Employee Retention Credit for Employers Subject to Closure Due to COVID-19
[As Enacted by the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 2301, 134 Stat. 281, 347 (2020) (codified at 26 U.S.C. § 3111 note), and Further Amended by the Consolidated Appropriations Act, 2021, Pub. L. No. 116- , div. EE, §§ 206–207, 134 Stat. , (2020)]

(a) IN GENERAL.—In the case of an eligible employer, there shall be allowed as a credit against applicable employment taxes for each calendar quarter an amount equal to ~~50 percent~~70 percent of the qualified wages with respect to each employee of such employer for such calendar quarter.

(b) LIMITATIONS AND REFUNDABILITY.—

(1) WAGES TAKEN INTO ACCOUNT.—The amount of qualified wages with respect to any employee which may be taken into account under subsection (a) by the eligible employer ~~for all calendar quarters shall not exceed $10,000~~for any calendar quarter shall not exceed $10,000.

(2) CREDIT LIMITED TO EMPLOYMENT TAXES.—The credit allowed by subsection (a) with respect to any calendar quarter shall not exceed the applicable employment taxes (reduced by any credits allowed under subsections (e) and (f) of section 3111 of the Internal Revenue Code of 1986 and sections 7001 and 7003 of the Families First Coronavirus Response Act [Pub. L. 116–127, set out as notes below]) on the wages paid with respect to the employment of all the employees of the eligible employer for such calendar quarter.

(3) REFUNDABILITY OF EXCESS CREDIT.—

(A) IN GENERAL.—If the amount of the credit under subsection (a) exceeds the limitation of paragraph (2) for any calendar quarter, such excess shall be treated as an overpayment that shall be refunded under sections 6402(a) and 6413(b) of the Internal Revenue Code of 1986.

(B) TREATMENT OF PAYMENTS.—For purposes of section 1324 of title 31, United States Code, any amounts due to the employer under this paragraph shall be treated in the same manner as a refund due from a credit provision referred to in subsection (b)(2) of such section.

(c) DEFINITIONS.—For purposes of this section—

(1) APPLICABLE EMPLOYMENT TAXES.—The term "applicable employment taxes" means the following:

(A) The taxes imposed under section 3111(a) of the Internal Revenue Code of 1986.

(B) So much of the taxes imposed under section 3221(a) of such Code as are attributable to the rate in effect under section 3111(a) of such Code.

(2) ELIGIBLE EMPLOYER.—

(A) IN GENERAL.—The term "eligible employer" means any employer—

(i) which was carrying on a trade or business ~~during calendar year 2020~~during the calendar quarter for which the credit is determined under subsection (a), and

(ii) with respect to any calendar quarter, for which—

(I) the operation of the trade or business described in clause (i) is fully or partially suspended during the calendar quarter due to orders from an appropriate governmental authority limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to the coronavirus disease 2019 (COVID-19), or

(II) the gross receipts (within the meaning of section 448(c) of the Internal Revenue Code of 1986) of such employer for such calendar quarter are less than 80 percent of the gross receipts of such employer for the same calendar quarter in calendar year 2019~~such calendar quarter is within the period described in subparagraph (B)~~.

With respect to any employer for any calendar quarter, if such employer was not in existence as of the beginning of the same calendar quarter in calendar year 2019, clause (ii)(II) shall be applied by substituting "2020" for "2019".

(B) ~~SIGNIFICANT DECLINE IN GROSS RECEIPTS~~ELECTION TO USE ALTERNATIVE QUARTER.—~~The period described in this subparagraph is the period~~At the election of the employer—

(i) subparagraph (A)(ii)(II) shall be applied—~~beginning with the first calendar quarter beginning after December 31, 2019, for which gross receipts (within the meaning of section 448(c) of the Internal Revenue Code of 1986) for the calendar quarter are less than 50 percent of gross receipts for the same calendar quarter in the prior year, and~~

(I) by substituting "for the immediately preceding calendar quarter" for "for such calendar quarter", and

(II) by substituting "the corresponding calendar quarter in calendar year 2019" for "the same calendar quarter in calendar year 2019", and

(ii) the last sentence of subparagraph (A) shall be applied by substituting "the corresponding calendar quarter in calendar year 2019" for "the same calendar quarter in calendar year 2019".~~ending with the calendar quarter following the first calendar quarter beginning after a calendar quarter described in clause (i) for which gross receipts of such employer are greater than 80 percent of gross receipts for the same calendar quarter in the prior year.~~

An election under this subparagraph shall be made at such time and in such manner as the Secretary shall prescribe.

