



PLATINUM GROUP  
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# Webinar 16

*Employer Updates 03-26-2021*

# Platinum Group

Webinar-March 26, 2021

## WEBINAR LOGISTICS

- **All Participants are muted. If you are experience audio issues when calling in, please try using your computer speakers.**
- **We would love to hear from you! Questions bar.**
- **A recording of the webinar and presentation slides will be available this afternoon.**
- **Rapidly changing environment – What we know now.**

## Platinum Group

Webinar-March 26, 2021

# COVID-19 WEBINAR 16

New stimulus bill changes to FFCRA, COBRA, and Unemployment  
Vaccine-related questions answered | Preparing for new OSHA guidance  
Employee Retention Credit (ERC) including new guidance on interaction with PPP  
SBA Updates | Various Extensions Issued  
3.26.21



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Webinar March 26, 2021

## AGENDA

- **New stimulus bill changes to FFCRA, COBRA, and unemployment**
- **Vaccine-related questions answered**
- **Preparing for new OSHA guidance**
- **Employee Retention Credit (ERC) including new guidance on interaction with PPP**
- **SBA Updates**
- **Highlighted Extensions**

# COVID-19 Employment Law Update

Platinum Group  
March 26, 2021

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# What's New?

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- The Stimulus Bill: American Rescue Plan Act of 2021
  - FFCRA Leave and Tax Credits
  - Unemployment
  - Other Issues
- COVID-19 Vaccinations and the Workplace
- OSHA Guidance

# The Stimulus Bill / FFCRA Tax Credits

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- Requirement that employer provide emergency paid sick leave and expanded Family and Medical Leave expired on December 31, 2020
  - Congressional act required to reinstate these requirements
- Employers may voluntarily decide to provide emergency paid sick leave or expanded FMLA leave and receive a tax credit until September 30, 2021
  - Even if not offering, do not forget other laws! (ADA, traditional FMLA)

# The Stimulus Bill / FFCRA Tax Credits

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- Provides that FFCRA tax credits are available for emergency paid sick leave and paid family leave for additional qualifying reasons:
  - Employee is obtaining immunization (vaccination) related to COVID-19
  - Employee is recovering from injury, disability, illness, or condition related to COVID-19 vaccination
  - Employee is seeking or awaiting the results of a diagnostic test or medical diagnosis for COVID-19 and the employee has been exposed to COVID-19 or the employee's employer has requested such test or diagnosis
- Resets the 10-day cap for emergency paid sick leave effective April 1
  - Cap is a maximum of \$511 per day for 10 days
- If discriminate in favor of certain employees in offering FFCRA leaves, will not qualify for credit during calendar quarter
  - Highly-compensated employees, full-time employees, employee tenure



# The Stimulus Bill / Unemployment

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- Retains the \$300/week federal Pandemic Unemployment Assistance benefit through September 6, 2021
  - Originally would have expired on March 14, 2021
- First \$10,200 in unemployment benefits received in 2020 are non-taxable if Adjusted Gross Income is less than \$150,000 per household
  - If joint return: each spouse receiving unemployment benefits can exclude up to \$10,200
- Unemployment still moving slow—back log of appeals



# The Stimulus Bill / Other Considerations

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- 100% COBRA premium subsidy effective April 1 through September 30, 2021 for those who are involuntarily terminated and want to remain on their employer's health insurance
- Expands the class of those who are entitled to help with the cost of their insurance through the Affordable Care Act
- Changes for Multiemployer Union Pensions

# COVID Vaccinations

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- EEOC Guidance

- Like a lot of other things we've talked about, this is what the EEOC thinks the law should be
- It is not a guarantee that the Courts would agree and this guidance is not in line with all court decisions
- Best we've got right now and best we are likely to have while it really matters

- Part of the Q&As the EEOC has had on its website regarding COVID beginning in March. New Section for Vaccinations added at the end of the document in late December



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# Can I Require My Employees to...

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## ■ Get the COVID Vaccine?

- YES – subject to the ADA and Title VII Requirements
- ADA
  - Reasonable Accommodation Requirement for employee's own health condition
  - You can require (and should require) information from employee's doctor
  - You can deny employee access to the workplace if failure to get the vaccine is a direct threat
  - Factors to consider in direct threat scenario:
    - The duration of the risk;
    - The nature and severity of the potential harm;
    - The likelihood that the potential harm will occur; and
    - The imminence of the potential harm.

