Exploring and Claiming the Employee Retention Tax Credit (ERTC) for Your Arts Organization

Supported by the NYSCA NYCON Partnership

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Employee Retention Tax Credit (ERTC)

is a refundable payroll tax credit taken against employment taxes that encourages businesses impacted by the pandemic to keep employees on payroll.

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Employee Retention Tax Credit (ERTC) Evolution

CARES ACT (3/27/20)

- Available until 12/31/20
- Below 50% decline in gross receipts to qualify
- Credit max is $5,000 per employee annually
- Small employer maximum is 100 employees
- Employers who received a PPP loan cannot claim the ERTC

Taxpayer Certainty & Disaster Relief Act (12/27/20)

- Extended to 6/30/21
- Only 20% decline in gross receipts to qualify
- Credit increased to $7,000 per employee per quarter
- Small employer maximum increased to 500 employees
- Employers who received the PPP can now claim the ERTC, but cannot use the same payroll/wages for both PPP and ERTC

American Rescue Plan Act of 2021 (3/11/21)

- Extended to 12/31/21
- All 4 quarters of 2021 apply

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ERTC 2020 vs 2021

2020

- Credit period is wages paid after 3/12/20 and before 1/1/21
- Eligibility: Fully or partially suspended by a COVID-19 governmental order or; gross receipts declined by 50% compared to gross receipts in the same quarter in 2019

2021

- Credit period is wages paid after 12/31/20 and before 1/1/22
- Eligibility: Fully or partially suspended by a COVID-19 governmental order or; gross receipts declined by 20% compared to gross receipts in the same quarter in 2019 (employer can use prior-quarter gross receipts to qualify for the credit)

Governmental Orders: Orders, proclamation or decrees from the Federal government, or any State or local government are considered orders from an appropriate governmental authority if they limit commerce, travel or group meetings due to COVID-19 in a way that impacts an employer's operation of its business.

ERTC: Business Operations Suspension

- An employer that operates an essential business could be considered to have a partial suspension of operations if more than a nominal portion of its business operations are suspended by government order.
- Defining "more than nominal portion" of business operations
  - Gross receipts from that portion of the business is not less than 10% of total gross receipts
  - Hours of service performed by employees in that portion of the business is not less than 10% of total number of hours of service performed by all employees.
- An employer modifying its business operations due to a governmental order does not result in a partial suspension unless the modification has more than a nominal effect on employer's business operations
- Depends on facts and circumstances of modification
- Governmental order must have resulted in minimum of 10% reduction in employer's ability to provide services in normal operations to have "more than a nominal effect"
- Probably second option to qualify (gross receipts decline being the priority)

ERTC: Gross Receipts Decline 2020

- An employer is considered to have a significant decline in gross receipts for the period:
  - Beginning with the first calendar quarter in 2020 for which its gross receipts are less than 50% of gross receipts compared to the same calendar quarter in 2019 and
  - Ending with the earlier of January 1, 2021 or the first calendar quarter after the quarter for which gross receipts are greater than 80% of gross receipts for the same calendar quarter in 2019.

	Jan-March	April-June	July-Sept	Oct-Dec
2019	200,000	250,000	290,000	210,000
2020	180,000	100,000	250,000	150,000
	90%	40%	86%	71%

- Decline in gross receipts begins April 1, 2020 and ends October 1, 2020.

ERTC: Gross Receipts Decline 2021

- Beginning with the first calendar quarter in 2021 for which its gross receipts are less than 80% of gross receipts compared to the same calendar quarter in 2019 or the prior quarter's gross receipts are less than 80% of gross receipts compared to the same quarter in 2019 and
- Ending with the earlier of January 1, 2022 or the first calendar quarter after the quarter for which gross receipts are greater than 80% of gross receipts for the same calendar quarter in 2019.

	Jan-March	April-June	July-Sept	Oct-Dec
2019	200,000	250,000	290,000	210,000
2020	180,000	100,000	250,000	150,000
2021	150,000	190,000	245,000	
	75%	76%	84%	?

- Decline in gross receipts continues January 1, 2021 and ends October 1, 2021.

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Gross Receipts and PPP

- Qualifying for the ERTC depends on gross receipts comparison and qualifying loss (criteria differs by year).

Point of Confusion has been:

  - Once an organization has secured their PPP loan forgiveness, is the PPP funding (which is no longer a loan) counted as gross receipts?

Answer:

- No, ERTC FAQs define gross receipts, and for a nonprofit, that is the Treasury 6033 regulations.
- The interpretation of the 6033 regulations exclude any PPP forgiveness revenue and EIDL advances, as they don't fit into the 5 buckets of NFP gross receipts.
- IRS guidance also relates that PPP is not counted as income, and thus is not taxable.

Eligibility: Full-Time vs Part-Time?

Point of Confusion:

- Do only full-time employees qualify for the ERTC?

Answer:

- A factor in qualifying for the ERTC is the number of full-time employees (not FTE, but average of 30 hours per week or 130 hours per month), which is 100 for 2020 and 500 for 2021.
- Once your organization qualifies, wages (and in 2021, health care costs) paid to all employees, including part-time employees are potentially eligible for the credit (depending of course on the use of PPP funds).

