Federal Tax Tools: Employee Retention Tax Credit & Payroll Tax Deferral[1]

Current as of May 5, 2020

This document is for general informational purposes only and is not legal advice. Readers should consult their attorney, accountant, lender, and payroll provider to make determinations regarding their organization's specific eligibility and to ensure compliance with all applicable laws and regulations. Because every organization's situation is unique, it is important that readers seek appropriate advice before taking or refraining from taking any action as a result of this document.

1. Employee Retention Tax Credit

The Employee Retention Tax Credit is a federal tool offered as an alternative to the Paycheck Protection Program (the "PPP") for organizations that might not otherwise qualify for the PPP. Note that organizations with 500 or less employees must choose between the PPP and this tax credit.[2] It is a fully refundable tax credit[3] for employers equal to 50 percent of qualified wages (including allocable qualified health plan expenses) that Eligible Employers pay their employees.[4]

A. Who is eligible for the employee retention tax credit?

Eligible employers include those employers that carry on a trade or business during calendar year 2020, including tax-exempt organizations, and that either:

- Fully or partially suspend operations during any calendar quarter in 2020; or
- Experience a significant decline in gross receipts during the calendar quarter.[5]

It is important to note that, while tax-exempt organizations are eligible for the tax credits,[6] governmental employers are not.[7] Additionally, self-employed individuals are not eligible for this credit for their self-employment earnings but may be able to claim the credit for wages paid to their employees.[8]

B. What does it mean to be partially suspended?

The operation of a trade or business may be partially suspended if an appropriate governmental authority imposes restrictions upon the business operations by limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to COVID-19 such that the operation can still continue to operate but not at its normal capacity.[9]

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1 This document was drafted by Jonathan Murphy, an attorney with Fortif Law Partners, LLC in Birmingham, Alabama.

2 *See* COVID-19-Related Employee Retention Credits, IRS at Q15 (last visited May 5, 2020) https://www.irs.gov/newsroom/covid-19-related-employee-retention-credits-general-information-faqs

3 *See id*. at Q12; *see also* CARES Act Section 2301(b)(3).

4 *See id*. at Q1; *see also* CARES Act Section 2301(a).

5 *See id*. at Q2; *see also* CARES Act Section 2301(c)(2)

6 CARES Act Section 2301(c)(2)(C)

7 *See id*. at 2301(c)(6)(f).

8 *See* IRS *supra*, note 2 at 2.

9 *See id*. at Q3; *see also* CARES Act Section 2301(c)(2)(A); *see also* COVID-19-Related Employee Retention Credits, IRS at Q30-38. (last visited May 5, 2020) https://www.irs.gov/newsroom/covid-19-related-employee-retention-credits-determining-when-an-employers-trade-or-business-operations-are-considered-to-be-fully-or-partially-suspended-due-to-a-governmental-order-faqs.

C. What is a significant decline in gross receipts?

A significant decline requires that an employer's gross receipts for a calendar quarter in 2020 be less than 50 percent of its gross receipts for the same calendar quarter in 2019.[10] This triggers eligibility.

Eligibility for claiming the credit due to a significant decline in gross receipts ends after the first calendar quarter where the employer's 2020 gross receipts are greater than 80 percent of its gross receipts for the same calendar quarter during 2019.[11] Employers must be careful to ensure that they meet the eligibility requirements before claiming any portion of the employee retention tax credit.

The next question concerns the maximum amount of the tax credit. Only 50 percent of the qualified wages that an eligible employer pays in a calendar quarter can be claimed.[12] Note that the maximum amount of qualified wages taken into account per employee, for all calendar quarters is $10,000, so that the maximum credit for qualified wages paid to any employee is $5,000.[13] The definition of qualified wages then becomes important when calculating the maximum credit available to an employer.