(C) TAX-EXEMPT ORGANIZATIONS.—In the case of an organization which is described in section 501(c) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code—

(i)~~,~~ clauses (i) and (ii)(I) of subparagraph (A) shall apply to all operations of such organization, and

(ii) any reference in this section to gross receipts shall be treated as a reference to gross receipts within the meaning of section 6033 of such Code.

(3) QUALIFIED WAGES.—

(A) IN GENERAL.—The term "qualified wages" means—

(i) in the case of an eligible employer for which the average number of full-time employees (within the meaning of section 4980H of the Internal Revenue Code of 1986) employed by such eligible employer during 2019 was greater than ~~100~~500, wages paid by such eligible employer with respect to which an employee is not providing services due to circumstances described in subclause (I) or (II) of paragraph (2)(A)(ii), or

(ii) in the case of an eligible employer for which the average number of full-time employees (within the meaning of section 4980H of the Internal Revenue Code of 1986) employed by such eligible employer during 2019 was not greater than ~~100~~500—

(I) with respect to an eligible employer described in subclause (I) of paragraph (2)(A)(ii), wages paid by such eligible employer with respect to an employee during any period described in such clause, or

(II) with respect to an eligible employer described in subclause (II) of such paragraph, wages paid by such eligible employer with respect to an employee during such quarter.

(B) EXCEPTION.—The term "qualifying wages"~~Such term~~ shall not include any wages taken into account under section 7001 or section 7003 of the Families First Coronavirus Response Act.

~~(B) LIMITATION.—Qualified wages paid or incurred by an eligible employer described in subparagraph (A)(i) with respect to an employee for any period described in such subparagraph may not exceed the amount such employee would have been paid for working an equivalent duration during the 30 days immediately preceding such period.~~

~~(C) ALLOWANCE FOR CERTAIN HEALTH PLAN EXPENSES.—~~

~~(i) IN GENERAL.—The term "qualified wages" shall include so much of the eligible employer's qualified health plan expenses as are properly allocable to such wages.~~

~~(ii) QUALIFIED HEALTH PLAN EXPENSES.—For purposes of this paragraph, the term "qualified health plan expenses" means amounts paid or incurred by the eligible employer to provide and maintain a group health plan (as defined in section 5000(b)(1) of the Internal Revenue Code of 1986), but only to the extent that such amounts are excluded from the gross income of employees by reason of section 106(a) of such Code.~~

~~(iii) ALLOCATION RULES.—For purposes of this paragraph, qualified health plan expenses shall be allocated to qualified wages in such manner as the Secretary may prescribe. Except as otherwise provided by the Secretary, such allocation shall be treated as properly made if made on the basis of being pro rata among employees and pro rata on the basis of periods of coverage (relative to the periods to which such wages relate).~~

(4) SECRETARY.—The term "Secretary" means the Secretary of the Treasury or the Secretary's delegate.

(5) WAGES.—

(A) IN GENERAL.—The term "wages" means wages (as defined in section 3121(a) of the Internal Revenue Code of 1986) and compensation (as defined in section 3231(e) of such Code). For purposes of the preceding sentence, in the case of any organization or entity described in subsection (f)(2), wages as defined in section 3121(a) of the Internal Revenue Code of 1986 shall be determined without regard to paragraphs (5), (6), (7), (10), and (13) of section 3121(b) of such Code (except with respect to services performed in a penal institution by an inmate thereof).

(B) ALLOWANCE FOR CERTAIN HEALTH PLAN EXPENSES.—

(i) IN GENERAL.—Such term shall include amounts paid by the eligible employer to provide and maintain a group health plan (as defined in section 5000(b)(1) of the Internal Revenue Code of 1986), but only to the extent that such amounts are excluded from the gross income of employees by reason of section 106(a) of such Code.

(ii) ALLOCATION RULES.—For purposes of this section, amounts treated as wages under clause (i) shall be treated as paid with respect to any employee (and with respect to any period) to the extent that such amounts are properly allocable to such employee (and to such period) in such manner as the Secretary may prescribe. Except as otherwise provided by the Secretary, such allocation shall be treated as properly made if made on the basis of being pro rata among periods of coverage.

(6) OTHER TERMS.—Any term used in this section which is also used in chapter 21 or 22 of the Internal Revenue Code of 1986 shall have the same meaning as when used in such chapter.