# Can I Require My Employees to...

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## ■ Get the COVID Vaccine?

- YES – subject to the ADA and Title VII Requirements
- ADA continued
  - EEOC acknowledges that as more are vaccinated the direct threat calculus may change
  - Must consider the employee's contact with vaccinated and unvaccinated people
    - Seems as though prolonged contact with individuals whose vaccination status you will not know may be
  - You may have to allow employee to work from home as a reasonable accommodation if employee can perform essential functions of job from home
  - If you have other positions open that employee can perform without a vaccine consider those
  - If “no way” you can accommodate, you can end employment – revisit the four factors before you do...



# Can I Require My Employees to...

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- Get the COVID Vaccine?

- Title VII Requirements

- Religious Exemption
    - If you are already aware of the employee's religious beliefs, you cannot ask for more documentation
    - If you are not aware or have reason to doubt the religious belief, you can ask for documentation
    - Court rulings have said that anti-vaxxer is not a religion
    - If employee needs an accommodation due to religious belief, you must provide it unless it would present an "undue hardship" which courts have said is more than a "de minimus" cost
    - Employee may be excluded from the workplace if failure to be vaccinated poses an undue hardship



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# How Do I...

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## ■ Get My Employees Vaccinated?

- Requiring your employees to get the vaccine from you or from someone with whom you contract is risky
- Pre-Vaccination questions may be medical exams under the ADA and open you to more scrutiny
- Guidance provides that offering the option to employees to voluntarily be vaccinated by the employer or by someone with whom the employer has contracted is OK

# How Do I...

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- **Know My Employee Has Been Vaccinated?**
  - Guidance provides that you can require an employee to offer proof of vaccination if the employee opts to be vaccinated by a third party not associated with the employer
  - This guidance is contrary to one federal court decision that provided under different circumstances that asking an employee if they were immune to a disease was a medical exam
  - If it is a medical exam, you have to show that the exam is job related and consistent with a business necessity
  - Given this guidance and the pandemic, unclear how a court would decide this issue

# Bottom Line

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## ■ As An Employer You Can...

- Make vaccination voluntary but engage in education (like the flu shot): this is the risk free option from an ADA and Title VII standpoint, but could pose more health risks
- Require vaccination so long as you allow employees to choose how they get the shot and consider ADA and Title VII implications
- Require vaccination as above, but offer a voluntary clinic for your employees, still allowing them to get the vaccine elsewhere
- Require vaccination as above, but require employees to get the vaccination from you or your contractor, but not without greater risk and analysis under direct threat framework



# OSHA Guidance

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- COVID-19 has been made part of OSHA's National Emphasis Program
- OSHA issued stronger guidance on COVID-19 on January 29
  - Intended to inform employers and workers
- Employers should implement COVID-19 Prevention Programs
  - Includes 16 elements that OSHA recommends
- Guidance can be found here:  
<https://www.osha.gov/coronavirus/safework>

# Questions?

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## Platinum Group

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# COVID-19 WEBINAR 16

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### EMPLOYEE RETENTION CREDIT (ERC)

#### Overview/History:

- Originally part of the "Cares Act" enacted on March 27, 2020 for wages paid from March 13, 2020 until December 31, 2020.
- Modified and expanded retroactively for certain provisions under the Consolidated Appropriations Act (CAA20) on 12/27/2020. This Act allows prior recipients of a PPP loan to potentially qualify for the ERC and expanded the ERC program to include the first two quarters of 2021. Same wages may not be used for both PPP and ERC.
- Further modified by the American Rescue Plan Act of 2021 ("ARPA") on 3/11/21. This Act extended the ERC for the entire year of 2021 and increased the qualified wages limit.
- Refundable credit against employer Social Security tax (Payroll Tax Credit). The ARPA now allows Medicare taxes to be included.
- Applies to certain wages and allocable health plan costs paid to employees.

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### EMPLOYEE RETENTION CREDIT

**Eligibility - To be eligible for the ERC, an employer must meet at least one of the following eligibility tests:**

- The employer's operations were fully or partially suspended due to a governmental order related to COVID-19 (available only for suspension period); or
- For 2020 - The employer incurred a decline in gross receipts of greater than 50% during a calendar quarter compared to the same calendar quarter during 2019.
- For 2021 - The employer incurred a decline in gross receipts of greater than 20% during a calendar quarter compared to the same calendar quarter during 2019. Alternatively, an employer may elect to instead compare the preceding calendar quarter's gross receipts against the gross receipts for the corresponding quarter in 2019, for the purposes of determining eligibility.

