Lesson 3

Tax Credit for Employee Retention

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This lesson covers the following topics:

Introduction

Overview

The Coronavirus Aid, Relief, and Economic Security Act (CARES Act), P.L. 116-136, 134 Stat. 281, was enacted on March 27, 2020. Under section 2301 of the CARES Act, certain employers who pay qualified wages to their employees are eligible for an Employee Retention Credit. For 2020, the Employee Retention Credit is a fully refundable tax credit for employers equal to 50 percent of qualified wages (including allocable qualified health plan expenses) that Eligible Employers pay their employees. As originally enacted, the Employee Retention Credit applied to qualified wages paid after March 12, 2020, and before January 1, 2021. In 2020, the maximum amount of qualified wages taken into account with respect to each employee for all calendar quarters in 2020 is $10,000, so that the maximum credit for an Eligible Employer for qualified wages paid to any employee in 2020 is $5,000. Subsequent legislation made significant changes to the Employee Retention Credit for 2021.

The Employee Retention Credit was initially only available for qualified wages paid between March 13, 2020, and December 31, 2020. The dates the credits are available was subsequently extended and/or modified by three additional acts:

1. Taxpayer Certainty and Disaster Tax Relief Act of 2020 (Relief Act), enacted as Division EE of the Consolidated Appropriations Act, 2021, P.L. 116-260, 134 Stat. 1182, on December 27, 2020
2. American Rescue Plan Act of 2021 (ARP), P.L. 117-2, 135 Stat. 4, enacted on March 11, 2021
3. Infrastructure Investment and Jobs Act (2021) (IIJA), P.L. 117-58, 135 Stat. 429, enacted on November 15, 2021

The Relief Act extended the credit to wages paid through June 30, 2021. The ARP Act further extended the credit to wages paid from July 1, 2021, through December 31, 2021. The IIJA terminated the Employee Retention Credit for wages paid after September 30, 2021, except for wages paid by an Eligible Employer which is a recovery startup business. Both the Relief Act and the ARP Act also made other amendments to the Employee Retention Credit. Additionally, the Relief Act also made retroactive changes to the credit applicable to 2020.

In 2021, the Employee Retention is equal to 70 percent of qualified wages (including certain health plan costs), up to $10,000 per employee per calendar quarter in 2021. The maximum credit for per employee for each calendar quarter in 2021 is $7,000.

This lesson will provide an explanation of the law applicable to the Employee Retention Credit. The first part of this lesson explains the law applicable to the credit for 2020. A separate section in this lesson explains the changes to the law applicable to the credit for 2021.

Objectives

At the end of this lesson, you will be able to:

1. Determine when an employer is eligible to claim the Employee Retention Credit against their employment tax liabilities.
2. Determine the amount of the Employee Retention Credit an employer may claim against their employment tax liabilities.
3. Identify the qualified wages includable in the computation of the Employee Retention Credit.
4. Identify the limitations on the Employee Retention Credit based on the number of full-time employees.
5. Determine the impact of the Employee Retention Credit on other credits and relief provisions.
6. Calculate the Employee Retention Credit.

Tax Credit for Employee Retention

Amount of Credit

The Employee Retention Credit is a refundable tax credit against certain employment taxes equal to 50 percent of the qualified wages an Eligible Employer pays to employees after March 12, 2020, and before January 1, 2021.

For each employee, the Employee Retention Credit is equal to 50 percent of qualified wages (including certain health plan costs), up to $10,000 for all calendar quarters in 2020. The maximum credit per employee in 2020 is $5,000.

The Employee Retention Credit was extended and modified in 2021. For qualified wages paid by an Eligible Employer after December 31, 2020, and before January 1, 2022, the Employee Retention is equal to 70 percent of qualified wages (including certain health plan costs), up to $10,000 per employee per calendar quarter in 2021. The maximum credit for an Eligible Employer per employee for each calendar quarter in 2021 is $7,000.

NOTE: The IIJA terminated the Employee Retention Credit for wages paid after September 30, 2021, except for wages paid by an Eligible Employer which is a recovery startup business (see **Eligible Employers – “Recovery Startup Businesses”**).

Eligibility for the Credit for Calendar Year 2020

Eligible Employers – 2020

Eligible Employers for the purposes of the Employee Retention Credit are employers that carry on a trade or business during calendar year 2020, including tax-exempt organizations, that either:

- Fully or partially suspend operation during any calendar quarter in 2020 due to orders from an appropriate governmental authority limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to COVID-19, or
- Experience a significant decline in gross receipts during the calendar quarter.

NOTE: Governmental employers are not Eligible Employers for purposes of the Employee Retention Credit for 2020. However, tribes or tribal entities may be Eligible Employers.

The number of employees an employer has does not affect whether it is an Eligible Employer that may claim the credit. However, the number of employees an employer had in 2019 (or 2020) impacts whether the wages they pay are qualified wages for purposes of the Employee Retention Credit, discussed below.

For purposes of the Employee Retention Credit, “trade or business” has the same meaning as when used in IRC § 162 other than the trade or business of performing services as an employee. Under IRC § 162, an activity does not qualify as a trade or business unless its primary purpose is to make a profit and it is carried on with regularity and continuity. The facts and circumstances of each case determine whether an activity is a trade or business. A taxpayer does not necessarily need to make a profit in any particular year in order to be in a trade or business as long as a good faith profit motive is present.

Governmental Employers – 2020

The federal government, the governments of any state or political subdivision thereof, and any agency or instrumentality of those governments are not Eligible Employers for 2020 and are not entitled to receive the Employee Retention Credit. However, tribes or tribal entities may be Eligible Employers.

In general, for employment tax purposes, the Internal Revenue Service (IRS) considers six factors in determining whether an organization is an instrumentality:

1. Whether the organization is used for a governmental purpose and performs a governmental function,
2. Whether performance of the organization’s function is on behalf of one or more states or political subdivisions,

3. Whether there are any private interests involved, or whether the states or political subdivisions involved have the powers and interests of an owner,
4. Whether control and supervision of the organization is vested in a public authority or authorities,
5. If express or implied statutory or other authority is necessary for the creation and/or use of such an instrumentality, and whether such authority exists, and
6. The degree of financial autonomy and the source of its operating expenses.

See Rev. Rul. 57-128, 1957-1 C.B. 311. No one factor is determinative. Instrumentality status is based on all the facts and circumstances. These same factors apply to identify an instrumentality of the federal government, or of a state or local government, for purposes of determining whether an employer is eligible for the Employee Retention Credit.

Tax Exempt Employers

Organizations described in IRC § 501(c), and exempt from tax under IRC § 501(a), may be Eligible Employers for purposes of the Employee Retention Credit if they are employers that otherwise meet the requirements to be eligible for the credit.

For purposes of the Employee Retention Credit, a tax-exempt organization described in IRC § 501(c) that is exempt from tax under IRC § 501(a) is deemed to be engaged in a "trade or business" with respect to all operations of the organization.

Tribal Government and Tribal Entities

Any tribal government or tribal entity that carries on a trade or business may be an Eligible Employer for purposes of the Employee Retention Credit if it otherwise meets the requirements for the credit.

As a general rule, whether activities constitute a trade or business for purposes of the Employee Retention Credit is determined under IRC § 162. However, because tribal governments are not subject to income tax under the Code and, therefore, are generally not otherwise required to determine whether a tribal activity is a trade or business under IRC § 162, the Treasury Department and the IRS have concluded that the IRC § 162 standards are not the appropriate bases for determining whether a tribal government is carrying on a trade or business for purposes of the Employee Retention Credit. Instead, solely for purposes of the Employee Retention Credit, a tribal government is treated as carrying on trade or business activities, and all activities conducted by the tribal government will be considered part of those trade or business activities. In addition, solely for purposes of the Employee Retention Credit, any entity that a tribal government reasonably believes shares the same tax status as the tribal government (tribal entity employer) is treated as carrying on trade or business activities, and all activities conducted by the tribal entity employer will be considered part of those trade or business activities. Any entity other than a tribal government or a tribal entity employer must determine whether its activities constitute carrying on a trade or business under IRC § 162 for purpose of determining eligibility for the Employee Retention Credit.

Household Employers

Household employers are not considered to operate a trade or business and, therefore, are not eligible for the Employee Retention Credit, with respect to their household employees. However, household employers who are also employers operating a trade or business and who generally report employment taxes attributable to their household employees on the same Form 941, *Employer's QUARTERLY Federal Tax Return*, or Form 944, *Employer's ANNUAL Federal Tax Return*, used to report the employment taxes attributable to the employees of the trade or business, may be eligible for the Employee Retention Credit, but only with respect to the trade or business employees and their qualified wages paid with respect to the trade or business.

Aggregated Employers

An Eligible Employer, for purposes of the Employee Retention Credit, includes all members of an aggregated group that are treated as a single employer in accordance with the provisions of section 2301(d) of the CARES Act. Section 2301(d) provides that all entities that are members of a controlled group of corporations or trades or businesses under common control under IRC §§ 52(a) or (b), members of an affiliated service group under IRC § 414(m), or otherwise aggregated under IRC § 414(o) are treated as a single employer for purposes of applying the Employee Retention Credit.

The aggregation rules under IRC §§ 52(a) and (b) generally apply to determine which entities are treated as a single employer for purposes of the tax credits available to an employer under IRC § 51, as well as for other Code provisions.

Under IRC § 52(a), corporate taxpayers that are members of a controlled group of corporations are treated as a single employer. A controlled group of corporations may be either a parent-subsidiary controlled group, a brother-sister controlled group, or a combined group of corporations.

- A parent-subsidiary controlled group of corporations is one or more chains of corporations where the common parent corporation owns more than 50 percent of the total combined voting power of all classes of stock entitled to vote, or more than 50 percent of the value of all classes of stock of each corporation.
- A brother-sister controlled group of corporations is two or more corporations where:
    1. Five or fewer persons who are individuals, estates, or trusts own at least 80 percent of the total combined voting power of all classes of stock entitled to vote, or the total value of shares of all classes of stock of each corporation, and
    2. The same five or fewer persons, taking into account ownership only to the extent that it is identical with respect to each corporation, own more than 50 percent of the total voting power of all classes of stock entitled to vote, or total value of shares of all classes of stock of each corporation.
- A combined group of corporations is three or more corporations, each of which is a member of either a parent-subsidiary or a brother-sister controlled group, and at least one of which is both the common parent of a parent-subsidiary controlled group and also a member of a brother-sister controlled group.

See Treas. Reg. § 1.52-1.

The IRC § 52(b) aggregation rules apply to partnerships, trusts, estates, corporations, or sole proprietorships in trades or businesses under common control. Under this rule, entities are treated as a single employer if they are under common control applying rules similar to the parent-subsidiary or brother-sister controlled group rules or the rules for a combined group of corporations.

IRC § 414(m)(1) provides that employees of members in an affiliated service group under IRC §§ 414(m)(2) and (5) are treated as employed by a single employer for purposes of employee benefit requirements listed in IRC § 414(m)(4). There are three types of affiliated service groups described in IRC § 414(m). The first and second types of affiliated service groups are described under IRC § 414(m)(2) and require a combination of common ownership and performance of services among certain organizations. The third type of affiliated service group is described under IRC § 414(m)(5), requires no common ownership, and aggregates employers based on the performance of management functions by one organization for another organization (and related organizations).

In addition, IRC § 414(o) generally provides that the Secretary shall prescribe regulations necessary to prevent avoidance of any of the employee benefit requirements listed in IRC § 414(m)(4) through the use of separate organizations or other arrangements. Many Code provisions, particularly those addressing employee benefits, apply the aggregation rules of IRC §§ 414(m) and (o). For example, IRC § 414(t) generally provides that the aggregation rules in IRC §§ 414(m) and (o) apply to various Code provisions listed in IRC § 414(t)(2).

Employers required to be aggregated are treated as a single employer for purposes of the following rules applicable to the Employee Retention Credit:

- Determining whether the employer has a trade or business operation that was fully or partially suspended due to orders related to COVID-19 from an appropriate governmental authority,
- Determining whether the employer experiences a significant decline in gross receipts,
- Determining whether the employer averaged more than 100 full-time employees, and
- Determining the maximum credit amount per employee.

Suspension of Operations

Full or Partial Suspension of Operations

The operation of a trade or business is partially suspended if an appropriate governmental authority imposes restrictions on the employer's operations by limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to COVID-19 such that the employer can still continue some, but not all of its typical operations.

Orders, proclamations, or decrees from the federal government, or any state or local government are considered "orders from an appropriate governmental authority" if they limit commerce, travel, or group meetings due to COVID-19 in a manner that affects an employer's operation of its trade or business, including orders that limit hours of operation. If the orders are from a state or local government, they must be from a state or local government that has jurisdiction over the employer's operations (referred to as a "governmental order").

Statements from a governmental official, including comments made during press conferences or in interviews with the media, do not rise to the level of a governmental order for purposes of the Employee Retention Credit. Additionally, the declaration of a state of emergency by a governmental authority is not sufficient to rise to the level of a governmental order if it does not limit commerce, travel, or group meetings in any manner. Further, such a declaration that limits commerce, travel, or group meetings, but does so in a manner that does not affect the employer's operation of its trade or business does not rise to the level of a governmental order for purposes of the Employee Retention Credit.

A governmental order allows employers to qualify as Eligible Employers for purposes of claiming the Employee Retention Credit without regard to the level of enforcement of the governmental order.

Governmental orders include:

- An order from the city's mayor stating that all non-essential businesses must close for a specified period.
- A state's emergency proclamation that residents must shelter in place for a specified period, other than residents who are employed by an essential business and who may travel to and work at the workplace location.
- An order from a local official imposing a curfew on residents that impacts the operating hours of a trade or business for a specified period.
- An order from a local health department mandating a workplace closure for cleaning and disinfecting.

Whether the operations of a trade or business are considered essential or non-essential will often vary from jurisdiction to jurisdiction. An employer should determine whether it is operating an essential or non-essential business by referring to the governmental order affecting the employer's operation of its trade or business.

Example 1

Governor of State Y issues an order that all non-essential businesses must close from March 20, 2020, until April 30, 2020. The order provides a list of non-essential businesses, including gyms, spas, nightclubs, barber shops, hair salons, tattoo parlors, physical therapy offices, waxing salons, fitness centers, bowling alleys, arcades, racetracks, indoor children's play areas, theaters, chiropractors, planetariums, museums, and performing arts centers. The governor's order is a governmental order limiting the operations of non-essential businesses. Therefore, employers with non-essential businesses may be considered Eligible Employers for purposes of Employee Retention Credit.

Example 2

Mayor of City Y holds a press conference encouraging residents to practice social distancing to prevent the spread of COVID-19. The statement during the press conference is not an order limiting commerce, travel, or group meetings. Accordingly, the mayor's statement would not be a governmental order for purposes of the Employee Retention Credit.

Example 3

A restaurant is ordered by a local health department to close due to a health code violation. Since the order is unrelated to COVID-19, it would not be considered a governmental order for purposes of the Employee Retention Credit.

Voluntary Suspension of Operations

An employer that voluntarily suspends operation of a trade or business or voluntarily reduces hours due to COVID-19 but is not required to do so pursuant to governmental orders is not eligible for the Employee Retention Credit on the basis of a full or partial suspension of its operations due to a governmental order. However, an employer that voluntarily suspends operations due to COVID-19 may be eligible for the Employee Retention Credit if it experiences a significant decline in gross receipts.

