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Creative Approaches to the Employee Retention Credit

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Much has been written about the Employee Retention Credit (ERC), enacted as part of the CARES Act, and amended and expanded by the Consolidated Appropriations Act (CCA) and most recently, the American Rescue Plan Act of 2021 (ARPA), enabling certain companies to receive credits/refunds of federal employment taxes. The 'expanded' ERC continues to encourage employers to maintain and possibly expand their workforces (not just for 2020 but now for all of 2021) and in conjunction with a forgivable PPP loan secured in 2020 or 2021, further increases a company's cash flow opportunities.

While there are restrictions as to how a company can qualify for the ERC, there are many different industries that can qualify, for example, health system providers, food purveyors, restaurants, caterers, private schools, manufacturers, construction companies and many others.

Most notably, over the last approximately 15 months – since March 2020 – the Baker Donelson Tax Group has done an extensive amount of work in the ERC area and developed several unique and proprietary methodologies to generate significant IRS credits as well as refunds for companies. We have also developed certain technology models to help more easily compute the applicable credits which need to be applied on an employee-by-employee basis (especially for companies which have not been able to satisfy the "small employer" rule (i.e., where the full-time (FT) employee count exceeds either (i) 100 when claiming the ERC for 2020 or (ii) 500 when claiming the ERC in 2021).

In fact, even if a company claimed the ERC in 2020, it does not preclude that same company from additional opportunities to expand the amount of the ERC by filing amended 2020 Forms 941. Each scenario needs to be analyzed carefully on a case-by-case basis.

Expanded Amount of the ERC

Under the CARES Act, the maximum credit was up to \$5,000 per eligible employee for 2020 but the amount has now been expanded through the CCA, and most recently the ARPA, up to \$7,000 per employee per quarter (or a total of up to \$28,000) for all of 2021. The decline in gross receipts required for obtaining the credit in 2021 is 20 percent, reduced from 50 percent in 2020.

Certain Government Entities Eligible in 2021

In 2020, the ERC was not available to any federal, state, or local governmental entity. Effective January 1, 2021, an exception allows state or local run colleges, universities, organizations providing medical or hospital care in certain businesses chartered by Congress (which includes agencies such as Fannie Mae, FDIC, federal home loan banks, and federal credit unions) to qualify for the ERC.

Important Caveat – Three Separate Categories for Wages

Although not specifically provided in the CARES Act, the CCA did provide for an added benefit for 2020 PPP loan recipients by allowing them to claim the ERC although they had received a forgivable PPP loan. The caveat is that a company cannot "double dip," which means the ERC can be applied solely to the portion of the wages not paid for by the forgiven PPP loan. For example, a company which received a PPP loan in 2020 and paid qualified wages in excess of the amount of the forgiven PPP loan used to pay wages is otherwise eligible

to claim the credit retroactively on such "excess." In addition, the same "wages" cannot be used for the ERC that were used to claim refunds under the Families First Coronavirus Response Act (FFCRA).

Similarly, companies that were related to a PPP borrower that did not claim the ERC because of affiliation rules should now be able to claim the credit retroactively, if they are otherwise eligible for the ERC

Again, there are no guarantees that every company qualifies for the ERC but at the same time, these are opportunities that companies should seriously explore. If you have any questions regarding the ERC, please contact one of the authors or your Baker Donelson attorney.