

Publications

Federal COVID Relief Act Expands Availability of the Employee Retention Tax Credit

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In early 2020, the CARES Act created a refundable payroll tax credit (the Employee Retention Tax Credit, or the “**ERTC**”) for eligible payroll costs of certain employers who were negatively impacted by COVID. (See *The Cares Act Impact on Employee Benefit Plans; IRS Releases FAQs with Additional Guidance on the CARES Act Employee Retention Tax Credit*.) The recent federal COVID relief act, enacted on December 27 (the “**Relief Act**”), makes a number of modifications to the ERTC, some of which are retroactive, but the most significant of which apply prospectively to the first two quarters of 2021.

Retroactive Changes

The following summarizes the key changes in the ERTC rules that apply retroactively:

- Companies that had taken advantage of the Paycheck Protection Program can now also claim the ERTC, with the only limitation being that wages cannot be double counted. In other words, an amount can be counted either toward the loan forgiveness under the PPP program or toward the ERTC credit, but not for both.
- The application of the gross receipts test to tax-exempt organizations was clarified.
- The health insurance expense test was clarified to eliminate the requirement that the insurance be properly allocable to qualified wages. (This change conforms with prior IRS guidance on qualifying health insurance expenses.)
- An anti-abuse provision was added to allow the Treasury Department to issue regulations limiting the ERTC in certain circumstances, specifically excluding employee leaseback arrangements.

Changes Applicable to 2021

As originally enacted, the ERTC was potentially available only for wages paid through December 31, 2020. The Relief Act extends the ERTC to wages paid through June 30, 2021, and expands the ability of employers to claim the credit for 2021 wages. The following summarizes the key changes in the ERTC rules that apply to the first two calendar quarters of 2021:

- Employers may potentially claim credits for an employee on up to \$10,000 of eligible wages for each of the first two calendar quarters in 2021 (up from \$10,000 of eligible wages for all of 2020).
- The amount of the credit in 2021 is equal to 70% of eligible wages (up from 50% of eligible wages in 2020).
- An employer can qualify for the credit in a 2021 calendar quarter if their gross receipts for the calendar quarter are less than 80% of their gross receipts for the same calendar quarter in 2019 (up from the 50% decline required for 2020). If the employer was not in existence on the first day of a calendar quarter in 2019, the comparison is to the gross receipts for the same calendar quarter in 2020.
- An employer also can qualify for the credit in a 2021 calendar quarter if their gross receipts for the immediately preceding calendar quarter are less than 80% of the gross receipts of such employer for the corresponding calendar quarter in 2019.
- Employers also remain eligible for the ERTC while their operations are fully or partially suspended due to an applicable governmental order.
- Although most governmental entities remain ineligible, the ERTC has been expanded for 2021 to apply to the following governmental entities:
 - Colleges and universities,
 - A governmental entity whose principal purpose or function is providing medical or hospital care, and
 - Governmental entities that are also tax exempt under Code Section 501(c)(1).
- Eligible employers with an average number of full-time employees in 2019 of no more than 500 (up from the 100 threshold that applied in 2020, and still taking into account affiliate employees) ("**Small Employers**"), are eligible to receive an ERTC with respect to wages paid to both furloughed and non-furloughed employees.
- Small Employers eligible for a credit also may elect to receive their ERTC in advance, based upon average quarterly wages paid in 2019, with a true up or down at the end of the applicable quarter.
- With respect to the application of the ERTC to third party payors, any IRS forms, guidance, etc. will require that the customer is ultimately responsible for the accounting of the credit and any liability for improperly claimed credits, and will also require that the certified professional employer organization (or other third party payor) accurately report such tax credits based on the information provided by the customer.
- For large employers claiming the ERTC with respect to employees on leave, the Relief Act removes the previous 30-day wage limit, thereby allowing the employer to claim an ERTC with respect to wages that may be higher than the wages paid to the employee during the 30 days preceding the leave. This will help employers who pay shift bonuses during the pandemic.

For questions about this bulletin, or any other aspect of the Relief Act, contact your Vorys advisor.