Essential Businesses

An employer that operates an essential business is not considered to have a full or partial suspension of operations if the governmental order allows all of the employer's operations to remain open. However, an employer that operates an essential business may be considered to have a partial suspension of operations if, under the facts and circumstances, more than a nominal portion of its business operations are suspended by a governmental order. For example, an employer that maintains both essential and non-essential business operations, each of which are more than nominal portions of the business operations, may be considered to have a partial suspension of its operations if a governmental order restricts the operations of the nonessential portion of the business, even if the essential portion of the business is unaffected. In addition, an essential business that is permitted to continue its operations may, nonetheless, be considered to have a partial suspension of its operations if a governmental order requires the business to close for a period of time during normal working hours.

Notice 2021-20, 2021-11 I.R.B. 922, provides a safe harbor for determining whether a portion of an employer's business operations will be deemed to constitute more than a nominal portion of its business operations. Solely for purposes of this Employee Retention Credit, a portion of an employer's business operations will be deemed to constitute more than a nominal portion of its business operations if either:

1. The gross receipts from that portion of the business operations are not less than 10 percent of the total gross receipts (both determined using the gross receipts of the same calendar quarter in 2019), or
2. The hours of service performed by employees in that portion of the business is not less than 10 percent of the total number of hours of service performed by all employees in the employer's business (both determined using the number of hours of service performed by employees in the same calendar quarter in 2019).

Even if an employer's operations are not considered to have been fully or partially suspended as a consequence of a governmental order, the employer may be considered an Eligible Employer and may be eligible for the Employee Retention Credit if it experiences a significant decline in gross receipts.

An employer with an essential business may be considered to have a full or partial suspension of operations if, under the facts and circumstances, the business's suppliers are unable to make deliveries of critical goods or materials due to a governmental order that causes the supplier to suspend its operations. If the facts and circumstances indicate that the essential business's operations are fully or partially suspended as a result of the inability to obtain critical goods or materials from its suppliers that were required to suspend operations, then the essential business would be considered an Eligible Employer and may be eligible to receive the Employee Retention Credit.

An employer that operates a business that is not required to close any of its physical locations or otherwise suspend its operations is not considered to have a full or partial suspension of its operations for the sole reason that its customers are subject to a government order requiring them to stay at home or otherwise causing a reduction in demand for its products or services because the employer is not prevented from operating its trade or business due to the governmental order. If an employer's operations are not suspended due to a governmental order but the employer experiences a reduction in demand, the employer may be considered an Eligible Employer if it experiences a significant decline in gross receipts (see **Decline in Gross Receipts for Calendar Year 2020**).

Example 4

Employer A operates an auto parts manufacturing business that is considered an essential trade or business in the jurisdiction where it operates. Employer A's supplier of raw materials is required to shut down its operations due to a governmental order. Employer A is unable to procure these raw materials from an alternate supplier. As a consequence of the suspension of Employer A's supplier, Employer A is not able to perform its operations for a period of time. Under these facts and circumstances, Employer A would be considered an Eligible Employer during this period because its operations have been suspended as a result of the governmental order that suspended operations of its supplier.

Example 5

Employer B, an automobile repair service business, is an essential business and is not required to close its locations or suspend its operations. Due to a governmental order that limits travel and requires members of the community to stay at home except for certain essential travel, such as going to the grocery store, Employer B's business has declined significantly. Employer B is not considered to have a full or partial suspension of operations due to a governmental order. However, Employer B may be considered an Eligible Employer if it has a significant decline in gross receipts.

Ability to Continue Operations

If an employer's workplace is closed by a governmental order, but the employer is able to continue operations comparable to its operations prior to the closure, including by requiring its employees to telework, the employer's operations are not considered to have been fully or partially suspended as a consequence of a governmental order.

However, if the closure of the workplace causes the employer to suspend business operations for certain purposes, but not others, it may be considered to have a partial suspension of operations due to the governmental order.

Example 6

Employer C, a software development company maintains an office in a city where the mayor has ordered that only essential businesses may operate. Employer C's business is not essential under the mayor's order and, therefore, Employer C is required to close its office. Prior to the governmental order, all employees at the company teleworked once or twice per week, and business meetings were held at various locations. Following the governmental order, the company ordered mandatory telework for all employees and limited client meetings to telephone or video conferences. Employer C's business operations are not considered to be fully or partially suspended by the governmental order because its business operations may continue in a comparable manner.

Example 7

Employer D operates a physical therapy facility in a city where the mayor has ordered that only essential businesses may operate. Employer D's business is not considered essential under the mayor's order and, therefore, Employer D is required to close its workplace. Prior to the governmental order, none of Employer D's employees provided services through telework and all appointments, administration, and other duties were carried out at Employer D's workplace. Following the governmental order, Employer D moves to an online format and is able to serve some clients remotely, but employees cannot access specific equipment or tools that they typically use in therapy and not all clients can be served remotely. Employer D's business operations are considered to be partially suspended by the governmental order because Employer D's workplace, including access to physical therapy equipment, is central to its operations, and the business operations cannot continue in a comparable manner.

Example 8

Employer E, a scientific research company with facilities in a state in which the governor has ordered that only essential businesses may operate, conducts research in a laboratory setting and through the use of computer modeling. Employer E's business is not essential under the governor's order and, therefore, Employer E is required to close its workplace. Prior to the governmental order, Employer E's laboratory-based research operations could not be conducted remotely (other than certain related administrative tasks) and employees involved in laboratory-based research worked on-site. Employer E's computer modeling research operations could be conducted remotely and employees who engaged in this portion of the business often teleworked. Following the governmental order, the employees engaged in the laboratory-based research cannot perform their work while the facility is closed and are limited to performing administrative tasks during the closure. In contrast, all employees engaged in computer modeling research are directed to telework, and those business operations are able to continue in a comparable manner. Employer E's business operations are considered to be partially suspended by the governmental order because Employer E's laboratory-based research business operations cannot continue in a comparable manner.

Business Operations Subject to Modification

If an employer's workplace is closed by a governmental order for certain purposes, but the employer's workplace may remain open for other purposes or the employer is able to continue certain operations remotely, the employer's operations would be considered to be partially suspended if, under the facts and circumstances, the operations that are closed are more than a nominal portion of its business operations and cannot be performed remotely in a comparable manner. If all, or all but a nominal portion, of an employer's business operations may continue, but the operations are subject to modification due to a governmental order (for example, to satisfy distancing requirements), such a modification of operations is considered to be a partial suspension of business operations due to a governmental order if the modification required by the governmental order has more than a nominal effect on the business operations under the facts and circumstances. Modifications altering customer behavior (for example, mask requirements or making store aisles one way to enforce social distancing) or that require employees to wear masks and gloves while performing their duties will not result in more than a nominal effect on the business operations.

Comparable Operations

The following factors should be considered in determining if an employer is able to continue comparable operations, although additional factors may be considered as well if relevant:

1. Employer's telework capabilities. Determine whether an employer has adequate support (IT and otherwise) such that operations can continue via work from another location.
2. Portability of employees' work. Determine the amount of portable work, or work otherwise adaptable to be performed from a remote location, within an employer's trade or business operations.
3. Need for presence in employee's physical workspace. Evaluate the role that the employer's physical workspace plays in an employer's trade or business (may be critical and necessary, beneficial but not necessary, or merely convenient). If the employer's physical workspace is so critical to its trade or business operations that tasks central to the trade or business's operations are unable to be performed remotely, then this factor alone indicates that the employer is not able to continue comparable operations. Examples of workspace that is critical include laboratories or manufacturing involving special equipment or materials that cannot be accessed or operated remotely.

4. Transitioning to telework operations. If an employer can conduct comparable operations via telework, but the employer's operations did not previously allow for telework, or allowed for only minimal telework, then some adjustment period is expected, and, generally, the employer's operations are not considered partially suspended during that period. However, if an employer incurs a significant delay (for example, beyond 2 weeks) in moving operations to comparable telework (for example, implementing telework policies or providing employees with equipment to telework), then the employer's trade or business operations may be deemed subject to a partial suspension during that transition period.

Example 9

Employer F, a restaurant business, must close its restaurant to on-site dining due to a governmental order closing all restaurants, bars, and similar establishments for sit-down service. Employer F is allowed to continue food or beverage sales to the public on a carry-out, drive-through, or delivery basis. Employer F's business operations are considered to be partially suspended because, under the facts and circumstances, more than a nominal portion of its business operations – its indoor and outdoor dining service – is suspended due to the governmental order.

Example 10

Same facts as Example 9, except that two months later, under a subsequent governmental order, Employer F is permitted to offer sit-down service in its outdoor space, but its indoor dining service continues to be closed. During the period in which Employer F is allowed to operate only its outdoor sit-down and carry-out service in accordance with the order, Employer F's business operations are considered to be partially suspended because, under the facts and circumstances, a more than nominal portion of its business operations – its indoor dining service – is suspended due to a governmental order. The following month, under a further governmental order, Employer F is permitted to offer indoor dining service, in addition to outdoor sit-down and carry-out service, provided that all tables in the indoor dining room must be spaced at least six feet apart. This spacing constraint has more than a nominal effect on Employer F's business operations. During this period, even though Employer F resumed all categories of its business operations, Employer F's business operations continue to be considered to be partially suspended because, under the facts and circumstances, the governmental order restricting its indoor dining service has more than a nominal effect on its operations.

Example 11

Employer G, a retail business, must close its retail storefront locations due to a governmental order. The retail business also maintains a website through which it continues to fulfill online orders. The retailer's online ordering and fulfillment system is unaffected by the governmental order. The retail storefront locations are more than a nominal portion of Employer G's business operations. Employer G's business operations are considered to have been partially suspended due to the governmental order requiring it to close its retail store locations, which are more than a nominal portion of its business operations.

Example 12

Employer H, a hospital, is considered to be operating an essential business under a governmental order with respect to its emergency department, intensive care, and other services for conditions requiring urgent medical care. However, the governmental order treats Employer H's elective and non-urgent medical procedures as non-essential business operations and prevents Employer H from performing these services. Employer H suspends operations related to elective and non-urgent medical procedures, which are more than a nominal portion of Employer H's business operations. Although Employer H is an essential business, Employer H is considered to have a partial suspension of operations due to the governmental order that prevents Employer H from performing elective and non-urgent medical procedures, which are more than a nominal portion of its business operations under the facts and circumstances.

Example 13

Employer I, a grocery store, is considered to be operating an essential business under a governmental order. However, the governmental order requires grocery stores to discontinue their self-serve offerings, such as salad bars, though they may offer prepared or prepackaged food. Employer I modifies its operations to close its salad bar and other self-serve offerings and instead offers prepackaged salads and other items. The salad bar and other self-serve offerings are not more than a nominal portion of Employer I's business operations. Further, the governmental order requiring Employer I to discontinue its self-serve offerings does not have more than a nominal effect on Employer I's business operations under the facts and circumstances, even though Employer I was required to modify its business operations. Accordingly, Employer I's business operations are not considered to be partially suspended due to a governmental order.

Example 14

Employer J, a large retailer, is required to close its storefront location due to a governmental order but is permitted to provide customers with curbside service to pick up items ordered online or by phone. The retail storefront location is more than a nominal portion of Employer J's business operations. During this period, Employer J's business operations are considered to have been partially suspended due to the governmental order requiring it to close its storefront location. Two months later, under a subsequent governmental order, Employer J is permitted to reopen its storefront location. Under the subsequent governmental order; however, Employer J must enforce social distancing guidelines that require Employer J to admit only a specified number of customers into the store per 1,000 square feet. While the governmental order results in customers waiting in line for a short period of time to enter the store during certain busy times of the week, the size of Employer J's storefront location is large enough that it is able to accommodate all of its customers after these short waits outside the store. The governmental order requiring Employer J to enforce social distancing guidelines does not have more than a nominal effect on Employer J's business operations under the facts and circumstances, even though Employer J is required to modify its business operations. During this period, Employer J's business operations are not considered to be partially suspended due to the governmental order because the governmental order requiring enforcement of social distancing guidelines does not have more than a nominal effect on its operations.

Reduced Hours Due to Governmental Order

An employer that reduces its operating hours due to a governmental order is considered to have partially suspended its operations since the employer's operations have been limited by a governmental order.

Example 15

Employer K operates a food processing facility that normally operates 24 hours a day. A governmental order issued by the local health department requires all food processing businesses to deep clean their workplaces once every 24 hours in order to reduce the risk of COVID-19 exposure. In order to comply with the governmental order, Employer K reduces its daily operating hours by five hours per day so that a deep cleaning may be conducted within its workplace once every 24 hours. Employer K is considered to have partially suspended its operations due to the governmental order requiring it to reduce its hours of operation.

Business Operations in Multiple Locations

Employers that operate a trade or business in multiple locations and are subject to state and local governmental orders limiting operations in some, but not all, jurisdictions are considered to have a partial suspension of operations. Employers that operate a trade or business on a national or regional basis may be subject to governmental orders requiring closure of their locations in certain jurisdictions but may not be subject to such a governmental order in other jurisdictions, including because it may be an essential business in some of those jurisdictions. To operate in a consistent manner in all jurisdictions, these employers may establish a policy that complies with the local governmental orders, as well as the Center for Disease Control and Prevention (CDC) recommendations and the Department of Homeland Security (DHS) guidance. In this case, even though the employer may not be subject to a governmental order to suspend operations of its trade or business in certain jurisdictions and may merely be following CDC or DHS guidelines in those jurisdictions, the employer would still be considered to have partially suspended operations due to the governmental orders requiring closure of its business operations in certain jurisdictions. Therefore, the employer would be an Eligible Employer with respect to all of its operations in all locations for calendar quarters during which the employer's operations are partially suspended whether or not the employer voluntarily adopts consistent measures for its business operations in other jurisdictions.

Example 16

Employer F is a national retail store chain with operations in every state in the United States. In some jurisdictions, Employer F is subject to a governmental order to close its stores to customers but is permitted to provide customers with curbside service to pick up items ordered online or by phone. In these jurisdictions, Employer F determines that it is not continuing comparable operations and that the stores that are closed to customers are more than a nominal portion of its business operations. In other jurisdictions, Employer F is not subject to any governmental order to close its stores to customers or is considered an essential business permitting its stores to remain fully open. Employer F establishes a company-wide policy, in compliance with the local governmental orders and consistent with the CDC and DHS recommendations and guidance, requiring the closure of all stores and operating with curbside pick-up only, even in those jurisdictions where the business was not subject to a governmental order. As a result of the governmental orders requiring closure of Employer F's stores to customers in certain jurisdictions, Employer F has a partial suspension of operations of its trade or business, whether or not Employer F chooses to take consistent measure for stores in other jurisdictions. The partial suspension results in Employer F being an Eligible Employer nationwide for calendar quarters during which the employer's operations are partially suspended.

Business Operations of Aggregated Group

All members of an aggregated group that are treated as a single employer under the aggregation rules are treated as a single employer for purposes of the Employee Retention Credit. If a trade or business is operated by multiple members of an aggregated group and if the operations of one member of the aggregated group are suspended by a governmental order, then all members of the aggregated group are considered to have their operations partially suspended, even if another member of the group is in a jurisdiction that is not subject to a governmental order.

Example 17

Employer Group G is a restaurant chain that operates a single trade or business through multiple subsidiary corporations located in various jurisdictions. Employer Group G is treated as a single employer under the aggregation rules for purposes of the Employee Retention Credit. Certain members of Employer Group G's operations are closed due to a governmental order, while other members of Employer Group G's operations are not subject to a governmental order and remain open. Because Employer Group G is treated as a single employer for purposes of the Employee Retention Credit, all members of Employer Group G are treated as partially suspended as a result of the governmental orders suspending the operations of certain of Employer Group G members.

Aggregation Rules for Tribal Governments and Tribal Entities

For purposes of determining eligibility for the Employee Retention Credit, all employers, including tribal governments and tribal entities, must apply the aggregation rules under IRC §§ 52(a) and (b) and IRC §§ 414(m) and (o). Tribal governments and tribal entity employers should use a reasonable, good faith interpretation in determining how the aggregation rules apply.