For example, if the employer had a 20% or greater decrease in gross receipts for Q4 2020 compared to Q4 2019 but did not have a 20 % or greater decrease for Q1 2021 compared to Q1 2019, the employer could elect to qualify for ERC for Q 2021 based on the Q4 2020 comparison to Q4 2019.

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### EMPLOYEE RETENTION CREDIT

#### **Gross Receipts Rules:**

- In general, gross receipts includes total sales, net of returns and allowances, and all amounts received for services and investment/outside sources (interest, dividends, rent, royalties and other income). Also includes receipts from foreign affiliates.
- If the cash method is used for income tax purposes (review your business tax return) then the cash method may be used for calculating gross receipts.
- If not using the cash method, this test is calculated under the accrual method.

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### EMPLOYEE RETENTION CREDIT

#### What are Qualified Wages:

- Qualified wages include wages and health plan expenses paid to all employees, whether they provided services or not during their qualified calendar quarter unless the employer is a large employer.
- The large employer exception for 2020 states:
  - For employers with 100 or fewer full-time employees in 2019, qualified wages include wages and health plan expenses paid to all employees, whether they provided services or not.
  - For employers with more than 100 full-time employees in 2019, qualified wages only include wages and health plan expenses paid to employees who were not providing services.
- For 2021 - The 100-full time employee threshold for determining “qualified wages” based on all wages paid to employees is increased to 500 or fewer full-time employees.
- A full-time employee is an employee who had an average of at least 30 hours per week or 130 hours per month during 2019. (ACA Rules)

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### EMPLOYEE RETENTION CREDIT

#### What is the definition on qualified health plan expenses?

- The amount of qualified health plan expenses used in determining the credit generally includes both the portion of the cost paid by the employer and the portion of the cost paid by the employee with pre-tax salary reduction contributions. (Does not include any employee after-tax contributions.)
- For fully-insured group health plans, employers may use any reasonable method to determine and allocate the plan expenses, including:
  - The COBRA premium for the employee.
  - An average premium rate for all employees.
  - A substantially similar method that takes into account the average premium rate determined separately for employees with self-only and other than self-only coverage.
- For self-insured group health plans, employers may use any reasonable method to determine and allocate the plan expenses, including:
  - The COBRA premium for the employee.
  - Any reasonable actuarial method to determine the estimated annual expenses of the plan,

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### EMPLOYEE RETENTION CREDIT

#### What is Excluded from Qualified Wages:

- Wages for which an eligible employer may claim the employee retention credit do not include the payroll and insurance costs included in the employer's PPP forgiveness application for round 1 or round 2.
- Wages for which an eligible employer may claim the employee retention credit do not include the qualified sick leave wages and qualified family leave wages for which it claims credits under the FFCRA.
- ERC is reduced by the Work Opportunity Wage Credit (WOTC).
- For 2021, Shuttered Venue Grant and Restaurant Revitalization Grant (again, no double dipping).
- Payments, including severance, made to a former employee following termination of employment are not considered qualified wages.

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### EMPLOYEE RETENTION CREDIT

#### What is Excluded from Qualified Wages:

- Wages paid to related individuals are not taken into account for purposes of the Employee Retention Credit. A related individual is any employee who has of any of the following relationships to the employee's employer who is an individual:
  - A child or a descendant of a child;
  - A brother, sister, stepbrother, or stepsister;
  - The father or mother, or an ancestor of either;
  - A stepfather or stepmother;
  - A niece or nephew;
  - An aunt or uncle;
  - A son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, or sister-in-law.

In addition, if the Eligible Employer is a corporation, then a related individual is any person that bears a relationship described above with an individual owning, directly or indirectly, more than 50 percent in value of the outstanding stock of the corporation.

If the Eligible Employer is an entity other than a corporation, then a related individual is any person that bears a relationship described above with an individual owning, directly or indirectly, more than 50 percent of the capital and profits interests in the entity.

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### EMPLOYEE RETENTION CREDIT

**Do ERC wages include raises and bonuses (in excess of pay rate in place less than 30 days prior to the beginning of the quarter)?**

- For 2020:
  - Yes, if employer had 100 or fewer FTE's in 2019.
  - No, if employer had greater than 100 FTE's in 2019.
- For 2021:
  - Yes, pay raises and bonuses, if reasonable in amount, count as ERC wages.

