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Federal and New York State Tax Credit Update for Businesses and Individuals

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Update on Federal Tax Credits

Federal Business Tax Credits

1. Credit for Federal Tax Paid on Fuels (Form 4136)
2. Work Opportunity Credit (Form 5884)
3. Credit for Increasing Research Activities (Form 6765)
4. Disabled Access Credit
5. Empowerment Zone Employment Credit
6. