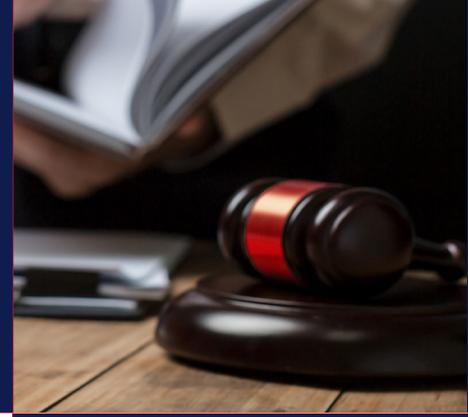


Eye on Washington Regulatory Update



IRS Guidance Regarding the Retroactive End of the Employee Retention Credit on September 30, 2021

The Internal Revenue Service (IRS) issued [Notice 2021-65](#) on December 6, 2021, to provide guidance to employers regarding the retroactive termination of the Employee Retention Credit (ERC). The Infrastructure Investment and Jobs Act, enacted on Nov. 15, 2021, terminated the ERC with retroactive effect to September 30, 2021; i.e., wages paid after that date do not qualify for the ERC, unless the employer is a recovery startup business.

[Notice 2021-65](#) applies to employers who paid wages after September 30, 2021, and either received advance payments of the ERC for such wages or reduced employment tax deposits in anticipation of the credit for the fourth quarter of 2021, but are now ineligible due to the Infrastructure Investment and Jobs Act.

Background

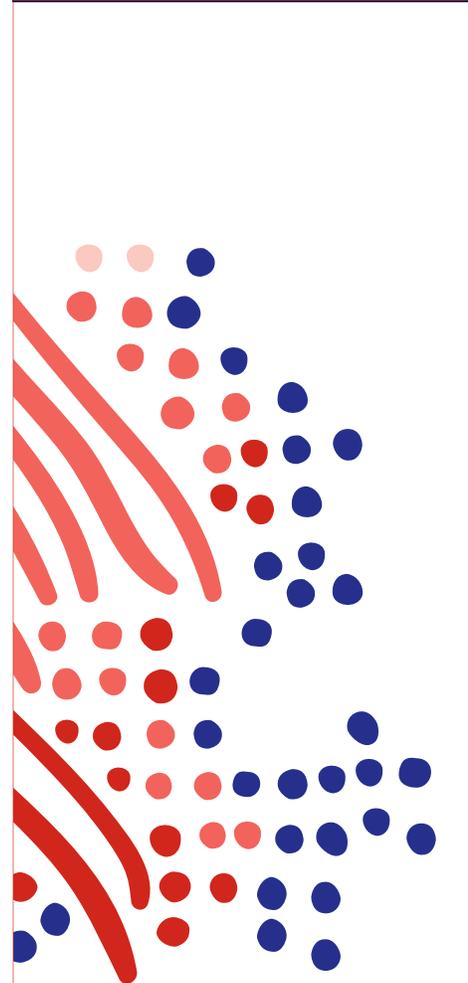
Originally introduced as part of the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020, the American Rescue Plan Act of 2021 extended the availability of the ERC through wages paid through December 31, 2021.

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 2019 (or 2020, in some cases). 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.

IRS Notice 2021-65 Guidance

Employers Who Received Advance Payments

Employers were able to request advance payments of the ERC by filing a Form 7200. Employers that received advance payments of the ERC for wages paid during the fourth quarter of 2021 must repay those amounts to the IRS by the due date of their applicable employment tax returns; i.e., generally by January 31, 2022.



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Employers That Reduced Employment Tax Deposits

Employers that reduced deposits for wages paid during the fourth calendar quarter of 2021 in anticipation of the ERC will be required to repay (deposit) the amounts retained on or before the due date for wages paid on December 31, 2021 (regardless of whether the employer actually pays wages on that date). For semiweekly depositors, this would generally be January 3 or January 5, 2022, depending on whether the accelerated next-day deposit requirement for liabilities of \$100,000 or more is met.

The IRS guidance concerning how to report the tax liability associated with ERC reversals referred employers to the instructions to the applicable employment tax return or schedule (i.e., Form 941 Schedule B, [Report of Tax Liability for Semiweekly Schedule Depositors](#)). The schedule and instructions have not been released as of December 8, 2021. Consequently, employers should monitor IRS guidance for details. Depending on the IRS instructions for how to report the tax liability associated with ERC reversals, the IRS may or may not issue proposed penalties for apparent late deposits of employment taxes. In accordance with Notice 2021-65, proposed penalties related to deposits due prior to December 21 would be waived upon request, but IRS penalty notices may be issued, and if so, employers would need to diligently respond to explain the circumstances and ask that the penalty be waived.

Generally, employers should have ceased applying ERC amounts to deposits once the Infrastructure Investment and Jobs Act was signed (November 15, 2021). However, to provide appropriate time for employers to learn about the change and adjust their systems, Notice 2021-65 specifies that no penalties will apply for employers that reduced deposits of Employment Taxes by the amount of an anticipated ERC for deposits due on or before December 20, 2021. Employers that reduce deposits after December 20, 2021, in anticipation of the Employee Retention Credit, will be subject to failure to deposit penalties, which will not be waived.

Recovery Startup Businesses Continue to Be Eligible for ERC Through December 31, 2021

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 that 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

- 1. Other than recovery startup businesses, employers should cease applying any ERC amounts to pay dates after September 2021.**
- 2. Any ERC credits applied after September must be reversed and paid to the IRS at this time.**

ADP Tax Filing Service clients will receive a separate communication explaining the funding and repayment process for ERC amounts applied after September 2021. ADP Tax Filing Service clients who requested and received advance payments via Form 7200 will need to coordinate this information with ADP.

Next Steps

ADP will monitor for IRS instructions for reporting ERC reversal liabilities. Depending on such guidance from the IRS, late deposit penalties may apply to any ERC amounts applied after September. If such notices are issued, employers would need to diligently respond to explain the circumstances and ask that the penalty be waived. ADP will publish additional details as soon as possible.

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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.

ADP is committed to assisting businesses with increased compliance requirements resulting from rapidly evolving legislation. Our goal is to help minimize your administrative burden across the entire spectrum of employment-related payroll, tax, HR and benefits, so that you can focus on running your business. This information is provided as a courtesy to assist in your understanding of the impact of certain regulatory requirements and should not be construed as tax or legal advice. Such information is by nature subject to revision and may not be the most current information available. ADP encourages readers to consult with appropriate legal and/or tax advisors. Please be advised that calls to and from ADP may be monitored or recorded.

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