

August 9, 2021

IRS Issues Additional Guidance for Claiming the Employee Retention Tax Credit

Tax Planning & Structuring

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The IRS released additional [guidance](#) on August 10, 2021, that allows employers to exclude forgiven PPP loans, shuttered venue operators grants and restaurant revitalization grants from gross receipts in determining eligibility for the employee retention credit.¹²

An employer using this safe harbor must exclude these amounts from gross receipts for each calendar quarter in which gross receipts are relevant to determining the employer's eligibility to claim the credit. Also, the employer must apply the safe harbor to all employers treated as a single employer under the aggregation rules.

¹The additional guidance comes on the same day the Senate passed a bipartisan infrastructure package that would end the credit three months early, on October 1.

²The safe harbor does not permit an employer to exclude these amounts from gross receipts for any other federal tax purpose.

Last week, the IRS issued additional [guidance](#) on the employee retention tax credit, including information regarding the expansion of the credit to certain wages paid during the third and fourth calendar quarters of 2021 and additional information on miscellaneous issues that apply to the credit for qualified wages paid in 2020 and 2021.¹

Background of Employee Retention Credit for 2020 and First Half of 2021

As we discussed in a previous [article](#), in March 2020, the CARES Act created a credit against employment taxes for employers impacted by COVID-19. For 2020, a credit equal to 50% of qualified wages (not to exceed a total of \$10,000 per employee) paid after March 12, 2020, and before January 1, 2021, could be claimed by employers whose operations were fully or partially suspended due to COVID-19 or who experienced a significant decline in gross receipts, although the credit could not be claimed by an employer who obtained a PPP loan.

A subsequent Gould & Ratner [article](#) described the December 2020 stimulus bill which extended the timeframe in which eligible wages can be paid to June 30, 2021 and expanded the credit percentage to 70% of qualified wages (not to exceed \$10,000 per employee per quarter) and to employers whose 2021 PPP loans are forgiven (as long as the wages being used to calculate the credit are not required for the loan to be forgiven).

A Gould & Ratner [article](#) published in March and another [article](#) published in April summarized additional guidance provided by the IRS for employers claiming the credit for 2020 and the first half of 2021, respectively.

Under the American Rescue Plan Act of 2021, passed by Congress in March of 2021, the IRS extended the employee retention credit to cover qualified wages paid after June 30, 2021 and before January 1, 2022, bringing the total credit an employer may claim to \$28,000 per employee for all of 2021 (up to \$7,000 per employee per quarter).

IRS Guidance on Expansion of Employee Retention Credit for Second Half of 2021

The IRS Notice confirms that the rules governing the credit for the third and fourth quarters of 2021 are largely the same as for the first and second quarters of 2021, with the following exceptions:

- In addition to employers whose operations were fully or partially suspended due to COVID-19 and employers who experienced a significant decline in gross receipts, a third category of eligible employers – recovery startup businesses – is eligible to claim the credit.
 - An employer is a recovery startup business if it began operating after February 15, 2020 and has average annual gross receipts of \$1 million or less.²
 - The normal rules apply to calculate the amount of the credit for a recovery startup business, but the credit is capped at \$50,000 per quarter for all employees.
- An employer with more than 500 full-time employees in 2019 whose operations were fully or partially suspended due to COVID-19 or who experienced a significant decline in gross receipts will be able to treat wages paid to employees who are performing services (as well as wages paid to employees who are not performing services) as qualified wages if the employer experiences a reduction of gross receipts of more than 90% compared to the same quarter in 2019.
- For wages paid after June 30, 2021, the credit is not available for qualified wages taken into account in connection with a shuttered venue operators grant or a restaurant revitalization grant.

New Guidance on Claiming the Credit for 2020 and 2021

The IRS Notice provides that the rules governing the employee retention credit in 2020 and the first and second quarters of 2021 generally continue to apply for the third and fourth quarters in 2021.

In addition, the Notice provides additional clarifications that apply to the credit for all of 2020 and 2021, including the following:

- Employers are not required to include full-time equivalents when determining the average number of full-time employees.
- Wages paid to all employees (whether full-time or part-time) may be treated as qualified wages.
- Wages paid to a majority owner of a corporation, the owner's spouse, and certain other related individuals may not be qualified wages, although wages paid to a majority owner of a corporation (or the owner's spouse) with no other living relatives may qualify.³
- Cash tips may be treated as qualified wages under certain circumstances.
- If a taxpayer files an adjusted employment tax return for 2020 to claim the credit and has already filed a federal income tax return for 2020 for the applicable year, the taxpayer should file an amended federal income tax return or administrative adjustment request for the applicable year to correct any overstated deduction.
- An employer that acquires a business in 2021 may include the gross receipts of the acquired business in determining whether the employer experienced a significant decline in gross receipts.⁴
- Employers are not required to use the alternative quarter election consistently. For example, the Notice provides that 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 that quarter are equal to 75% 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.

If you have any questions about claiming the employee retention tax credit, please contact one of the attorneys in [Gould & Ratner's Tax Planning Practice](#).

¹The guidance comes as the Senate is debating a bipartisan infrastructure package that would end the credit three months early, on October 1.

²The guidance refers to average annual gross receipts of the employer for a 3 year period. However, it is unclear how an employer would have begun operating after February 15, 2020 and have 3 years of annual gross receipts.

³The Notice observes that wages paid to the owner of a partnership or other noncorporate entity, or to the owner of a sole proprietorship, generally cannot qualify for the credit.

⁴This extends the rule that is applicable to employers that acquired a business in 2020.