



The Employee Retention Credit (“ERC”) continues to provide a wide variety of employers with lucrative refundable payroll tax credits for qualified wages paid to employees in 2020 and 2021. **Businesses can still apply for the ERC by filing an amended Form 941X (Quarterly Federal Payroll Tax Return) for the quarters during which the company was an Eligible Employer.**

“Even though employers can only assess their Eligible Employer status from March 13, 2020, through September 30, 2021, we are seeing record numbers of our clients being approved to receive the ERC. Unfortunately, many companies still have not evaluated whether they qualify for the four separate credits.” K. Chern

### **How does the Employee Retention Credit work?**

The ERC is a refundable payroll tax credit that can be as high as \$5,000 per employee in 2020 and as high as \$21,000 per employee in 2021.

### **Who qualifies for the Employee Retention Credit?**

Employers that experienced partial shutdowns due to government orders limiting commerce, travel or group meetings; or that experienced significant declines in quarterly gross receipts (as compared to their quarterly gross receipts in 2019) due to the pandemic are eligible employers under this program.

### **What are ERC qualified wages?**

ERC credits are calculated based on the qualifying wages paid to employees during eligible employer status. For most companies taking advantage of this program, the refundable tax credits are well in excess of the payroll taxes paid by the employers. ERC benefits can be larger than the amounts a company received in PPP funding.

### **Are benefits of the Employee Retention Credit the same for large and small employers?**

Small employers receive enhanced benefits under the ERC regime. Specifically, for the time they are an Eligible Employer, they can include wages paid to all employees. Large employers can only include wages paid to employees for not providing services.



## How do I calculate if an employer is a large or small employer for the Employee Retention Credits?

- For the 2020 ERC, an employer with 100 or fewer average full-time employees (as measured in 2019) is defined as a small employer.
- For the 2021 ERCs, an employer with 500 or fewer full-time employees (as measured in 2019) is defined as a small employer.
- The term “full-time employee” means an employee who, with respect to any calendar month in 2019, had an average of at least 30 hours of service per week or 130 hours of service in the month (130 hours of service in a month is treated as the monthly equivalent of at least 30 hours of service per week), as determined in accordance with section 4980H of the Code. An employer that operated its business for the entire 2019 calendar year determines the number of its full-time employees by taking the sum of the number of full-time employees in each calendar month in 2019 and dividing that number by 12. Special rules apply to those who were not in business all of 2019.

## Is the Employee Retention Credit only for full-time employees?

No. An employer may include wages paid to part-time and full-time employees in the calculation of the ERC. The only limitation on the calculation of the credits is that an employer may only calculate the credits on the first \$10,000 of wages and health plan costs paid to each employee during each credit-generating period.

## What is the ERC eligibility / credit-generating periods?

If eligible, employers can claim the ERC for qualified wages paid in 2020, as well as Q1, Q2 and Q3 of 2021.

## Can I still apply for the Employee Retention Credit?

Yes. The statute of limitations for the 2020 ERC does not close until April 15, 2024. The statute of limitations for the 2021 ERCs does not close until April 15, 2025. The ERC application is a 941X, which is an amended 941. You have 3 years to amend a 941 filing. Therefore, deadline to amend each quarter we are looking at is as follows:

2020 Q4 - 1/1/23  
2021 Q1 - 4/1/24  
2021 Q2 - 7/1/24  
2021 Q3 - 10/1/24

## What is the interplay between wages included in the R&D Credit and wages utilized in the ERC Calculations?

- Wage expenses utilized in the ERC calculation cannot also be used in the R&D Credit calculation.
- Wage expenses that qualify as both ERC-eligible Qualifying Wages and Qualified Research Expenses for R&D Credit purposes still need to be included as QREs in the base year calculations for future year R&D Credit calculations.
- Wages funded by PPP can be included in the R&D credit calculation.



## Are most companies utilizing the Gross Receipts Test or the Government Mandate Test to reach eligibility for ERC purposes?

For the 2020 ERC, most companies are qualifying as an eligible employer under the Government Mandate Test. For the 2021 ERCs, most companies are qualifying as an eligible employer under the Gross Receipts Test.