Governmental Order Lifted

If an employer is subject to a governmental order to fully or partially suspend its business operations and the order is subsequently lifted in the middle of a calendar quarter, the employer is considered to have business operations that were suspended, but only for periods during the calendar quarters in which the trade or business operations were fully or partially suspended. The employer can claim a credit only for qualified wages paid during the period the order is in force even though the employer is an Eligible Employer for the entire calendar quarter.

Example 18

State Y issued a governmental order for all non-essential businesses to close from March 10, 2020, through April 30, 2020, and the governmental order was not extended. Pursuant to the order, Employer H, which operates a non-essential business in State Y, closes from March 10, 2020, through April 30, 2020. Employer H is an Eligible Employer in the first quarter (and second quarter but may claim the credit only for qualified wages paid from March 13, 2020, the effective date of section 2301 of the CARES Act, through April 30, 2020).

Decline in Gross Receipts for Calendar Year 2020

Significant Decline in Gross Receipts

An employer that has a significant decline in gross receipts is an Eligible Employer that may be entitled to the Employee Retention Credit. An employer is considered to have a significant decline in gross receipts for the period beginning with the first calendar quarter in 2020 for which its gross receipts are less than 50 percent of gross receipts from the same calendar quarter in 2019 and ending with the earlier of January 1, 2021, or the first calendar quarter after the quarter for which gross receipts are greater than 80 percent of gross receipts for the same calendar quarter in 2019.

A significant decline in gross receipts is calculated by determining the first calendar quarter in 2020 (if any) in which an employer's gross receipts are less than 50 percent of its gross receipts for the same calendar quarter in 2019. If the gross receipts decline to that extent, the employer also must determine if there is a later calendar quarter in 2020 in which the employer's 2020 quarterly gross receipts are greater than 80 percent of its gross receipts for the same calendar quarter in 2019. If so, the significant decline in gross receipts ends with the first calendar quarter that follows the first calendar quarter in which the employer's 2020 quarterly gross receipts are greater than 80 percent of its gross receipts for the same calendar quarter in 2019, or with the first calendar quarter of 2021.

NOTE: The information presented in this section of the lesson applies to the determination of a decline in gross receipts for purposes of the Employee Retention Credit for calendar year 2020. See **Law Changes for 2021 Credit** later in this lesson for changes to the determination of a decline in gross receipts for calendar year 2021.

Example 19

Employer I's gross receipts were $100,000, $190,000, and $230,000 in the first, second, and third calendar quarters of 2020, respectively. Its gross receipts were $210,000, $230,000, and $250,000 in the first, second, and third calendar quarters of 2019, respectively. Thus, Employer I's 2020 first, second, and third quarter gross receipts were approximately 48 percent, 83 percent, and 92 percent of its 2019 first, second, and third quarter gross receipts, respectively. Accordingly, Employer I experienced significant decline in gross receipts commencing on the first day of the first calendar quarter of 2020 (the calendar quarter in which gross receipts were less than 50 percent of those in the same quarter of 2019) and ending on the first day of the third calendar quarter of 2020 (the quarter following the quarter for which the gross receipts were more than 80 percent of those in the same quarter of 2019). Thus, Employer I is entitled to an Employee Retention Credit with respect to qualified wages paid during the first and second calendar quarters.

Definition of Gross Receipts

"Gross receipts" for purposes of the Employee Retention Credit for an employer other than a tax-exempt organization has the same meaning as when used under IRC § 448(c). Under the regulations for IRC § 448(c), "gross receipts" means gross receipts of the taxable year and generally includes total sales (net of returns and allowances) and all amounts received for services. In addition, gross receipts include any income from investments, and from incidental or outside sources. For example, gross receipts include interest (including original issue discount and tax-exempt interest within the meaning of IRC § 103), dividends, rents, royalties, and annuities, regardless of whether those amounts are derived in the ordinary course of the taxpayer's trade or business. Gross receipts are generally not reduced by cost of goods sold but are generally reduced by the taxpayer's adjusted basis in certain property used in a trade or business or capital assets sold. Gross receipts do not include the repayment of a loan, or amounts received with respect to sales tax if the tax is legally imposed on the purchaser of the good or service, and the taxpayer merely collects and remits the sales tax to the taxing authority.

Gross Receipts Safe Harbor – PPP Loans and Certain Grants

Rev. Proc. 2021-33, 2021-34 I.R.B. 327, provides a safe harbor that permits an employer to exclude the amount of the forgiveness of a Paycheck Protection Program (PPP) Loan and the amount of ERC-Coordinated Grants from the definition of gross receipts solely for the purpose of determining eligibility to claim the Employee Retention Credit (safe harbor). An employer is not required to apply this safe harbor. This safe harbor does not permit the exclusion of the amount of forgiveness of a PPP Loan or the amount of ERC-Coordinated Grants from the definition of gross receipts IRC §§ 448(c) or 6033 for any other federal tax purpose.

An employer may exclude the amount of the forgiveness of a PPP Loan and the amount of any ERC-Coordinated Grants from its gross receipts in determining eligibility to claim the Employee Retention Credit for a calendar quarter if the employer consistently applies this safe harbor in determining eligibility to claim the Employee Retention Credit. An employer consistently applies this safe harbor by:

1. Excluding the amount of the forgiveness of any PPP Loan and the amount of any ERC-Coordinated Grant from its gross receipts for each calendar quarter in which gross receipts for that calendar quarter are relevant to determining eligibility to claim the Employee Retention Credit, and
2. Applying the safe harbor to all employers treated as a single employer under the Employee Retention Credit aggregation rules.

Subject to the rule in section 3.03 of Rev. Proc. 2021-33, an employer may revoke its safe harbor election by including the amount of the forgiveness of the PPP Loan or the amount of ERC-Coordinated Grants in its gross receipts when determining eligibility to claim the Employee Retention Credit for a calendar quarter on its adjusted employment tax return for that calendar quarter or, for employers that file employment tax returns on an annual basis, for the year including the calendar quarter. Due to the consistency rule in section 3.03 of Rev. Proc. 2021-33, the employer must adjust all employment tax returns that are affected by the revocation of the safe harbor election.

Reason for Decline in Gross Receipts

The CARES Act does not require that the significant decline in gross receipts be related to COVID-19. However, employers should keep records for the relevant calendar quarters in 2019 and 2020 to document the significant decline in gross receipts. The records should be available for IRS review for at least four years.

Time Decline in Gross Receipts Determined

The employer may claim the Employee Retention Credit on qualified wages paid in 2020 if it determines that a significant decline in gross receipts occurred in 2020 even if it does not make the determination until after January 1, 2021. In this case, the employer may claim the credit by filing the appropriate form to report adjustments to its employment taxes, typically Form 941-X, *Adjusted Employer's Quarterly Federal Tax Return or Claim for Refund*.

Gross Receipts of Aggregated Group

All entities treated as a single employer under the aggregation rules are treated as a single employer for purposes of determining whether the employer had a significant decline in gross receipts.

To be an Eligible Employer on the basis of a significant decline of gross receipts, the employer must take into account the gross receipts of all members of the aggregated group. If the aggregated group does not experience a significant decline in gross receipts, then no member of the group may claim the Employee Retention Credit on that basis.

Example 20

Employer J and Employer K are members of an IRC § 52(a) controlled group of corporations and are treated as a single employer under the aggregation rules. Because Employer J and Employer K are treated as a single employer under the aggregation rules, they must be treated as a single employer for purposes of determining whether there has been a significant decline in gross receipts. Neither Employer J nor Employer K is subject to a governmental order suspending business operations. Employer J has gross receipts of $1,000,000 in the second quarter of 2019 and $400,000 in the second quarter of 2020. Employer K has gross receipts of $1,000,000 in second quarter of 2019 and $750,000 in second quarter of 2020. Although Employer J's gross receipts in the second quarter of 2020 were 40 percent of its 2019 second quarter gross receipts, neither Employer J nor Employer K can claim the Employee Retention Credit due to a significant decline in gross receipts. This is because Employers J and K are treated as a single employer for purposes of the Employee Retention Credit and had combined gross receipts of $2,000,000 in the second quarter of 2019 and $1,150,000 in the second quarter of 2020. Their combined gross receipts for the second quarter of 2020 would have had to be less than $1,000,000 (50 percent of $2,000,000) for Employers J and K to have experienced a significant decline in gross receipts for the second quarter of 2020.

Gross Receipts for Businesses Started in 2019

An employer that started a business in the first quarter of 2019 should use the gross receipts for the applicable quarter of 2019 for comparison to the gross receipts for the same quarter in 2020 to determine whether it experienced a significant decline in gross receipts in any quarter of 2020.

An employer that started a business in the second quarter of 2019 should use that quarter as the base period to determine whether it experienced a significant decline in gross receipts for the first two quarters in 2020 and should use the third and fourth quarters of 2019 for comparison to the third and fourth quarters of 2020, respectively, to determine whether it experienced a significant decline in gross receipts for those quarters.

An employer that started a business in the third quarter of 2019 should use that quarter as the base period to determine whether it experienced a significant decline in gross receipts for the first three quarters in 2020 and should use the fourth quarter of 2019 for comparison to the fourth quarter of 2020 to determine whether it experienced a significant decline in gross receipts for that quarter.

An employer that started a business in the fourth quarter of 2019 should use that quarter as the base period to determine whether it had a significant decline in gross receipts for any quarter in 2020.

If the employer commenced business in the middle of a quarter in 2019, the employer should estimate the gross receipts it would have had for the entire quarter based on the gross receipts for the portion of the quarter that the business was in operation.

Gross Receipts for Businesses Acquired in 2020

For purposes of the Employee Retention Credit, to determine whether an employer experiences a significant decline in gross receipts, an employer that acquires (in an asset purchase, stock purchase, or any other form of acquisition) a trade or business during 2020 (an acquired business) is required to include the gross receipts from the acquired business in its gross receipts computation for each calendar quarter that it owns and operates the acquired business. Solely for purposes of the Employee Retention Credit, when an employer compares its gross receipts for a 2020 calendar quarter when it owns an acquired business to its gross receipts for the same calendar quarter in 2019, the employer may, to the extent the information is available, include the gross receipts of the acquired business in its gross receipts for the 2019 calendar quarter. Under this safe harbor approach, the employer may include these gross receipts regardless of the fact that the employer did not own the acquired business during that 2019 calendar quarter.

An employer that acquires a trade or business in the middle of a calendar quarter in 2020 and that chooses to use this safe harbor approach must estimate the gross receipts it would have had from that acquired business for the entire quarter based on the gross receipts for the portion of the quarter that it owned and operated the acquired business. However, an employer that chooses not to use this safe harbor approach is only required to include the gross receipts from the acquired business for the portion of the quarter that it owned and operated the acquired business.

Example 21

Employer L acquired all of the assets of a trade or business in a taxable transaction on January 1, 2020. The gross receipts of the acquired business were $50,000 for the quarter beginning January 1, 2020, and ending March 31, 2020, and $200,000 for the quarter beginning January 1, 2019, and ending March 31, 2019. Employer L has access to the books and records from the prior owner of the acquired trade or business and can determine the amount of gross receipts attributable to the trade or business for the quarter beginning January 1, 2019, and ending March 31, 2019. For purposes of the Employee Retention Credit, Employer L must include $50,000 in its gross receipts computation for the quarter beginning January 1, 2020, and ending March 31, 2020, (Employer L actually owned the trade or business) and may include $200,000 in its gross receipts computation for the quarter beginning January 1, 2019, and ending March 31, 2019.

Gross Receipts for Tax-Exempt Employers

Gross receipts for purposes of the Employee Retention Credit, for a tax-exempt organization, has the same meaning as under IRC § 6033. Under the IRC § 6033 regulations, “gross receipts” means the gross amount received by the organization from all sources without reduction for any costs or expenses including, for example, cost of goods or assets sold, cost of operations, or expenses of earning, raising, or collecting such amounts. Thus, gross receipts includes, but is not limited to:

- The gross amount received as contributions, gifts, grants, and similar amounts without reduction for the expenses of raising and collecting such amounts,
- The gross amount received as dues or assessments from members or affiliated organizations without reduction for expenses attributable to the receipt of such amounts,
- Gross sales or receipts from business activities (including business activities unrelated to the purpose for which the organization qualifies for exemption),
- The gross amount received from the sale of assets without reduction for cost or other basis and expenses of sale, and
- The gross amount received as investment income, such as interest, dividends, rents, and royalties.

To determine whether there has been a significant decline in gross receipts, a tax-exempt employer computes its gross receipts received from all of its operations during the calendar quarter and compares those gross receipts to the same gross receipts received for the same calendar quarter in 2019.

Amount of Credit for Calendar Year 2020

Amount of Credit

For calendar year 2020, the Employee Retention Credit equals 50 percent of the qualified wages (including qualified health plan expenses) that an Eligible Employer pays in a calendar quarter. The maximum amount of qualified wages taken into account with respect to each employee for all calendar quarters is $10,000, so that the maximum credit for qualified wages paid to any employee is $5,000. See **Law Changes for 2021 Credit** for changes to the amount of the Employee Retention Credit for 2021.

If an employee is employed by two or more entities treated as a single employer under the aggregation rules, the maximum amount of qualified wages for all calendar quarters that may be taken into account with respect to that employee is $10,000 in the aggregate. Thus, an aggregated group treated as a single employer may not claim more than the maximum credit of $5,000 with respect to any one individual employed by the members of the aggregated group. With respect to such an employee, the amount of the Employee Retention Credit that may be claimed by any member of an aggregated group is based on the member's proportionate share of qualified wages giving rise to the credit per the return period for which the credit is claimed.

Example 22

Employer M is an Eligible Employer and pays $10,000 in qualified wages to Employee A in the second quarter of 2020. The Employee Retention Credit available to Employer M for the qualified wages paid to Employee A is $5,000.

Example 23

Employer N is an Eligible Employer and pays $8,000 in qualified wages to Employee B in the second quarter 2020 and $8,000 in qualified wages in the third quarter 2020. The credit available to Employer N for the qualified wages paid to Employee B is equal to $4,000 in the second quarter and $1,000 in the third quarter due to the overall limit of 50 percent of $10,000 of qualified wages per employee for all calendar quarters.

Example 24

Employer E and Employer F are members of an aggregated group treated as a single employer, that, as such, is an Eligible Employer. Employee G is employed by both Employer E and Employer F. Employee G received $10,000 in qualified wages from each employer during the second quarter of 2020, for a total of $20,000.
Because Employers E and F are treated as a single employer under the aggregation rules, the total amount of qualified wages that may be taken into account for determining the Employee Retention Credit with respect to Employee G is limited to $10,000, and the maximum credit available for qualified wages paid to Employee G is $5,000. Employers E and F can claim their proportionate share of the $5,000 credit. Since Employers E and F paid equal amounts of qualified wages to Employee G, they can each claim $2,500. Additionally, because Employers E and F each paid the maximum amount of qualified wages ($10,000) to Employee G during the second quarter, Employers E and F are not entitled to the Employee Retention Credit for wages paid to Employee G in any remaining quarter in 2020.

Qualified Wages for 2020

Qualified Wages

Qualified wages are wages and compensation paid by an Eligible Employer to some or all employees after March 12, 2020, and before January 1, 2021. Qualified wages include the Eligible Employer's qualified health plan expenses that are properly allocable to an employee.

Qualified wages are limited to "wages" as defined by section 2301(c)(5) of the CARES Act. Section 2301(c)(5) of the CARES Act, in general, defines the term "wages" to mean wages (as defined in IRC § 3121(a)) and compensation (as defined in IRC § 3231(e)), both determined without regard to the contribution and benefit base (as determined under section 230 of the Social Security Act).

