced a “significant decline in gross receipts.”

A significant decline in gross receipts means that the employer’s gross receipts in a calendar quarter of 2020 are less than 50% of its gross receipts for the same calendar quarter in 2019. An employer no longer has a significant decline in gross receipts once its gross receipts for a calendar quarter are more than 80% of its gross receipts in the same calendar quarter in 2019.

A tax exempt organization (within the meaning of section 501(c) of the Code) is an eligible employer if it has carried on a trade or business during the 2020 calendar year, and during any calendar quarter its trade or business has been fully or partially suspended because of a Limiting Government Order.

### **What are Qualified Wages?**

The definition of “qualified wages” depends on the size of an eligible employer’s full-time workforce:

- For an eligible employer with fewer than 100 full-time employees, qualified wages are *any* wages (including health benefits) paid during any period in which a Limiting Government Order is in effect or during any calendar quarter in which the employer has a significant decline in gross receipts.
- For an eligible employer with more than 100 full-time employees, qualified wages are wages (including health benefits) paid for employees who are *not providing services* to the employer because of a Limiting Government Order or because the employer’s trade or business has a significant decline in gross receipts. Qualified wages with respect to an employee cannot exceed the amount such employee would have been paid for working an equivalent duration during the 30 days immediately preceding the period of not providing services.

A “full-time” employee is generally one who is employed on average at least 30 hours of service per week. For purposes of determining what constitutes a single eligible employer under this provision, the employer aggregation rules of section 52 and section 414 of the Code apply.

*Example 1:* An eligible employer pays \$10,000 in qualified wages to Employee 1 during Q2 2020. The amount of the ERC available to the eligible employer with respect to Employee 1 is \$5,000 (50% of \$10,000 in qualified wages). During Q2 2020, the eligible employer has reached the cap on ERC available with respect to Employee 1.

*Example 2:* An eligible employer pays \$8,000 in qualified wages to Employee 2 during Q2 2020, and \$8,000 in qualified wages during Q3 2020. The amount of the ERC available to the eligible employer in Q2 2020 with respect to Employee 2 is \$4,000 (50% of \$8,000). The amount of the ERC available to the eligible employer in Q3 2020 with respect to Employee 2 is \$1,000 (50% of \$2,000 in qualified wages, as the total amount paid is limited to \$10,000). The eligible employer reaches the cap on ERC available with respect to Employee 2 during Q3 2020.

### **Additional Limitations**

Employers should weigh the benefits before pursuing the various kinds of relief provided by the federal government under the Families First Coronavirus Relief Act (“FFCRA”) or the CARES Act. An employer who receives a Paycheck Protection Program loan, enacted pursuant to section 1102 of the CARES Act, is not eligible for the ERC.

In order to prevent duplication of benefits, eligible employers may not claim amounts under the ERC with respect to an employee for which the employer is claiming a work opportunity tax credit under section 51 of the Code. Additionally, wages are not qualified wages if the employer receives a credit for paid family and medical leave under section 45S of the Code with respect to such wages. Qualified wages for purposes of the ERC also do not include wages that were taken into account under Section 7001 or 7003 of the FFCRA (payroll credits for required paid sick leave and family leave).

### **Coordination with Deferral of Social Security Taxes**

Section 2302 of the CARES Act generally provides that an employer can defer paying the employer portion of Social Security taxes for the period from March 27, 2020 through December 31, 2020. An employer will be treated as having timely made all deposits of such taxes so long as (i) 50% of such taxes are deposited on or prior to December 31, 2021, and (ii) the remaining 50% of such taxes are deposited on or prior to December 31, 2022. An employer is not eligible to defer its tax payments under this section if it receives a Paycheck Protection Program loan and has all or part of the loan forgiven under the CARES Act.

There is no restriction under the CARES Act on an employer taking advantage of both the ERC and the payment deferral provision. Thus, to the extent applicable employment taxes are due in excess of the ERC, it appears such taxes can be paid on the delayed schedule outlined above.

### **How to Claim the ERC**

The IRS provided in [Notice 2020-22](#) that eligible employers can take advantage of this credit immediately by reducing their required deposits of payroll taxes that have been withheld from employees' wages by the amount of the credit. To the extent an eligible employer's tax deposits are not sufficient to cover the credit, the employer may receive an advance payment from the IRS by filing Form 7200. Any penalties under section 6656 of the Code for failure to make a deposit of applicable employment taxes will be waived to the extent the amount not timely deposited is less than or equal to the amount of the anticipated credits and the employer did not seek advance payment with respect to the same amounts. Beginning with the second quarter of 2020, eligible employers will report their total quarterly qualified wages and related health insurance costs on Form 941.

The IRS has released [FAQs on the ERC](#) which can be accessed here.

For additional information, please feel free to call or email Jessica Edwards (314-259-2355 or [jessica.edwards@bclplaw.com](mailto:jessica.edwards@bclplaw.com)), Philip Wright (314-259-2499 or [pbwright@bclplaw.com](mailto:pbwright@bclplaw.com)), Kwabena Yeboah (202-508-6083 or [kwabena.yeboah@bclplaw.com](mailto:kwabena.yeboah@bclplaw.com)), or any member of our Tax Advice and Controversy team.

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