

Paycheck Protection Program (PPP) & Employee Retention Credit (ERC)



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DISCLAIMER

This explanation and interpretation of the CARES Act and its updated versions are based upon a best-efforts review of the legislation by the presenter and will most likely be inaccurate with respect to one or more items.

More will be learned when the SBA issues FAQs, new rules, and other pronouncements.

PPP and ERC Update – What’s New and What’s Still to Come!

On Monday, March 1st, the IRS released 102 pages of guidance on the Employee Retention Credit (ERC) in the form of Notice 2021-20. The SBA also released updated guidance on March 3rd that changes the method that a Schedule C taxpayer calculated their loan amount, and other changes to “further promote equitable access to relief.”

30,000 ft. View of CARES Act Support Programs							
	PPP I 2020	PPP II 2021 (If 25% Reduction)	Employee Tax Retention Credit 2020	Employee Tax Retention Credit 2021 (Q1, 2, 3 & 4)	HHS Provider Relief	EIDL Grant	EIDL Loan
What this is?	A 2.5x “average monthly payroll payment”	Same formula for different months (3.5x for food and lodging businesses)	Requires 50% revenue decrease for a calendar quarter or suspension of business operations	Requires 20% revenue decrease for a calendar quarter or suspension of business operations	Based upon past Medicare revenue / past tax return revenue / targeted distributions	Up to \$1,000 per employee. \$10,000 max.	Based on need – 3.75% loan directly from SBA with 30-year amortization.
Necessity / Substantial Injury Requirements?	Must be necessary to support ongoing operations of business	25% reduction in gross receipts is deemed to be necessary	No requirement	No requirement	No requirement	Must have substantial economic injury (a very high standard)	Must have substantial economic injury (a very high standard)
Mutually Exclusive?	No	No	Not now – but cannot use same wages as PPP	Not now – but cannot use same wages as PPP	No	No	No
Coordination of PPP and Wage Credit Required to Get Both?	Yes	Yes	Yes	Yes	N/A	N/A	N/A
Is the Payment Taxable? Expenses Deductible?	Completely tax-free	Completely tax-free	Lose income tax deduction for exact amount rec’d	Lose income tax deduction for exact amount rec’d	Payment is taxed as income – taxes paid are a permitted expense	Tax-free	N/A
Must be Repaid?	Not if spent on forgivable expenses	Not if spent on forgivable expenses	No	No	Yes, if reduced receipts and increased expenses do not exceed amount rec’d	No	Yes – with interest at 3.75%
Are Receipts of Benefit counted as receipts for determining if revenue reduction or HHS revenue reduction / expense increase has occurred?	No	No	No	No	Most likely	No	No
Apply for Independent Contractors / Sole Proprietors?	Yes	Yes	No, unless have W-2 employees	No, unless have W-2 employees	Yes, if billed for professional services in 2019	Yes	Yes
Spending Allowed?	General business expenses – including “forgiveness expenses” – Not avail. In bankruptcy	General business expenses – including “forgiveness expense” – Not available in bankruptcy yet	No requirements	No requirements	Healthcare related expenses or lost revenues	Must spend on business	Must keep in business – cannot pay bonuses or dividends w/out written consent of SBA
Available in Bankruptcy	Was not available in bankruptcy	Not available in bankruptcy yet	Yes	Yes	Yes – payment rec’d is creditor proof	Yes	Yes
Deadline	Forgiveness 10-months after end of covered period. PPP I loan by March 31 st .	Apply by March 31 st	Based on filing of Amended Form 941	Based on filing form 941	Initial deadline of Feb 15 th to report use of funds has been extended		

Employee Retention Tax Credit – Update

Now available for employers with PPP Loan

- This change retro into 2020
- With a PPP loan, wages used to calculate ERTC must be different than used for PPP

2020: 50% of 10K wages up to \$5,000/employee

2021: 70% of 10K wages up to \$7,000/quarter.

