

THOUGHT LEADERSHIP

LEGAL UPDATES

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FAQ: Employee Retention Credit for Employers under CARES Act

Eligible employers may take an immediate and refundable credit against the employer portion of their Social Security payroll tax equal to 50% of qualified wages. Below, we have summarized key CARES Act information business owners need in the form of Frequently Asked Questions (FAQ).

Q: Who is an Eligible Employer?

A. An eligible employer means any employer, including an Internal Revenue Code Section 501(c) tax exempt entity, that was carrying on a trade or business during 2020 and either:

1. the employer's operations were fully or partially suspended during a calendar quarter due to governmental orders related to COVID-19, or
2. the calendar quarter is within a period of significant decline in gross receipts (gross receipts are calculated using the gross receipts test under IRC Section 448(c)).

Q: May employers who take a Paycheck Protection Program (PPP) loan under the CARES Act receive this retention credit?

A. The statute says that employers who take a PPP loan are not eligible for the retention credit; however, it is not clear is how this exclusion would work for employers who receive this retention credit and who subsequently take a PPP loan. Further guidance on this is expected. Additionally, please consult our companion FAQ for more information about the Small Business Administration's CARES Act loan programs.

Q: How do you Determine a Significant Decline in Gross Receipts?

A. A period of significant decline in gross receipts **begins** with the first 2020 calendar quarter where gross receipts were less than 50% of gross receipts for the same quarter in the prior year. The period **ends** following the first quarter where gross receipts are greater than 80% of gross receipts for the same quarter in the prior year.

For example, the employer's gross receipts in the below table show the employer's period of significant decline in gross receipts begins January 1, 2020 (beginning of quarter 1) and ends September 30, 2020 (end of quarter 3). Although quarter 4 is below 80%, it is not below the 50% threshold to trigger a new period.

| | 2019 Gross Receipts | 2020 Gross Receipts | Comparison to Prior Yr |
|-----------|---------------------|---------------------|---|
| Quarter 1 | \$ 1,000,000 | \$ 450,000 | 45% (decline begins) |
| Quarter 2 | \$ 1,000,000 | \$ 600,000 | 60% |
| Quarter 3 | \$ 1,000,000 | \$ 850,000 | 85% |
| Quarter 4 | \$ 1,000,000 | \$ 700,000 | 70% (decline ends because prior quarter > 80%) |

Q: What Wages Constitute Qualified Wages for Purposes of the Credit?

A. The meaning of qualified wages depends upon the size of the eligible employer.

Qualified wages for an eligible employer who averages 100 full-time employees or less are any wages paid to employees during the period between March 12, 2020, and January 1, 2021. Thus, for example, wages paid to furloughed workers, as well as salaries paid to employees working from home, are qualified wages.

Qualified wages for eligible employers who average more than 100 full-time employees are wages paid to employees during the period between March 12, 2020, and January 1, 2021 who are not working. Thus, for example, salaries paid to employees who are working from home are not qualified wages.

The amount of qualified wages is limited to the first \$10,000 of compensation per employee, including health benefits.

Full-time status generally means an employee who is employed on average at least 30 hours per week.

Qualified wages may not exceed the amount an employee would have been paid for working an equivalent duration during the 30 days immediately preceding a government COVID-19 order or period of significant decline in gross receipts.

Qualified wages do not include paid sick leave or paid FMLA leave wages mandated under the Families First Coronavirus Response Act.

Additional Miscellaneous Rules

Credit is reduced by any credit received for sick pay or family leave in Families First Coronavirus Response Act. Any excess employee retention credits will be refunded to the eligible employer.

If employer receives an IRC section 51 (work opportunity tax credit) credit for an employee, the employee cannot be included in calculating the retention credit.

Wages taken into account for the retention credit cannot be used to determine the credit allowed under IRC section 45S (credit for paid family and medical leave).

CARES Act updates

Husch Blackwell's CARES Act resource team has reviewed the Act carefully and is developing content to help clients determine how best to access the available assistance. The team will add new content frequently as the Act is implemented through a number of agency rulemakings over the coming weeks.

Disclaimer: The issues discussed above are under further review, and guidance is not complete. Please continue to check back as we continue to update regularly.