Section 2301(c)(5)(B) of the CARES Act provides that "wages" include amounts paid by an eligible employer to provide and maintain a group health plan (as defined in IRC § 5000(b)(1)), but only to the extent that the amounts are excluded from the gross income of employees by reason of IRC § 106(a). Amounts treated as wages under section 2301(c)(5)(B) of the CARES Act are treated as paid with respect to any employee (and with respect to any period) to the extent the amounts are properly allocable to the employee (and to the period), and, except as otherwise provided by the Secretary, the allocation will be treated as proper if made on the basis of being pro rata among periods of coverage.

The definition of qualified wages depends, in part, on the average number of full-time employees (as defined in IRC § 4980H) employed by the Eligible Employer during 2019.

If the Eligible Employer averaged more than 100 full-time employees in 2019, qualified wages are the wages paid to an employee for time that the employee is **not providing services** due to either:

1. A full or partial suspension of operations by order of a governmental authority due to COVID-19, or
2. A significant decline in gross receipts.

For these large Eligible Employers, an additional limitation requires that qualified wages taken into account for an employee may not exceed what the employee would have been paid for working an equivalent duration during the 30 days immediately preceding the periods described in (1) or (2) above.

If the Eligible Employer averaged 100 or fewer full-time employees in 2019, qualified wages are **all wages paid to any employee** whether or not they are providing services during any period of full or partial suspension or during a calendar quarter in which there is a significant decline in gross receipts.

Number of Full-Time Employees

Determining the Average Number of Full-Time Employees

The term "full-time employee" means an employee who, with respect to any calendar month in 2019, had an average of at least 30 hours of service per week or 130 hours of service in the month (130 hours of service in a month is treated as the monthly equivalent of at least 30 hours of service per week), as determined in accordance with IRC § 4980H. An employer that operated its business for the entire 2019 calendar year determines the number of its full-time employees by taking the sum of the number of full-time employees in each calendar month in 2019 and dividing that number by 12.

An employer that started its business operations during 2019 determines the number of its full-time employees by taking the sum of the number of full-time employees in each full calendar month in 2019 in which the employer operated its business and dividing by that number of months.

An employer that started its business operations during 2020 determines the number of its full-time employees by taking the sum of the number of full-time employees in each full calendar month in 2020 in which the employer operated its business and dividing by that number of months, consistent with the approach discussed above for employers that began business operations during 2019.

Notice 2021-49, 2021-34 I.R.B. 316, clarified that, for purposes of the Employee Retention Credit, Eligible Employers are not required to include full-time equivalents when determining the average number of full-time employees.

Average Number of Employees for Aggregated Group

All entities that are treated as a single employer under the aggregation rules are treated as a single employer for purposes of determining the employer's average number of employees.

Example 25

Employers O and P each averaged 75 full-time employees, respectively. Employers O and P are treated as a single employer for purposes of determining the Employee Retention Credit. They are an Eligible Employer. Employers O and P together averaged 150 full-time employees in 2019. Because Employers O and P are a large Eligible Employer, each employer is eligible for the Employee Retention Credit only for wages paid to an employee that is not providing services due to either (1) a full or partial suspension of operations by governmental order, or (2) a significant decline in gross receipts.

100 or Fewer Full-Time Employees in 2019

An Eligible Employer that averaged 100 or fewer employees during 2019 may treat all wages paid to its employees after March 12, 2020, and before January 1, 2021, with respect to their employees during any period in the calendar quarter in which the employer's business operations are fully or partially suspended due to a governmental order or during a calendar quarter in which the employer experiences a significant decline in gross receipts as qualified wages, subject to the maximum of $10,000 per employee for all calendar quarters.

More than 100 Full-Time Employees in 2019

Eligible Employers that averaged more than 100 full-time employees for 2019 may not treat the wages as qualified wages if they were paid to employees for the time that they provide services to the employer as qualified wages. For these employers, only wages paid to employees, after March 12, 2020, and before January 1, 2021, for the time they are not providing services during the period in the calendar quarter in which the employer's business operations are fully or partially suspended due to a governmental order or during a calendar quarter in which the employer experiences a significant decline in gross receipts may be treated as qualified wages.

Example 26

Employer Q, a large Eligible Employer operating a local chain of full-service restaurants in State X that averaged more than 100 full-time employees in 2019, is subject to a governmental order for restaurants to discontinue sit-down service to customers inside the restaurant but may continue food or beverage sales to the public on a carry-out, drive-through, or delivery basis. Employer Q continues to pay wages to kitchen staff and certain wait staff needed to facilitate fulfillment of carry-out orders. Wages paid to these employees for the time that they provide carry-out service are not qualified wages. However, wages paid to their employees not providing services during this time are qualified wages.

Example 27

Employer R averaged more than 100 full-time employees in 2019 and was forced to suspend operations at the end of the first calendar quarter in 2020. Its employees performed services during the first part of the calendar quarter but then stopped due to the suspension of operations. However, Employer R continued to pay the employees' normal wages for the entire quarter, including the period during which they were not providing services. The wages paid during the period when employees were not providing services are qualified wages.

Increased Wage Payments When More than 100 Full-Time Employees

For Eligible Employers that averaged more than 100 full-time employees during 2019, qualified wages paid to an employee may not exceed what the employee would have been paid for working an equivalent duration during the 30 days immediately preceding the commencement of the full or partial suspension of the operation of the trade or business or the first day of the calendar quarter in which the employer experienced a significant decline in gross receipts. For a variable hour employee, the amount paid for working an equivalent duration during that 30-day period may be determined using any reasonable method. The method(s) that the Department of Labor has prescribed to determine the amount to pay an employee with an irregular schedule who is eligible for paid sick leave under the Families First Coronavirus Response Act (FFCRA), P.L. 116-127, 134 Stat. 178, would be considered reasonable for this purpose.

Example 28

Employer S, a grocery store chain that averaged more than 100 full-time employees in 2019, is subject to a governmental order limiting store hours. In response, Employer S has reduced the hours its employees work, but increases that rate of pay for those employees who continue to provide services by $2 an hour. Only the amounts paid to employees for time they are not providing services, and at the rate of pay in effect prior to the increase, would be considered qualified wages.

More Than 100 Employees – Wages Paid to Hourly and Non-Exempt Employees

For an Eligible Employer that averaged more than 100 full-time employees in 2019, wages paid to hourly and non-exempt salaried employees for hours that the employees were not providing services would be considered qualified wages for the purposes of the Employee Retention Credit. For an employee who does not have a fixed schedule of work, the hours for which the employee is not providing services may be determined using any reasonable method. The method that the Eligible Employer would use to determine the employee's entitlement to leave under the Family and Medical Leave Act would be a reasonable method for this purpose. Similarly, the method(s) that the Department of Labor has prescribed to determine the number of hours for which an employee with an irregular schedule is eligible for paid sick leave under the FFCRA would be considered reasonable for this purpose.

It is not reasonable for the employer to treat an employee's hours as having been reduced based on an assessment of the employee's productivity levels during the hours the employee is working.

Wages paid to the employees for hours for which they provided services are not considered qualified wages for purposes of the Employee Retention Credit.

Example 29

Employer T, a manufacturing business, that averaged more than 100 full-time employees in 2019, has several locations that are closed during the second quarter of 2020 due to a governmental order. Employer T continues to pay hourly employees who are not providing services at the closed locations 50 percent of their normal hourly wage rates. Employer T also reduced headquarters' administrative staff hours by 40 percent but continues to pay them at 100 percent of their normal hourly wage rates. For employees who are not providing services due to the closure of their location but are receiving 50 percent of their normal hourly wage rates, Employer T may treat the wages paid as qualified wages for purposes of the Employee Retention Credit. For the administrative staff whose hours were reduced by 40 percent, but who are paid for 100 percent of the normal wage rate, Employer T may treat the 40 percent of wages paid for time that these employees are not providing services as qualified wages for purposes of the Employee Retention Credit. The 60 percent of wages that Employer T pays the administrative staff for hours during which the employees are actually providing services is not considered qualified wages for purposes of the Employee Retention Credit.

Example 30

Employer U, in the business of staging homes that are for sale, averaged more than 100 full-time employees in 2019. Employer U's non-exempt salaried employees cannot perform their usual services of delivering and installing furniture to be used in staging houses because open houses are prohibited in its service area during the second quarter of 2020. However, the employees are required to provide Employer U with periodic status updates about furniture that has been leased out and other administrative matters. Employer U continues to pay wages to employees at their normal rates even though the employees cannot provide their normal services. Employer U has determined that its employees are working 20 percent of the time. Employer U is entitled to treat 80 percent of the wages paid as qualified wages for purposes of the Employee Retention Credit.

More Than 100 Employees – Wages Paid to Exempt Salaried Employees

For an Eligible Employer that averaged more than 100 full-time employees during 2019, the wages paid after March 12, 2020, and before January 1, 2021, to exempt salaried employees for the time that they are not providing services would be considered qualified wages for purposes of the Employee Retention Credit. An Eligible Employer may use any reasonable method to determine the number of hours that a salaried employee is not providing services, but for which the employee receives wages either at the employee's normal wage rate or at a reduced wage rate. Reasonable methods include the method (or methods) the employer uses to measure exempt employees' entitlement to leave on an intermittent or reduced leave schedule under the Family and Medical Leave Act, or the method the employer uses to measure exempt employees' entitlement to and usage of paid leave under the employer's usual practices. It is not reasonable for the employer to treat an employee's hours as having been reduced based on an assessment of the employee's productivity levels during the hours the employee is working.

Example 31

Employer V, a large fitness club business that employed an average of more than 100 full-time employees in 2019, closed all of its locations in City B due to a governmental order issued by City B's mayor. Employer V continues to pay its exempt managerial employees their regular salaries. While the clubs are closed and there is not sufficient administrative work to occupy the managerial employees full-time, they continue to perform some accounting and similar administrative functions. Employer V has determined, based on the time records maintained by employees, that they are providing services for 10 percent of their typical work hours. In this case, 90 percent of wages paid to these employees during the period the clubs were closed are qualified wages.

Example 32

Employer W, a large consulting firm that employed an average of more than 100 full-time employees in 2019, closed its offices due to various governmental orders and required all employees to telework. Although Employer W believes that some of its employees may not be as productive while working remotely, employees are working their normal business hours. Because employees' work hours have not changed, no portion of the wages paid to the employees by Employer W are qualified wages.

Payments Includable in Credit

Payments for Pre-Existing Vacation, Sick, and Other Personal Leave

If the Eligible Employer averaged more than 100 full-time employees in 2019, the employer may not treat as qualified wages amounts paid to employees for paid time off for vacations, holidays, sick days and other days off. These wages are paid pursuant to existing leave policies that represent benefits accrued during a prior period in which the employees' provided services and are not wages paid for time in which the employees are not providing services.

However, if the Eligible Employer averaged 100 or fewer full-time employees in 2019, all wages paid to employees during the period of the full or partial suspension of operations or the significant decline in gross receipts, even if under a pre-existing vacation, sick and other leave policy, may be treated as qualified wages for purposes of the Employee Retention Credit (unless the wages are qualified sick and/or family leave wages under sections 7001 and 7003 of the FFCRA).

Payments to Former Employees

Payments, including severance payments or other post-termination payments, made to a former employee following termination of employment are not considered qualified wages for purposes of the Employee Retention Credit. Payments may be considered qualified wages only if the payments are made to an employee who continues to be employed by the Eligible Employer. Payments made in connection with a former employee's termination of employment are not qualified wages because they are payments for the past employment relationship and thus are not payments made with respect to an employee during the time for which the Employee Retention Credit may be claimed. See *United States v. Quality Stores, Inc*., 572 U.S. 141 (2014). Whether an employee has terminated employment is based on all of the facts and circumstances, including whether the employer has treated the employment relationship as terminated for purposes other than the continuation of wage payments.

Payments to Employees Exempt from FICA

The Employee Retention Credit is allowed on qualified wages paid to employees. An amount must constitute wages within the meaning of IRC § 3121(a) (or must constitute qualified health plan expenses properly allocable to an employee) in order to fall within the definition of qualified wages.

Example 33

A church in State X employs an ordained minister. The minister is a common law employee of the church. The governor of State X issues an executive order limiting gatherings of more than 10 people. As a result, the church suspends Sunday worship services, but continues to pay the minister's salary and parsonage allowance.
The minister's salary and parsonage allowance do not constitute wages within the meaning of IRC § 3121(a) and, therefore, are not qualified wages for purposes of the Employee Retention Credit.

Example 34

A group of licensed real estate agents at Real Estate Brokerage Firm Y receive substantially all their payments for services directly related to home sales and perform services under a written contract providing that they will not be treated as employees for federal tax purposes. Therefore, the licensed real estate agents at Real Estate Brokerage Firm Y are treated as statutory nonemployees under the Code. Amounts paid to the licensed real estate agents at Real Estate Brokerage Firm Y do not constitute wages within the meaning of IRC § 3121(a) and, therefore, are not qualified wages for purposes of the Employee Retention Credit.

Example 35

Employer A is a small Eligible Employer that has had a partial suspension of its business operations due to a governmental order. Employer A offers its employees various benefits that provide for pre-tax salary reduction contributions, including a qualified section 401(k) plan, a fully-insured group health plan, a dependent care assistance program satisfying the requirements of IRC § 129, and qualified transportation benefits satisfying the requirements of IRC § 132(f). Employer A also makes matching and non-elective contributions to the qualified section 401(k) plan and pays the portion of the cost of maintaining the group health plan remaining after the employees' share. None of these amounts are wages taken into account for purposes of the credits claimed under sections 7001 and 7003 of the FFCRA.

Employer A may treat as qualified wages the amounts its employees contribute as pre-tax salary reduction contributions to the qualified section 401(k) plan with respect to the period of the partial suspension of operations because those amounts are wages within the meaning of IRC § 3121(a).

Employer A may also treat all amounts paid toward maintaining the group health plan (including any employee pre-tax salary reduction contribution) with respect to the period of the partial suspension of operations as qualified health plan expenses and thus as qualified wages.

Employer A may not treat as qualified wages the amounts Employer A contributes as matching or non-elective contributions to the qualified section 401(k) plan, nor may it treat as qualified wages any employee pre-tax salary reduction contributions toward the dependent care assistance program or qualified transportation benefits. These amounts do not constitute wages within the meaning of IRC § 3121(a) and, therefore, are not qualified wages for purposes of the Employee Retention Credit.

Wages Paid to Related Employees

Wages paid to related individuals, as defined by IRC § 51(i)(1), are not taken into account for purposes of the Employee Retention Credit. A related individual is any employee who has of any of the following relationships to the employee's employer who is an individual:

- A child or a descendant of a child
- A brother, sister, stepbrother, or stepsister
- The father or mother, or an ancestor of either
- A stepfather or stepmother
- A niece or nephew
- An aunt or uncle
- A son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, or sister-in-law

In addition, if the Eligible Employer is a corporation, then a related individual is any person that bears a relationship described above with an individual owning, directly or indirectly, more than 50 percent in value of the outstanding stock of the corporation.

If the Eligible Employer is an entity other than a corporation, then a related individual is any person that bears a relationship described above with an individual owning, directly or indirectly, more than 50 percent of the capital and profits interests in the entity.

If the Eligible Employer is an estate or trust, then a related individual includes a grantor, beneficiary, or fiduciary of the estate or trust, or any person that bears a relationship described above with an individual who is a grantor, beneficiary, or fiduciary of the estate or trust.

Wages Paid to Owners and Related Individuals

Notice 2021-49 clarifies whether wages paid to an employee who owns more than 50 percent (majority owner) of the value of the corporation may be treated as qualified wages, as well as whether wages paid to related individuals of a majority owner may be treated as qualified wages. The answer depends on the application of the constructive ownership rules and the qualifying relative rules.

