

**CHANGES TO THE EMPLOYEE RETENTION TAX CREDIT (ERTC)
MADE BY THE CONSOLIDATED APPROPRIATIONS ACT, 2021 (CAA)¹**

ISSUE	ORIGINAL ERTC LAW (as enacted in the CARES Act ²)	RETROACTIVE CAA CHANGES (treated as if enacted in the CARES Act)	PROSPECTIVE CAA CHANGES (effective for calendar quarters beginning after December 31, 2020)
DURATION OF CREDIT	The ERTC (under the CARES Act) applies with respect to wages paid by eligible employers after March 12, 2020 and before January 1, 2021.		ERTC Extended for 6 Months: The ERTC is extended with respect to wages paid through June 30, 2021.
AMOUNT OF CREDIT	<p>Eligible employers are generally entitled to a tax credit against employment taxes for each calendar quarter equal to 50% of “qualified wages” with respect to each employee for the quarter.</p> <p>Maximum total wages considered for any employee for all calendar quarters in 2020 are capped at \$10,000 (i.e., maximum credit is \$5,000 per employee during 2020).</p>		<p>Credit Percentage Increased: Beginning with respect to wages paid on January 1, 2021 and through June 30, 2021, the ERTC credit rate is increased to 70% of qualified wages.</p> <p>Maximum Credit Increased: For 2021, the limit on per-employee qualified wages is increased from \$10,000 for all quarters to \$10,000 for <u>each</u> quarter (i.e., maximum credit is \$7,000 for each of the first two quarters of 2021, for a total maximum credit in 2021 of \$14,000 per employee).</p>
“QUALIFIED WAGES” DEFINED	<p>“Qualified wages” are calculated as follows:</p> <ul style="list-style-type: none"> • For employers with 100 or fewer full-time employees: all employee wages paid to any employee during (1) any period in the calendar quarter in which the business operations are fully or partially suspended due to a governmental order or (2) any calendar quarter in which the business is experiencing a significant decline in gross receipts. • For employers with more than 100 full-time employees: wages paid to employees not performing services due to COVID-19-related circumstances 		Threshold for Treatment as Small Employer Increased: For 2021, the more generous small employer definition of qualified wages (described to the left) applies to employers that have 500 or fewer employees (instead of 100 or fewer employees).

¹ Enacted December 27, 2020. As of the date of this chart, the IRS has published only limited guidance on the CAA amendments to the ERTC.

² The CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT (enacted March 27, 2020). IRS FAQs on the CARES Act ERTC provisions are available [here](#). As of the date of this chart, the IRS FAQs have not been updated to reflect the changes made to the ERTC by the CAA.

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	<p>(either suspension of operations or reduction in gross receipts).</p> <p>In certain cases, qualified wages are limited to the amount the employee would have been paid for working the equivalent duration during the 30 days immediately preceding such period.</p> <p>Wages considered under paid sick/family leave (FFCRA) (i.e., those that receive a separate 100% credit) are excluded.</p>		<p>Past Pay Limitation Repealed: The limitation based on the employee’s past pay no longer applies for wages paid in 2021.</p>
<p>QUALIFIED HEALTH PLAN EXPENSES AS WAGES</p>	<p>The calculation of qualified wages includes employer’s “properly allocable” qualified health plan expenses with respect to the employee.</p>	<p>Consistent with previous IRS guidance, the CAA clarified that certain group health plan expenses are treated as wages for purposes of the ERTC, even if no other wages are paid to the employee. [See below re: special reporting option for this retroactive provision.]</p>	
<p>ELIGIBLE EMPLOYERS, IN GENERAL</p>	<p>The ERTC is available to an employer:</p> <p>(1) that was carrying on a trade or business during calendar year 2020, and</p> <p>(2) with respect to any calendar quarter:</p> <ul style="list-style-type: none"> o had its operations fully or partially suspended under government orders due to COVID-19, or o had a decline of at least <u>50%</u> in gross receipts as compared to the same calendar quarter in 2019. <p>Special rules apply for employers that were not in operation for all or part of the same calendar quarter in 2019.</p>		<p>Expanded Eligible Employer Definition: Beginning with respect to wages paid on January 1, 2021 and through June 30, 2021, the reduction in revenues eligibility requirement applies to any business that experienced a decline in gross receipts of more than 20% compared to the same calendar quarter in 2019.</p> <p>For employers that were not in existence in 2019, the decline in gross revenue test is applied by comparing 2021 gross revenue for the calendar quarter to the same calendar quarter in 2020.</p> <p>The CAA also gives employers the option of determining ERTC eligibility based on the reduction in gross receipts based on the immediately preceding calendar quarter when compared to the corresponding calendar quarter in 2019.</p>

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INTERACTION WITH THE PAYCHECK PROTECTION PROGRAM (PPP)	Under the original CARES Act, the ERTC was <u>not</u> available if an eligible employer received a covered loan under the PPP.	The section denying the ERTC to employers receiving a PPP loan is repealed. Mechanisms will be created to prevent the same wages from being used for both PPP loan forgiveness and the ERTC. Although further guidance is expected on how an employer may elect to coordinate the ERTC and PPP loan provisions, the IRS has provided the following on its website: “The eligible employer can claim the [ERTC] on any qualified wages that are not counted as payroll costs in obtaining PPP loan forgiveness. Any wages that could count toward eligibility for the [ERTC] or PPP loan forgiveness can be applied to either of these two programs, but not both.” [See below re: special reporting option for this retroactive provision.]	
ELIGIBILITY OF CERTAIN TAX-EXEMPT AND GOVERNMENTAL EMPLOYERS	<p>In the case of tax-exempt organizations described in section 501(c) of the Internal Revenue Code (Code) and exempt under section 501(a), certain requirements are determined based on “all operations of such organization.”</p> <p>The ERTC is not available to the US government, the government of any State or political subdivision, thereof, or any agency or instrumentality of any of the above.</p>	For eligible tax-exempt employers, the CAA clarifies that any reference to gross receipts is to be treated as a reference to gross receipts within the meaning of Code section 6033 (the reporting rules applicable to 501(c)(3) organizations).	The changes clarify that, in 2021, the prohibition on governmental entities does not apply to certain public instrumentalities, including certain federally chartered tax-exempt entities and certain tax-exempt colleges, universities, or hospitals.

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<p>CLAIMING THE ERTC</p>	<p>Credit is taken immediately against the employer’s certain federal employment tax obligations that the IRS specifies and is reported on IRS Form 941. Special Schedule R reporting rules apply for third-party payors of employment taxes.</p> <p>If employer is not able to claim entire credit against applicable employment taxes due, any excess credit is treated as an overpayment to be refunded promptly by the IRS. The IRS has provided that these excess credits may be paid in advance through the use of Form 7200, and that such payments must be reconciled with the Form 941 by third-party payors.</p>		<p>Advance payments with respect to wages paid in 2021 are limited to employers whose average number of “full-time employees” during 2019 was 500 or fewer, based on the methodology of Code section 4980H.</p> <p>Moreover, the maximum advance payment for eligible small employers in 2021 is capped at 70% of the average quarterly wages paid by the employer in calendar year 2019.</p> <p>Special rules are provided for employers not in existence in 2019 and seasonal employers.</p> <p>In addition, the CAA states that the amount of the advance credit reduces the credit that the taxpayer is allowed to claim, and that a failure to do so will be treated as a mathematical or clerical error (and thus not be eligible for certain procedural protections pursuant to Code section 6213(b)(1)). Moreover, the statute states that, if the advance payments exceed the credit allowed, the employer’s employment tax for the calendar quarter is increased by the excess.</p>
<p>SPECIAL REPORTING RULES FOR RETROACTIVE CHANGES</p>		<p>In conjunction with the retroactive changes described above, the CAA includes a special reporting rule that gives employers that have already filed a tax return with respect to applicable employment taxes before December 27, 2020 the <i>option</i> of treating certain amounts as an amount paid in Q4 2020. This reporting rule appears to be aimed at reducing the need for employers to file an amended Form 941 for earlier quarters as a result of the retroactive changes to the ERTC.</p> <p>The IRS acknowledged on its website that employers may have been challenged to implement the</p>	

