

CONSOLIDATED APPROPRIATIONS ACT EXPANDS EMPLOYEE RETENTION CREDIT

Hodgson Russ Federal-International Tax Alert
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On December 27, 2020, President Trump signed the Consolidated Appropriations Act, 2021 (the “CAA”). The CAA provides a diverse array of tax-related relief measures to combat the negative impacts of COVID-19 on taxpayers. Congress included in the CAA provisions that extend, increase, and clarify the employee retention tax credit (“ERC”) originally provided under the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act. Importantly, in order to qualify for the ERC employers still must have experienced either a qualifying revenue decline (albeit reduced under the CAA) or suspension of operations due to a COVID-related shutdown order.

ERC Background

As discussed in our prior alert (May 5, 2020), the ERC made available (with certain exceptions) a refundable payroll tax credit for 50 percent of qualified wages paid or incurred by employers from March 13, 2020 through December 31, 2020, limited to the first \$10,000 of employee compensation. In order to take advantage of the credit, employers had to satisfy certain operation suspension or gross receipt decline metrics. The rules also drew distinctions between “large” employers (those with more than 100 full-time employees) and smaller employers, with the ERC generally being more useful for smaller employers due to the definition of “qualified wages” for each employer type.

CAA Extension, Expansion, Clarifications, and Technical Improvements of the ERC

Set forth below are some of the more significant changes that the CAA makes to the ERC:

Beginning January 1, 2021 and *running through June 30, 2021*:

- The applicable credit percentage is increased from 50 percent to 70 percent of qualified wages.
- The limit on per-employee creditable wages is increased from \$10,000 for the year to \$10,000 per quarter.

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- The requisite year-over-year decline in receipts threshold is decreased from 50 percent to 20 percent, and a safe harbor allows employers to use the immediately preceding calendar quarter to determine their eligibility.
- Employers are now permitted to claim the ERC for bonus pay to essential workers due to the removal of the 30-day wage limitation (which provided that wages were only qualified wages for the purposes of the ERC if they did not exceed the amount such employee would have been paid for working an equivalent duration during the 30 days immediately preceding the wage period).
- The “large employer” designation only applies to those employers having more than 500 employees (as opposed to 100 employees under the CARES Act).
- Employers who were not in existence for all or part of 2019 are permitted to claim the credit.
- Certain governmental employers may now take advantage of the ERC, including 501(c)(3) organizations, colleges and universities, and other entities the principal purpose or function of which is providing medical or hospital care.
- Businesses with 500 or less employees are permitted to advance the credit at any point during the quarter, estimated based on 70 percent of average quarterly wages paid in calendar year 2019.

Retroactive to the effective date of the CARES Act ERC:

- Employers who receive Paycheck Protection Program (“PPP”) loans may still qualify for the ERC with respect to wages that are not paid for with forgiven PPP proceeds.
- Group health plan expenses can be considered qualified wages even when no other wages are paid to the employee. Specifically, amounts paid by an eligible employer to provide and maintain a group health plan constitute qualified wages, but only to the extent that such amounts are excluded from employees’ gross income.
- For tax-exempt organizations, the term “gross receipts” with respect to the ERC has the same meaning as in Code section 6033 (which deals with return filing requirements).

Conclusion

Employers who have suffered shutdowns or other economic decline should reevaluate their ability to utilize the ERC under the enhanced rules provided by the CAA. Many employers, especially those with between 100 and 500 employees, may find themselves able to derive more benefit from the program under the CAA.

Please contact Brad Birmingham (716.848.1511) or Joe Rekrut (716.848.1715) with any questions you may have regarding the ERC or the CAA.

Please check our Coronavirus Resource Center and CARES Act pages to access prior alerts related to both of these rapidly evolving topics.

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