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### EMPLOYEE RETENTION CREDIT

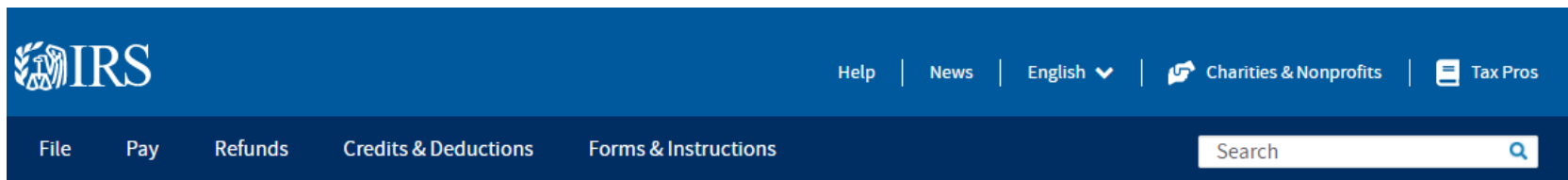
#### How much is the credit?

	<u>2020</u> 03/13/20 -12/31/2020	<u>2021</u> 01/01/2021 – 12/31/2021*
Co-exist with a PPP Loan?	Yes, but cannot use the same wages.	Yes, but cannot use the same wages.
Eligible Compensation Base	\$10,000/ <u>year</u> /employee	\$10,000/ <u>quarter</u> /employee
Rate of Credit	50%	70%
Maximum amount of credit	\$5,000/year/employee	\$7,000/quarter/employee
Maximum amount of credit per year	\$5,000/year/employee	*\$28,000/year/employee
		*Changed in ARPA ACT 03-11-21

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## EMPLOYEE RETENTION CREDIT

IRS Notice 2021-20 issued 03/01/21 <https://www.irs.gov/pub/irs-drop/n-21-20.pdf>



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## FAQs: Employee Retention Credit under the CARES Act

### Topics in the News

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### Tax Scams/Consumer Alerts

### The Tax Gap

### This Page is Not Current

Please see [Notice 2021-20](#) [PDF](#) for guidance on the Employee Retention Credit as it applies to qualified wages paid after March 12, 2020, and before January 1, 2021.



These FAQs do not reflect the changes made by the Taxpayer Certainty and Disaster Tax Relief Act of 2020 (Relief Act), enacted December 27, 2020, or the American Rescue Plan Act of 2021 (ARP Act), enacted March 11, 2021. The Relief Act amended and extended the employee retention credit (and the availability of certain advance payments of the tax credits) under section 2301 of the CARES Act for the first and second calendar quarters of 2021. The ARP Act modified and extended the employee retention credit for the third and fourth quarters of 2021.

The Employee Retention Credit under the CARES Act encourages businesses to keep employees on their payroll. The refundable tax credit is 50% of up to \$10,000 in wages paid by an eligible employer whose business has been financially impacted by COVID-19.

### Frequently Asked Questions

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### EMPLOYEE RETENTION CREDIT

#### **How does the ERC interact with the PPP (Notice 2021-20)?**

- To the extent wages are included as a payroll cost on the PPP loan forgiveness application, the business is deemed to have made the “election” out of claiming the ERC with respect to such wages.
- The Notice provides that a business will only be deemed to make the election out of claiming ERC for the minimum amount of wages that will result in loan forgiveness taking into account any other eligible expenses reported on the PPP loan forgiveness application.
- Please see some examples from the Notice on the following slides.

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### EMPLOYEE RETENTION CREDIT

#### How does the ERC interact with the PPP (Notice 2021-20)?

- **Example 3:** Employer C received a PPP loan of \$200,000. Employer C is an eligible employer and paid \$200,000 of qualified wages that would qualify for the employee retention credit during the second and third quarters of 2020. Employer C also paid other eligible expenses of \$70,000. In order to receive forgiveness of the PPP loan in its entirety, Employer C was required, under the SBA rules, to report a total of \$200,000 of payroll costs and other eligible expenses (and a minimum of \$120,000 of payroll costs). Employer C submitted a PPP Loan Forgiveness Application and reported the \$200,000 of qualified wages as payroll costs in support of forgiveness of the entire PPP loan, but did not report the other eligible expenses of \$70,000. Employer C received a decision under section 7A(g) of the Small Business Act in the first quarter of 2021 for forgiveness of the entire PPP loan amount of \$200,000.