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		special reporting rule for Q4 2020 due to time constraints and stated the following: “You do not have to use this limited 4th quarter procedure. You can instead choose the regular process of filing an adjusted return or claim for refund for the appropriate quarter to which the additional [ERTC] relates using Form 941-X.”	
RESTRICTIONS ON OTHER TAX CREDITS	Employers may not double count: <ul style="list-style-type: none"> • the same employee for purposes of the ERTC if the employer was “allowed” a work opportunity tax credit (Code section 51) for that employee • any wages taken into account in determining the ERTC for purposes of the employer credit for voluntary paid family and medical leave added in 2017 tax reform legislation (Code section 45S) • qualified leave wages under the FFCRA 		The anti-double dip rules are prospectively extended to also apply to tax credits under Code sections 41 (R&D), 45A (Indian employment), 45P (active duty military), and 1396 (empowerment zone employment). [Note, it will be important for taxpayers to carefully review the interaction of these credits. For example, under the original CARES Act, an employee can’t be included for purposes of the ERTC if the employer is allowed a WOTC for that employee. Under the prospective CAA modifications, a different rule applies to 2021. Under that rule, any wages taken into account for determining the ERTC cannot also be taken into account as wages for WOTC. So, in 2020, the WOTC precludes the employee completely from the ERTC, but in 2021 there is just no double counting of wages.]
TREASURY/IRS REGULATIONS AND GUIDANCE	The Treasury Department and IRS are directed to issue forms, instructions, regulations, and guidance, as necessary, including: <ol style="list-style-type: none"> 1. to allow advance payment of the credit; 2. to provide reconciliation of such advance payment with the amount advanced at the time of filing the return for the applicable calendar quarter or taxable year; 3. with respect to the application of the credit to “third party payors” (including specifically PEOs, CPEOs or agents under section 3504 of the Code), including guidance allowing such payors to submit documentation necessary to substantiate the 	The Treasury Department and IRS are specifically authorized to issue guidance “to prevent the avoidance of the purposes of the limitations under this section, including through the leaseback of employees.”	The Treasury/IRS direction to provide reconciliation of advance payment with the amount advanced at the time of filing the return for the applicable calendar quarter or taxable year (see #2 to the left) is eliminated. [See discussion of changes regarding advance payments under CLAIMING THE ERTC above.] The Treasury/IRS direction to provide guidance is modified by adding the following flush language: “Any forms, instructions, regulations, or guidance shall require the customer to be responsible for the accounting of the credit and for any liability for improperly claimed credits and shall require the certified professional

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	<p>eligible employer status of employers that use such payors; and</p> <p>4. for application of certain eligibility rules for employers that were not carrying on a trade or business for all or part of 2019.</p>		<p>employer organization or other third party payor to accurately report such tax credits based on the information provided by the customer.”</p> <p>[Note, the IRS Instructions for Form 7200 (Rev. Jan. 2021) state the following: “The common-law employer is responsible for the accounting of the employee retention credit and for any liability for improperly claimed credits. CPEOs and other third-party payers must accurately report the employee retention credits based on the information provided by the common-law employer. The CPEO or other third-party payer will be liable for employment taxes, in accord with its normal liability, that are due as a result of any improperly claimed credits.”]</p>
CPEOS AND THEIR CLIENTS	<p>The statute provides that the ERTC is treated as a credit described in Code section 3511(d)(2) (i.e., the list of tax credits that clarifies that, for CPEOs, credit eligibility is determined at the client level).</p>		

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