

PUBLIC AFFAIRS
POLICY
BRIEF SERIES

POLICY BRIEF: UPDATES FROM TAXPAYER CERTAINTY & DISASTER TAX RELIEF ACT, ENACTED 12/27/20

UNDERSTANDING THE EMPLOYEE RETENTION TAX CREDIT

HOW RESTAURANTS CAN BENEFIT FROM ERTC

- ✓ Employee Retention Tax Credits (ERTC) are key benefits used by many restaurants.
- ✓ Use this background sheet to understand recent updates to the program.
- ✓ Share this information with your accounting and finance team to ensure that your operations can benefit if eligible.

LEARN MORE

 Visit
RestaurantsAct.com

Disclaimer: This content is for informational purposes only, and should not be used as legal, tax, investment, financial, or other advice. This information is of a general nature and does not address the circumstances of any particular individual or entity. The document does not constitute professional and/or financial advice, nor does any information constitute a comprehensive or complete statement of the matters discussed or the law. The reader of the document alone assumes the sole responsibility of evaluating the merits and risks associated with the use of any information before making any decisions based on such information.

WHAT IS ERTC AND HOW DOES IT HELP MY RESTAURANT?

Eligible restaurants can now access ERTC for both 2020 and 2021 for eligible employee wages as long as these specific payroll wages and/or group benefits were not directly paid with Paycheck Protection Program (PPP) loan funds. Employers can access up to \$5,000 per employee for a calendar quarter in 2020, and up to \$7,000 per employee and per quarter for January 1 – March 31 and April 1 – June 30, 2021.

- ✓ **Restaurants can now receive up to \$19,000 per eligible employee in ERTC across 2020 (up to \$5,000) and 2021 (\$7,000 in both the 1st and 2nd calendar quarter).**

EXAMPLES OF ERTC UTILIZATION

Example 1: Henry's Hotcakes (HH) received a \$120,000 PPP loan in April 2020. These funds were fully spent on its 10 employees by September 20, 2020. Previously, HH would not have qualified for ERTC. However, HH can now reach back to its wages for the fourth quarter of 2020 (OCT-DEC) and obtain up to \$5,000 per eligible employee (50% credit of up to \$10,000 in eligible wages) in ERTC.

- ✓ **HH obtains up to \$50,000 for Q4 2020 wages in ERTC.**

Example 2: Henry's Hotcakes (HH) is eligible for a Second Draw PPP loan but would also like to coordinate ERTC for its 10 employees during the first quarter of 2021 (JAN-MAR). On February 1, 2021, HH receives a Second Draw loan of \$168,000 (at the 3.5 multiplier for restaurants/accommodations) and selects a 24-week covered period to utilize funds. HH spends 40% of the loan on rent, protective equipment, cleaning supplies, a new drive-thru window, and other forgivable PPP expenses in February and March 2021. Beginning April 2021, HH spends the rest of the PPP funds (60%) on eligible payroll expenses for the remainder of the covered period. For the first quarter of 2021 (JAN-MAR), HH utilizes ERTC and obtain \$7,000 per eligible employee (70% credit of up to \$10,000 in eligible wages) in ERTC.

- ✓ **HH obtains up to \$70,000 for Q1 2021 wages in ERTC; AND**
- ✓ **HH utilizes a Second Draw PPP loan that can cover both Q1 non-payroll expenses and Q2 (APR-JUN) and/or July payroll expenses, depending on the covered period.**

UNDERSTANDING THE EMPLOYEE RETENTION TAX CREDIT

HOW ERTC CHANGED IN DECEMBER 2020

Congress enacted key changes in December 2020 to expand eligibility of the ERTC program.

	Prior Law: 3/13/20 to 12/31/20	New Law: 3/13/20 to 12/31/20	New Law: 1/1/21 to 6/30/21
PPP Loan Interaction	No ERTC if employer used a PPP loan	Employers that used a PPP loan can now claim ERTC as long as credits are not taken on direct PPP payroll expenses (wages, group benefits)	NO CHANGE: Employers that used a PPP loan can now claim ERTC as long as credits are not taken on direct PPP payroll expenses (wages, group benefits)
Maximum creditable wages per employee*	\$10,000 per year	\$10,000 per year	\$10,000 per quarter
Maximum credit	Up to \$5,000 per employee	Up to \$5,000 per employee	Up to \$14,000 per employee
Threshold to be considered a "large employer" (based on average full-time employees in 2019, and considering aggregation rules)	More than 100	More than 100	More than 500

*Qualified wages are defined in section 3121(a) of the Internal Revenue Code and compensation (defined in section 3231(e)), both determined without regard to the contribution and benefit base (as determined under section 230 of the Social Security Act). This includes qualified health plan expenses.

IS MY BUSINESS ELIGIBLE FOR ERTC?

The following criteria define eligible employers and circumstances for ERTC eligibility.

✓ Eligible Employers:

Employers of 100 or less full-time employees can access ERTC for on-premises, working employees in 2020 and employers of 500 or less full-time employees can access ERTC for on-premises, working employees in 2021. The employer status is calculated by counting the average number of full-time employees employed during 2019.