Employer C is deemed to have made an election not to take into account \$200,000 of qualified wages for purposes of the employee retention credit, which was the amount of qualified wages included in the payroll costs reported on the PPP Loan Forgiveness Application up to (but not exceeding) the minimum amount of payroll costs, together with any other eligible expenses reported on the PPP Loan Forgiveness Application, sufficient to support the amount of the PPP loan that is forgiven. Although Employer C could have reported \$70,000 of eligible expenses (other than payroll costs) and \$130,000 of payroll costs, Employer C reported \$200,000 of qualified wages as payroll costs on the PPP Loan Forgiveness Application. As a result, no portion of those qualified wages reported as payroll costs may be treated as qualified wages for purposes of the employee retention credit. Employer C cannot reduce the deemed election by the amount of the other eligible expenses that it could have reported on its PPP Loan Forgiveness Application.

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### EMPLOYEE RETENTION CREDIT

#### How does the ERC interact with the PPP (Notice 2021-20)?

- **Example 4:** Employer C submitted a PPP Loan Forgiveness Application and reported the \$200,000 of qualified wages as payroll costs, as well as \$70,000 of other eligible expenses, in support of forgiveness of the PPP loan. Employer C received a decision under section 7A(g) of the Small Business Act in the first quarter of 2021 for forgiveness of the entire PPP loan amount of \$200,000. In this case, Employer C is deemed to have made an election not to take into account \$130,000 of qualified wages for purposes of the employee retention credit, which was the amount of qualified wages included in the payroll costs reported on the PPP Loan Forgiveness Application up to (but not exceeding) the minimum amount of payroll costs, together with the \$70,000 of other eligible expenses reported on the PPP Loan Forgiveness Application, sufficient to support the amount of the PPP loan that was forgiven. As a result, \$70,000 of the qualified wages reported as payroll costs may be treated as qualified wages for purposes of the employee retention credit.
- Please see Notice 2020-20 here for more examples: <https://www.irs.gov/pub/irs-drop/n-21-20.pdf>

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### EMPLOYEE RETENTION CREDIT

#### How does the ERC interact with the PPP?

	<u>Example 3</u>	<u>Example 4</u>
Amount of PPP Loan	\$200,000	\$200,000
Payroll costs on forgiveness application	\$200,000	\$200,000
Non-payroll costs on forgiveness application	N/A	\$70,000
Amount Forgiven	\$200,000	\$200,000
PPP Payroll costs excluded for ERC purposes	\$200,000	\$130,000 (\$200k-\$70k)
Amount of PPP payroll costs available for ERC	N/A	\$70,000

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### EMPLOYEE RETENTION CREDIT

#### How does the ERC define full or partial suspension of trade or business operations (Notice 2021-20)?

- **Q-11:** If a governmental order requires non-essential businesses to suspend operations but allows essential businesses to continue operations, is an essential business considered to have a full or partial suspension of operations due to a governmental order?
- **A-11:** An employer that operates an essential business is not considered to have a full or partial suspension of operations if the governmental order allows all of the employer's operations to remain open. However, an employer that operates an essential business may be considered to have a partial suspension of operations if, under the facts and circumstances, **more than a nominal portion** of its business operations are suspended by a governmental order. For example, an employer that maintains both essential and non-essential business operations, each of which are more than nominal portions of the business operations, may be considered to have a partial suspension of its operations if a governmental order restricts the operations of the non-essential portion of the business, even if the essential portion of the business is unaffected. In addition, an essential business that is permitted to continue its operations may, nonetheless, be considered to have a partial suspension of its operations if a governmental order requires the business to close for a period of time during normal working hours.

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### EMPLOYEE RETENTION CREDIT

#### How does the ERC define full or partial suspension of trade or business operations (Notice 2021-20)?

- **A-11 continued:** Solely for purposes of this employee retention credit, a portion of an employer's business operations will be deemed to constitute **more than a nominal portion of its business operations if either**
  - (i) the gross receipts from that portion of the business operations is not less than 10 percent of the total gross receipts (both determined using the gross receipts of the same calendar quarter in 2019), or
  - (ii) the hours of service performed by employees in that portion of the business is not less than 10 percent of the total number of hours of service performed by all employees in the employer's business (both determined using the number of hours of service performed by employees in the same calendar quarter in 2019).
- **Q-12** – Governmental order causes the suppliers to a business to suspend operations, with examples.
- **Q-13 & Q-14** – Voluntary suspension by business