- Program through 12/31: \$28,000/employee

Revenue Reduction Rule Differences Between PPP & ERC

	PPP I	PPP II	ERC 2020	ERC 2021
Reduction in Receipts Needed	No	Yes – 25% (or more)	Yes – 50% (or more)	Yes – 20% (or more)
Reference Period for Reduction	Non-Applicable	2 nd , 3 rd , or 4 th Quarter in 2020 must be 75% or less of corresponding Quarter in 2019. Alternate tests apply if not in business for entire 2019 year.	For 2 nd , 3 rd , or 4 th Quarter 2020, if receipts were less than 50% of corresponding Quarter in 2019.	Will qualify if 1 st Quarter 2021 is 80% or less of 1 st Quarter 2019, or 4 th Quarter 2020. May also use prior quarter to determine qualification. For example, for Q1 2021 business can compare Q4 of 2020 to Q4 of 2019. For 2 nd Quarter 2021 can compare Q1 2021 to Q1 2019.
Notes			It is a bit more complicated than that.	It is a bit more complicated than that.

Second Draw PPP Loan Requirements

Top Employee Retention Credit Revelations Under IRS Notice 2021-20

Top Revelations for Employee Retention Credit Under IRS Notice 2021-20 Published on March 3, 2021

Interaction between ERC Wages and PPP Forgiveness Inclusion

- A business will only be deemed to make the election out of claiming the ERC for the minimum amount of wages needed to receive full loan forgiveness, taking into account any other eligible expenses reported on the PPP Loan Forgiveness Application.

10% Threshold to be Considered Partially Suspended

- Portion of the business that is suspended must account for at least 10% of total receipts of the business in order to be considered “partially suspended” for purposes of ERC qualification.

Factors to Consider in Determining Whether a Business is Partially Suspended

- Guidance provides a list of factors to consider in determining if the business was able to continue comparable business operations even if affected by a closure order.

Large Employers Can Only Receive Assistance for Wages Paid for Times that Employees Were Not Working

- Detailed guidance on distinctions between “large employers” (more than 100 employees in 2020, 500 in 2021) and “small employers”.

How to Claim Your Credit Retroactively

- Detailed guidance on retroactively claiming the credit for 2020 by filing amended Form 941 in most situations.

Coordination of PPP and ERC

- ❖ Wages used to qualify for PPP loan forgiveness, may not be treated as Qualified Wages under the ERC, and vice-versa. Prior to this Notice, borrowers had no guidance on how these programs interacted, and what accounting was necessary to keep the two separate.
- ❖ The good news is that the Notice makes this process relatively simple. The “election” is made by not claiming the ERC on the Form 941 Federal Employment Tax Return. The Notice further states that to the extent if wages are included as a payroll cost on the PPP Loan Forgiveness Application, the business is deemed to have made the “election” out of claiming the ERC with respect to such wages.
- ❖ *GREAT NEWS:* The Notice provides that a business will only be deemed to make the election out of claiming the ERC for the minimum amount of wages that will result in loan forgiveness after taking into account any other eligible expenses reported on the PPP loan forgiveness application. This means that borrowers that reported more payroll costs than necessary to achieve full PPP loan forgiveness will not be to amend a PPP Loan Forgiveness Application to remove the excess payroll costs, since the deemed election out of ERC only applies to the minimum amount of wages needed to achieve full forgiveness.

Claiming the Credit

An employer that qualifies to claim the ERC for qualified wages must report those wages and the amount of credit to which it is entitled on the designated lines of the federal employment tax return in order to benefit.

The credit can be claimed on the Form 941 federal employment tax return and eligible employers can either:

1. Reduce their deposit of federal employment taxes up to the amount of the anticipated credit.
2. Request a refund if the credit exceeds the amount of payroll taxes required to be paid.
3. Request an advance of the amount of the anticipated credit filing Form 7200.

Employers that did not previously claim the ERC for qualified wages on the Form 941 must file an amended Form 941-X for the applicable quarter in which the wages were paid in order to retroactively claim the credit.

There is also a special 4th quarter rule that only applies if wages paid in the second or third quarter of 2020 were reported as payroll costs on a PPP Loan Forgiveness Application, and forgiveness of the loan is subsequently denied. In this case, the employer may include the wages paid in the second or third quarter on the 4th quarter Form 941 in order to retroactively claim the credit. This special rule is optional, and the employer may instead follow the normal procedure for filing the Form 941-X to amend the second or third quarter return to claim the ERC on the qualified wages.

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