Section 2301(e) of the CARES Act and IRC § 3134(e) provide, in relevant part, that rules similar to the rules of IRC § 51(i)(1) apply. IRC § 51(i)(1) generally provides that wages paid to certain related individuals are not taken into account for purposes of the Work Opportunity Tax Credit (WOTC). Specifically, IRC § 51(i)(1) and Treas. Reg. § 1.51-1(e)(1) provide that wages are not taken into account with respect to an individual who bears any of the relationships described in IRC § 152(d)(2)(A)-(H) to the following:

1. The taxpayer,
2. If the taxpayer is a corporation, to an individual who owns, directly or indirectly more than 50 percent in value of the outstanding stock of the corporation (majority owner of a corporation), or
3. If the taxpayer is an entity other than a corporation, to any individual who owns, directly or indirectly, more than 50 percent of the capital and profits interests in the entity (majority owner of a noncorporate entity).

IRC § 51(i)(1)(A) includes a parenthetical at the end of the subparagraph stating that an individual's ownership is determined with the application of IRC § 267(c). The Treasury Department and the IRS have concluded that the IRC § 267(c) ownership attribution rules apply for purposes of determining both an individual's ownership of stock of a corporation and an individual's capital and profits interests in a partnership or other entity, consistent with the language in Treas. Reg. § 1.51-1(e)(1)(iii) and IRC § 51(i)(1)(A).

Initially, simply applying the rules of IRC §§ 152(d)(2)(A) to (H) for purposes of the Employee Retention Credit, before taking into consideration the attribution rules of IRC § 267(c), the wages paid to employees with the following relationships to a majority owner of a corporation or of a partnership or other entity are not qualified wages:

1. A child or a descendant of a child.
2. A brother, sister, stepbrother, or stepsister.
3. The father or mother, or an ancestor of either.
4. A stepfather or stepmother.
5. A niece or nephew.
6. An aunt or uncle.
7. A son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, or sister-in-law.
8. An individual (other than a spouse, determined without regard to IRC § 7703, of the taxpayer) who, for the taxable year of the taxpayer, has the same principal place of abode as the taxpayer and is a member of the taxpayer's household.

IRC § 267(c) provides rules regarding the constructive ownership of stock for purposes of determining whether an individual is considered a majority owner of a corporation. IRC § 267(c) sets forth the following rules to determine whether an individual has constructive ownership of stock of a corporation:

1. Stock owned, directly or indirectly, by or for a corporation, partnership, estate, or trust is considered as being owned proportionately by or for its shareholders, partners, or beneficiaries,
2. An individual is considered to own the stock owned, directly or indirectly, by or for the individual's family,
3. An individual owning (otherwise than by the application of (2)) any stock in a corporation is considered to own the stock owned, directly or indirectly, by or for his partner,
4. The family of an individual includes only his brothers and sisters (whether by the whole or half-blood), spouse, ancestors, and lineal descendants, and
5. Stock constructively owned by a person by reason of the application of (1) will be treated, for the purpose of applying (1), (2), or (3), as actually owned by that person. Stock constructively owned by an individual by reason of the application of (2) or (3) will not be treated as owned by the individual to again apply either rule to reattribute and make another individual the constructive owner of the stock.

Applying the rules of IRC §§ 152(d)(2)e (A) to (H) and 267(c), a majority owner of a corporation is a related individual for purposes of the Employee Retention Credit, whose wages are not qualified wages, if the majority owner has a brother or sister (whether by whole or half-blood), ancestor, or lineal descendant. That is, applying the constructive ownership rules of IRC § 267(c), the direct majority owner's ownership of the corporation is attributed to each of the owner's family members with a relationship described in IRC § 267(c)(4). Further, because each of those family members is considered to own more than 50 percent of the stock of the corporation after applying IRC § 267(c), the direct majority owner of the corporation would have a relationship as defined in IRC § 152(d)(2)(A) to (H) to the family member who is a constructive majority owner. Therefore, the direct majority owner is a related individual for purposes of the Employee Retention Credit.

The spouse of a majority owner is a related individual for purposes of the Employee Retention Credit, whose wages are not qualified wages, if the majority owner has a family member who is a brother or sister (whether by whole or half-blood), ancestor, or lineal descendant (and thus is deemed to own the majority owner's shares under IRC § 267(c)) and the spouse bears a relationship described in IRC § 152(d)(2)(A) to (H) to the family member. For example, a direct majority owner's brother would be a constructive majority owner under IRC §§ 267(c)(2) and (4) and the spouse of the direct majority owner would be considered a related individual to the constructive majority owner by virtue of the in-law relationship described in IRC § 152(d)(2)(G).

In the event that the majority owner of a corporation has no brother or sister (whether by whole or half-blood), ancestor, or lineal descendant as defined in IRC § 267(c)(4), then neither the majority owner nor the spouse is a related individual within the meaning of IRC § 51(i)(1) and the wages paid to the majority owner and/or the spouse are qualified wages for purposes of the Employee Retention Credit, assuming the other requirements for qualified wages are satisfied.

Example 36

Corporation A is owned 80 percent by Individual E and 20 percent by Individual F. Individual F is the child of Individual E. Corporation A is an Eligible Employer with respect to the first calendar quarter of 2021. Both Individual E and Individual F are employees of Corporation A. Pursuant to the attribution rules of IRC § 267(c), both Individual E and Individual F are treated as 100 percent owners of Corporation A. Individual E has the relationship to Individual F described in IRC § 152(d)(2)(C), and Individual F has the relationship to Individual E described in IRC § 152(d)(2)(A). Accordingly, Corporation A may not treat as qualified wages any wages paid to either Individual E or Individual F because both Individual E and Individual F are each related individuals for purposes of the Employee Retention Credit.

Example 37

Corporation B is owned 100 percent by Individual G. Individual H is the child of Individual G. Corporation B is an Eligible Employer with respect to the first calendar quarter of 2021. Individual G is an employee of Corporation B, but Individual H is not. Pursuant to the attribution rules of IRC § 267(c), Individual H is attributed 100 percent ownership of Corporation B, and both Individual G and Individual H are treated as 100 percent owners. Individual G has the relationship to Individual H described in IRC § 152(d)(2)(C). Accordingly, Corporation B may not treat as qualified wages any wages paid to Individual G because Individual G is a related individual for purposes of the Employee Retention Credit.

Example 38

Corporation C is owned 100 percent by Individual J. Corporation C is an Eligible Employer with respect to the first calendar quarter of 2021. Individual J is married to Individual K, and they have no other family members as defined in IRC § 267(c)(4). Individual J and Individual K are both employees of Corporation C. Pursuant to the attribution rules of IRC § 267(c), Individual K is attributed 100 percent ownership of Corporation C, and both Individual J and Individual K are treated as 100 percent owners. However, Individuals J and K do not have any of the relationships to each other described in IRC §§ 152(d)(2)(A) to (H). Accordingly, wages paid by Corporation C to Individual J and Individual K in the first calendar quarter of 2021 may be treated as qualified wages if the amounts satisfy the other requirements to be treated as qualified wages.

Example 39

Corporation D is owned 34 percent by Individual L, 33 percent by Individual M, and 33 percent by Individual N. Individual L, Individual M, and Individual N are siblings. Corporation D is an Eligible Employer with respect to the first calendar quarter of 2021. Individual L, Individual M, and Individual N are employees of Corporation D. Pursuant to the attribution rules of IRC § 267(c), Individual L, Individual M, and Individual N are treated as 100 percent owners. Individual L, Individual M, and Individual N have the relationship to each other described in IRC § 152(d)(2)(B). Accordingly, Corporation D may not treat as qualified wages any wages paid to Individual L, Individual M, or Individual N.

Other Limits on Qualified Wages

The Eligible Employer may not treat as qualified wages for purposes of the Employee Retention Credit any wages for which the employer received a credit for qualified sick and/or family leave wages (sections 7001 and 7003 of the FFCRA). Additional limitations on wages the taxpayer may treat as qualified wages are discussed later in this lesson. See **Impact of Other Credits and Relief Provisions**.

Qualified wages are calculated without regard to federal taxes imposed or withheld, including the employee's or employer's shares of social security taxes, the employee's and employer's shares of Medicare tax, and federal income taxes required to be withheld.

Qualified Health Plan Expenses

Qualified wages include an allocable portion of the "qualified health plan expenses" paid or incurred by an Eligible Employer. "Qualified health plan expenses" are amounts paid or incurred by the Eligible Employer to provide and maintain a group health plan (as defined in IRC § 5000 (b)(1)), but only to the extent that those amounts are excluded from the gross income of employees by reason of IRC § 106(a).

For more information on qualified health plan expenses, see section III.H. of Notice 2021-20.

Law Changes for 2021 Credit

Impact of Other Credits and Relief Provisions

The Taxpayer Certainty and Disaster Tax Relief Act of 2020, enacted December 27, 2020, made a number of changes to the employee retention tax credits previously made available under the CARES Act, including modifying and extending the Employee Retention Credit, for six months for qualified wages paid through June 30, 2021. Several of the changes apply only to 2021, while others apply to both 2020 and 2021. The ARP Act enacted on March 11, 2021, further extended and amended the credit for qualified wages paid through December 31, 2021. The Infrastructure Investment and Jobs Act (IIJA), enacted on November 15, 2021, terminated the Employee Retention Credit for wages paid after September 30, 2021, except for wages paid by an Eligible Employer which is a recovery startup business. The same rules applicable to 2020 continue to apply to 2021, except for pieces that were amended by the Relief Act and the ARP Act.

The Relief Act made the following changes to the Employee Retention Credit for qualified wages paid after December 31, 2020, and before July 1, 2021:

- Increases the maximum credit amount that may be claimed per employee (making it equal to 70 percent of $10,000 of qualified wages paid to an employee per calendar quarter),
- Expands the category of employers that may be entitled to claim the credit,
- Modifies the gross receipts test,
- Modifies the definition of qualified wages,
- Broadens the denial of double benefit rule and applies it to IRC §§ 41, 45A, 45P, 51, and 1396, and
- Changes the eligibility to receive advance payments and limits the amount of the advances.

The ARP Act added IRC § 3134 and made the following changes to the Employee Retention Credit for qualified wages paid after June 30, 2021, and before January 1, 2022:

- Applies the credit against taxes imposed under IRC § 3111(b), or so much of the taxes imposed under IRC § 3221(a) as are attributable to the rate in effect under IRC § 3111(b),
- Expands the types of Eligible Employers to include a “recovery startup business” (as defined under IRC § 3134(c)(5)) with a separate maximum credit amount,
- Modifies the definition of qualified wages for “severely financially distressed employers” (as defined under IRC § 3134(c)(3)(C)),

- Modifies the definition of qualified wages to exclude any wages taken into account under IRC §§ 41, 45A, 45P, 45S, 51, 1396, 3131, and 3132,
- Provides that the Employee Retention Credit shall not apply to so much of the qualified wages paid by an Eligible Employer as are taken into account as payroll costs in connection with a covered loan under section 7(a)(37) or 7A of the Small Business Act, a grant under section 324 of the Economic Aid to Hard-Hit Small Businesses, Non-Profits, and Venues Act, or a restaurant revitalization grant under section 5003 of the ARP Act, and
- Extends the limitation on the time period for assessment from 3 years to 5 years with respect to the credits under the ARP Act.

The IIJA amended IRC § 3134(n) to provide that the Employee Retention Credit under IRC § 3134 shall apply only to wages paid after June 30, 2021, and before October 1, 2021 (or, in the case of wages paid by an Eligible Employer which is a recovery startup business, January 1, 2022). Additionally, effective for calendar quarters beginning after September 30, 2021, the IIJA amended the definition of recovery startup business under IRC § 3134(c)(5) to remove the requirement that a recovery startup business not otherwise be an Eligible Employer due to a full or partial suspension of operations or a decline in gross receipts.

Notice 2021-23, 2021-16 I.R.B. 1113, discusses the rules applicable to the first and second calendar quarters in 2021. Notice 2021-49 discusses the rules applicable to the third and fourth calendar quarters in 2021. Note that Notice 2021-49 also has a section addressing miscellaneous issues that apply to both 2020 and 2021. Notice 2021-65, 2021-51 I.R.B. 880, modifies the rules in Notice 2021-49 that are applicable to the fourth calendar quarter of 2021.

The following sections of this lesson identify and explain the changes to the tax credits. For an overview of a comparison of the law changes, see Exhibit 3-1, *Comparison of Law for CARES Act 2020, Relief Act 2021, ARP Act 2021, and IIJA 2021*.

Eligible Employers – Certain Government Employers

The definition of Eligible Employers was expanded to include public colleges or universities, government entities whose principal purpose is medical or hospital care, and certain tax-exempt federal entities.

Notice 2021-49 provides that, for purposes of the Employee Retention Credit, a college or university means an educational organization as defined in IRC § 170(b)(1)(A)(ii) and Treas. Reg. § 1.170A-9(c)(1) that is a college or university, and an entity that has the principal purposes or function of providing medical or hospital care means an entity that has the principal purpose or function of providing medical or hospital care within the meaning of IRC § 170(b)(1)(A)(iii) and Treas. Reg. § 1.170A-9(d)(1).

Eligible Employers – Suspension of Operations or Decline in Gross Receipts

For the first three calendar quarters of 2021, employers are eligible if they operate a trade or business and experience either:

1. A full or partial suspension of the operation of their trade or business during this period because of governmental orders limiting commerce, travel or group meetings due to COVID-19, or
2. A decline in gross receipts in a calendar quarter in 2021 where the gross receipts of that calendar quarter are less than 80 percent of the gross receipts in the same calendar quarter in 2019 (to be eligible based on a decline in gross receipts in 2020 the gross receipts were required to be less than 50 percent).

Employers that did not exist in 2019 can use the corresponding quarter in 2020 to measure the decline in their gross receipts. If an employer was not in existence as of the beginning of the first calendar quarter of 2019, that employer generally determines whether the decline in gross receipts test is met in the first calendar quarter of 2021 by comparing its gross receipts in the first calendar quarter of 2021 to its gross receipts in the first calendar quarter of 2020. Similarly, if an employer was not in existence as of the beginning of the second calendar quarter of 2019, that employer generally determines whether the decline in gross receipts test is met in the second calendar quarter of 2021 by comparing its gross receipts in the second calendar quarter of 2021 to its gross receipts in the second calendar quarter of 2020.

In addition, for the first three calendar quarters in 2021, employers may elect in a manner provided in Notice 2021-23 to measure the decline in their gross receipts using the immediately preceding calendar quarter (i.e., the fourth calendar quarter of 2020 and first calendar quarter of 2021, respectively) compared to the same calendar quarter in 2019. For example, for the first calendar quarter of 2021, an employer may elect to use its gross receipts for the fourth calendar quarter of 2020 compared to those for the fourth calendar quarter of 2019 to determine if the decline in gross receipts test is met. If an employer was not in existence as of the beginning of the fourth calendar quarter of 2019, then the alternative quarter election will not be available for the first calendar quarter of 2021. For the second calendar quarter of 2021, an employer may elect to use its gross receipts for the first calendar quarter of 2021 compared to those for the first calendar quarter of 2019 to determine if the decline in gross receipts test is met. If an employer was not in existence as of the beginning of the first calendar quarter of 2019, then that employer may elect to measure the decline in gross receipts for the second calendar quarter of 2021 using its gross receipts for the first calendar quarter of 2021 compared to those for the first calendar quarter of 2020.

Notice 2021-49 clarifies that employers are not required to use the alternative quarter election above consistently. For example, an employer may be an Eligible Employer due to a decline in gross receipts for the second quarter of 2021 if its gross receipts for the second quarter are equal to 75 percent of its gross receipts in the second quarter of 2019 (i.e., the employer does not rely on the alternative quarter election for the second quarter). The employer could then use the alternative quarter election to be an Eligible Employer for the third quarter of 2021.

