

CLIENT ALERT

IRS Issues Guidance on the Employee Retention Credit: Who Can Claim It and How Much?

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Section 2301 of the CARES Act includes a refundable tax credit to incentivize employers to continue to pay workers while their businesses are affected by COVID-19 (“Employee Retention Credit”). However, ambiguities in the statutory language made it difficult for employers to determine if they qualify for the credit and, if they do, what wages they can claim. Without guidance from the IRS, it has been difficult for companies to integrate the credit into their employment decisions. On April 29, the IRS released new FAQs on the credit, stating its position on some of these questions. The FAQs will not be published in the Internal Revenue Bulletin, and cannot be relied on as legal authority in any future disputes regarding the credit. However, the FAQs provide a preview of the IRS’s approach to eligibility and calculation.

The Employee Retention Credit allows “qualified employers” to claim a refundable tax credit against their payroll tax liabilities equal to 50% of “qualified wages” up to \$10,000 per employee (i.e., credits can be up to \$5,000 per employee). “Qualified employers” are those whose businesses were partially or fully suspended as a result of a COVID-19 related government order, or who have suffered a calendar quarter with gross receipts less than 50% of the gross receipts for the same calendar quarter in 2019. “Qualified wages” depends on the size of the employer’s workforce; for employers with fewer than 100 employees, qualified wages are any wages paid during the period affected by the government order or during the quarters of severely reduced gross receipts; and, for employers of 100 or more, qualified wages are those paid to employees not providing services.

The FAQ’s provide the IRS view on several important issues:

Essential Businesses Not Suspended. The FAQs provide some details on the IRS’s view as to when a business’ operations are considered “partially or fully suspended” pursuant to government order. “Essential businesses” that are allowed to remain open under government orders will not be considered “partially suspended” – even if their customer base is reduced due to stay-at-home orders. However, if a government order forces a business to reduce its operating hours or if crucial materials or supplies are cut off because of a government order, an essential business may still qualify. Businesses will need to track their categorization under these orders closely as re-opening begins. Crowell & Moring has a team tracking orders in all fifty states, as well as many local jurisdictions.

Multi-Jurisdiction Businesses Partially Suspended. The FAQs also provide guidance to businesses that are subject to different government orders in different jurisdictions. Those businesses may qualify for the credit if they adopt a national policy in compliance with Centers for Disease Control and Department of Homeland Security guidelines, even if operations are not suspended by local government order in every jurisdiction in which they operate. Controlled corporate groups that include some essential businesses, and other businesses with suspended operations, can qualify as “partially suspended” because they are treated as one employer under the statute’s aggregation rule.

Businesses Able to Continue Full Operations Via Telework. Per the FAQs, businesses that are able to fully maintain their operations with only slight changes (such as video conference rather than in-person meetings) through telework will not be considered “qualified employers.” However, the example used in the FAQs is a software developer who is able to continue all

operations remotely. There will be many businesses that are able to maintain some operations remotely, but must suspend others, and thus will still qualify for the credit.

Hours Not Worked Does Not Include Reduced Productivity. For large employers who may only claim the credit for wages paid for time not worked, the FAQs provide some guidance on what qualifies, and what substantiation is required. The FAQs focus on hours worked, and state that it is not reasonable for employers to estimate time “not providing services” by tracking the reduction in productivity of employees working regular hours. The FAQs also state that hours not worked may be tracked and claimed for both exempt and non-exempt employees. For employees without regular work hours, employers may use a reasonable method to track this time, for example the method used to calculate an employee’s entitlement to FMLA leave.

Interaction With Other Credits. Finally, the FAQs also contain details about how the credit interacts with other credits, allocation of qualified health expenses to “qualified wages,” and interaction with the Payroll Protection Program.

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Companies affected by COVID-19 should consider claiming the Employee Retention Credit, because it can mean a refundable tax credit of up to \$5,000 per employee. However, careful analysis of the “qualified employer” and “qualified wage” requirements should be done to understand the true value of the credit, especially in light of these new FAQs. Find more COVID-19 analysis on our [COVID-19 Resource Center](#).

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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