



Infrastructure law sunsets Employee Retention Credit early

The Employee Retention Credit (ERC) was a valuable tax credit that helped employers survive the COVID-19 pandemic. A new law has retroactively terminated it before it was scheduled to end. It now only applies through September 30, 2021 (rather than through December 31, 2021) — unless the employer is a “recovery startup business.”

The Infrastructure Investment and Jobs Act, which was signed by President Biden on November 15, doesn’t have many tax provisions but this one is important for some businesses.

If you anticipated receiving the ERC based on payroll taxes after September 30 and retained payroll taxes, consult with us to determine how and when to repay those taxes and address any other compliance issues.

The American Institute of Certified Public Accountants (AICPA) is asking Congress to direct the IRS to waive payroll tax penalties imposed as a result of the ERC sunset. Some employers may face penalties because they retained payroll taxes believing they would receive the credit. Affected businesses will need to pay back the payroll taxes they retained for wages paid after September 30, the AICPA explained. Those employers may also be subject to a 10% penalty for failure to deposit payroll taxes withheld from employees unless the IRS waives the penalties.

The IRS is expected to issue guidance to assist employers in handling any compliance issues.

Credit basics

The ERC was originally enacted in March of 2020 as part of the CARES Act. The goal was to encourage employers to retain employees during the pandemic. Later, Congress passed other laws to extend and modify the credit and make it apply to wages paid before January 1, 2022.

An eligible employer could claim the refundable credit against its share of Medicare taxes (1.45% rate) equal to 70% of the qualified wages paid to each employee (up to a limit of \$10,000 of qualified wages per employee per calendar quarter) in the third and fourth calendar quarters of 2021.

For the third and fourth quarters of 2021, a recovery startup business is an employer eligible to claim the ERC. Under previous law, a recovery startup business was defined as a business that:

- Began operating after February 15, 2020,
- Had average annual gross receipts of less than \$1 million, and
- Didn't meet the eligibility requirement, applicable to other employers, of having experienced a significant decline in gross receipts or having been subject to a full or partial suspension under a government order.

However, recovery startup businesses are subject to a maximum total credit of \$50,000 per quarter for a maximum credit of \$100,000 for 2021.

Retroactive termination

The ERC was retroactively terminated by the new law to apply only to wages paid before October 1, 2021, unless the employer is a recovery startup business. Therefore, for wages paid in the fourth quarter of 2021, other employers can't claim the credit.

In terms of the availability of the ERC for recovery startup businesses in the fourth quarter, the new law also modifies the recovery startup business definition. Now, a recovery startup business is one that began operating after February 15, 2020, and has average annual gross receipts of less than \$1 million. Other changes to recovery startup businesses may also apply.