



Eye on Washington Legislative Update



Infrastructure Investment and Jobs Act Ends Employee Retention Tax Credit on 9/30/2021

HR 3684, the "Infrastructure Investment and Jobs Act," (Public Law No. 117-58) was signed into law on November 15, 2021. The Act generally provides funding for physical infrastructure such as roads, waterways, ports, bridges, rail, electric vehicles, airports, drinking water, electric grid, broadband, and cybersecurity, among other things. Included in the Act is the early/retroactive sunset of the Employee Retention Tax Credit (ERC) as of September 30, 2021 except for recovery startup businesses, which remain eligible through December 2021.

Consequently, other than Recovery Startup Businesses, employers should not apply any Employee Retention Tax Credit amounts to payroll pay dates after September. Further, any Employee Retention Tax credits applied to pay dates after September must be reversed and paid to the Internal Revenue Service (IRS).

Background on the Employee Retention Tax Credit

Originally introduced as part of the CARES Act of 2020, the American Rescue Plan Act of 2021 extended the availability of the ERC through wages paid through December 31, 2021.

Generally, for 2021, the employers were eligible for the ERC, based on whether they experienced at least a partial suspension of operations due to government restrictions related to COVID-19, or incurred declines in gross receipts of more than 20 percent compared to the same calendar quarter in 2020 or 2019. Up to \$10,000 in wages per employee was eligible for the credit each quarter, and the credit was 70 percent of qualified wages (i.e., the total possible ERC was \$7,000 per employee per quarter in 2021). Employers were able to take the credit by filing IRS Form 7200 to request a payment, or by reducing federal employment tax deposits by any ERC amount for which the employer was eligible.

The Infrastructure Investment and Jobs Act retroactively ended the ERC program as of September 30, 2021, except for recovery startup businesses, which remain eligible through December 2021.



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Recovery Startup Businesses

Section 3134(c)(5) defines a “recovery startup business” as an employer that began carrying on a trade or business after February 15, 2020 — for which the average annual gross receipts do not exceed \$1,000,000 — and is not otherwise an eligible employer due to a full or partial suspension of operations or a decline in gross receipts. A recovery startup business is permitted a credit of no more than \$50,000 per quarter in the third and fourth quarters of 2021.

Action Required for Employers (other than Recovery Startup Businesses)

1. **Employers should not apply any ERC amounts to payroll pay dates after September.**
2. **Any ERC amounts applied to pay dates after September must be reversed and paid to the IRS at this time.**

ADP® has asked the IRS for guidance on how ending the ERC program retroactively could affect the timeliness of tax deposits to which ERC amounts were applied. Employers were previously protected from late deposit penalties for employers that reduced employment tax deposits by an ERC amount to which they were entitled, but

these provisions expired upon enactment of the Infrastructure Investment and Jobs Act.

Employers that received the ERC for payrolls after September 2021 will need to pay such amounts to the IRS. It is not clear whether such payments are immediately due (i.e., as of November 15, 2021), or whether the IRS may permit more time to repay such amounts.

The IRS may offer guidance that could specify a later deadline (i.e., in late November or December) for such repayments. However, the IRS has not yet issued such guidance, and may not issue guidance. Absent guidance from the IRS, late deposit penalties may apply to any ERC amounts applied after September. In order to minimize the penalty impact should the IRS not provide relief, employers that applied ERC amounts after September should reverse and pay to the IRS any under-deposited amounts associated with the ERC as quickly as possible.

Next Steps

ADP Tax Filing Service clients will receive a separate communication and invoice explaining the funding and tax payment process.

We are actively monitoring related regulatory developments and will publish additional details as soon as possible.

ADP Compliance Resources

ADP maintains a staff of dedicated professionals who carefully monitor federal and state legislative and regulatory measures affecting employment-related human resource, payroll, tax and benefits administration, and help ensure that ADP systems are updated as relevant laws evolve. For the latest on how federal and state tax law changes may impact your business, visit the ADP Eye on Washington Web page located at www.adp.com/regulatorynews.

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