

# EMPLOYEE RETENTION CREDIT:

AMERICAN COUNCIL OF ENGINEERING  
COMPANIES OF MASSACHUSETTS

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# Agenda for Today



Introduction



Overview of Employee Retention Credit (ERC)



How to Claim the ERC



Interplay Between ERC and Paycheck Protection Program (PPP)



Questions

With You Today



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# Overview

The Employee Retention Credit (ERC) was part of the Coronavirus Aid, Relief, and Economic Security (CARES) Act, enacted on March 27, 2020

- ▶ Refundable credit against employer Social Security tax (IRS Form 941).
- ▶ Payroll tax credit, not income tax credit.
- ▶ Applied to certain wages and allocable health plan costs paid to employees between March 13, 2020, and September 30, 2021.
- ▶ Credit up to \$26,000 per employee during the eligibility periods.
  - \$5,000 in 2020
  - \$21,000 in 2021



To take advantage of the ERC, employers must satisfy one of two “eligibility” tests AND must have “qualified wages.”

## OVERVIEW

# Which Industries Are Claiming the ERC?



Which industries are taking advantage of the 2020 and 2021 ERC opportunities?

- ▶ Retail
- ▶ Restaurants, Breweries and Bars
- ▶ Non-essential Manufacturing
- ▶ Construction
- ▶ Technology/Software
- ▶ Gaming and Hospitality
- ▶ Healthcare & Hospitals
- ▶ Auto Dealerships
- ▶ Any other industry significantly impacted from COVID-19



Can essential businesses qualify as eligible employers?

- ▶ Yes! Essential businesses may still qualify under the gross receipts test or under the governmental order test if they have a partial shutdown.
- ▶ Essential business may be considered partially shut down if a governmental order requires the employer to close its workplace for certain non-essential purposes but not others and/or if a governmental order requires an employer to reduce its operating hours.

# Employer Aggregation Rules



## How are aggregated groups determined and what is the impact on ERC?

- ▶ All entities that are treated as a single employer under IRC § 52(a) or (b) controlled group rules or are otherwise aggregated under IRC § 414(m) and (o) are considered one employer for the ERC.
  - Evaluation of facts-and-circumstances to determine whether other portfolio companies directly or indirectly owned or controlled by the fund may need to be considered to determine ERC eligibility.
- ▶ This applies to the determination of eligibility, the number of average employees, and the calculation of qualified wages.
- ▶ The amount of the ERC calculated must be apportioned to the entity generating the qualified wages.



## How is the governmental order test applied to aggregated groups and/or employers operating across multiple jurisdictions?

- ▶ For aggregated groups, if the operations of one member of the group are suspended by a governmental order, then all members of the aggregated group may be considered to have their operations partially suspended.
- ▶ If an employer establishes a policy to comply with the local governmental orders that constitutes a full or partial shutdown and applies this policy across jurisdictions in order to operate in a consistent manner, the employer would be considered an eligible employer with respect to all locations in which the policy is enacted; this applies to both essential and non-essential businesses.



## HOW TO CLAIM THE ERC

# Eligibility

To be eligible for the ERC, an employer must meet at least one of the following “eligibility” tests:



The employer’s operations were fully or partially suspended, or more than a nominal portion of the employer’s business was suspended due to a governmental order related to COVID-19; or



The employer incurred a decline in gross receipts of greater than:

- ▶ 50% during a 2020 calendar quarter compared to the same calendar quarter during 2019.
- ▶ 20% during a 2021 calendar quarter compared to the same calendar quarter during 2019.



## HOW TO CLAIM THE ERC

# Gross Receipts Rules



### Is the gross receipts test calculated on the cash or accrual method?

- ▶ If the employer is entitled to the small business exclusion that allows them to use the cash method for the tax return under IRC § 448(c), then they can also use the cash method for calculating gross receipts.
- ▶ Otherwise, this test is calculated under the accrual method.



### How are gross receipts calculated?

- ▶ In general, gross receipts includes total sales, net of returns and allowances, and all amounts received for services, income from investments, and from incidental or outside sources (interest, dividends, rent, royalties, and other income).
- ▶ For tax-exempt organizations, the definition of gross receipts follows IRC § 6033 (i.e., all receipts, same as for Form 990 reporting).
- ▶ Gross receipts from foreign affiliates are included.



## HOW TO CLAIM THE ERC

# Overview of Qualified Wages

The definition of “qualified wages” for ERC purposes varies depending upon the employer’s average headcount in 2019.

