

## The American Rescue Plan Act & IRS Notice 2021-20

### New guidance on the COVID-19 Employee Retention Credit

Please find below a summary of the Senate-passed American Rescue Plan Act of 2021 as well as IRS Notice 2021-20 in relation to the **COVID-19 Employee Retention Credit**.

#### **The American Rescue Plan Act of 2021, H.R. 1319**

On March 6, 2021 the Senate passed the American Rescue Plan Act of 2021, [H.R. 1319](#), (“the Act”) and sent the legislation back to the House of Representatives which must pass the Senate version before it is provided to President Biden to sign. The House of Representatives is expected to pass the Act this week and President Biden is expected to sign it into law immediately thereafter.

Among other provisions, the Act extends the employee retention credit through the end of 2021 maintaining the limit of a \$7,000 credit per employee per quarter (i.e., maximum of \$28,000 credit per employee for 2021). The Act establishes new eligibility requirements for certain startup businesses and businesses that have been severely financially impacted, starting in calendar 2021 Q3 and Q4. The eligibility requirements remain unchanged for companies that do not satisfy either of the two new eligibility categories established by the Act.

Two new categories of eligible employers:

- ***Recovery startup businesses:*** Start-up businesses that began after February 15, 2020 with average annual gross receipts of less than \$1,000,000 (on an aggregated basis) are not subject to the significant decline in gross receipts or government order eligibility requirements, and therefore, are automatically eligible beginning July 1, 2021 for the employee retention credit. However, these businesses are subject to a new \$50,000 cap per quarter after applying the \$7,000 credit per employee per quarter limit (i.e., a maximum of \$14,000 credit per employee for 2021).
- ***Severely financially distressed employers:*** Companies with a greater than 90% reduction in gross receipts in calendar 2021 Q3 and Q4 when compared to the applicable quarter in 2019, or based on a comparison of the prior calendar quarter can claim the employee retention credit on all wages paid beginning July 1, 2021, regardless of employer size. Prior to July 1, 2021, large employers (i.e., more than 500 employees) are only eligible to claim the credit with respect to certain qualified wages paid to employees not providing services.

#### IRS Notice 2021-20

On March 1, 2021 the IRS published [Notice 2021-20](#), which provides substantive guidance related to the 2020 employee retention credit that was previously only captured through [FAQs](#) on the IRS website. An IRS Notice may be relied upon as legal authority whereas the FAQs may not. The Notice incorporates the same question and answer format and generally takes positions consistent with the guidance provided by prior FAQs, including in some cases restating the same questions and answers originally published as IRS FAQs. However, the Notice includes some updates to the previous FAQs, as well as new guidance to reflect changes made by the Taxpayer Certainty and Disaster Relief Act of 2020, enacted on December 27, 2020. A non-exhaustive list of these updates is included below.

- Guidance that a portion of an employer's business operations ***will be deemed to constitute more than a nominal portion*** if either (i) the gross receipts from that portion of the business operations is not less than 10% of the total gross receipts, or (ii) the hours of service performed by employees in that portion of the business is not less than 10% of the total number of hours performed by all employees in the employer's business. For purposes of applying these tests the employer must evaluate the relative size of gross receipts and employee service hours

attributable to the portion of a business in the same calendar quarter in 2019 that is subject to a full or partial suspension of operations due to a governmental order in calendar year 2020 or calendar year 2021 (Question 11).

- Updated description of businesses that are not considered partially or fully suspended where customers are subject to a governmental order requiring them to stay at home or the governmental order otherwise causes a reduction in demand for the employer's products or services (Question 13).
- A list of factors that should be considered in determining if an employer is able to continue comparable operations despite workplace closures, including telework capabilities, portability of employees, need for presence in physical work space, and transitioning to telework operations (Question 16).
- Updated examples of the impacts of government orders, including examples of modifications businesses must make to accommodate social distancing and whether those modifications are deemed to have more than a nominal effect on business operations. A governmental order that results in a reduction in the employer's ability to provide goods or services in the normal course of the employer's business of not less than 10% **will be deemed to have more than a nominal effect** on the employer's business operations (Questions 17 and 18).
- Guidance on the interaction of PPP loan forgiveness timing decisions and retention credit claims (Question 49).
- Examples related to the process of filing a Form 941-X, including application of the special fourth quarter rule for companies who received a PPP loan (Questions 57 and 58).
- Guidance for employers who use a third-party payer such as a PEO (Questions 62, 64-67).
- Examples of documentation that should be maintained to substantiate the credit (Questions 70 and 71).

Deloitte will be releasing a Tax Alert related to the potential implications of the various updates and additions provided by Notice 2021-20 in more detail.

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