ERTC: 2020 vs 2021

	2020	2021
Amount of Credit	50% of qualified wages paid to employee including certain health plan expenses	Effective January 1, 2021, 70% of qualified wages paid to employee including certain health plan expenses
Maximum Credit Amount	Capped at $5,000 per employee ($10,000 x 50%) annually	Effective January 1, 2021, capped at $7,000 per employee ($10,000 x 70%) per quarter, for each quarter of 2021 ($28,000 maximum credit per employee)
Credit Eligibility- Employer Size/ Whether an Employee is Working or Not	Employers with more than 100 employees can only take the credit for wages paid to employees who are not performing services Employers with less than 100 employees can take the credit for wages paid to employees performing services or employees who are not performing services (not working)	Effective January 1, 2021, the threshold increases to 500 employees. Employers with less than 500 employees will now be eligible to claim the credit, even for employees who are performing services

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ERTC: 2020 vs 2021

	2020	2021
Advance Payments	IRS permitted employers to reduce tax deposits in anticipation of claiming credits, then request an advance payment of the credit using Form 7200 after reducing deposits	IRS is only allowing Employers with less than 500 employees to request an advance payment of the credit (up to 70% of the average quarterly wages paid by the employer for the same qtr. in 2019)
Limitation on Increase in Pay Rate	Required 30-day lookback period for determining wages that counted towards the credit	30-day lookback period is repealed, allowing raises and bonuses to be counted towards the credit
PPP Loan Eligibility	Could not claim the credit if employer received a PPP loan in 2020	New legislation retroactively allows employers who received a PPP loan, to claim the credit in 2020 as well as 2021, just not for the same wages

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Claiming the ERTC (2020)

- An eligible employer may file a claim for refund or make an adjustment by filing Form 941-X, Adjusted Employer's Quarterly Federal Tax Return or Claim for Refund, for a past calendar quarter to claim the ERTC.
- An eligible employer that received a PPP loan and did not claim the ERTC may also file Form 941-X for the relevant calendar quarters in which the employer paid qualified wages (as long as wages were not reported as payroll costs for PPP loan forgiveness).

Claiming the ERTC (2021)

More common approach

- Eligible employers report their total qualified wages for purposes of the ERTC and claim the credit on their federal employment tax returns; for most employers, this is the quarterly Form 941, Employer's Quarterly Federal Tax Return.
  - Up until June 30, 2021, the ERTC is claimed against the employer's share of the Social Security tax (6.2%), after the tax is reduced by any credits for FFCRA paid sick and family leave wages for which they are entitled to claim on Form 941 as well.
  - Starting July 1, 2021, the ERTC is claimed against the employer's share of Medicare tax (1.45%).

At this point, less likely for organizations:

- Employers can access the ERTC prior to filing their quarterly 941s by reducing their employment tax deposits (filing Form 7200, Advance of Employer Credits Due to Covid-19)

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ERTC and PPP

- Eligible employers who received PPP loans can now claim the ERTC on any qualified wages that are not included as payroll costs on PPP loan forgiveness applications.
- Many Employers that received a PPP loan in 2020:
  - Would not have evaluated whether they were eligible for the ERTC and would want to do so now.
  - Will likely have wages in excess of their PPP loan and will have qualified wages for the ERTC.
  - Reported only payroll costs on PPP loan forgiveness applications even if they had qualifying nonpayroll costs.

ERTC and PPP

- "Excess" wages during the PPP covered period may be considered qualified wages for the ERTC.
- If the Employer has not applied for loan forgiveness, there is still an opportunity to include more eligible non-payroll costs (up to 40%) on their loan forgiveness application to free up more wages for the ERTC.
- There is an opportunity to strategically assign wages to ERTC or PPP during the covered period.
- There is no carryforward for unused compensation, nor "make up" provisions. Once an organization files its PPP loan forgiveness, assigned payroll cannot be revised or reallocated by using eligible non-payroll costs for ERTC.
- No double dipping. If an organization uses the quarterly compensation for PPP, only the unused amount of compensation in that quarter can be applied to ERTC. The same is true in reverse, if an organization uses ERTC first, then PPP funds can only be applied to the unused compensation.
- Example: PPP 2nd draw covered period starts May 1st and ends July 31st and applied to all payroll. If qualified (gross revenue loss), the Q1, part of Q2 (April), part of Q3 (August and September), or Q4 could apply.

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Financial Statement Reporting of the ERTC

- Limited guidance exists from the FASB and the AICPA
- Accrue revenue and receivable into the financial statements as you calculate the tax credit each quarter
- Categorize revenue as a government grant or a contribution – without donor restrictions
  - This would be considered a non-reciprocal payment from the government (i.e. Contribution)
  - There is no restriction as to purpose or to use
- One question is whether you should reduce the FICA tax expense for the quarter first before recording the revenue?

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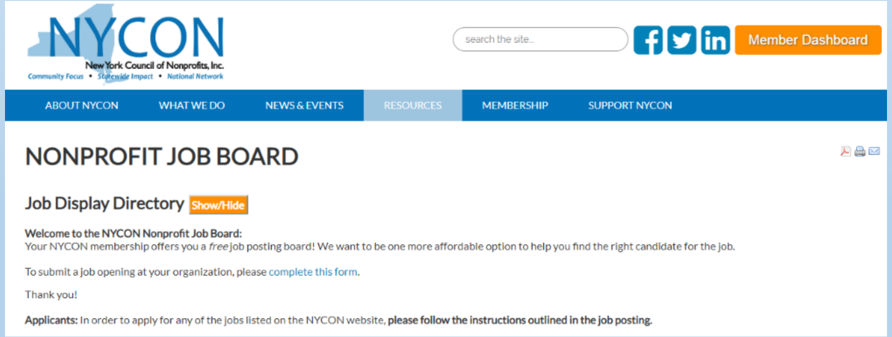

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