- ▶ For 2020, 100 or fewer full-time employees on average in 2019: Qualified wages are **all** wages paid to all employees during the period of eligibility.
- ▶ Greater than 100 full-time employees: Qualified wages are **only** wages paid to employees who are **not** performing services due to COVID-19 during the period of eligibility.
- ▶ For 2021 quarters, replace “100” (above) with “500.”

### Additional provisions:

- ▶ Allocable health plan expenses are eligible for the ERC (subject to the \$10,000 qualified wage limitation).
- ▶ Wages used to satisfy forgiveness for a Paycheck Protection Program (PPP) loan may not be used to claim ERC.
- ▶ Wages are not eligible for the ERC if they were the basis for other tax credits, such as:
  - Families First Coronavirus Relief Act (FFCRA) mandatory federal paid leave credit and the Work Opportunity Tax Credit (WOTC); and,
  - Credit for Increasing Research Activities under I.R.C Section 41 (R&D Tax Credit) **for 2021 only.**

## HOW TO CLAIM THE ERC

# Common Questions on Qualified Wages



### How is the average number of full-time employees determined?

- ▶ A full-time employee is an employee who had an average of at least 30 hours per week or 130 hours per month during 2019. (Using ACA rules.)
- ▶ The average is determined by taking the sum of the number of full-time employees in each calendar month in 2019 and dividing by the number of full calendar months the employer operated its business in 2019.



### What costs are potentially includable/excludable as qualified wages?

- ▶ Qualified wages are defined as wages under IRC 3121(a).
- ▶ If an eligible employer averaged **more than** 100 full-time employees for 2020 ERC purposes or 500 full-time employees for 2021 ERC purposes in 2019, the employer may generally **not** treat as qualified wages amounts paid to employees for paid time off for vacations, holidays, sick days and other off days.
- ▶ Payments, including severance, made to a former employee following termination of employment are not considered qualified wages.
- ▶ Wages paid to related individuals, such as employees who are children or other family members, are not qualified wages.

## HOW TO CLAIM THE ERC

# Documentation of the Credit

### Federal Employment Tax Return

- ▶ An employer must claim the credit directly on its amended quarterly federal employment tax return (Form 941-X).
- ▶ Employers will need to report the qualified wages and health plan expenses on their amended quarterly IRS Form 941-X.
- ▶ Federal Tax Return Implications
  - I.R.S. Notice 2021-49 provides guidance that eligible employers must reduce the deduction for qualified wages and qualified health plan expenses on the employer's federal income tax return in the same year that the ERC is claimed, which will require amendments to federal tax return(s).

**An eligible employer will adequately substantiate eligibility for the ERC if the employer creates and maintains records that include the following information:**

- ▶ Employer's eligibility and qualified wages
  - Applicable government orders
  - Records relied upon to determine whether more than a nominal portion of its operations were suspended due to a governmental order or whether a governmental order had more than a nominal effect on its business operations
  - Gross receipts decline documentation
  - Qualified wage computations, including method for determining non-service time for large employers
- ▶ Qualified health plan expense computations
- ▶ Applicability of aggregation rules
- ▶ Copies of Forms 941 and Forms 941-X

# Interplay of ERC and PPP

## LIMITATIONS

- ▶ Payroll costs funded by forgiven PPP loans are not eligible for the ERC.
- ▶ ERC qualified wages cannot be considered payroll costs that are eligible for PPP forgiveness

## CONSIDERATIONS

- ▶ An employer can support the PPP loan using any period of time within the PPP covered loan period.
- ▶ Most borrowers received PPP draw 1 funds in April or May 2020, while most government shut-down orders were issued starting mid-March 2020 through June 2020; so, there are typically periods of time before and after when operations were fully/partially shut down where there is no overlap with the PPP “covered period”.
- ▶ Employers that received a PPP loan may claim the ERC, however qualified wages for ERC are excluded from payroll costs paid during the covered period that qualify for forgiveness under the PPP.
- ▶ If an employer designated certain wages for PPP forgiveness and those payroll costs are not forgiven, then the employer may still treat those amounts as qualified wages for ERC purposes.

# Additional Guidance & ERC Resources

## ▶ [Employee Retention Credit Calculator](#)

- Interactive tool to determine whether your company may be eligible to claim ERC benefits

## ▶ [BDO ERC Resources Page](#)

- The BDO website containing Employee Retention Credited Insights and other resources


## ▶ [BDO Business Incentives & Tax Credits Landing Page](#)

- The BDO Business Incentives & Tax Credits website containing information on ERC and our other service offerings:
  - R&D Tax Credits - Our [R&D Tax Credit Calculator](#) or [FAQs on the R&D Tax Credit](#)
  - Negotiated Credits & Incentives
  - Sales & Manufacturing Credits
  - Green Energy Incentives



Questions?





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