

Employer Retention Credit for Employers Subject to Closure due to COVID-19
Section 2301 of the CARES Act

A. In general

Eligible employers may claim a refundable credit against the 6.2% (out of a total of 7.65%) of the employer portion of the FICA Tax for an amount equal to 50% of the qualified wages paid from March 13 to December 31, 2020 with respect to each employee.

B. Eligible Employers

To qualify for the credit, the employer must have been in operations during the calendar year 2020 and:

1. Its operation is fully or partially suspended during the calendar quarter due to orders from an appropriate governmental authority limiting commerce, travel, or group meetings due to the COVID-19 ("Government Order"); **or**
2. The employer suffered a significant decline in gross receipts during the calendar quarter. It shall be considered that the employer suffered a significant decline in gross receipts if during any calendar quarter for the year 2020 the gross receipts of the employer are less than 50% of gross receipts for the same calendar quarter in the prior year. In this case, the credit may be claimed up to the calendar quarter that gross receipts are greater than 80% of the gross receipt for the same calendar quarter in the prior year or December 31, 2020, whichever is earlier.

Employers that were granted a qualified loan under the SBA's Paycheck Protection Program (PPP) established under the CARES Act may not claim the credit.

Tax exempt organizations may claim the credit.

C. Qualified Wages

There is a limit of \$10,000 of qualified wages per employee. Therefore, the maximum credit for each employee is \$5,000 (\$10,000 x 50%).

If the employer had more than 100 employees during 2019, the employer may only consider qualified wages subject to the credit the wages paid to employees not providing services. If the employer had not more than 100 employees during 2019, then the qualified wages subject to the credit will be all wages paid to the employees.

Any wages paid that are eligible for the credits provided under the Families First Coronavirus Response Act (FFCRA) are not eligible wages subject to the credit.

If the employer claim the credit due to a suspension of its operations due to a Government Order, qualified wages may not exceed the amount of the wages that the employee would have received for working a duration equivalent to the 30 days immediately preceding this period.

Eligible wages include the cost of the group health plan attributed to the eligible wages.

D. Process to claim the credit

We are still awaiting regulations from the U.S. Department of Treasury on the process to claim the credit. However, the CARES Act provides that the regulations should:

1. Allow the advance payment of the credit;
2. Provide for the reconciliation of the advance payment with the amount to be claimed when filing the return of the tax for applicable to the calendar quarter or taxable year;
3. Provide the recapture of the credit if the employer receives a qualified loan under the PPP;
4. Provide for the application of the credit to third party payors; and
5. Provide for the application of the credit to employers that were not in operations during the applicable calendar quarters in 2019.

E. Application of the credit to Puerto Rico

The credit is applicable to employers in Puerto Rico. The Service has already published Form 7200 "*Advance Payment of Employer Credits Due to COVID-19*", which is the form to be used to claim the advance payment of the Employer Retention Credit and the credits under the FFCRA. The instructions to Form 7200, which are available in the Internal Revenue Service's (IRS) website, provide useful hindsight to the upcoming regulations, along with IR 2020-62 issued by the IRS, for the application of the Employer Credits Due to COVID-19. Contrary to other employer retention credits that have been applicable to Puerto Rico in previous instances, it is not expected that this credit be handled by the Puerto Rico Department of Treasury since the credit can be claimed directly against the payroll tax to be paid to the IRS.