## What is considered Gross Receipts for ERC?

- **For taxable entities:**
  - Total sales (net of returns and allowances) and all amounts received for services.
  - Includes any income from investments:
    - Dividends
    - Interest
    - Rents
    - Royalties and annuities, regardless of whether those amounts are derived in the ordinary course of the taxpayer's trade or business
  - Reduced by the taxpayer's adjusted basis in certain property used in a trade or business or capital assets sold.
  - Tax accounting method for income recognition applies.
- **For non-taxable entities:**
  - Gross Receipts means gross receipts of the taxable year and generally includes all receipts.
  - Tax accounting method for income recognition applies.
  - Includes proceeds from investments and grants.
  - Not Reduced by the taxpayer's adjusted basis in certain property used in a trade or business or capital assets sold.

## If I qualify under the Government Mandate Test, does that automatically qualify me as an eligible employer for the entire quarter?

Technically, yes, but you only pay qualifying wages while the mandates are in effect and they are having a more than nominal impact on the business.

## Do I take the ERC into income when I receive it?

No. Instead, the employer must reduce deductions for wages on their income tax return for the tax year in which they are an eligible employer for ERC purposes.

## Does the Employee Retention Credit have to be paid back?

No. The Employee Retention Credit is a fully refundable tax credit that eligible employers claim against certain employment taxes. It is not a loan and does not have to be paid back. For most taxpayers, the refundable credit is in excess of the payroll taxes paid in a credit-generating period.



### **How do I apply for the ERC?**

Going forward, the only way to apply for the ERC is to file an amended Form 941X (Quarterly Federal Payroll Tax Return) for the quarters during which the company was an eligible employer.

### **How long does it take for the IRS to provide a refund after filing an amended Form 941X?**

Based on our experience, it is taking approximately nine months to receive a refund from the IRS after filing an amended Forms 941X.

### **Can I get both the ERC and PPP Loan?**

Yes. While an employer may not include wages funded by a PPP loan in the ERC calculation, PPP funds only apply to eight to ten weeks of wage expenses. The ERC eligibility periods are longer. PPP loans can also fund non-wage expenses.

For ERC purposes, it is most important to develop work papers that allocate the PPP funding across the entire 24 week Covered Period.

PPP funding may be allocated to wages that would not generate any ERC (e.g., to owners of the company or to wages in excess of \$10,000 in one of the four ERC credit-generating periods).

### **Do I need to file for PPP forgiveness before I file for the ERC?**

No, but, if possible, allocate the maximum available non-wage allowable costs to the PPP being forgiven.

### **Does PPP forgiveness count as gross receipts for ERC?**

No. Based on safe harbor guidance released by the IRS in August 2021, it has been confirmed that PPP forgiveness does not create gross receipts in the amount of the forgiveness (this also applies to Shuttered Venue Grant proceeds and Restaurant Revitalization Funding).



## Can churches and other religious organizations qualify for ERC?

Yes. The Employee Retention Credit is available to churches and other religious organizations that were impacted by government-ordered capacity restrictions on gatherings or that experienced significant declines in gross receipts.

## Do companies owned by Private Equity Funds need to aggregate their gross receipts and employee counts together when determining eligible employer status?

Generally, no. Brother-sister portfolio companies under the fund can likely be treated as separate trades or businesses when considering eligible employer status because the Fund owning the portfolio companies is not an active trade or business (rather a passive investment vehicle).

## Who qualifies for ERC?

A wide range of employers qualify for the ERC, including businesses in the following industries:

- Education
- Government Contractors
- Healthcare and Life Sciences
- Hospitality and Retail
- Industrial
- Not-For-Profit
- Professional Services
- Real Estate and Construction
- Technology

## If I use a PEO instead of a traditional payroll tax provider, can I still claim the ERC?

Yes. Employers using a PEO are still entitled to claim the Employee Retention Credit.

For more information about the Employee Retention Credit, contact Kevin Chern at [Kevin@BizHeadLaw.com](mailto:Kevin@BizHeadLaw.com) or call 312-899-6175.