



# TaxNewsFlash

United States



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## IRS updates FAQs on employee retention credit, interaction with PPP relief (COVID-19)

The IRS today updated a set of “frequently asked questions” (FAQs) about the employee retention credit (ERC) as provided by the “Coronavirus Aid, Relief, and Economic Security Act” (CARES Act) (Pub. L. No. 116-136).

The ERC is a refundable payroll tax credit of 50% of qualified wages paid by an eligible employer whose business has been affected by COVID-19. Qualified wages are limited to \$10,000 of compensation, including health benefits, paid to each employee. Thus, the maximum credit is \$5,000 (50% x \$10,000) per employee.

The [updated FAQs](#) (dated November 16, 2020) address the interaction of the ERC with other credit and relief provisions, in particular with regard to the paycheck protection program (PPP). The PPP is one of two programs intended to provide nearly \$900 billion to support lending to both small and large businesses under measures enacted by the CARES Act.

Text of the updated or new FAQs is provided below:

***18. Are Federal, State, or local government entities eligible to receive the Employee Retention Credit? (updated November 16, 2020)***

*No. The Federal government, the governments of any State or political subdivision thereof, and any agency or instrumentality of those governments are not Eligible Employers and are not entitled to receive the Employee Retention Credit. However, tribal governments and tribal entities may be Eligible Employers. See [Are tribal governments and tribal entities eligible for the Employee Retention Credit?](#)*

\* \* \*

***21. Are tribal governments and tribal entities eligible for the Employee Retention Credit? (updated November 16, 2020)***

Yes. Any tribal government or tribal entity that carries on a trade or business may be an Eligible Employer for purposes of the Employee Retention Credit, if it otherwise meets the requirements for the credit.

As a general rule, whether activities constitute a trade or business for purposes of the Employee Retention Credit is determined under section 162 of the Code. However, because tribal governments are not subject to income tax under the Code and, therefore, are generally not otherwise required to determine whether a tribal activity is a trade or business under section 162 of the Code, the Treasury Department and the IRS have concluded that the section 162 standards are not the appropriate bases for determining whether a tribal government is carrying on a trade or business for purposes of the Employee Retention Credit. Instead, solely for purposes of the Employee Retention Credit, a tribal government is treated as carrying on trade or business activities, and all activities conducted by the tribal government will be considered part of those trade or business activities. In addition, solely for purposes of the Employee Retention Credit, any entity that a tribal government reasonably believes shares the same tax status as the tribal government (tribal entity employer) is treated as carrying on trade or business activities, and all activities conducted by the tribal entity employer will be considered part of those trade or business activities. Any entity other than a tribal government or a tribal entity employer must determine whether its activities constitute carrying on a trade or business under section 162 for purpose of determining eligibility for the Employee Retention Credit.

**21a. How do the aggregation rules apply to tribal governments and tribal entities? (added November 16, 2020)**

For purposes of determining eligibility for the Employee Retention Credit, all employers, including tribal governments and tribal entities, must apply the aggregation rules under sections 52(a) and (b) of the Code and sections 414(m) and (o) of the Code. Tribal governments and tribal entity employers should use a reasonable, good faith interpretation in determining how the aggregation rules apply.

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**81a. How is eligibility for the Employee Retention Credit affected if an employer acquires the stock or other equity interests of a target employer that had received a Paycheck Protection Program (PPP) loan and, under the aggregation rules, the employers are treated as a single employer as a result of the transaction? (added November 16, 2020)**

The following rules apply for purposes of determining whether an employer (Acquiring Employer) that acquires the stock or other equity interests of an entity (Target Employer) in a transaction that results in the Target Employer becoming a member of an aggregated group with the Acquiring Employer that is treated as a single employer under the aggregation rules (the Aggregated Employer Group) is eligible for the Employee Retention Credit on and after the transaction closing date.