Eligible Employers must maintain documentation to support the determination of the decline in gross receipts, including which calendar quarter an Eligible Employer elects to use in measuring the decline. An election to use an alternative quarter to calculate gross receipts is made by claiming the Employee Retention Credit for the quarter using the alternative quarter to calculate gross receipts.

NOTE: The same full or partial suspension rules discussed in the section addressing 2020 apply for 2021.

NOTE: For 2020, the gross receipts test was based on a period of significant decline, which started when gross receipts dropped below 50 percent for the calendar quarter when compared with the corresponding calendar quarter in 2019 and ends when gross receipts reach 80 percent for a calendar quarter when compared to the corresponding calendar quarter in 2019. For 2021, the gross receipts test is based on a decline, which is determined separately for each quarter (there is no period like 2020). However, for 2021, the alternative election applies so that employers that qualify under one quarter in 2021 will automatically be eligible for the following quarter.

NOTE: The IIJA terminated the Employee Retention Credit in the fourth calendar quarter of 2021 for employers other than recovery startup businesses.

Eligible Employers – "Recovery Startup Businesses"

For the third and fourth calendar quarters in 2021, the ARP Act allows "recovery startup businesses," who otherwise would not meet eligibility criteria, to be eligible to claim the credit.

In the third calendar quarter of 2021, a recovery startup business is an employer that:

- Began carrying on a trade or business after February 15, 2020,
- Had average annual gross receipts of $1 million or less for the 3 tax years ending with the tax year before the calendar quarter in which the Employee Retention Credit is claimed, and
- Is not otherwise eligible for the third quarter for the Employee Retention Credit because business operations are not fully or partially suspended due to a governmental order or because gross receipts (within the meaning of IRC § 448(c) or if the taxpayer is a tax-exempt organization, IRC § 6033) are not less than 80 percent of the gross receipts for the same calendar quarter in calendar year 2019.

For the fourth calendar quarter of 2021, the requirement that a recovery startup business not otherwise be an Eligible Employer due to a full or partial suspension of operations or a decline in gross receipts was removed by the IIJA.

Recovery startup businesses are limited to a maximum Employee Retention Credit of $50,000 per quarter.

As discussed earlier in this lesson, for purposes of the Employee Retention Credit, "trade or business" has the same meaning as when used in IRC § 162 other than the trade or business of performing services as an employee. IRC § 3134(c)(5)(A) provides that a recovery startup business is an employer that began carrying on a trade or business after February 15, 2020. Therefore, the determination of when an employer "began carrying on a trade or business" is made in the same manner as for purposes of IRC § 162. In general, for purposes of IRC § 162, a taxpayer has not begun carrying on a trade or business "until such time as the business has begun to function as a going concern and performed those activities for which it was organized." *Richmond Television Corp. v. U.S.*, 345 F.2d 901, 907 (4th Cir. 1965), vacated and remanded on other grounds per curiam, 382 U.S. 68 (1965), on remand, 354 F.2d 410 (4th Cir. 1965), overruled on other grounds; *NCNB Corporation v. United States*, 684 F.2d 285 (4th Cir. 1982); see also Rev. Rul. 81-150, 1981-1 C.B. 119.

Notice 2021-20 states that, for purposes of the Employee Retention Credit, a tax-exempt organization described in IRC § 501(c) that is exempt from tax under IRC § 501(a) is deemed to be engaged in a "trade or business" with respect to all operations of the organization, as provided in section 2301(c)(2)(C) of the CARES Act. Notice 2021-49 clarified that the Treasury Department and the IRS consider it appropriate for an organization described in IRC § 501(c) and exempt from tax under IRC § 501(a) to be able to be treated as an Eligible Employer due to being a recovery startup business based on all of its operations and average annual gross receipts determined under IRC § 6033 as defined in section III.E. of Notice 2021-20.

The aggregation rules apply when determining whether an employer is a recovery startup business. The aggregation rules also apply with respect to the $50,000 limitation on the Employee Retention Credit.

Recovery Startup Business – Qualified Wages

In the third and fourth calendar quarters of 2021, a recovery startup business that is a small Eligible Employer may treat all wages paid with respect to an employee during the quarter as qualified wages.

Percent of Qualified Wages Eligible for Credit

For the first and second calendar quarters in 2021, Eligible Employers claim the Employee Retention Credit against the employer share of social security tax equal to 70 percent of the qualified wages they pay to employees after December 31, 2020, through June 30, 2021. For the third and fourth calendar quarters in 2021, Eligible Employers claim the Employee Retention Credit against the employer share of Medicare tax, with the same percentage and limitation amounts. Therefore, qualified wages are limited to $10,000 per employee per calendar quarter in 2021. Thus, the maximum Employee Retention Credit amount available is $7,000 per employee per calendar quarter, for a total of $28,000 in 2021.

NOTE: The $28,000 calendar limit per employee for 2021 only applies to employers that were recovery startup businesses in the fourth quarter of 2021 and were otherwise eligible for the credit in the other calendar quarters because only recovery startup businesses can claim the Employee Retention Credit in the fourth quarter of 2021.

Severely Financially Distressed Employers – Qualified Wages

For the third calendar quarter of 2021, "severely financially distressed employers" may treat all wages as qualified wages. This applies to large Eligible Employers, whose qualified wages are typically limited to wages paid to employees for time the employees are not providing services due to a full or partial suspension or a decline in gross receipts. Under this rule for the third calendar quarter of 2021, a severely financially distressed employer that is a large Eligible Employer may treat all wages paid to its employees during the quarter in which the employer is considered severely financially distressed as qualified wages.

Severely financially distressed employers are those with gross receipts that are less than 10 percent of what they were in the same calendar quarter in 2019.

A severely financially distressed employer may claim the Employee Retention Credit only with respect to qualified wages the employer paid in the same calendar quarter in which it is claiming the credit.

The determination of whether an employer is a severely financially distressed employer is based on whether the employer is an Eligible Employer due to experiencing a decline in gross receipts. Because the IIJA terminated the Employee Retention Credit in the fourth calendar quarter of 2021 for employers other than recovery startup businesses, no employer is treated as a severely financially distressed employer in the fourth calendar quarter of 2021.

Severely Financially Distressed Employers – Alternative Election Rule

In the third calendar quarter of 2021, for purposes of determining whether an Eligible Employer is a severely financially distressed employer, an employer may elect to use an alternative quarter to determine whether it has experienced a decline in gross receipts.

For example, an Eligible Employer that has gross receipts of 5 percent in the second quarter of 2021 compared to gross receipts in the second quarter of 2019 is a severely financially distressed employer for the third quarter of 2021 based on the alternative quarter election.

Example 40

Employer A is a large Eligible Employer with gross receipts in the third quarter of 2021 equal to 15 percent of its gross receipts in the third quarter of 2019. Employer A is not a severely financially distressed employer for the third quarter of 2021 based on the third quarter's gross receipts. However, Employer A's gross receipts in the second quarter of 2021 are less than 10 percent of its gross receipts in the second quarter of 2019. Therefore, Employer A may elect to use the alternative election rule to meet the definition of a severely financially distressed employer under IRC § 3134(c)(3)(C)(ii) in the third quarter of 2021.

In the third quarter of 2021, Employer A pays Employee B $10,000 in wages for services Employee B provided during the third quarter. Employer A may claim the Employee Retention Credit in the third quarter of 2021 (the quarter in which Employer A is determined to be severely financially distressed under the alternative election rule) and may treat all of the wages paid to Employee B during the third quarter of 2021 as qualified wages.

Qualified Wages Based on Number of Employees

Effective January 1, 2021, the definition of qualified wages was changed to provide:

- For an employer that averaged more than 500 full-time employees (previously 100) in 2019, qualified wages are generally those wages paid to employees that are not providing services because operations were fully or partially suspended or due to the decline in gross receipts.
- For an employer that averaged 500 or fewer full-time employees (previously 100) in 2019, qualified wages are generally those wages paid to all employees during a period that operations were fully or partially suspended or during the quarter that the employer had a decline in gross receipts regardless of whether the employees are providing services.

The aggregation rules apply when determining whether an employer is a 2021 large Eligible Employer or 2021 small Eligible Employer, just as they do for determining 2020 large Eligible Employers and 2020 small Eligible Employers.

For 2021, there is no longer the restriction on large Eligible Employers that qualified wages paid to an employee may not exceed what the employee would have been paid for working an equivalent duration during the 30 days immediately preceding the commencement of the full or partial suspension of the operation of the trade or business or the first day of the calendar quarter in which the employer experienced a significant decline in gross receipts.

Qualified Wages – Certain Governmental Employers

For certain governmental employers, amounts paid as remuneration are not wages because the services provided to these governmental employers are excepted from the definition of "employment." Section 2301(c)(5)(A) of the CARES Act, as amended, provides that, in the case of any an organization described in IRC § 501(c)(1) and exempt from tax under IRC § 501(a), or a governmental entity that is a college, university, or entity whose principal purpose or function is providing medical or hospital care, "wages" as defined in IRC § 3121(a) will be determined without regard to paragraphs (5), (6), (7), (10), and (13) of IRC § 3121(b) (except with respect to services performed in a penal institution by an inmate thereof). These specific exclusions from "employment," which are disregarded for purposes of the Employee Retention Credit for the first and second calendar quarters of 2021, relate to certain services performed for governmental or educational entities. Accordingly, for Eligible Employers described in section 2301(f)(2) of the CARES Act, as amended, remuneration for services described in paragraphs (5), (6), (7), (10), and (13) of IRC § 3121(b) (except with respect to services performed in a penal institution by an inmate thereof) constitutes wages for purposes of determining the Employee Retention Credit for the first and second calendar quarters of 2021.

An Eligible Employer receiving a shuttered venue operators grant or restaurant revitalization grant must retain in its records support for the Employee Retention Credit claimed, which includes any documentation supporting that the Eligible Employer did not claim the Employee Retention Credit on amounts taken into account as payroll costs paid in the third and fourth quarters of 2021 in connection with the shuttered venue operators grant or restaurant revitalization grant programs.

Period of Limitations

IRC § 3134(l) extends the limitation on assessment. IRC § 3134(l) provides that, notwithstanding IRC § 6501, the limitation on the time period for the assessment of any amount attributable to a credit claimed under IRC § 3134 will not expire before the date that is 5 years after the later of:

1. The date on which the original return that includes the calendar quarter with respect to which the credit is determined is filed, or
2. The date on which the return is treated as filed under IRC § 6501(b)(2).

The extension of limitation on assessment applies to the Employee Retention Credit claimed for the third and fourth calendar quarters of 2021 under IRC § 3134 but does not apply to the Employee Retention Credit under section 2301 of the CARES Act.

The extension of limitation on assessment does not apply to other employment tax adjustments such as adjustments to fringe benefits or worker classification. The normal 3-year period of limitations applies to other issues.

Impact of Other Credits and Relief Provisions

Impact of Other Credits and Relief Provisions

An Eligible Employer's ability to claim the Employee Retention Credit is impacted by other credit and relief provisions as follows:

- If an employer receives a Small Business Interruption Loan under the Paycheck Protection Program, authorized under the CARES Act, then the employer is eligible for the Employee Retention Credit. However, the Employee Retention Credit will not apply to payroll costs taken into account for purposes of PPP loan forgiveness, as discussed below.
- Wages for this credit do not include wages for which the employer received a tax credit for paid sick and family leave under the FFCRA.
- If an employer receives a shuttered venue operators grant or restaurant revitalization grant, then the employer is still eligible for the Employee Retention Credit. However, the Employee Retention Credit will not apply to payroll costs taken into account in connection with either program.
- Wages counted for this credit cannot be counted for the credit for paid family and medical leave under IRC § 45S.
- Employees are not counted for this credit if the employer is allowed a WOTC under IRC § 51 for the employee.

Paycheck Protection Program Loans and Certain Grants

Retroactive to the March 27, 2020, enactment of the CARES Act, the law now allows employers who received PPP loans to claim the Employee Retention Credit for qualified wages that are not treated as payroll costs in obtaining forgiveness of the PPP loan. The same rules regarding the interaction between PPP loans and the Employee Retention Credit continue to apply in 2021, discussed below. Under those rules, the Employee Retention Credit does not apply to qualified wages for which an election or deemed election to not take the wages into account for purposes of the credit is made.

For the third and fourth calendar quarters in 2021, the Employee Retention Credit must be coordinated with two additional grants. The Employee Retention Credit does not apply to the qualified wages taken into account as payroll costs in connection with a grant under section 324 of the Economic Aid to Hard-Hit Small Businesses, Non-Profits, and Venues Act (shuttered venue operators grant) and to the qualified wages taken into account as payroll costs in connection with a restaurant revitalization grant under section 5003 of the ARP Act (restaurant revitalization grant).

Employers Who Receive PPP Loan

An employer that received a PPP loan may claim the Employee Retention Credit for any qualified wages paid to employees if the employer is an Eligible Employer that meets the requirements for the credit. However, qualified wages for which the employer claims the Employee Retention Credit are excluded from payroll costs paid during the covered period (payroll costs) that qualify for forgiveness under the PPP. See section 7A(a)(12) of the Small Business Act, as amended by section 206(c)(1) of the Relief Act.

Section 2301(g)(1) of the CARES Act, as amended by the Relief Act, permits an Eligible Employer to elect not to take into account certain qualified wages for purposes of the Employee Retention Credit. An Eligible Employer generally makes the election by not claiming the Employee Retention Credit for those qualified wages on its federal employment tax return. However, an Eligible Employer that received a PPP loan is deemed to have made the election under section 2301(g)(1) of the CARES Act for those qualified wages included in the amount reported as payroll costs on a Paycheck Protection Program Loan Forgiveness Application (PPP Loan Forgiveness Application). Specifically, the amount for which the Eligible Employer is deemed to have made the election is the amount of qualified wages included in the payroll costs reported on the PPP Loan Forgiveness Application up to (but not exceeding) the minimum amount of payroll costs, together with any other eligible expenses reported on the PPP Loan Forgiveness Application, sufficient to support the amount of the PPP loan that is forgiven. The Employee Retention Credit does not apply to the qualified wages for which the election or deemed election is made. An Eligible Employer is not deemed to have made an election for any qualified wages paid by the Eligible Employer that are not included in the payroll costs reported on the PPP Loan Forgiveness Application. Notwithstanding a deemed election, if an Eligible Employer reports any qualified wages as payroll costs on a PPP Loan Forgiveness Application to obtain forgiveness of the PPP loan amount, but the loan amount is not forgiven by reason of a decision under section 7A(g) of the Small Business Act, those qualified wages may subsequently be treated as subject to section 2301 of the CARES Act and may be taken into account for purposes of the Employee Retention Credit. If an Eligible Employer obtains forgiveness of only a portion of the PPP loan amount, then the employer is deemed to have made an election for the minimum amount of qualified wages included in the payroll costs reported on the PPP Loan Forgiveness Application necessary to obtain the forgiveness of that amount of the PPP loan.

Example 41

Employer A received a PPP loan of $100,000. Employer A is an Eligible Employer and paid $100,000 in qualified wages that would qualify for the Employee Retention Credit during the second and third quarters of 2020. In order to receive forgiveness of the PPP loan in its entirety, Employer A was required, under the Small Business Administration (SBA) rules, to report a total of $100,000 of payroll costs and other eligible expenses (and a minimum of $60,000 of payroll costs). Employer A submitted a PPP Loan Forgiveness Application and reported the $100,000 of qualified wages as payroll costs in support of forgiveness of the entire PPP loan. Employer A received a decision under section 7A(g) of the Small Business Act in the first quarter of 2021 for forgiveness of the entire PPP loan amount of $100,000.