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### EMPLOYEE RETENTION CREDIT

#### How does the ERC define full or partial suspension of trade or business operations (Notice 2021-20)?

- **Q-15:** If a governmental order requires an employer to close its workplace, but the employer is able to continue operations comparable to its operations prior to the closure by requiring employees to telework, is the employer considered to have a suspension of operations?
- **A-15:** No. If an employer's workplace is closed by a governmental order, but the employer is able to continue operations comparable to its operations prior to the closure, including by requiring its employees to telework, the employer's operations are not considered to have been fully or partially suspended as a consequence of a governmental order. However, if the closure of the workplace causes the employer to suspend business operations for certain purposes, but not others, it may be considered to have a partial suspension of operations due to the governmental order. (See 4 Examples in Notice)

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### EMPLOYEE RETENTION CREDIT

#### How does the ERC define full or partial suspension of trade or business operations (Notice 2021-20)?

- **Q-16:** What factors should be considered in determining if an employer is able to continue operations comparable to its operations prior to closure such that the employer's operations are not considered to have been fully or partially suspended due to a governmental order?
- **A-16:** The following factors should be considered in determining if an employer is able to continue comparable operations, although additional factors may be considered as well if relevant:
  1. Employer's telework capabilities.
  2. Portability of employees' work.
  3. Need for presence in employee's physical workspace.
  4. Transitioning to telework operations.
  - The Notice goes into greater detail on these points so if they apply to you, please review.
- **Q-17** – Addresses businesses required to close a portion of their business. (Provides 6 industry examples including Restaurants, Retail Businesses, Hospitals and Grocery Stores).

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### EMPLOYEE RETENTION CREDIT

#### How does the ERC define full or partial suspension of trade or business operations (Notice 2021-20)?

- **Q-18:** What factors should be taken into account in determining whether a modification required by a governmental order has more than a nominal effect on business operations for purposes of Q/A-17?
- **Q-19:** Are an employer's operations considered to be partially suspended for purposes of the employee retention credit if the employer is required to reduce its operating hours by a governmental order?
- **A-19:** Yes. An employer that reduces its operating hours due to a governmental order is considered to have partially suspended its operations since the employer's operations have been limited by a governmental order. (The Notice provides an example).
- **Q-20:** Is an employer that operates a trade or business in multiple locations and is subject to governmental orders requiring full or partial suspension of its operations in some jurisdictions, but not in others, considered to have a partial suspension of operations?
- **A-20:** Yes. Employers that operate a trade or business in multiple locations and are subject to State and local governmental orders requiring full or partial suspension of operations in some, but not all, jurisdictions are considered to have a partial suspension of operations. (The Notice goes on to explain this in more detail and provides an example).

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### EMPLOYEE RETENTION CREDIT

#### How does the ERC define full or partial suspension of trade or business operations (Notice 2021-20)?

- **Q-21:** If the operations of a trade or business of one member of an aggregated group are fully or partially suspended due to a governmental order, are the operations of the trade or business of the other members of the aggregated group considered to be fully or partially suspended for purposes of the employee retention credit?
- **A-21:** Yes. All members of an aggregated group that are treated as a single employer under the aggregation rules are treated as a single employer for purposes of the employee retention credit. (The Notice provides more details and an example)
- **Q-22:** If an employer is subject to a governmental order to fully or partially suspend its business operations and the order is subsequently lifted in the middle of a calendar quarter, is the employer an eligible employer for the entire calendar quarter?
- **A-22:** Yes. An employer with business operations that are fully or partially suspended due to a governmental order during a portion of a calendar quarter is an eligible employer for the entire calendar quarter. However, only wages paid with respect to the period during which the employer is fully or partially suspended due to a governmental order may be considered qualified wages. (The Notice provides an example).