**PPP loan is fully satisfied or escrow established pre-transaction**

If the Target Employer had received a PPP loan, but prior to the transaction closing date, the Target Employer fully satisfied the PPP loan in accordance with paragraph 1 of the Small Business Administration Notice effective October 2, 2020 (the SBA October 2 Notice), or submitted a forgiveness application to the PPP lender and established an interest-bearing escrow account in accordance with paragraph 2.a of the SBA October 2 Notice, then, after the closing date, the Aggregated Employer Group will not be treated as having received a PPP loan, provided that the Acquiring Employer (including any member of the Acquiring Employer's pre-transaction Aggregated Employer Group) had not received a PPP loan before the closing date and no member of the

*Aggregated Employer Group receives a PPP loan on or after the closing date. In this case, any employer that is a member of the Aggregated Employer Group, including the Target Employer, may claim the Employee Retention Credit for qualified wages paid on and after the closing date, provided that the Aggregated Employer Group otherwise meets the requirements to claim the Employee Retention Credit. In addition, any Employee Retention Credit claimed by the Acquiring Employer's pre-transaction Aggregated Employer Group for qualified wages paid before the closing date will not be subject to recapture under section 2301(l)(3) of the CARES Act.*

**PPP loan is not fully satisfied and no escrow established pre-transaction**

*If the Target Employer had received a PPP loan, but prior to the transaction closing date, the PPP Loan is not fully satisfied and no escrow account was established in accordance with paragraphs 1 or 2.a of the SBA October 2 Notice, then, after the closing date, the Aggregated Employer Group (other than the Target Employer) will not be treated as having received a PPP loan, provided that the Acquiring Employer (including any member of the Acquiring Employer's pre-transaction Aggregated Employer Group) had not received a PPP loan before the closing date and no member of the Aggregated Employer Group receives a PPP loan on or after the closing date. Any employer (other than the Target Employer) that is a member of the Aggregated Employer Group may claim the Employee Retention Credit for qualified wages paid on and after the closing date, provided that the Aggregated Employer Group otherwise meets the requirements to claim the Employee Retention Credit. In addition, any Employee Retention Credit claimed by the Acquiring Employer's pre-transaction Aggregated Employer Group for qualified wages paid before the closing date will not be subject to recapture under section 2301(l)(3) of the CARES Act. However, the Target Employer that received the PPP loan prior to the transaction closing date and that continues to be obligated on the PPP loan after the closing date is ineligible for the Employee Retention Credit for any wages paid to any employee of the Target Employer before or after the closing date.*

**81b. How is eligibility for the Employee Retention Credit affected if an employer acquires the assets of an employer that received a Paycheck Protection Program (PPP) loan? (added November 16, 2020)**

*The following rules apply for purposes of determining whether an employer (Acquiring Employer) that acquires the assets and liabilities of an entity (Target Employer) is eligible for the Employee Retention Credit.*

**No assumption of PPP loan obligations**

*An Acquiring Employer that acquires the assets of a Target Employer that had received a PPP loan will not be treated as having received a PPP loan by virtue of the asset acquisition, provided that the Acquiring Employer does not assume the Target Employer's obligations under the PPP loan. In this case, the Acquiring Employer will be eligible for the Employee Retention Credit after the transaction closing date if the employer otherwise meets the requirements to claim the credit. In addition, any Employee Retention Credit claimed by the Acquiring Employer for qualified wages paid before the closing date will not be subject to recapture under section 2301(l)(3) of the CARES Act.*

**Assumption of PPP loan obligations**

*If, as part of the acquisition of the Target Employer's assets and liabilities, the Acquiring Employer assumes the Target Employer's obligations under the PPP loan, then after the transaction closing date, the Acquiring Employer generally will not be treated as having received a PPP loan, provided that the Acquiring Employer had not received a PPP loan before or on or after the closing date; however, the wages that may be treated as qualified wages after the closing date will be limited. Specifically, the wages paid by the Acquiring Employer after the closing date to any individual who*

*was employed by the Target Employer on the closing date shall not be treated as qualified wages. Subject to this limitation, the Acquiring Employer may claim the Employee Retention Credit for qualified wages paid on and after the closing date, provided that the employer otherwise meets the requirements to claim the Employee Retention Credit. In addition, any Employee Retention Credit claimed by the Acquiring Employer for qualified wages paid before the closing date will not be subject to recapture under section 2301(l)(3) of the CARES Act.*

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