Employer A is deemed to have made an election not to take into account $100,000 of the qualified wages for purposes of the Employee Retention Credit, which was the amount of qualified wages included in the payroll costs reported on the PPP Loan Forgiveness Application up to (but not exceeding) the minimum amount of payroll costs, together with any other eligible expenses reported on the PPP Loan Forgiveness Application, sufficient to support the amount of the PPP loan that is forgiven. It may not treat that amount as qualified wages for purposes of the Employee Retention Credit.

Example 42

Employer B received a PPP loan of $200,000. Employer B is an Eligible Employer and paid $250,000 of qualified wages that would qualify for the Employee Retention Credit during the second and third quarters of 2020. In order to receive forgiveness of the PPP loan in its entirety, Employer B was required, under the SBA rules, to report a total of $200,000 of payroll costs and other eligible expenses (and a minimum of $120,000 of payroll costs). Employer B submitted a PPP Loan Forgiveness Application and reported the $250,000 of qualified wages as payroll costs in support of forgiveness of the entire PPP loan. Employer B received a decision under section 7A(g) of the Small Business Act in the first quarter of 2021 for forgiveness of the entire PPP loan amount of $200,000.

Employer B is deemed to have made an election not to take into account $200,000 of the qualified wages for purposes of the Employee Retention Credit, which was the amount of qualified wages included in the payroll costs reported on the PPP Loan Forgiveness Application up to (but not exceeding) the minimum amount of payroll costs, together with any other eligible expenses reported on the PPP Loan Forgiveness Application, sufficient to support the amount of the PPP loan that is forgiven. It may not treat that amount as qualified wages for purposes of the Employee Retention Credit. Employer B is not treated as making a deemed election with respect to $50,000 of the qualified wages ($250,000 reported on the PPP Loan Forgiveness Application, minus $200,000 reported on the PPP Loan Forgiveness Application up to the amount of the loan that is forgiven), and it may treat that amount as qualified wages for purposes of the Employee Retention Credit.

Example 43

Employer C received a PPP loan of $200,000. Employer C is an Eligible Employer and paid $200,000 of qualified wages that would qualify for the Employee Retention Credit during the second and third quarters of 2020. Employer C also paid other eligible expenses of $70,000. In order to receive forgiveness of the PPP loan in its entirety, Employer C was required, under the SBA rules, to report a total of $200,000 of payroll costs and other eligible expenses (and a minimum of $120,000 of payroll costs). Employer C submitted a PPP Loan Forgiveness Application and reported the $200,000 of qualified wages as payroll costs in support of forgiveness of the entire PPP loan, but did not report the other eligible expenses of $70,000. Employer C received a decision under section 7A(g) of the Small Business Act in the first quarter of 2021 for forgiveness of the entire PPP loan amount of $200,000.

Employer C is deemed to have made an election not to take into account $200,000 of qualified wages for purposes of the Employee Retention Credit, which was the amount of qualified wages included in the payroll costs reported on the PPP Loan Forgiveness Application up to (but not exceeding) the minimum amount of payroll costs, together with any other eligible expenses reported on the PPP Loan Forgiveness Application, sufficient to support the amount of the PPP loan that is forgiven. Although Employer C could have reported $70,000 of eligible expenses (other than payroll costs) and $130,000 of payroll costs, Employer C reported $200,000 of qualified wages as payroll costs on the PPP Loan Forgiveness Application. As a result, no portion of those qualified wages reported as payroll costs may be treated as qualified wages for purposes of the Employee Retention Credit. Employer C cannot reduce the deemed election by the amount of the other eligible expenses that it could have reported on its PPP Loan Forgiveness Application.

Example 44

Same facts as in Example 43 above, except Employer C submitted a PPP Loan Forgiveness Application and reported the $200,000 of qualified wages as payroll costs, as well as the $70,000 of other eligible expenses, in support of forgiveness of the PPP loan. Employer C received a decision under section 7A(g) of the Small Business Act in the first quarter of 2021 for forgiveness of the entire PPP loan amount of $200,000.
In this case, Employer C is deemed to have made an election not to take into account $130,000 of qualified wages for purposes of the Employee Retention Credit, which was the amount of qualified wages included in the payroll costs reported on the PPP Loan Forgiveness Application up to (but not exceeding) the minimum amount of payroll costs, together with the $70,000 of other eligible expenses reported on the PPP Loan Forgiveness Application, sufficient to support the amount of the PPP loan that was forgiven. As a result, $70,000 of the qualified wages reported as payroll costs may be treated as qualified wages for purposes of the Employee Retention Credit.

Example 45

Same facts as in Example 44 above, except Employer C paid $90,000 of other eligible expenses, and reported the $200,000 of qualified wages as payroll costs, as well as the $90,000 of other eligible expenses, in support of forgiveness of the entire PPP loan. In this case, Employer C is deemed to have made an election not to take into account $120,000 of qualified wages for purposes of the Employee Retention Credit, which was the amount of qualified wages included in the payroll costs reported on the PPP Loan Forgiveness Application up to (but not exceeding) the minimum amount of payroll costs, together with the $90,000 of other eligible expenses reported on the PPP Loan Forgiveness Application, sufficient to support the amount of the PPP loan that was forgiven. As a result, $80,000 of the qualified wages reported as payroll costs may be treated as qualified wages for purposes of the Employee Retention Credit.

Example 46

Employer D received a PPP loan of $200,000. Employer D is an Eligible Employer and paid $150,000 of qualified wages that would qualify for the Employee Retention Credit during the second and third quarters of 2020. In addition to the qualified wages, Employer D had $100,000 of other payroll costs that are not qualified wages and $70,000 of other eligible expenses. In order to receive forgiveness of the PPP loan in its entirety, Employer D was required, under the SBA rules, to report $200,000 of payroll costs and other eligible expenses (and a minimum of $120,000 of payroll costs).

Employer D submitted a PPP Loan Forgiveness Application and reported $130,000 of payroll costs and $70,000 of other eligible expenses, in support of forgiveness of the entire PPP loan. Employer D can demonstrate that the payroll costs reported on the PPP Loan Forgiveness Application consist of $100,000 of payroll costs that are not qualified wages and $30,000 of payroll costs that are qualified wages. Employer D received a decision under section 7A(g) of the Small Business Act in the first quarter of 2021 for forgiveness of the entire PPP loan amount of $200,000.

Employer D is deemed to have made an election not to take into account $30,000 of qualified wages for purposes of the Employee Retention Credit, which was the amount of qualified wages included in the payroll costs reported on the PPP Loan Forgiveness Application up to (but not exceeding) the minimum amount of payroll costs, together with any other eligible expenses reported on the PPP Loan Forgiveness Application, sufficient to support the amount of the PPP loan that is forgiven. It may not treat that amount as qualified wages for purposes of the Employee Retention Credit. Employer D is not deemed to have made an election with respect to the $120,000 of qualified wages that are not included in the payroll costs reported on the PPP Loan Forgiveness Application. Accordingly, Employer D may take into account the $120,000 of qualified wages ($150,000 of qualified wages paid minus $30,000 of qualified wages included in the payroll costs reported on the PPP Loan Forgiveness Application) for purposes of the Employee Retention Credit.

Example 47

Same facts as in Example 46 above except Employer D's PPP loan is not forgiven by reason of a decision under section 7A(g) of the Small Business Act. Employer D may treat the full $150,000 as qualified wages (the $30,000 of qualified wages included in the payroll costs reported on the PPP Loan Forgiveness Application, plus the additional $120,000 of qualified wages not included in the payroll costs) as qualified wages for purposes of the Employee Retention Credit.

IRC § 45S Credit

An Eligible Employer may receive both the IRC § 45S credit and the Employee Retention Credit, but not for the same wage payments.

IRC § 45S provides a general business credit for employers who provide paid family and medical leave to their employees. Eligible employers may claim the credit, which is equal to a percentage of wages they pay to qualifying employees while the employees are on family and medical leave. The credit generally is effective for wages paid in taxable years of the employer beginning after December 31, 2017. The Taxpayer Certainty and Disaster Tax Relief Act of 2019 extends this credit until December 31, 2020. The Taxpayer Certainty and Disaster Tax Relief Act of 2020 extended the credit to cover tax years beginning in 2021 through 2025. For more information, see Notice 2018-71, 2018-41 I.R.B. 548.

Any qualified wages for which an Eligible Employer claims the Employee Retention Credit may not be taken into account for purposes of determining an IRC § 45S credit. Thus, an employer may not claim a credit under IRC § 45S with respect to the qualified wages for which it claims the Employee Retention Credit, but it may be able to take a credit under IRC § 45S with respect to any additional wages paid, provided the requirements of IRC § 45S are met with respect to the additional wages.

IRC § 51 Credit

An Eligible Employer may not claim the Employee Retention Credit and the WOTC under IRC § 51 for the same employee for the same period of time for calendar quarters in 2020. For calendar quarters in 2021, may receive both the WOTC under IRC § 51 and the Employee Retention Credit, but not for the same wage payments.

The WOTC is a federal tax credit available to employers for hiring individuals from certain targeted groups who have consistently faced significant barriers to employment.

Other Issues

Employer's Income and Deduction

Section 2301(e) of the CARES Act provides that rules similar to IRC § 280C(a) shall apply for purposes of applying the Employee Retention Credit. IRC § 280C(a) generally disallows a deduction for the portion of wages paid equal to the sum of certain credits determined for the taxable year. Accordingly, a similar deduction disallowance would apply under the Employee Retention Credit, such that an employer's aggregate deductions would be reduced by the amount of the credit as result of this disallowance rule.

An employer receiving a tax credit for qualified wages, including allocable qualified health plan expenses, does not include the credit in gross income for federal income tax purposes. Neither the portion of the credit that reduces the employer's applicable employment taxes, nor the refundable portion of the credit, is included in the employer's gross income.

Notice 2021-49 addresses the timing of the reduction in the deduction for wages, specifically in the circumstance in which a taxpayer files an adjusted employment tax return to claim the Employee Retention Credit for prior calendar quarters and has already filed a federal income tax return for the tax year in which the credit is claimed on the adjusted return.

A reduction in the amount of the deduction allowed for qualified wages, including qualified health plan expenses, caused by receipt of the Employee Retention Credit occurs for the tax year in which the qualified wages were paid or incurred. When a taxpayer claims the Employee Retention Credit because of the retroactive amendment of section 2301 of the CARES Act by section 206(c) of the Relief Act (relating to eligibility of PPP borrowers to claim the Employee Retention Credit) or otherwise files an adjusted employment tax return to claim the Employee Retention Credit, the taxpayer should file an amended federal income tax return or administrative adjustment request (AAR), if applicable, for the taxable year in which the qualified wages were paid or incurred to correct any overstated deduction taken with respect to those same wages on the original federal tax return. Section 2301(e) generally provides, in relevant part, that rules similar to the rules of IRC § 280C(a) shall apply. IRC § 280C(a) requires tracing to the specific wages generating the applicable credit. See, generally, Treas. Reg. § 1.280C-1. To satisfy this tracing requirement, the taxpayer must file an amended return or AAR, as applicable.

Calculating the Credit

Overview

The amount of the Employee Retention Credit is equal to 50 percent of qualified wages (including allocable qualified health plan expenses) paid to some or all employees after March 12, 2020, and before January 1, 2021, but the maximum amount of qualified wages (including allocable qualified health plan expenses) taken into account with respect to each employee for all calendar quarters in 2020 is $10,000. Therefore, the maximum credit amount with respect to each employee for all calendar quarters in 2020 is $5,000.

For qualified wages paid by an Eligible Employer after December 31, 2020, and before January 1, 2022, the Employee Retention is equal to 70 percent of qualified wages (including certain health plan costs), up to $10,000 per employee per calendar quarter in 2021. The maximum credit for per employee for each calendar quarter in 2021 is $7,000 in 2021.

NOTE: The IIJA terminated the Employee Retention Credit for wages paid after September 30, 2021, except for wages paid by an Eligible Employer which is a recovery startup business.

There are nonrefundable and refundable portions of the credit. Worksheets in the instructions for Forms 941, 943, 944, and CT-1 are used to determine the nonrefundable and refundable portions of credit for qualified sick and family leave wages as well as the nonrefundable and refundable portions of Employee Retention Credit. The Worksheets are discussed in detail in Lesson 4, *Filing for the Credits*.

Nonrefundable Portion of Employee Retention Credit

An Eligible Employer may receive both the Paid Sick and Family Leave Credits and the Employee Retention Credit. If an employer received both the Paid Sick and Family Leave Credits and Employee Retention Credit the taxpayer must calculate the nonrefundable and refundable portions of the Paid Sick and Family Leave Credits before figuring the nonrefundable and refundable portions of the Employee Retention Credit.

For 2020 and the first and second calendar quarters of 2021, the nonrefundable portion of the Employee Retention Credit is limited to the employer share of social security tax on wages and tips after that share is first reduced by any of the following credits:

- Form 8974, *Qualified Small Business Payroll Tax Credit for Increasing Research Activities*, for the qualified small business payroll tax credit for increasing research activities,
- Form 5884-C, *Work Opportunity Credit for Qualified Tax-Exempt Organizations Hiring Qualified Veterans*, for the work opportunity credit for qualified tax-exempt organizations hiring qualified veterans, or

- Form 5884-D, *Employee Retention Credit for Certain Tax-Exempt Organizations Affected by Qualified Disasters*.

For periods third and fourth quarters of 2021, the nonrefundable portion of the Employee Retention Credit is limited to the employer share of Medicare tax on wages and tips.

When calculating the employer share of social security for a third-party payer of sick pay, and the employer is not an agent, the employer share of social security tax on wages and tips must be reduced by any adjustment for sick pay reported on Form 941 transferred to a client of that third-party payer.

If the employer received a Section 3121(q) Notice and Demand for tax due on unreported tips during the quarter, the amount of the employer share of social security tax can also be reduced by the nonrefundable portion of the Employee Retention Credit.

Third-Party Payers

Use of Third-Party Payers

An eligible common law employer that uses a third-party to report and pay employment taxes to the IRS can get the Employee Retention Credit.

If a common law employer is otherwise eligible to claim the Employee Retention Credit, it is entitled to the credit, regardless of whether it uses a third-party payer (such as a reporting agent, payroll service provider, professional employer organization (PEO), certified professional employer organization (CPEO), or 3504 Agent) to report and pay its federal employment taxes. The third-party payer is not entitled to the tax credits with respect to the wages it remits on the client employer's behalf (regardless of whether the third-party is considered an "employer" for other purposes of the Code). In other words, the third-party payer is required to remit the allocable share of the refund it received on the client employer's behalf to the client employer. If an employer uses a third-party to file, report, and pay employment taxes, different rules will apply depending on the type of third-party payer the employer uses for claiming/reporting the Employee Retention Credit.

If an eligible common law employer uses a reporting agent to file its federal employment tax returns the reporting agent will need to reflect the tax credits for qualified wages on the federal employment tax returns it files on the employer's behalf.

If an eligible common law employer uses a PEO, CPEO, or a 3504 Agent that received its designation as an agent by submitting Form 2678, *Employer/Payer Appointment of Agent*, to report its federal employment taxes on an aggregate Form 941, the PEO, CPEO, or 3504 Agent must report the tax credits for qualified wages on its aggregate Form 941 and Schedule R, *Allocation Schedule for Aggregate Form 941 Filers*. Non-certified PEOs do not have to complete Schedule R with respect any employer for which it is not claiming any tax credits for qualified wages, although they will include relevant information on line 8 of the Schedule R.

An eligible common law employer can submit its own Form 7200, *Advance Payment of Employer Credits Due to COVID-19*, to claim the advance credit. The eligible common law employer will need to provide a copy of the Form 7200 to the PEO, CPEO, or 3504 Agent so the PEO, CPEO, or 3504 Agent can properly report the Employee Retention Credit on the Form 941.

