

32nd Annual
Tax Symposium

**HOT TOPICS IN ERCS:
IRS GUIDANCE AND MORATORIA**

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I. BACKGROUND

What is an ERC?

Employee Retention Credit programs are not new. Congress frequently enacts ERCs as part of disaster responses:

- Wildfires
- Droughts
- Hurricanes
- Other natural disasters

The difference is that all previous ERC programs were localized
COVID is a national (and global) disaster

I. COVID ERC BASICS

The Employee Retention Credit, referred to as the ERTC or the ERC, was included as part of the CARES Act relief package.

The ERC is still available retroactively for both 2020 and 2021.

- Qualifying businesses can get up to \$26,000 per W-2 employee.
- Employer can get paid in excess of what its paid in taxes (even though it is called a “tax credit”).
- Businesses that received PPP loans are eligible.
- Businesses have until April 2024 to amend their 2020 tax filing and until April 2025 to amend their 2021 filing to apply for the ERC.

LEGISLATIVE TIMELINE

CARES Act – 2020

The Employee Retention Credit was first introduced as part of the Coronavirus, Aid, Relief, and Economic Security Act (CARES Act) in 2020. The act permitted qualifying businesses to claim 50% of qualifying wages up to \$10,000 per employee paid from March 13 through Dec. 31.

Consolidated Appropriations Act – 2021

The Employee Retention Credit was updated in 2021 to allow qualifying employers to claim 70% of qualifying wages up to \$10,000 per quarter in 2021. Also, permitted PPP loan recipients to receive an ERC payments (although PPP does impact ERC receipts).

LEGISLATIVE TIMELINE

American Rescue Plan Act – 2021

This act added “**Recovery Startup Businesses**” who started their business on or after Feb. 15, 2020, as eligible businesses if their annual gross receipts didn’t exceed \$1 million in 2020 or 2021 and they had more than one or more W-2 employees excluding family members.

Infrastructure Investment And Jobs Act – 2021

This act terminated the ERC credit for the 4th quarter of 2021 except for recovery startup businesses.

ELIGIBILITY MATRIX

<https://www.irs.gov/pub/newsroom/erc-eligibility-if-then-chart.pdf>

Step 1: Did the Company have employees and pay wages to them between March 13, 2020, and December 31, 2021?

- Note: self-employed individuals and household employers do not count.

ELIGIBILITY MATRIX

Step 2: Did the Company's trade or business experience a significant decline in gross receipts during the eligibility periods during 2020 or the first three calendar quarters (Jan. through Sept.) of 2021??

Yes: it may be eligible

No: proceed to Step 3

ELIGIBILITY MATRIX

Step 3: Is the company a Recovery Start Up Business?

Yes: it may be eligible

No: proceed to Step 4

RECOVERY START UP BUSINESS

- Business started on or after February 15, 2020.
- Annual gross receipts don't exceed \$1 million for the individual 2020 and 2021 tax years.
- One or more W2 employees, not including owner-operators or family members.

Example

A food delivery business started on April 1, 2020 with three employees and earned \$500,000 for the 2020 and 2021 tax years

ELIGIBILITY MATRIX

Step 4: Was the operation of the business or organization fully or partially suspended by a government order due to the COVID-19 pandemic during 2020 or the first three calendar quarters (Jan. through Sept.) of 2021?

Note: It must have been a government order, not guidance, a recommendation or a statement.

ELIGIBILITY MATRIX

Step 4: (continued)

- If the loss is a result of supply chain disruptions, this may or may not qualify as a “loss” for the ERC.
 - A supply chain issue by itself does not qualify you for the ERC.
 - The IRS provided a narrow, limited exception if an employer was not fully or partially suspended but their supplier was. However, it applied only when the employer **absolutely could not operate without the supplier's product and the supplier was fully or partially suspended themselves.**
- In addition to having the supplier's governmental order, you will need to show that:
 - The government order caused the supplier to suspend operations,
 - The supplier's goods or materials were unavailable elsewhere (**regardless of cost**), and
 - It caused a full or partial suspension of business operations.

WORKING WITH ERC VENDORS

THE ERC VENDOR PITCH:

1. We don't get paid until you receive your refund.
2. We work with national law firms ("DLA Piper") to make sure the ERC is received.
3. We will provide support if you get audited.
4. Filing an application is "Risk Free"
5. Everyone is getting paid but you (FOMO).

WORKING WITH ERC VENDORS

ISSUES:

The IRS seems primarily concerned with ERC Vendors with regard to:

1. Unsupportable supply chain applications,
2. Use of OSHA/CDC guidance (but not orders) as “governmental orders,”
3. Ignorance of PPP loans in ERC calculations,
4. Bona-fide ERC fraud.

WORKING WITH ERC VENDORS

Red Flags:

- Unsolicited calls or advertisements mentioning an "easy application process."
- Statements that the promoter or company can determine ERC eligibility within minutes, or that the company *is* eligible without any review.
- Large upfront fees.
- Preparers refusing to sign the ERC return.

WORKING WITH ERC VENDORS

Best Practices:

1. Due diligence:
2. Engagement Letter Review– DON'T BE A HERO, CALL COUNSEL!
 - Contingency fee provisions
 - Opinion of Counsel Letter
 - Audit support is included in fees
 - “we are not providing accountant services” or “We only prepare, you file”
3. Don't count your chickens before they hatch. Assume an audit will happen eventually. Be careful about spending the refund.

THE IRS'S MORATORIUM ON ERC

- The IRS has ordered a moratorium to run through at least December 31, 2023, on processing new Employee Retention Credit claims citing an increase in suspect claim submissions.
- The IRS is working to add new protections and safeguards to prevent bad claims from being filed.
- Due to stricter compliance reviews during the moratorium, existing ERC claims may take 180 days or longer to process.

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THANK YOU



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