

How employers can claim the Employee Retention Tax Credit under the CARES Act

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The Coronavirus Aid, Relief, and Economic Security Act (CARES Act), includes tax credit provisions designed to encourage employee retention by employers experiencing economic hardship related to COVID-19.

Payroll Tax Credit

This Employee Retention Credit is a fully refundable tax credit equal to 50% of up to \$10,000 of qualified wages per employee, including qualified health plan expenses, paid between March 12, 2020 and January 1, 2021. The Employee Retention Credit can be up to \$5,000 per employee. The Employee Retention Credit cannot be taken simultaneously with credits taken for emergency Paid Sick Leave or extended FMLA under the Families First Coronavirus Response Act. Additionally, the Employee Retention Credit is not available to an employer that takes a loan under other provisions of the CARES Act (the Keeping American Workers Paid and Employed Act).

Eligible Employers

The financial hardship required to be an Eligible Employer for the Employee Retention Credit can take two forms. First, eligibility can be based upon the full or partial suspension of operations as a result of an order limiting commerce, travel or group meetings due to COVID-19 (a "stay at home order"). Second, the hardship can be in the form of a significant decline in gross receipts. In this second scenario, an employer becomes eligible if its gross receipts in any calendar quarter in 2020 are less than 50% of gross receipts for the same quarter in the prior year. That employer remains eligible until the first calendar quarter after the quarter in which gross receipts increase to more than 80% of gross receipts for the same quarter in the prior year.

Qualified Wages

The definition of qualified wages depends, in part, on the average number of full-time employees. For employers who had more than 100 full-time employees (defined as an employee who works an average of at least 30 hours per week during any month) in 2019, qualified wages are the wages paid to an employee for time that the employee is not providing services. Qualified wages cannot exceed what the employee would have been paid for working an equivalent duration during the 30 days immediately before the period of economic hardship. The IRS guidance does not clearly explain this 30-day period. Presumably, an employer would look at the employee's average earnings for the 30 days

prior to the hardship and that amount would then form the basis for the employee's average wages for the next quarter. We anticipate the IRS may issue additional guidance in the coming days, which will hopefully further clarify this point.

For employers that had an average of 100 or fewer full-time employees in 2019, qualified wages are the wages paid to any employee during the period of economic hardship.

Steps Required to Access the Employee Retention Credit

The CARES Act itself provides little guidance for employers in actually accessing the Employee Retention Credit. Fortunately, the Internal Revenue Service has now released guidance clarifying the necessary steps.

Eligible Employers will need to report their total qualified wages and the related credits. This report is typically made via the Employer's Quarterly Federal Tax Return (Form 941), used to report income, social security and Medicare tax withholdings and the employer's portion of social security and Medicare tax.

Using the Tax Credit to Fund Payroll

The IRS Guidance also clarifies that Eligible Employers do not need to wait to receive the Employee Retention Credit and can use this amount to fund qualified wages immediately. The CARES Act permits immediate access and retention of the employment taxes ordinarily required to be deposited with the IRS. This includes taxes withheld from all of an employer's employees. Employers will not be assessed a penalty for failure to timely deposit these amounts if: (1) qualified wages are paid to the employee in the calendar quarter prior to the required deposit; (2) the amount not timely deposited is equal to or less than the anticipated credit as of the time of the required deposit (less any amounts not deposited in anticipation of the paid sick or family leave credits under the Families First Coronavirus Response Act); and (3) if the employer did not seek payment of an advance with respect to any portion of the anticipated credits it relied upon to reduce its deposits.

If the amount of employment taxes described above is less than the anticipated credit, an employer may request an advance of the remaining amount by filing Form 7200, Advance payment of Employer Credits Due to COVID-19.

Finally, the credits are fully refundable. An Eligible Employer may get a refund if the amount of the credit is more than the employer portion of the social security tax on all wages paid to employees. =