

# ERC MAY END EARLY TO PAY FOR INFRASTRUCTURE BILL

## IRS ALSO RELEASES NEW GUIDANCE FOR TAX CREDITS

Last week, two pieces of news related to Employee Retention Tax Credits (ERC) were released. First, on August 2, details of the infrastructure bill were released, including an announcement that the proposed legislative package in its current form would largely end the ERC on September 30 instead of the current December 31 deadline. Meanwhile, on August 4, the IRS released Notice 2021-49, which provides guidance and clarification on the ERC.

### IRS Notice 2021-49

Notice 2021-49 includes guidance on the extension and modification of the ERC under the American Rescue Plan (ARP). Under the Notice, ERC may be claimed by an eligible employer for qualified wages paid in the third and fourth calendar quarters of 2021. Some of the more notable items addressed are as follows:

#### ❖ **Related Individual Clarification**

The Notice provides specific details, starting on page 25, that explain whether wages paid to majority owners (an employee who owns more than 50% of the value of a corporation) may be treated as qualified wages and whether wages paid to a spouse or family member of a majority owner may be treated as qualified wages. In short, based on the somewhat complicated (if not just strange) “family attribution” rules, any children, siblings or parents of a business owner are also deemed as owners of any interest that belongs to the business owner, therefore, the business owner is almost always likely to be deemed a “family member” of an owner and so said business owner’s wages would likely not be eligible for the ERC.

#### ❖ **Full-time Employee / Full-time Equivalent Clarification**

In welcome news, the Notice includes a section defining full-time employees for purposes of the ERC. The language is fairly specific that only full-time employees, those working 30 hours per week or 130 hours per month on average, count and full-time equivalents do not need to be included in determining whether an employer is large or small. Also, full-time status is irrelevant to identifying qualifying wages. In other words, wages for full-time and/or part-time are allowable.

#### ❖ **Timing of Qualified Wage Disallowance**

The Notice states, “a reduction in the amount of the deduction allowed for qualified wages, including qualified health plan expenses, caused by receipt of the employee retention credit occurs for the tax year in which the qualified wages were paid or

incurred. When a taxpayer claims the employee retention credit because of the retroactive amendment of section 2301 of the CARES Act by section 206(c) of the Relief Act (relating to eligibility of PPP borrowers to claim the employee retention credit) or otherwise files an adjusted employment tax return to claim the employee retention credit, the taxpayer should file an amended federal income tax return or administrative adjustment request (AAR), if applicable, for the taxable year in which the qualified wages were paid or incurred to correct any overstated deduction taken with respect to those same wages on the original federal tax return.”

❖ **Clarification of Qualified Wages**

The limit on the maximum ERC (70% of up to \$10,000 of an employee’s qualified wages per calendar quarter, or \$7,000) continues to apply to the third and fourth quarters of 2021. The Notice also states that a separate credit limit of \$50,000 per calendar quarter applies to recovery startup businesses (after application of the \$10,000 wage limit).

❖ **Rules on Coordination with the Shuttered Venue Grant or Restaurant Revitalization Fund**

Per the Notice, “an eligible employer receiving a shuttered venue operators grant or restaurant revitalization grant may not treat any amounts reported to the Small Business Administration (SBA) or otherwise taken into account as payroll costs in connection with either program as qualified wages for purposes of the employee retention credit in the third and fourth quarters of 2021.”

❖ **Statute of Limitations**

The Notice states that the statute of limitations for auditing is extended to 5 years but only for the third and fourth quarters of 2021.

❖ **Clarification of Tips as Qualified Wages**

The Notice states that any cash tips treated as wages within the definition of section 3121(a) or compensation within the definition of section 3231(e)(3) are treated as qualified wages if all other requirements to treat the amounts as qualified wages are satisfied.

❖ **Guidance on Recovery Startup Businesses**

Per the Notice, a recovery startup business is an employer that:

- (1) is not otherwise an eligible employer (either fully or partially shut down or experiencing a decline in gross receipts)
- (2) began carrying on a trade or business after February 15, 2020
- (3) has average annual gross receipts of no more than \$1 million for the three tax years preceding the quarter in which it claims the ERC

❖ **Gross Receipts Safe Harbor**

The Notice states, “Section III.E. of Notice 2021-20 permits an employer that acquires a business in 2020 to include the gross receipts of the acquired business in its gross receipts for 2019 to determine whether the employer experienced a significant decline in gross receipts. The safe harbor allows the employer to include the gross receipts of the acquired business regardless of the fact that the employer did not own the acquired business during a calendar quarter in 2019. The Treasury Department and the IRS have been asked whether this rule continues to apply to employers that acquire businesses in 2021. This rule continues to apply to employers that acquire businesses in 2021 for purposes of measuring whether a decline in gross receipts occurred.”

The full Notice 2021-49 may be found at the following link: <https://www.irs.gov/pub/irs-drop/n-21-49.pdf>

## Infrastructure Bill

While both employers and advisors welcomed the clarification provided in Notice 2021-49, they may not be too happy about the announcement that the ERC may end early to pay for an estimated \$8.2 billion of the \$1.2 trillion proposed infrastructure package. The proposal would end the ERC on September 30 (rather than the current deadline of December 31) for most business with the exception of Recovery Startup Businesses, which would still be able to use the ERC for wages paid through the end of the 2021.

So far, this measure is just a proposal. It has passed in the Senate but has not been passed in the House yet. The House has already left on their recess and will not return until September.

## For More Information

We will continue to monitor this situation and release updates. If you have any questions, please contact our HR team at **210-775-6082**, toll-free at **1-888-757-2104**, or [HRmanagement@BFGonline.com](mailto:HRmanagement@BFGonline.com).



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