



## ALERTS

### Employee Retention Credits Now Available To Many More Employers

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#### Highlights

In December 2020, Congress extended the employee retention tax credit and eliminated conflicts with PPP loans

If your business received a PPP loan in 2020, you may still be eligible for employee retention credits for 2020 retroactively

Even if there has been no decline in your business's gross receipts, it may be possible to meet the business suspension test and qualify for these credits

The CARES Act, passed last March to provide relief to small businesses adversely affected by the COVID-19 pandemic, includes a temporary refundable tax credit for certain wages paid to employees after March 12, 2020, and before January 1, 2021. As originally enacted, this "employee retention credit" had somewhat limited utility because it was not available to employers who received payroll protection program (PPP) loans.

In December 2020, Congress passed further business relief legislation that retroactively removed the exclusion for employers receiving a PPP loan, and extended and expanded the credit for wages paid during the first half of 2021. The legislation also added an employee retention credit

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for disasters other than COVID-19, including the recent severe winter weather.

As a result of these changes, employers of all sizes should look again at the employee retention credit to see if they might qualify for 2020 and the first half of 2021. An employer still can't "double dip" by using the same wages to claim both the employee retention credit and to obtain forgiveness for a PPP loan, but receiving a PPP loan no longer precludes claiming the employee retention credit. Even if an employer received a PPP loan in 2020 and that loan is forgiven or may be forgiven, the employer may still be eligible for employee retention credits for 2020 retroactively.

## **COVID-19 Employee Retention Credit**

In general, the employee retention credit is equal to 50 percent of qualified wages paid during 2020 (after March 12) and 70 percent of qualified wages paid during the first half of 2021. Qualified wages include allocable qualified health plan expenses for employees who were otherwise on unpaid leave.

For 2020, the maximum amount of qualified wages per employee is \$10,000 for all quarters, making the maximum credit \$5,000 per employee for 2020. For 2021, the maximum amount of wages is \$10,000 per quarter, so a maximum of \$14,000 per employee.

For wages paid during 2020, an "eligible employer" is generally defined as an employer carrying on a business during calendar year 2020 and, with respect to any calendar quarter, for which either:

1. the business is fully or partially suspended 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
2. the business suffers a significant decline in gross receipts.

A business suffers a significant decline in gross receipts beginning with the first calendar quarter in 2020 for which gross receipts are less than 50 percent of gross receipts for the same calendar quarter in 2019, and ending after the first calendar quarter for which gross receipts are more than 80 percent of the same calendar quarter for 2019.

For wages paid in 2021, the employer must be carrying on a trade or business during the applicable calendar quarter, and the test for a significant decline in gross receipts is any calendar quarter for which gross receipts are less than 80 percent of gross receipts for the same calendar quarter in 2019 (or 2020 if the business was not in existence of the relevant quarter in 2019). Whereas for wages paid in 2020 there must be an initial decline in gross receipts of more than 50 percent to meet the significant decline in gross receipts test, for wages paid in 2021 there need only be a 20 percent decline.

For either period (2020 or 2021), even if there is no decline in gross receipts, it will often still be possible to meet the business suspension test because nearly all businesses were adversely affected, to some extent, by pandemic-related shutdown orders. In those cases, large employers

(generally, those with more than 100 employees in 2020 or 500 employees in 2021) must establish that the qualified wages were paid for time that the employees were not working (determined using any reasonable method), whereas small employers can count any wages paid to employees (whether they were working or not).

## **Employee Retention Credit for Other Natural Disasters**

The December legislation also added a separate employee retention credit for businesses that were forced to close due to natural disasters other than COVID-19. This credit is available for disasters declared anytime from January 1, 2020, through February 25, 2021, and includes the recent natural disaster declarations for many parts of the country affected by the recent severe winter weather.

In general, employers whose businesses were rendered inoperable as a result of the winter storm, or any other applicable disaster, may be eligible for an income tax credit equal to 40 percent of up to \$6,000 of qualified wages paid to employees while the business is closed (yielding a potential credit of up to \$2,400 per employee). The credit is available regardless of whether the employee continues to perform services for the business during the period the business is closed (including maintaining or repairing the place of business while it is closed).

## **Careful Analysis Required**

Many aspects of the December legislation are highly complex and fact-specific. For example, the determination whether an employer experienced a partial suspension of business, and whether a large employer paid employees for time they were not working during any business suspension, requires careful analysis. Employers and their advisers should not assume too quickly that an employer is not eligible for the credits and should not unwittingly understate the credits to which they are entitled.

For more information, please contact the Barnes & Thornburg attorney with whom you work or Jim Browne at 214-258-4133 or [jim.browne@btlaw.com](mailto:jim.browne@btlaw.com).

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