D. What are qualified wages?

Put simply, qualified wages are compensation paid by an employer after March 12, 2020, and before January 1, 2021.[14] Note that qualified wages include the Eligible Employer's qualified health plan expenses that are properly allocable to the wages.[15]

E. How does an eligible employer claim the employee retention tax credit?

Eligible employers must report their total qualified wages and the related credits for each calendar quarter on their federal employment tax returns.[16] In anticipation of receiving the credits, eligible employers can fund qualified wages by:

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10 *See* CARES Act Section 2301(c)(2)(B); *see also* COVID-19-Related Employee Retention Credits, IRS at Q30-38 (last visited May 5, 2020) https://www.irs.gov/newsroom/covid-19-related-employee-retention-credits-determining-when-an-employers-trade-or-business-operations-are-considered-to-be-fully-or-partially-suspended-due-to-a-governmental-order-faqs.

11 *See* IRS *supra*, note 2 at Q4; *see also* COVID-19-Related Employee Retention Credits, IRS at Q39-46 (last visited May 5, 2020) https://www.irs.gov/newsroom/covid-19-related-employee-retention-credits-determining-when-an-employer-is-considered-to-have-a-significant-decline-in-gross-receipts-and-maximum-amount-of-an-eligible-employers-employee-retention#gross_receipts.

12 *See* COVID-19-Related Employee Retention Credits, IRS at Q47 (last visited May 5, 2020) https://www.irs.gov/newsroom/covid-19-related-employee-retention-credits-determining-when-an-employer-is-considered-to-have-a-significant-decline-in-gross-receipts-and-maximum-amount-of-an-eligible-employers-employee-retention#gross_receipts.

13 *See id*.; *see also* CARES Act Section 2301(b)

14 *See* IRS *supra*, note 2 at Q6; *see also* CARES Act 2301(c)(3); *see also* COVID-19-Related Employee Retention Credits, IRS at Q48-61 (last visited May 5, 2020) https://www.irs.gov/newsroom/covid-19-related-employee-retention-credits-determining-qualified-wages-faqs#determining_qualified_wages.

15 *See id*. at 7; *see also* CARES Act 2301(c)(3)(C).

16 *See* COVID-19-Related Employee Retention Credits, IRS at 73-38 (last visited May 5, 2020) https://www.irs.gov/newsroom/covid-19-related-employee-retention-credits-how-to-claim-the-employee-retention-credit-faqs.

- tapping into their federal employment taxes, including their withheld taxes, that are required to be deposited with the IRS; OR
- by requesting an advance of the credit from the IRS.[17]

Eligible employers should speak with their accountant and/or payroll provider prior to taking either of these actions.

2. Payroll Tax Deferral

The Payroll Tax Deferral program is another tax program designed to keep money in the pockets of employers during this crisis. Note that the Payroll Tax Deferral option and the Employee Retention Tax Credit are distinct tools that should not be confused with one another. While both involve payroll taxes, the Payroll Tax Deferral program is not a tax credit, but is, rather, a kind of no interest loan that allows eligible employers to hold back money from the government that they would otherwise have been required to pay for a period of time.

This tool allows employers to defer the deposit and payment of employer's portion of Social Security taxes and certain railroad retirement taxes incurred between March 27, 2020 and December 31, 2020.[18] The deferred taxes are due and considered timely paid if 50% of the amount deferred is paid by December 31, 2021 and the remaining 50% deferred amount is paid by December 31, 2022.[19] Note that Federal withholding taxes, Medicare taxes and withholding, and employee social security withholding are not eligible for the deferral.[20] Note that employers may receive PPP loans and defer their payroll taxes but, once an employer receives a decision from its lender that its PPP loan is forgiven, it cannot defer any additional amounts.[21] The amount of the deposit and payment that was deferred through the date that the PPP loan was forgiven however, will continue to be deferred until the applicable due date.[22]

In conclusion, if an employer is interested in claiming the Employee Retention Tax Credit or Deferring its payroll taxes, it should consult with its accountant, attorney, and/or payroll provider to make a specific determination about its eligibility.

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17 *See id*.

18 *See* CARES Act Section 2302(a), (d)

19 *See id*. at 2302(b)

20 *See* Deferral of employment tax deposits and payments through December 31, 2020 IRS at Q1 https://www.irs.gov/newsroom/deferral-of-employment-tax-deposits-and-payments-through-december-31-2020.

21 *See id*. at Q4.

22 *See id*.