CARES ACT AND CONSOLIDATED APPROPRIATIONS ACT 2021 AID EMPLOYERS WHO CONTINUE TO PAY EMPLOYEES

The Coronavirus Aid, Relief, and Economic Security (CARES) Act provide two distinct and substantial employment tax benefits for certain employers under Sections 2301 and 2302 of the Act. Section 2301 which has been expanded by the recent Consolidated Appropriations Act (CAA) provides a refundable payroll tax credit for certain wages paid to employees from March 13 to March 31, 2021.

Section 2302 of the CARES Act allows employers to defer the deposit of certain employment taxes for as much as two years. Taken together, these provisions provide significant relief for employers and are designed to encourage employers to continue paying wages to employees during these unprecedented times.

Employee Retention Credit (CARES Act Section 2301 and CAA Section 206)

FOR THE PERIOD MARCH 13, 2020 THROUGH DECEMBER 31, 2020 (SEE BELOW FOR 2021):

This credit is not limited to small employers and is now available even if an employer received a Small Business Administration Loan under the Paycheck Protection Program of the CARES Act.

The Acts provide a payroll tax credit of up to $5,000 per employee for eligible employers. The credit is equal to 50% of "qualified wages" paid to employees during a quarter, capped at $10,000 of "qualified wages" for 2020. The credit is available for wages paid from March 13 to December 31, 2020.

Eligible Employers
To be eligible, employers must meet the following criteria:

1. They must be carrying on a trade or business during 2020, and
2. During the calendar quarter, either:
    a. Their operations were fully or partially suspended as a result of orders from a governmental authority limiting commerce, travel, or group meetings due to COVID-19, or
    b. Their gross receipts for the quarter were less than 50% of the gross receipts for the same calendar quarter in the prior year. The employer will remain eligible for the credit until the first calendar quarter after the quarter for which gross receipts are greater than 80% of the gross receipts for the same calendar quarter in 2019.

Qualifying Wages
The wages that can be used to calculate the tax credit differ based on whether the employer has over or under 100 employees. For employers with 100 or more full-time employees on average during 2019 (as determined by IRC Section 4980H as enacted by the Affordable Care Act), only wages paid to employees who are not providing services qualify for the credit. There are also additional limits for employers with 100 or more employees. But for employers with less than 100 full-time employees, all wages paid to employees, regardless of whether the employees are providing services, qualify for the credit. For purposes of the employee count, organizations that are under common control (using IRC Section 52(a) and (b)) or that are a member of an affiliated service group (using IRC Section 414(m) and (o)) will be treated as a single employer.

Qualified wages are based on the definition of wages used for FICA taxes, plus the amount paid by the employer for health plan expenses for March 12, 2020 through December 31, 2020.

Any federally mandated sick or child care leave paid under the Families First Coronavirus Response Act (FFCRA) is specifically excluded from "qualified wages" for the employee retention tax credit, since employers receive a dollar-for-dollar tax credit for such paid leave wages.

Also, wages paid by an employer to employees who are related individuals are not "qualified wages". Question 59 on the IRS FAQ's provides more details.

Insight:
The employee retention tax credit cannot be taken on the same wages as other tax credits, such as Work Opportunity Tax Credit under IRC Section 51 or Employer Credit for Paid Family and Medical Leave under IRC Section 45S.

How to claim the credit

The employee retention credit can be claimed on the employer's federal employment tax returns, usually Form 941. Under the CAA passed at the end of December 2020, employers who were not previously eligible for the ERC or who did not claim the credit during 2020 but could have, can report the credit on the 4th quarter 941 for all quarters in 2020 as if they paid the wages in the 4th quarter.

KEY CHANGES TO ERC FOR THE PERIOD JANUARY 1, 2021 THROUGH JUNE 30, 2021:

This credit is not limited to small employers and is now available even if an employer received a Small Business Administration Loan under the Paycheck Protection Program of the CARES Act.

The Acts provide a payroll tax credit of up to $7,000 per employee per quarter for eligible employers. The credit is equal to 70% of "qualified wages" paid to employees during a quarter, capped at $10,000 of "qualified wages" per quarter. The credit is available for wages paid from January 1, 2021 through June 30, 2021. Therefore, the maximum credit per employee increased from $5,000 in 2020 to $14,000 in 2021.

Eligible Employers

To be eligible, employers must meet the following criteria:

1. They must be carrying on a trade or business during 2020, and
2. During the calendar quarter, either:
    a. Their operations were fully or partially suspended as a result of orders from a governmental authority limiting commerce, travel, or group meetings due to COVID-19, or
    b. Their gross receipts for the quarter were less than 80% of the gross receipts for the same calendar quarter in the prior year.

<u>**Qualifying Wages (100 employee threshold increased to 500)**</u>
The wages that can be used to calculate the tax credit differ based on whether the employer has over or under 500 employees. For employers with 500 or more full-time employees, only wages paid to employees who are <u>not providing services</u> qualify for the credit. There are also additional limits for employers with 500 or more employees. But for employers with less than 500 full-time employees, <u>all wages paid to employees,</u> regardless of whether the employees are providing services, qualify for the credit. For purposes of the employee count, organizations that are under common control (using IRC Section 52(a) and (b)) or that are a member of an affiliated service group (using IRC Section 414(m) and (o)) will be treated as a single employer.

<u>Section 2302 Employer Payroll Tax Deferral</u>

Insight:
This payroll tax deferral is available to all employers with no size restriction. However, any employer whose Paycheck Protection Program (PPP) SBA loan is forgiven under Section 1106 of the CARES Act is ineligible for this payroll tax delay.

Section 2302 of the CARES Act permits employers to forgo timely payment of the employer portions of Social Security and RRTA taxes that would otherwise be due from March 27 through December 31, 2020, without penalty or interest charges (as confirmed by IRS Notice 2020-22, dated March 31, 2020). Employers must pay 50% of the deferred amount by December 31, 2021, and the remainder by December 31, 2022.

Insight:
If the employer utilizes this benefit and later is approved for PPP SBA loan forgiveness, it is not clear if the payment date on accumulated deferrals is accelerated to the forgiveness date or if deferrals cease on a prospective basis.

Self-employed individuals can take an equivalent tax deferral on 50% of the OASDI tax imposed on self-employment income under IRC Section 1401 and will not be penalized for failing to make estimated tax deposits on that amount during the deferral period.

To protect third parties, such as payroll service providers and certified professional employer organizations, the CARES Act requires that the customer or client bear the ultimately responsibility for the payment of any deferred taxes if they instruct the third party to defer payment.

Insight:
It is not yet clear how these two provisions would work in tandem. At the moment, it appears that an employer could defer its deposit of payroll taxes that are otherwise due from March 13 to December 31, 2020 (using the payroll tax holiday under Section 2302 of the CARES Act) and offset against those un-remitted payroll taxes the employee retention credit (under Section 2301 of the CARES Act), and/or the tax credits for paying federally mandated FFCRA sick and child care leave, which would reduce the amount that the employer would eventually need to remit (i.e., 50% of the net amount would be owed on December 31, 2021, and the remainder would be owed on December 31, 2022).