(d) AGGREGATION RULE.—All persons treated as a single employer under subsection (a) or (b) of section 52 of the Internal Revenue Code of 1986, or subsection (m) or (o) of section 414 of such Code, shall be treated as one employer for purposes of this section.

(e) CERTAIN RULES TO APPLY.—For purposes of this section, rules similar to the rules of sections 51(i)(1) and 280C(a) of the Internal Revenue Code of 1986 shall apply.

(f) CERTAIN GOVERNMENTAL EMPLOYERS.—

(1) IN GENERAL.—This credit shall not apply to the Government of the United States, the government of any State or political subdivision thereof, or any agency or instrumentality of any of the foregoing.

(2) EXCEPTION.—Paragraph (1) shall not apply to—

(A) any organization described in section 501(c)(1) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code, or

(B) any entity described in paragraph (1) if—

(i) such entity is a college or university, or

(ii) the principal purpose or function of such entity is providing medical or hospital care.

In the case of any entity described in subparagraph (B), such entity shall be treated as satisfying the requirements of subsection (c)(2)(A)(i).

(g) ~~ELECTION NOT TO HAVE SECTION APPLY~~ELECTION TO NOT TAKE CERTAIN WAGES INTO ACCOUNT.—

(1) IN GENERAL.—This section shall not apply to so much of the qualified wages paid by an eligible employer as such employer elects (at such time and in such manner as the Secretary may prescribe) to not take into account for purposes of this section.

(2) COORDINATION WITH PAYCHECK PROTECTION PROGRAM.—The Secretary, in consultation with the Administrator of the Small Business Administration, shall issue guidance providing that payroll costs paid during the covered period shall not fail to be treated as qualified wages under this section by reason of an election under paragraph (1) to the extent that a covered loan of the eligible employer is not forgiven by reason of a decision under section 7A(g) of the Small Business Act or the application of section 7(a)(37)(J) of the Small Business Act. Terms used in the preceding sentence which are also used in section 7A(g) or 7(a)(37)(J) of the Small Business Act shall, when applied in connection with either such section, have the same meaning as when used in such section, respectively.~~This section shall not apply with respect to any eligible employer for any calendar quarter if such employer elects (at such time and in such manner as the Secretary may prescribe) not to have this section apply.~~

(h) SPECIAL RULES.—

(1) DENIAL OF DOUBLE BENEFIT.—Any wages taken into account in determining the credit allowed under this section shall not be taken into account as wages for purposes of sections 41, 45A, 45P, 45S, 51, and 1396 of the Internal Revenue Code of 1986.~~EMPLOYEE NOT TAKEN INTO ACCOUNT MORE THAN ONCE.—An employee shall not be included for purposes of this section for any period with respect to any employer if such employer is allowed a credit under section 51 of the Internal Revenue Code of 1986 with respect to such employee for such period.~~

~~(2) DENIAL OF DOUBLE BENEFIT.—Any wages taken into account in determining the credit allowed under this section shall not be taken into account for purposes of determining the credit allowed under section 45S of such Code.~~

(~~3~~2) THIRD PARTY PAYORS.—Any credit allowed under this section shall be treated as a credit described in section 3511(d)(2) of such Code.

(i) TRANSFERS TO FEDERAL OLD-AGE AND SURVIVORS INSURANCE TRUST FUND.—There are hereby appropriated to the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund established under section 201 of the Social Security Act (42 U.S.C. 401) and the Social Security Equivalent Benefit Account established under section 15A(a) of the Railroad Retirement Act of 1974 (45 U.S.C. 14 [sic] 231n–1(a)) amounts equal to the reduction in revenues to the Treasury by reason of this section (without regard to this subsection). Amounts appropriated by the preceding sentence shall be transferred from the general fund at such times and in such manner as to

replicate to the extent possible the transfers which would have occurred to such Trust Fund or Account had this section not been enacted.

(j) ~~RULE FOR EMPLOYERS TAKING SMALL BUSINESS INTERRUPTION LOAN. If an eligible employer receives a covered loan under paragraph (36) of section 7(a) of the Small Business Act (15 U.S.C. 636(a)), as added by section 1102 of this Act, such employer shall not be eligible for the credit under this section.~~ADVANCE PAYMENTS.—

(1) IN GENERAL.—Except as provided in paragraph (2), no advance payment of the credit under subsection (a) shall be allowed.

