

The New & Improved Employee Retention Credit

Businesses that took PPP loans in 2020 or will take one in 2021 can now qualify for the Employee Retention Credit (ERC). There are two different sets of standards that are used to determine if a business is eligible to claim an Employee Retention Credit, one for 2020 and another for 2021.

The process of qualifying for and calculating a 2020 ERC is:

1. To be eligible for the Employee Retention Credit in a given quarter a business must have been either partially or fully shut down by government order, or they must have experienced a 50% decline in gross receipts in that quarter as compared to the same quarter in 2019.
2. Eligible wages are limited to a maximum of \$10,000 per employee for 2020, and which wages are eligible wages for the credit depends on the number of employees the business had in 2019:
 - a. Under 100 employees: all wages paid to employees are includable.
 - b. Over 100 employees: only wages paid to employees who are not working (such as during the shutdown, or, for example, they were being paid for 40 hours while only working 30) are includable.
3. Any wages for which PPP loan forgiveness was or will be received are not eligible. This creates opportunities for businesses that have not yet applied for forgiveness as they can maximize their eligible non-payroll costs to "free up" eligible wages for the ERC. Wages that have already been included on a business's PPP forgiveness application but were in excess of the forgiveness amount would not be made ineligible for the ERC.
4. The Credit is 50% of eligible wages up to a maximum of \$5,000 (\$10,000 x 50%).
5. Amended payroll tax returns can be filed to claim any ERC for which the business was eligible but did not previously claim.

The ERC was enhanced and extended through June 30, 2021. The process for determining the credit during the first two quarters of 2021 is:

1. To be eligible for the ERC in a given quarter a business must have been either partially or fully shut down by government order, or they must have experienced a 20% decline in gross receipts in that quarter as compared to the same quarter in 2019. There is also an Alternate Gross Receipt Test. For 2021, employers can elect to look at the immediately preceding calendar quarter and compare that quarter to the corresponding quarter in 2019.

2. Eligible wages are limited to a maximum of \$10,000 per employee per quarter (in 2020 it was \$10,000 per year) and which wages are eligible for the credit depends on the number of employees the business had in 2019:
 - a. Under 500 employees: all wages paid to employees are includable.
 - b. Over 500 employees: only wages paid to employees who are not working (such as during the shutdown, or if they were being paid for 40 hours while only working 30) are includable.
3. If a business receives a second PPP, they can still claim the ERC; however, any wages that are used to claim the ERC cannot also be used to support PPP forgiveness.
4. The Credit is 70% of eligible wages per quarter up to \$7,000 per employee (\$10,000 x 70%). The maximum credit for 2021 is \$14,000 per employee.
5. Employers with under 500 employees can request an advance refund using Form 7200. The refund amount is limited to 70% of average quarterly wages paid in 2019.

Planning Opportunity

A company that receives a PPP loan is no longer prohibited from claiming the employee retention tax credit. This change is retroactive and applies to wages paid after March 12, 2020. As a result, a company that received a PPP loan in 2020 and paid qualified wages in excess of the amount of the forgiven PPP loan should be able to file amended employment tax returns to claim the credit. Furthermore, companies related to a PPP borrower that did not claim the credit because an affiliated company received a PPP loan should also be able to file amended employment tax returns to claim the credit, if they were otherwise eligible to do so.

Companies that did not claim the credit due to a PPP loan should review the credit requirements to determine if they might be eligible to claim the credit for qualified wages paid after March 12, 2020. This can happen as the Economic Aid to Hard-Hit Small Businesses, Nonprofits and Venues Act retroactively expands PPP forgivable costs. This results in certain non-payroll expenditures being treated as expenses eligible to support loan forgiveness. By reallocating PPP dollars to non-payroll costs, borrowers can expand the opportunity to claim retention credits.

However, we do not know how/if the nontaxable PPP loan forgiveness income will impact the 50% and 20% gross receipt reduction tests. Recent guidance from Treasury stated that PPP I Forgiveness and EIDL Grants do not count towards gross receipts for PPP II. However, this latest guidance doesn't address the issue for the ERC. Hopefully, the SBA and Treasury will provide guidance for the ERC soon.

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