UNDERSTANDING THE EMPLOYEE RETENTION TAX CREDIT

- A full-time employee is an employee who, with respect to any calendar month in 2019, worked an average of at least 30 hours per week or 130 hours in the month.
 - An employer that began business during 2019 determines the number of its full-time employees by taking the sum of the number of full-time employees in each full calendar month in 2019 when operating and dividing by that number of months.
 - An employer that began business during 2020 determines the number of its full-time employees by taking the sum of the number of full-time employees in each full calendar month in 2020 when operating and dividing by that number of months, same as the approach for employers that began business operations during 2019.
- Aggregation rules apply when determining the number of full-time employees; in most cases all entities are considered a single employer if they are a “controlled group” of corporations, are under common control, or are aggregated for benefit plan purposes.

✓ Eligible Circumstances:

1. Operations either fully or partially suspended due to orders from a governmental authority due to COVID-19, **OR;**
2. The business experienced a significant decline in gross receipts when comparing either the calendar quarter or the prior quarter to the corresponding quarter in 2019.

To understand the “full or partial closure orders” during a calendar quarter due to government order, the Internal Revenue Service (IRS) provides these specific restaurant examples:

- **Capacity restrictions to enable social distancing:** The following month, under a further governmental order, the restaurant is permitted to offer indoor dining service, in addition to outdoor sit-down and carry-out service, provided that all tables in the indoor dining room must be spaced at least six feet apart. Under the facts and circumstances, the governmental order restricting the spacing of tables limits the restaurant’s indoor dining service capacity and has more than a nominal effect on its business operations. During this period, the restaurant’s business operations continue to be considered to be partially suspended because the governmental order restricting its indoor dining service has more than a nominal effect on its operations.
- **Indoor dining closed but outdoor is open:** Same facts as #1, except that two months later, under a subsequent governmental order, the restaurant is permitted to offer sit-down service in its outdoor space, but its indoor dining service continues to be closed. During the period in which the restaurant is allowed to operate only its outdoor sit-down and carry-out service in accordance with the order, the restaurant’s business operations are considered to be partially suspended because, under the facts and circumstances, a more than nominal portion of its business operations – its indoor dining service – is closed due to a governmental order.

UNDERSTANDING THE EMPLOYEE RETENTION TAX CREDIT

- **All on-site dining closed:** A restaurant must close its restaurant to on-site dining due to a governmental order closing all restaurants, bars, and similar establishments for sit-down service. The restaurant is allowed to continue food or beverage sales on a carry-out, drive-through, or delivery basis. The restaurant's business operations are considered to be "partially suspended" because a portion of its business operations – its indoor and outdoor dining service – is closed due to the governmental order.

ADDITIONAL ERTC PROVISIONS

✓ Advance Payments

Form 7200: For 2020, the IRS allowed employers to reduce deposits of employment taxes when anticipating ERTC for qualified wages by filing Form 7200. For 2021, advance payments of ERTC are permitted only for small employers (500 or fewer employees during 2019) and only up to 70% of the average quarterly wages paid by the employer in calendar year 2019.

✓ Eligible Wages

Qualified wages are defined under section 3121(a) and section 3231(e) of the Internal Revenue Code. The employer's health plan expenses can be included.

✓ Ineligible Wages

Wages are qualified for ERTC only if the wages are made to an employee who continues to be employed by the employer. Any payments correlated with a former employee's termination of employment are not qualified wages because they are payments for the past employment relationship and not attributable for employee retention credits.

- The definition of compensation in section 3231(e) appears to exclude tips as a form of "eligible wages" for ERTC, as they are not paid by an Eligible Employer.

✓ Tax Treatment

Qualified wages are calculated without regard to federal taxes imposed or withheld, including the employee's or employer's shares of social security taxes, the employee's and employer's shares of Medicare tax, and federal income taxes required to be withheld.

- Deductions for qualified ERTC wages are not allowed for an employer's federal taxable income under IRC Section 280C(a). Any employer receiving ERTC must reduce its deduction for salaries and wages by the amount of the ERTC.

UNDERSTANDING MORE

The following links and resources are useful as you review your own ERTC eligibility and application.

- ["Employers May Be Able to Claim the Employee Retention Credit and Have a PPP Loan,"](#) IRS, January 28, 2021
- ["Significant Enhancements to the Employee Retention Tax Credit \(ERTC\): Maximizing the ERTC in 2020 and 2021,"](#) BDO, January 11, 2021

UNDERSTANDING THE EMPLOYEE RETENTION TAX CREDIT

- [“FAQs: Employee Retention Credit under the CARES Act,”](#) IRS
Note that the Taxpayer Certainty and Disaster Tax Relief Act of 2020, enacted December 27, 2020, amended and extended the employee retention credit (and the availability of certain advance payments of the tax credits) under section 2301 of the CARES Act. These FAQs do not currently reflect the changes made by the Taxpayer Certainty and Disaster Tax Relief Act of 2020; however, please continue to check back on this page for any updates related to the change in law.
- [“Instructions for Form 7200 – Advance Payments of Employer Credits Due to COVID-19,”](#) February 2, 2021
- [“Form 7200: Advance Payments of Employer Credits Due to COVID-19,”](#) IRS documents for 2021 ERTC, January 2021

CONTINUED ON NEXT PAGE (“ELIGIBILITY FLOWCHART”)

UNDERSTANDING THE EMPLOYEE RETENTION TAX CREDIT