(2) ADVANCE PAYMENTS TO SMALL EMPLOYERS.—

(A) IN GENERAL.—Under rules provided by the Secretary, an eligible employer for which the average number of full-time employees (within the meaning of section 4980H of the Internal Revenue Code of 1986) employed by such eligible employer during 2019 was not greater than 500 may elect for any calendar quarter to receive an advance payment of the credit under subsection (a) for such quarter in an amount not to exceed 70 percent of the average quarterly wages paid by the employer in calendar year 2019.

(B) SPECIAL RULE FOR SEASONAL EMPLOYERS.—In the case of any employer who employs seasonal workers (as defined in section 45R(d)(5)(B) of the Internal Revenue Code of 1986), the employer may elect to substitute "the wages for the calendar quarter in 2019 which corresponds to the calendar quarter to which the election relates" for "'the average quarterly wages paid by the employer in calendar year 2019".

(C) SPECIAL RULE FOR EMPLOYERS NOT IN EXISTENCE IN 2019.—In the case of any employer that was not in existence in 2019, subparagraphs (A) and (B) shall each be applied by substituting "2020" for "2019" each place it appears.

(3) RECONCILIATION OF CREDIT WITH ADVANCE PAYMENTS.—

(A) IN GENERAL.—The amount of credit which would (but for this subsection) be allowed under this section shall be reduced (but not below zero) by the aggregate payment allowed to the taxpayer under paragraph (2). Any failure to so reduce the credit shall be treated as arising out of a mathematical or clerical error and assessed according to section 6213(b)(1) of the Internal Revenue Code of 1986.

(B) EXCESS ADVANCE PAYMENTS.—If the advance payments to a taxpayer under paragraph (2) for a calendar quarter exceed the credit allowed by this section (determined without regard to subparagraph (A)), the tax imposed by chapter 21 or 22 of the Internal Revenue Code of 1986

(whichever is applicable) for the calendar quarter shall be increased by the amount of such excess.

(k) TREATMENT OF DEPOSITS.—The Secretary shall waive any penalty under section 6656 of the Internal Revenue Code of 1986 for any failure to make a deposit of any applicable employment taxes if the Secretary determines that such failure was due to the reasonable anticipation of the credit allowed under this section.

(l) REGULATIONS AND GUIDANCE.—The Secretary shall issue such forms, instructions, regulations, and guidance as are necessary—

(1) to allow the advance payment of the credit under subsection (a) as provided in subsection (j)(2), subject to the limitations provided in this section, based on such information as the Secretary shall require,

~~(2) to provide for the reconciliation of such advance payment with the amount advanced at the time of filing the return of tax for the applicable calendar quarter or taxable year,~~

~~(3) to provide for the recapture of the credit under this section if such credit is allowed to a taxpayer which receives a loan described in subsection (j) during a subsequent quarter,~~

(42) with respect to the application of the credit under subsection (a) to third party payors (including professional employer organizations, certified professional employer organizations, or agents under section 3504 of the Internal Revenue Code of 1986), including regulations or guidance allowing such payors to submit documentation necessary to substantiate the eligible employer status of employers that use such payors, and

(~~5~~) ~~for application of subparagraphs (A)(ii)(II) and (B) of subsection (c)(2) in the case of any employer which was not carrying on a trade or business for all or part of the same calendar quarter in the prior year.~~

(3) to prevent the avoidance of the purposes of the limitations under this section, including through the leaseback of employees.

Any forms, instructions, regulations, or guidance described in paragraph (2) shall require the customer to be responsible for the accounting of the credit and for any liability for improperly claimed credits and shall require the certified professional employer organization or other third party payor to accurately report such tax credits based on the information provided by the customer.

(m) APPLICATION.—This section shall only apply to wages paid after March 12, 2020, and before ~~January 1, 2021~~July 1, 2021.

(n) PUBLIC AWARENESS CAMPAIGN.—

(1) IN GENERAL.—The Secretary shall conduct a public awareness campaign, in coordination with the Administrator of the Small Business Administration, to provide information regarding the availability of the credit allowed under this section.

(2) OUTREACH.—Under the campaign conducted under paragraph (1), the Secretary shall—

(A) provide to all employers which reported not more than 500 employees on the most recently filed return of applicable employment taxes a notice about the credit allowed under this section and the requirements for eligibility to claim the credit, and

(B) not later than 30 days after the date of the enactment of this subsection [i.e., December 27, 2020, 30 days from which falls on January 26, 2021], provide to all employers educational materials relating to the credit allowed under this section, including specific materials for businesses with not more than 500 employees.

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