



IRS Releases Guidance on Employee Retention Credit

● September 1, 2021 ●

On August 4, 2021, the Internal Revenue Service (IRS) published [Notice 2021-49](#) with respect to the 2021 Employee Retention Credit (ERC). Previously, The American Rescue Plan Act (ARPA, P.L. 117-2) extended the ERC through December 2021 and revised certain provisions and ERC eligibility. With this recently issued notice, the IRS provides further details related to some important matters businesses needed clarification on.

Specific topics addressed include recovery startup businesses; coordination with PPP loans; severely financially distressed employers; and wages paid to majority owners and spouses, in addition to clarifying other areas.

ERC Guidance Provided by Notice 2021-49

[Notice 2021-49](#) provides guidance on the employee retention credit available under certain conditions under section 3134 of the Internal Revenue Code, enacted by section 9651 of the American Rescue Plan Act of 2021 which provides a credit for eligible wages paid after June 30, 2021, and before January 1, 2022.

Important changes and clarifications include:

- Confirming the employee retention credit availability under section 3134 to eligible employers that pay qualified wages after June 30, 2021, and before January 1, 2022.
- Expanding the definition of eligible employer to include “recovery startup business.” A recovery startup business is defined in the Internal Revenue Code as an employer that (i) began carrying on any trade or business after February 15, 2020, (ii) for which the average annual gross receipts of the employer for the 3-taxable-year period ending with the taxable year that precedes the calendar quarter for which the credit is determined does not exceed \$1,000,000 and (iii) that is not otherwise an eligible employer due to a full or partial suspension of operations or a decline in

gross receipts. Eligible employers qualifying for ERC under the recovery startup business eligibility are limited to \$50,000 for each of the third and fourth calendar quarters of 2021.

Clarification of the Full-Time Equivalent Rules Allows More Employers to Receive Favorable Small Employer Treatment

For purposes of the employee retention credit, favorable clarification was provided on the application of employee full-time equivalent rules. Full-time equivalents are not required to be included in determining the average number of full-time employees, but wages for the full-time equivalent employees are permitted to be used for qualified wage purposes.

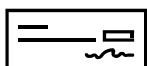
Small employers are defined as 500 or fewer employees and large employers are defined as more than 500 employees. The favorable full-time equivalent treatment is significant because large employers are only able to count wages paid to (and qualified health plan expenses paid for) employees that were not working due to COVID-19 impacts. Small employers can count all wages paid to and qualified health plan expenses paid for all employees.

Continued Application of Specific CARES Act Provisions

[Notice 2021-49](#) provides additional guidance on the ERC (employee retention credit), applicable to the third and fourth calendar quarters of 2021.

The rules set forth in IRS [Notice 2021-20](#) and [Notice 2021-23](#) addressing CARES Act provisions that are the same as those provided under section 3134 of the Internal Revenue Code continue to apply for the third and fourth calendar quarters of 2021.

Important Terms Related to the Employee Retention Credit



Qualified Wages

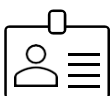
For purposes of determining “qualified wages,” section 2301(c)(5)(A) of the CARES Act provides that the term “wages” generally means wages as defined in section 3121(a) of the Internal Revenue Code and compensation as defined in section 3121(a) and includes all remuneration for employment unless a specific exception applies.

Qualified wages include a portion of the “qualified health plan expenses” paid or incurred by an eligible employer. These are paid or incurred by the employer to provide a group health plan to the extent that those amounts are excluded from the gross income of employees.



Wages

Section 2301 (c)(5)(B) of the CARES Act provides that “wages” include amounts paid by an eligible employer to provide and maintain a group health plan (as defined in section 5000(b)(1)) of the Internal Revenue Code.



Full-Time Employee

A “Full-Time Employee” for purposes of ERC is an employee who averaged at least 30 hours of service per week or 130 hours of service in a calendar month in 2019.

If an employer conducted business operations for the entirety of 2019 the full-time employee (FTE) calculation would be determined by adding the number of FTEs in each calendar month in 2019 and dividing by 12.

Related Party Wages

Notice 2021-49 provides clarification around wages paid to majority owners of a corporation, and their spouses. These wages are generally not eligible wages for purposes of the ERC.

If the majority owner and their spouse do not have siblings or children, their wages would, generally, otherwise qualify for the ERC.

Next Steps

While the clarification and guidance provided by Notice 2021-49 is important and provides current direction, it should be noted that pending legislation could impact the employee retention credit. Specifically, the bipartisan infrastructure bill recently passed in the Senate includes a provision that would end the credit for wages paid after the end of the third quarter. Startup Recovery Businesses, however, would remain eligible for

the credit through the end of 2021. The final infrastructure bill has not been enacted but it will be important for employers to continue to monitor developments in this legislation.

Employers should also continue to monitor COVID-19 related government programs and eligibility terms to maximize potential benefits to their businesses.

ADDITIONAL RESOURCES

[Notice 2021-49](#)

[Notice 2021-23](#)

[Notice 2021-20](#)

[American Rescue Plan Act of 2021 \(H.R. 1319\)](#)