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### EMPLOYEE RETENTION CREDIT

#### How is a significant decline in gross receipts determined (Notice 2021-20)?

- **Q-23:** How is the period during which there is a significant decline in gross receipts determined?
- **A-23:** The period during which there is a significant decline in gross receipts is determined by identifying the first calendar quarter in 2020 (if any) in which an employer's gross receipts are less than 50 percent of its gross receipts for the calendar quarter in 2019. The period during which there is a significant decline in gross receipts ends with the earlier of January 1, 2021, or the calendar quarter that follows the first calendar quarter in which the employer's 2020 quarterly gross receipts are greater than 80 percent (20% decline) of its gross receipts for the same calendar quarter in 2019.
- **Example:** Employer A's gross receipts were \$100,000, \$190,000, and \$230,000 in the first, second, and third calendar quarters of 2020, respectively. Its gross receipts were \$210,000, \$230,000, and \$250,000 in the first, second, and third calendar quarters of 2019, respectively. Thus, Employer A's 2020 first, second, and third quarter gross receipts were approximately 48 percent, 83 percent, and 92 percent of its 2019 first, second, and third quarter gross receipts, respectively. Accordingly, Employer A experienced a significant decline in gross receipts commencing on the first day of the first calendar quarter of 2020 (the calendar quarter in which gross receipts were less than 50 percent of those in the same quarter of 2019) and ending on the first day of the third calendar quarter of 2020 (the quarter following the first quarter in which the gross receipts were more than 80 percent of those in the same quarter of 2019). Thus, Employer A is an eligible employer during the first and second calendar quarters of 2020.

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### EMPLOYEE RETENTION CREDIT

**Significant decline in gross receipts example for 2020:**

	<u>Quarter 1</u>	<u>Quarter 2</u>	<u>Quarter 3</u>
Gross receipts 2020	\$100,000	\$190,000	\$230,000
Gross receipts 2019	\$210,000	\$230,000	\$250,000
% of 2019 receipts (2020 divided by 2019)	48%	83%	92%
% decline in gross receipts	52%	17%	8%
Qualify for ERC	Yes	Yes, due to Q1	NO

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### EMPLOYEE RETENTION CREDIT

#### How is a significant decline in gross receipts determined (Notice 2021-20)?

- **Q-26:** For members of an aggregated group, is a significant decline in gross receipts determined based on the entire group?
- **A-26:** Yes. All entities that are treated as a single employer under the aggregation rules are treated as a single employer for purposes of determining whether the employer experienced a significant decline in gross receipts. (The Notice provides more details and examples)
- **Q-27:** How does an employer that started its business in 2019 determine whether it experienced a significant decline in gross receipts for purposes of the employee retention credit?
- **A-27:** See Notice if this applies to you.
- **Q-28:** How does an employer that acquires a trade or business during the 2020 calendar year determine if the employer experienced a significant decline in gross receipts?
- **A-28:** See Notice if this applies to you

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### EMPLOYEE RETENTION CREDIT

#### How do I claim the ERC credits for 2020 (Notice 2021-20)?

- The employer will claim the credit on its quarterly federal employment tax return by amending (form 941-X) for the respective quarter for which the ERC is being claimed.
- There is also a special fourth quarter rule that only applies if wages paid in the second or third quarter of 2020 were reported as payroll costs on a PPP loan forgiveness application, and forgiveness of the loan is subsequently denied. In this case, the employer may include the wages paid in the second or third quarter on the fourth quarter Form 941 in order to retroactively claim the credit. This special rule is optional, and the employer may instead follow the normal procedure for filing Form 941-X to amend the second or third quarter return to claim the ERC on the qualified wages. (Please refer to Notice **Q/A-58** for details and examples if this applies to you).

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### EMPLOYEE RETENTION CREDIT

#### How do I claim the ERC credits for 2021?

- The employer can claim the credit on its quarterly federal employment tax return (941) or by amending (form 941-X) for the respective quarter for which the ERC is being claimed.
- The credit can also be claimed on the Form 941 federal employment tax return and eligible employers can either:
  - (1) reduce their deposits of federal employment taxes up to the amount of the anticipated credit,
  - (2) request a refund if the credit exceeds the amount of payroll taxes required to be paid, or
  - (3) request an advance of the amount of the anticipated credit by filing Form 7200.
- NOTE: The advance credit option is currently not available to employers with greater than 500 FTE's (2019). The IRS is planning on issuing further guidance in the future.

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### EMPLOYEE RETENTION CREDIT

#### ERC employer substantiation requirements (Notice 2021-20):

- **Q/A70** Adequate substantiation includes the following:
  - Documentation showing how the employer determined it was an eligible employer that paid qualified more than a nominal portion of its operations were suspended or whether a governmental order had more than a nominal effect on its business operations; records showing a significant decline in gross receipts; records showing employees received qualified wages and the amounts; and documentation showing wages were paid for not performing services (if a large employer).
  - Documentation showing how the employer determined the amount of allocable qualified health plan expenses.
  - Documentation showing how the employer applied the aggregated group rules and allocation of the ERC.
  - Copies of Forms 7200 (if any) filed with the IRS.
  - Copies of relevant employment tax returns.

