



Changes the Consolidated Appropriations Act of 2021 made to the Employee Retention Tax Credit

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The Consolidated Appropriations Act (CAA) of 2021, which was signed into law on December 27, 2020, makes changes to the employee retention tax credit (ERC) in two separate sections. Some of the changes are retroactive back to the enactment of the CARES Act, while others are prospective to tax periods beginning in 2021.

As with most new legislation, there are unanswered questions and parts that may need clarification or revisions due to unclear language in the act.

General ERC rules: CARES Act

In general, the ERC as passed under the CARES Act allowed qualified employers to claim a credit of 50% on employee qualified wages paid from March 13, 2020, through December 31, 2020. For purposes of this credit, wages include the employer portion of group health care costs.

The maximum eligible wages per employee are \$10,000, resulting in a maximum annual credit of up to \$5,000 per employee. To qualify for the credit, an employer must meet all of the following criteria:

1. The employer must have carried on a trade or business during calendar year 2020; and
2. The operation of that trade or business either:
 1. Was fully or partially suspended due to orders from an appropriate governmental authority limiting commerce, travel or group meetings due to COVID-19; or

2. Has gross receipts for at least one calendar quarter that are less than 50% of the gross receipts received during the same calendar quarter(s) in the prior year. This period of significant decline in gross receipts is recognized until the end of the 2020 calendar quarter in which gross receipts are greater than 80% of gross receipts of the corresponding calendar quarter in 2019.

In addition, for employers with over 100 full-time employees, ERC is available only on wages paid to employees for not working. For employers with 100 or fewer full-time employees, the credit is available for all employee wages. The 100-employee threshold is based on the average number of employees during 2019.

PPP borrowers: Claiming ERC for 2020 wages under CAA

The CCA does not change the requirements or limits for wages paid during 2020. It does now allow anyone who took out a Paycheck Protection Program (PPP) loan to claim the ERC. This provides an opportunity to go back and claim the ERC on 2020 wages. However, the CAA also added that the ERC and PPP loan forgiveness can not be claimed on the same wages.

In addition, the ordering rule is that wages are first applied to the ERC and then to PPP loan forgiveness. The PPP borrower does have an option, under an election method to be determined by the Secretary of the Treasury, to not take wages into account for the ERC.

This causes uncertainty for all PPP borrowers, but even more so for those who have already filed their PPP loan forgiveness applications. If they want to now claim the ERC for 2020 but already claimed the wages for PPP purposes, will they need to file an amended PPP loan forgiveness application? Will they need to still file an election to not claim the wages for ERC purposes if they would rather have full loan forgiveness? We anticipate the Small Business Administration and Treasury will issue more guidance in this area.

How to claim the ERC for 2020

Normally, payroll tax corrections are done by filing a Form 941X. However, the CAA provides language as follows:

“an employer who has filed a return of tax with respect to employment taxes before the date of the enactment of the Act may elect (in such manner as the Secretary of the Treasury (or the Secretary’s delegate) shall prescribe) to treat any applicable amount as paid in the calendar quarter which includes the date of the enactment of the Act”

Thus it would appear possible that the catch-up credit could be claimed on the 2020 fourth quarter Form 941, which has a due date of February 1, 2021. Many taxpayers have completed or are close to completing their 2020 payroll computations and are now wondering, how can Congress expect them to make this determination with their payroll provider when there is no guidance and the filing date is less than a month away? Again, we are anticipating guidance to be released shortly.

In addition, the wording of “may elect” could indicate there will be other options, such as amending previously filed 2020 941s, claiming in 2021 or some new form specifically for claiming the refund.

Recommended next steps

1. Determine if you are an eligible employer for ERC (you meet the required shut down or gross receipts reduction test).
2. If yes to number 1, determine if there are 2020 wages eligible for ERC, and prepare estimates of ERC for 2020 (remember the limit for all of 2020 is \$10,000 in wages per employee).
3. Review PPP wages to determine if you have paid wages that would be needed to claim ERC and PPP loan forgiveness.
4. If you have not already filed your PPP loan forgiveness application, we would recommend waiting to do so until there is additional guidance on the integration of ERC and PPP loan forgiveness.
5. On claiming the catch-up ERC (if eligible), continue with the preparation of your 2020 fourth quarter Form 941, but wait as long as possible to file in the hopes that the Secretary is able to provide guidance before February 1.

ERC: 2021 CAA changes

As noted above, the ERC was set to expire on December 30, 2020. The CAA extended the ERC for wages paid from January 1, 2021, through June 30, 2021.

In addition, the ERC eligibility and limits were changed as follows:

- Reduced the quarter over quarter gross receipts decline from 50% to 20%, comparing the 2021 calendar quarter to the corresponding quarter in 2019 (rather than 2020).
- Increased the ERC wage limit to \$10,000 per employee per quarter rather than \$10,000 per year.
- Increased the ERC percentage from 50% to 70% of gross wages.
- Increased the “large employer” full time employee limit from 100 to 500.
- Clarified that ERC wages can not be used for several other tax credits — most notably WTC and R&D.
- Increased eligible employers to include certain governmental entities.

- New employers who were not in existence for all or part of 2019 can use the comparable 2020 calendar quarter to determine the extent of the decline in gross receipts.

As for first-time PPP loans, borrowers under PPP Second Draw will be able to claim ERC. They will also be subject to the rule that the same wages cannot be used for both ERC and PPP Second Draw.

If you have questions about any of the changes discussed above or need assistance, contact our tax specialists ([/contact](#)).

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