

Employee Retention Credit Update

Background

The Employee Retention Tax Credit (ERC) is a federal program that allows businesses that have suffered a mandated closure or loss of income due to COVID-19 to take credits against their quarterly payroll taxes to support employee retention during these difficult financial times by covering a portion of the cost of an employee's pay, including some health care plan expenses. The ERC was created through the CARES Act in March 2020 and was updated and broadened in December 2020 through the Coronavirus Response and Relief Supplemental Appropriations Act (CRRSA). The CRRSA modifications make the parameters less restrictive, which means your school may now be eligible. In addition, the American Rescue Plan (ARP) extended the ERC through 2021. Businesses can still claim their ERC for 2020 but the rules of the March 2020 legislation still apply. The new rules only apply to the ERC for 2021, with the exception of the lifting of restrictions on businesses which received a PPP loan. Details for 2020 and 2021 rules are outlined separately in the relevant sections below.

PPP Borrowers Now Eligible

Businesses that receive(d) a PPP loan are no longer prohibited from claiming the ERC. However, a credit may not be claimed for wages paid with the proceeds of a PPP loan that have been forgiven (no double dipping).

- This change is retroactive to the effective date under the original law (for wages paid after March 12, 2020). As a result, a school should be able to file amended employment tax returns to claim the credit if it:
 - Received a PPP loan in 2020 and
 - Paid qualified wages *in excess of* the amount of forgiven PPP funds used to pay wages and
 - Is otherwise eligible to claim the credit.

Schools that did not claim the credit due to a PPP loan should review the credit requirements to determine if they are eligible to claim the credit for qualified wages paid after March 12, 2020.

Timeframe

The modifications extend the availability of the ERC so the program is now available for qualified wages paid March 12, 2020-December 31, 2020, and January 1, 2021-December 31, 2021, with different conditions applying to each period as outlined below.

Credit Amount

Both laws are based on a percentage of qualifying wages and have a maximum credit per employee.

- **2020 payroll:** Businesses can take a credit of 50% of the qualified wages paid to the employee and costs to continue providing health benefits to the employee. The maximum total per employee is \$10,000 of qualifying pay. Therefore, businesses can claim \$5,000 per employee for all qualified wages paid during 2020 (\$10,000 in qualified wages multiplied by the 50% tax credit rate).
- **2021 payroll:** The new law, effective Jan. 1, 2021, increased the credit amount to 70% of up to \$10,000 qualified wages per employee, and continues to include the cost of providing health benefits. So businesses can claim \$7,000 per employee per quarter (\$10,000 in qualified wages multiplied by the 70% tax credit rate). This employee maximum credit of \$28,000 for 2021 is available even if the employer received the \$5,000 maximum credit for wages paid to such employee in 2020.

Eligibility

Due to a lowering of the required reduction in gross receipts for 2021, schools that didn't meet the 2020 required reduction may now be eligible for this tax credit in 2021.

- **2020 payroll:** Businesses whose operations were either fully or partially suspended by a COVID-19 lockdown order *or*, had gross receipts for any quarter in 2020 that were less than 50% of gross receipts for the same quarter in 2019 qualify for this tax credit for that quarter and the subsequent quarter.
- **2021 payroll:** Businesses whose operations are either fully or partially suspended by a COVID-19 lockdown order, *or*, have gross receipts for a quarter in 2021 that are less than 80% of gross receipts for the same quarter in 2019 qualify for this tax credit.

Credit Eligibility Whether an Employee is Working or Not

- **2020 payroll:** For a business with more than 100 employees, no credit is available for wages paid to an employee performing services for the employer (either teleworking, or working at the workplace, even though at reduced capacity due to reduction in business, which would include remote teaching). A school with 100 employees or less *is* eligible for the credit, even if the employee was working.
- **2021 payroll:** The system of determining eligibility is the same but the numbers have changed. Effective Jan. 1, this threshold will be raised to 500 employees, so that for the

first two quarters of 2021, if your school has 500 or fewer employees you will be eligible for the credit, even if those employees are working in any capacity.

Advance Payments

- **2020 payroll:** There was no allowance for any advance payments of the ERC.
- **2021 payroll:** It is expected that the Treasury Department will draft guidance to allow an advance payment of the credit for businesses with 500 or fewer employees, based on 70% of average quarterly payroll for the same quarter in 2019. In other words, such schools may monetize the credit before the wages are paid. If the amount of the actual credit determined at the end of the quarter is less than the amount of the advance payment, you will need to repay the excess.

Pay Rate Increase

- **2020 payroll:** There is no allowance for an increase in the credit for pay rate increases.
- **2021 payroll:** Beginning Jan. 1, the credit is now allowable on hazard pay increases, among others.

As of the writing of this brief, the IRS ERC FAQ page had not been updated to include information about the 2021 ERC program, but we anticipate that update soon.