If a third-party payer (CPEO, PEO, or 3504 Agent) is claiming the Employee Retention Credit on behalf of the client employer, it must collect from the client any information necessary to accurately claim the credit on its client's behalf. This includes obtaining information with respect to the client's claims for credits under IRC §§ 41, 45A, 45P, 45S, 51, and the Paid Sick and Family Leave Credits.

Schedule R, Allocation Schedule for Aggregate Form 941 Filers

Schedule R has been updated based on the changes to Form 941 due to FFCRA, the CARES Act, and the ARP Act.

CPEOs and 3504 Agents must complete Schedule R each time they file an aggregate Form 941. However, other third-party payers that file aggregate Forms 941, such as non-certified PEOs must complete and file Schedule R if they have clients that are claiming the qualified small business payroll tax credit for increasing research activities, the Paid Sick and Family Leave Credits, the Employee Retention Credit, the COBRA premium assistance credit, or clients deferring the employer and/or employee share of social security tax. Third-party payers other than CPEOs and 3504 Agents need to include client-by-client amounts only for those clients claiming one or more of these credits and/or deferrals.

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Summary

Review of Lesson

The following summarizes this lesson:

Under section 2301 of the CARES Act and IRC § 3134 as enacted under the ARP Act, certain employers who pay qualified wages to their employees are eligible for an Employee Retention Credit.
For 2020, the Employee Retention Credit is a fully refundable tax credit for employers equal to 50 percent of qualified wages (including allocable qualified health plan expenses) that Eligible Employers pay their employees.
For 2021, the Employee Retention Credit is a fully refundable tax credit for employers equal to 70 percent of qualified wages (including allocable qualified health plan expenses) that Eligible Employers pay their employees.
The Employee Retention Credit was initially only available for qualified wages paid between March 13, 2020, and December 31, 2020.
The Taxpayer Certainty and Disaster Tax Relief Act of 2020 extended the credit to wages paid through June 30, 2021. The ARP Act of 2021 further extended the credit to wages paid from July 1, 2021, through December 31, 2021. The legislation also made other amendments to the credits. The IIJA terminated the credit for wages paid after September 30, 2021, except for wages paid by an Eligible Employer which is a recovery startup business.
Eligible Employers for the purposes of the Employee Retention Credit are employers that carry on a trade or business, including tax-exempt organizations, that either: • Fully or partially suspend operation during any calendar quarter in 2020 due to orders from an appropriate governmental authority limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to COVID-19 (not available for fourth quarter of 2021), • Experience a significant decline in gross receipts during the calendar quarter (not available for fourth quarter of 2021), or • For the third and fourth calendar quarters in 2021, are a recovery startup business.
An Eligible Employer, for purposes of the Employee Retention Credit, includes all members of an aggregated group that are treated as a single employer in accordance with the provisions of section 2301(d) of the CARES Act and IRC § 3134(d).
For 2020, if the Eligible Employer averaged more than 100 full-time employees in 2019, qualified wages are the wages paid to an employee for time that the employee is **not providing services** due to a full or partial suspension or a decline in gross receipts. For 2021, this rule applies to Eligible Employers that averaged more than 500 full-time employees in 2019.

For 2020, If the Eligible Employer averaged 100 or fewer full-time employees in 2019, qualified wages are the wages paid to **any employee** whether or not providing services during any period of full or partial suspension or during a calendar quarter in which the employer is experiencing a significant decline in gross receipts. For 2021, this rule applies to Eligible Employers that averaged 500 or fewer full-time employees in 2019.
An Eligible Employer may receive both the IRC § 45S credit and the Employee Retention Credit, but not for the same wage payments.
An Eligible Employer may not claim the Employee Retention Credit and the WOTC under IRC § 51 for the same employee for the same period of time for calendar quarters in 2020. For calendar quarters in 2021, may receive both the WOTC under IRC § 51 and the Employee Retention Credit, but not for the same wage payments.
Section 2301(e) of the CARES Act and IRC § 3134(e) provides that rules similar to IRC § 280C(a) shall apply for purposes of applying the Employee Retention Credit. IRC § 280C(a) generally disallows a deduction for the portion of wages paid equal to the sum of certain credits determined for the taxable year.
An eligible common law employer that uses a third-party to report and pay employment taxes to the IRS can get the Employee Retention Credit.

Exhibit 3-1, *Comparison of Law for CARES Act 2020, Relief Act 2021, ARP Act 2021, and IIJA 2021*

	Cares Act of March 2020	Relief Act of 2021	American Rescue Plan Act of 2021	Infrastructure Investment and Jobs Act (IIJA)
Period for qualified wages paid	March 13 – December 31, 2020	Extended: January 1 – June 30, 2021	Extended: July 1, 2021 – December 31, 2021 * *IIJA retroactively amends section 3134 to limit availability in the fourth quarter of 2021 to a recovery startup business.	October 1 – December 31, 2021 for wages paid only by a recovery startup business, as defined in section 3134(c)(5) of the Code.
Eligible Employer	Any employer operating a trade or business or a tax-exempt organization, but not governments, their agencies, and instrumentalities.	Expanded to include certain governmental employers that are: • Organizations described in section 501(c)(1) and exempt from tax under section 501(a) • Colleges or universities or whose principal purposes is to provide medical or hospital care	No changes	No changes
Employment tax offset	Employer's portion of social security tax	No change	Changed to employer's portion of Medicare tax	No change

Exhibit 3-1, *Comparison of Law for CARES Act 2020, Relief Act 2021, ARP Act 2021, and IIJA 2021*, Continued

	Cares Act of March 2020	Relief Act of 2021	American Rescue Plan Act of 2021	Infrastructure Investment and Jobs Act (IIJA)
Eligibility requirements	Employer must experience: • Full or partial suspension of operations due to government order due to COVID-19 during any quarter, or • Significant decline in gross receipts (beginning when gross receipts are less than 50 percent of gross receipts for the same calendar quarter in 2019 and ending in the first calendar quarter after the calendar quarter in which gross receipts are greater than 80 percent of gross receipts for the same calendar quarter in 2019).	For calendar quarters in 2021, amended decline in gross receipts to be defined as quarter where gross receipts are less than 80 percent of the same quarter in 2019. For calendar quarters in 2021, added an alternative quarter election rule giving employers ability to look at prior calendar quarter in 2021 and compare to the same calendar quarter in 2019 to determine whether there was a decline in gross receipts. Provided a rule for employers not existence in 2019 to allow employers that were not in existence in 2019 to determine whether there was a decline in gross receipts by comparing the calendar quarter in 2021 to its gross receipts to the same calendar quarter in 2020.	For third and fourth calendar quarters of 2021,amended to make the credit available to "recovery startup businesses," employers who otherwise do not meet eligibility criteria (full or partial suspension or decline in gross receipts) • "Recovery startup businesses" are employers: • That began carrying on any trade or business after February 15, 2020, • That had average annual gross receipts under $1,000,000 for the 3-taxable-year period ending with the taxable year that precedes the calendar quarter for which the credit is determined, and • Do not meet the other eligibility criteria.	Limited availability for the fourth quarter of 2021 to a recovery startup business as defined in section 3134(c)(5) of the Code. Removed requirement for fourth calendar quarter that a recovery startup business not otherwise be an Eligible Employer due to a full or partial suspension of operations or a decline in gross receipts.

Exhibit 3-1, *Comparison of Law for CARES Act 2020, Relief Act 2021, ARP Act 2021, and IIJA 2021*, Continued

	Cares Act of March 2020	Relief Act of 2021	American Rescue Plan Act of 2021	Infrastructure Investment and Jobs Act (IIJA)
Percent of qualified wages eligible for credit	• 50 percent of qualified wages ($10,000 per employee for the **year** including certain health care expenses) • 100 or fewer average full-time employees in 2019, wages paid to employees providing services and not providing services are qualified wages • Greater than 100 average full-time employees in 2019, wages paid to employees not providing services are qualified wages	• Increased maximum to 70 percent ($10,000 per employee per **calendar quarter** including certain health care expenses) for qualified wages paid between January 1 and June 30, 2021 • For calendar quarters in 2021, 500 or fewer average full-time employees in 2019, wages paid to employees providing services and not providing services are qualified wages • For calendar quarters in 2021, greater than 500 average full-time employees in 2019, wages paid to employees not providing services are qualified wages	• Maximums unchanged • For third and fourth calendar quarters of 2021, “severely financially distressed employers” may treat all wages as qualified wages during the calendar quarter in which the employer is severely financially distressed • “Severely financially distressed employers” are Eligible Employers due to a decline in gross receipts, but with gross receipts that are less than 10 percent of the gross receipts in a calendar quarter as compared to the same calendar quarter in 2019. • No change for small employers qualified wages • Provides that employers that were not in existence in 2019 may use the average number of full-time employees in 2020 to determine whether the employer had greater than 500 average full-time employees	• Maximums unchanged • Due to unavailability of “decline in gross receipts,” rules relating to “severely financially distressed employers” no longer apply in the fourth calendar quarter of2021.

Exhibit 3-1, *Comparison of Law for CARES Act 2020, Relief Act 2021, ARP Act 2021, and IIJA 2021*, Continued

	Cares Act of March 2020	Relief Act of 2021	American Rescue Plan Act of 2021	Infrastructure Investment and Jobs Act (IIJA)
Credit maximums	Maximum credit of $5,000 per employee in 2020	Increased the maximum per employee to $7,000 per employee per quarter in 2021	• Maintained quarterly maximum defined in Relief Act ($7,000 per employee per calendar quarter) • “Recovery startup businesses” are limited to a $50,000 credit per calendar quarter	No changes

Exhibit 3-2, *Guidance*

Notice 2021-20, 2021-11 I.R.B. 922

Title: GUIDANCE ON THE EMPLOYEE RETENTION CREDIT UNDER SECTION 2301 OF THE CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT

Purpose: This notice provides guidance on the Employee Retention Credit provided under section 2301 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116-136, 134 Stat. 281 (March 27, 2020), as amended by section 206 of the Taxpayer Certainty and Disaster Tax Relief Act of 2020 (Relief Act), which was enacted as Division EE of the Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182 (December 27, 2020). The guidance provided in this notice addresses the Employee Retention Credit as it applies to qualified wages paid after March 12, 2020, and before January 1, 2021. This notice does not address the changes made by section 207 of the Relief Act that apply to the Employee Retention Credit for qualified wages paid after December 31, 2020. The Department of the Treasury (Treasury) and the Internal Revenue Service (IRS) will address the modifications made by section 207 of the Relief Act applicable to calendar quarters in 2021 in future guidance.

Notice 2021-23, 2021-16 I.R.B. 1113

Title: GUIDANCE ON THE EMPLOYEE RETENTION CREDIT UNDER THE CARESACT FOR THE FIRST AND SECOND CALENDAR QUARTERS OF 2021

Purpose: This notice amplifies Notice 2021-20, 2021-11 I.R.B. 922, which provides guidance on the Employee Retention Credit under section 2301 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116-136, 134 Stat. 281 (March 27, 2020), as amended by section 206 of the Taxpayer Certainty and Disaster Tax Relief Act of 2020 (Relief Act), enacted as Division EE of the Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182 (December 27, 2020). Specifically, this notice expands on the guidance provided in Notice 2021-20 by providing guidance with respect to the amendments made to section 2301 of the CARES Act by section 207 of the Relief Act, which are effective beginning January 1, 2021.

Exhibit 3-2, *Guidance*, Continued

Notice 2021-49, 2021-34 I.R.B. 316

Title: GUIDANCE ON THE EMPLOYEE RETENTION CREDIT UNDER SECTION 3134 OF THE CODE AND ON MISCELLANEOUS ISSUES RELATED TO THE EMPLOYEE RETENTION CREDIT

Purpose: This notice provides guidance on the Employee Retention Credit available under section 3134 of the Internal Revenue Code (Code), enacted by section 9651 of the American Rescue Plan Act of 2021 (the ARP), Pub. L. No. 117-2, 135 Stat. 4 (March 11, 2021), which provides a credit for wages paid after June 30, 2021, and before January 1, 2022. This notice amplifies Notice 2021-20, 2021-11 IRB 922, which provides guidance on the Employee Retention Credit under section 2301 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116-136, 134 Stat. 281 (2020), as amended by section 206 of the Taxpayer Certainty and Disaster Tax Relief Act of 2020 (Relief Act), enacted as Division EE of the Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182 (2020). This notice also amplifies Notice 2021-23, 2021-16 IRB 1113, which provides guidance on the Employee Retention Credit under section 2301 of the CARES Act, as amended by section 207 of the Relief Act, for the first and second calendar quarters of 2021. Specifically, this notice amplifies both Notice 2021-20 and Notice 2021-23 by providing additional guidance on the Employee Retention Credit, applicable to the third and fourth calendar quarters of 2021. As amplified by this notice, the rules set forth in Notice 2021-20 and Notice 2021-23 addressing CARES Act provisions that are the same as those provided under section 3134 of the Code continue to apply for the third and fourth calendar quarters of 2021. Finally, this notice provides additional guidance on issues regarding the Employee Retention Credit under both section 2301 of the CARES Act and section 3134 of the Code. The Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) will continue to monitor potential legislation related to the Employee Retention Credit that may impact certain rules described in this notice.

Notice 2021-65, 2021-51 I.R.B. 880

Title: TERMINATION OF THE EMPLOYEE RETENTION CREDIT UNDER SECTION 3134 OF THE CODE IN THE FOURTH CALENDAR QUARTER OF 2021 FOR CERTAIN EMPLOYERS

Purpose: Notice 2021-65 provides guidance regarding the retroactive termination of the employee retention credit under IRC section 3134 in the fourth calendar quarter of 2021 for employers who are not recovery startup businesses. This notice applies to employers that paid wages after September 30, 2021 and received an advance payment of the employee retention credit for those wages or reduced employment tax deposits in anticipation of the credit for the fourth calendar quarter of 2021, but are now ineligible for the credit due to the change in the law. The notice also provides guidance regarding how the rules apply to recovery startup businesses during the fourth calendar quarter of 2021. This notice modifies Notice 2021-49, 2021-34 IRB 316, and Notice 2021-24 2021-18 IRB 1122, to implement statutory changes made by the Infrastructure Investment and Jobs Act (Infrastructure Act), Pub. L. 117-58, 135 Stat. 429 (2021), enacted November 15, 2021. This notice modifies Notice 2021-49, 2021-34 IRB 316, and Notice 2021-24 2021-18 IRB 1122, to implement statutory changes made by the Infrastructure Investment and Jobs Act (Infrastructure Act), Pub. L. 117-58, 135 Stat. 429 (2021), enacted November 15, 2021.

Revenue Procedure 2021-33, 2021-34 I.R.B. 327

Purpose: This revenue procedure provides a safe harbor that permits a taxpayer to exclude certain items from “gross receipts” under §§ 448(c) and 6033 of the Internal Revenue Code (Code), as applicable, solely for purposes of determining eligibility to claim the employee retention credit under section 2301 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Public Law 116-136, 134 Stat. 281 (March 27, 2020), as amended by sections 206 and 207 of the Taxpayer Certainty and Disaster Tax Relief Act of 2020 (Relief Act), enacted as Division EE of the Consolidated Appropriations Act, 2021 (CAA), Public Law 116-260, 134 Stat. 1182 (December 27, 2020), and extended by section 9651 of the American Rescue Plan Act of 2021 (ARP), Public Law 117-2, 135 Stat. 4 (March 11, 2021). The items covered by the safe harbor are: (1) the amount of the forgiveness of a Paycheck Protection Program (PPP) loan under section 7(a)(37) or 7A of the Small Business Act, (2) a grant under section 324 of the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act (Economic Aid Act), enacted as Title III of Division N of the CAA, and (3) a restaurant revitalization grant under section 5003 of the ARP.

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