Employers are urged to retain documentation substantiating the ERC for at least four years after the later of the date the employment taxes become due or are paid.

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### EMPLOYEE RETENTION CREDIT

#### ERC effect on income taxes (Notice 2021-20)?

- **Q/A60** provides that the employer's deduction for qualified wages, including qualified health plan expenses, is reduced by the amount of the ERC. However, Q/A-60 clarifies that an employer does not reduce its deduction for the employer's share of social security and Medicare.
- In addition, the section 280C(a) deduction add back appears to track the tax year related to the relevant ERC such that an employer applying for the credit after filing its tax return may need to amend its related tax return if later claiming the ERC for wages included in the earlier return. (For example, a taxpayer that previously received a PPP loan has already filed its 2020 tax return).

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### EMPLOYEE RETENTION CREDIT

#### Summary of steps to take to identify ERC eligibility and qualified wages:

1. Determine if you meet one of the following eligibility tests:
  - Decline in gross receipts compared to same quarter in 2019 – (50% for 2020/20% for 2021).
  - Fully or partially suspended due to government order related to COVID-19
2. Identify your FTE count for 2019 (for 2020 you are a large employer if over 100 FTE's. For 2021 this threshold increases to over 500 FTE's). As discussed, rules are different.
3. Identify if your business has any of the following:
  - A PPP loan - You must identify the paycheck dates/wages and insurance included in your forgiveness application as these need to be excluded.
  - Work Opportunity Tax Credit (WOTC) wages need to be excluded.
  - FFCRA wages need to be excluded.
  - Remove wages paid to "related individuals" per slide above.
4. Claim Credits, if you qualify.
5. Reduce payroll/insurance expenses for year that credit is claimed. May require amended business return.

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### SBA UPDATES

#### EIDL updates:

- **03/24/21** - The U.S. Small Business Administration is more than tripling the maximum amount that small businesses and nonprofits can borrow under the COVID-19 Economic Injury Disaster Loans (EIDL) program.
  - Starting the week of April 6, the loan limit for COVID-19 EIDL loans will jump from six months of economic injury with a maximum loan amount of \$150,000 to up to 24 months of economic injury with a maximum loan amount of \$500,000.
  - Any COVID-19 EIDL loans in process when the new loan limits go into effect will automatically be considered for the new maximum limits, the SBA said. Existing COVID-19 EIDL borrowers will be able to request an increase beginning April 6. A spokesperson said the SBA will provide updated instructions on how to request a loan increase on SBA.gov and also will reach out directly via email to existing COVID-19 borrowers with loans approved prior to the increased loan limit taking effect.

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### SBA UPDATES

#### EIDL updates:

- **03/12/21** - the SBA announced extended deferment periods for all of its disaster loans, including the COVID-19 EIDL loans. The deferral details differ depending on the calendar year the disaster loan was made.
  - For all SBA disaster loans made in 2020, the first payment due date is 24 months, extended from 12 months, from the date of the note.
  - For all SBA disaster loans made in 2021, the first payment due date is 18 months, extended from 12 months, from the date of the note.

The SBA also granted an additional 12-month deferment of principal and interest payments for existing disaster loans approved prior to 2020 that were in regular servicing status as of March 1, 2020.

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### SBA & OTHER UPDATES

#### Other updates:

- The U.S. Small Business Administration (SBA) indicated that the Shuttered Venue Operators Grant (SVOG) program is to open April 8.
- The U.S. Small Business Administration (SBA) is targeting early April to launch a phased rollout of the \$28.6 billion Restaurant Revitalization Fund (RRF).
- The Internal Revenue Service (IRS) has extended the individual tax filing deadline from April 15, 2021 to May 17, 2021. North Carolina has also extended to May 17, 2021.
  - Individual estimated tax payments are still due on April 15, 2021.
- On 03/25/21 The senate passed the PPP Extension Act of 2021 that is expected to be signed by the President. This Act, if signed, will extend the deadline for PPP applications from March 31, 2021 to May 31, 2021.

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# Questions?

COVID-19 WEBINAR 16

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# Thank you!

Future Webinars will be scheduled based on new guidance

Invitations will be sent

**Recordings and presentation slides will be sent out this afternoon.**

**This presentation is based on information available on March 25, 2021 and is  
subject to change.**