

Eye on Washington Regulatory Update



New IRS Guidance on the Employee Retention Credit

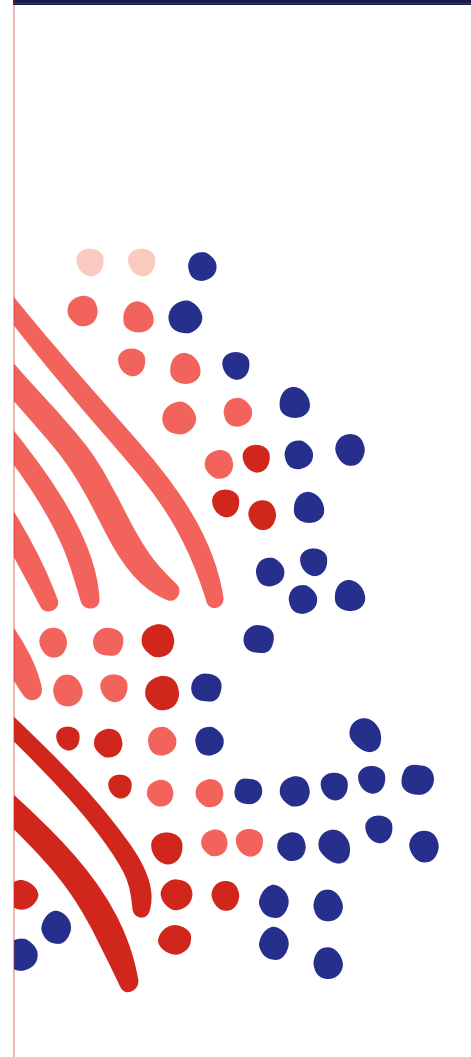
On August 4, 2021, the Internal Revenue Service (IRS) published [Notice 2021-49](#) concerning the 2021 Employee Retention Credit (ERC) to explain changes made by the [American Rescue Plan Act](#) (ARPA, P.L. 117-2). The ARPA extended the ERC from July through December 2021 and revised eligibility and other provisions. This Notice provides additional details concerning recovery startup businesses and severely financially distressed employers, as well as common questions such as the treatment of tips as qualified wages; qualified wages deduction disallowance; coordination with other programs such as PPP loans; and wages paid to majority owners and spouses.

Background

As background, in March 2020, Congress enacted the **Coronavirus Aid, Relief, and Economic Security Act ("CARES Act")** to provide relief to employers and individuals affected by COVID-19. The CARES Act established the Employee Retention Tax Credit (ERC) for employers subject to closure due to COVID-19. This provided private-sector employers with a refundable tax credit of up to \$5,000 per employee for employers, whose operation was at least partially suspended due to orders from a governmental authority limiting commerce, travel or meetings due to COVID-19, or who experienced a 50 percent decline in gross receipts when compared to the same quarter of the prior year.

In December 2020, the **Consolidated Appropriations Act (CAA)** extended the ERC through June 2021 and increased the value of the ERC for 2021 wages paid through June to 70 percent of qualified wages, which were increased to \$10,000 per quarter. The maximum credit per employee for wages paid between January and June 2021 was then \$14,000. The CAA permitted employers to qualify if they experienced revenue declines of 20 percent (formerly 50 percent), and changed the large employer definition from 100 employees to 500, enabling businesses with under 500 employees to take the ERC for all wages paid, rather than only for wage payments for which no services were provided. Lastly, the CAA enabled employers that received Paycheck Protection Program (PPP) loans to also take the ERC, retroactive to March 2020.

In March 2021, the **American Rescue Plan Act (ARPA)** extended the ERC through December 2021, and made other changes. The maximum ERC for 2021 became \$28,000 per employee.



Eye on Washington

Regulatory Update

IRS Notice 2021-49

IRS Notice 2021-49 explains changes made by the ARPA and provides guidance on several common questions. Generally, beginning July 2021, qualified recovery startup businesses can treat all wages paid to employees as qualified wages, even if the business employs over 500 employees. (Normally the ERC would only apply for wages paid for which no work is performed, i.e., paid time off, for organizations with over 500 employees.)

A recovery startup business is an organization that began carrying on a trade or business after February 15, 2020; has average annual gross receipts of not more than \$1,000,000; and does not otherwise qualify as an eligible employer. Recovery start-up businesses are limited to no more than \$50,000 per quarter in aggregate ERC for the third and fourth quarters of 2021.

The Notice also addresses **"severely financially distressed"** employers, which are generally organizations with gross receipts reductions of over 90 percent compared to the same quarter in 2019 (or 2020, if the employer was not in existence in 2019). As with qualified recovery startup businesses, severely financially distressed businesses may treat all wages paid to employees as qualified wages, even if the business employs over 500 employees.

Notice 2021-49 also addresses certain questions about the ERC, including:

- The definition of full-time employee,
- The treatment of tips as qualified wages and the interaction with the Section 45B credit,
- The timing of the qualified wages deduction disallowance and whether taxpayers must amend income tax returns after claiming the ERC on an adjusted employment tax return,

- Coordination with certain programs such as PPP loans and shuttered venue grants (Section 324 of the Economic Aid to Hard-Hit Small Businesses, Non-Profits, and Venues Act), and
- Whether wages paid to majority owners and spouses may be treated as qualified wages.

Pending Legislation Could End the ERC After September 2021

H.R. 3684, the Infrastructure Investment and Jobs Act includes a provision to end the ERC on September 30, rather than December 31, 2021, other than for recovery start-up businesses, which would remain eligible through December. This legislation is pending and may or may not be approved. ADP will continue to monitor this and other legislation affecting the ERC and will keep clients apprised of any changes.

The ERC remains a helpful support for qualifying businesses as they recover from the effects of the COVID pandemic. Employers should consult appropriate legal and/or tax advisors to determine their eligibility for the ERC.

Additional Resources:

[Notice 2021-20](#) provides ERC guidance on wages paid in 2020.

[Notice 2021-23](#) provides ERC guidance on wages paid in January - June 2021.

Eye on Washington

Regulatory Update

ADP Compliance Resources

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