

## ***MEMORANDUM***

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**DATE:** February 25, 2021  
**TO:** File  
**FROM:** Wendy J. Manson, CPA and William J. Palazzolo, Esq  
**RE:** Employee Retention Tax Credit Expanded for 2021

On December 27, 2020, President Trump signed the Consolidated Appropriations Act into law, which includes various forms of COVID-19 relief (the “New Stimulus Act”). Specifically, the New Stimulus Act includes the Taxpayer Certainty and Disaster Tax Relief Act of 2020, effective January 1, 2021, which expands the employee retention tax credit (“ERC”) and allows for advance payments of the ERC. The important points of the ERC as expanded by the New Stimulus Act are as follows:

### **ERC Amount Increased**

Under the CARES Act, enacted back on March 27, 2020, eligible employers were entitled to an ERC (i.e., a refundable payroll tax credit) equal to 50% of the first \$10,000 in wages and certain health plan expenses paid per employee (or \$5,000). Under the New Stimulus Act, eligible employers are entitled to an ERC equal to 70% of the first \$10,000 in wages and certain health care plan expenses paid per employee for each of the first two quarters of 2021 (or \$14,000). It is of critical importance to note that this combined maximum \$14,000 ERC for the first two quarters of 2021 is available even if the employer obtained the \$5,000 maximum credit for wages paid to such employee in 2020.

### **ERC Eligibility Expanded**

For employers to be eligible for the initial ERC under the CARES Act, the employer must have either: (a) had operations suspended due to orders from an appropriate governmental authority limiting commerce, travel, or group meetings due to COVID-19; or (b) experienced a reduction in gross receipts of at least 50% when comparing corresponding calendar quarters of 2020 and 2019. Eligibility for the ERC under the New Stimulus Act has been expanded to include employers that experienced a reduction in gross receipts of at least 20% when comparing corresponding calendar quarters of 2021 and 2019. Therefore, this lower threshold of gross receipt reductions should expand the pool of eligible employers. Additionally, while governmental entities were not eligible for an ERC under the CARES Act, the New Stimulus Act makes the ERC available to state or local run colleges, universities, organizations providing medical or hospital care, and certain organizations chartered by Congress.

## **ERC Wage Period Extended**

The initial ERC under the CARES Act applied to qualified wages paid after March 12, 2020, and before January 1, 2021. The ERC under the New Stimulus Act applies to qualified wages paid after March 12, 2020, and before July 1, 2021. In other words, the New Stimulus Act extends the period in which the ERC is available through the first two quarters of 2021.

## **PPP Disqualification Eliminated**

If a business received a Paycheck Protection Program (PPP) loan, it was previously not eligible for an ERC under the CARES Act. The New Stimulus Act makes it so that a PPP loan no longer disqualifies employers from receiving an ERC. However, the credit may not be claimed for wages paid with the proceeds of a PPP loan that have been - or will be - forgiven (i.e., no “double-dipping”). This change is retroactive to the effective date under the CARES Act. In other words, a PPP recipient that paid more in qualified wages than the amount of the forgiven PPP loan in 2020 could claim the ERC retroactively and apply it to the excess payroll paid over the amount of payroll claimed to qualify for the PPP forgiveness. Additional guidance on how to retroactively claim the ERC is expected from the IRS.

## **Whether Employees Are Working is Now Less Relevant to ERC Eligibility**

Under the CARES Act, companies with 100 employees or fewer were eligible for the ERC for the wages paid to their employees, regardless of whether their employees were working. Conversely, companies with more than 100 employees were rendered ineligible for the ERC for wages paid to an employee that performed services, whether those services were provided remotely or at the workplace, even if hours were reduced due to reduction in business. Under the New Stimulus Act, however, the threshold will be raised to 500 employees. Put differently, for the first two quarters of 2021, a company with 500 or fewer employees will be eligible for the ERC for wages paid to their employees, regardless of whether their employees are working. Note, that in calculating this 500-employee threshold, the employees of all affiliated companies sharing more the 50% common ownership are aggregated.

## **Advance Payments on the ERC Now Available**

Under the CARES Act, businesses were unable to monetize the ERC before qualified wages were paid. However, under the New Stimulus Act, companies with 500 or fewer employees will be allowed to receive advance payments on the ERC, based on 70% of average quarterly payroll for the same quarter in 2019. If the amount of the actual credit determined at the end of the quarter is less than the amount of the advance payment, the company will need to repay the excess. The IRS is expected to issue additional guidance on this process.