

CLIENT ALERT

New Developments for Employers and PPP Loan Borrowers

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President Biden signed the American Rescue Plan Act of 2021 (the Act) into law on March 11, 2021. The Act is the latest relief package providing aid and economic stimulus in response to the COVID-19 pandemic. Furthering Congress's objective of providing relief directly to employers, the Act extends and expands the employee retention tax credit (ERC) and the paid sick and family medical leave tax credits that were initially enacted under the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act) and the Families First Coronavirus Response Act, respectively, and subsequently amended by the Consolidated Appropriations Act, 2021 (the CAA).

Also of note, the Internal Revenue Service (IRS) released Notice 2021-20 on March 1, 2021, providing guidance to employers claiming the ERC for 2020.

As Congress responds to the hardships caused by the COVID-19 pandemic, and the Internal Revenue Service diligently works to provide timely guidance, it is important for employers to understand the relief available to them under the various relief packages that have been enacted to date.

Employee Retention Credit

The Act extends the ERC through December 31, 2021, and allows eligible employers to claim a refundable payroll tax credit equal to 70 percent qualified wages (up to \$10,000 per employee) paid to employees in a calendar quarter. The Act also provides new categories of employers that are eligible for the ERC:

- Certain small startup businesses that began operating after February 15, 2020, will be eligible for a maximum credit of \$50,000 per quarter, even if the business has not experienced an eligible decline in gross receipts or been subjected to a full or partial suspension of operations.
- "Severely financially distressed employers," which are employers who have experienced a decline in quarterly gross receipts of 90 percent or more compared to the same calendar quarter in 2019, are also eligible for the ERC and may treat all wages paid during quarters of eligibility as qualified wages up to the \$10,000 cap, regardless of how many employees they have and whether such employees provide services.

Consistent with the changes made under the CAA, employers are generally eligible to claim the employee retention credit even if they received a Paycheck Protection Program (PPP) loan, but may not do so with respect to wages taken into account in connection with an application for PPP loan forgiveness. These changes to the ERC are effective for calendar quarters beginning after June 30, 2021.

Paid Sick and Family Medical Leave Credits

The Act extends the refundable payroll tax credits to compensate employers who provide paid sick and family medical leave to employees through September 30, 2021. The Act also expands various provisions of these credits. The definition of qualifying wages is expanded to include, among other circumstances, leave to obtain immunization related to COVID-19. The timeframe for the paid sick leave credit resets beginning April 1, 2021, so that the credit will be available on qualifying wages for an additional 10 days of paid sick leave. The amount of qualified wages eligible for the credit for paid family leave is increased to \$12,000 (from \$10,000). The Act also adds a non-discrimination requirement, under which the credits will not be allowed if the employer discriminates in determining availability of the paid leave in favor of highly compensated employees, full-time employees, or employees on the basis of employment tenure. These changes apply to wages paid during the period beginning on April 1, 2021, and ending on September 30, 2021.

Recent Guidance for Employers Claiming the Employee Retention Credit

In Notice 2021-20, the IRS provides guidance for employers claiming the ERC for 2020 under the CARES Act, as amended by the CAA. This guidance clarifies and expands on the information provided on the IRS's website. For 2020, the ERC generally can be claimed by eligible employers who paid qualified wages after March 12, 2020, and before January 1, 2021, and who experienced a full or partial suspension of their operations or a significant decline in gross receipts. The amount of the credit is equal to 50 percent of the qualified wages paid, including qualified health plan expenses, for up to \$10,000 per employee in 2020. Therefore, the maximum credit available for each employee is \$5,000 in 2020. Notice 2021-20 provides further answers to questions such as: who are eligible employers; what constitutes full or partial suspension of operations; what is a significant decline in gross receipts; how much is the maximum amount of an eligible employer's ERC; what are qualified wages; how does an eligible employer claim the ERC; and how does an eligible employer substantiate its claim for the ERC.

The CAA significantly changed the ERC for 2020 by permitting eligible employers that received a PPP loan to claim the ERC, although the same wages cannot be taken into account in connection with an application for PPP loan forgiveness and for calculating the ERC. Notice 2021-20 explains when and how employers that received a PPP loan can claim the ERC for 2020.

Businesses should be aware, however, that Notice 2021-20 does not address the changes made to the ERC under the CAA and the Act for qualified wages paid after December 31, 2020.

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

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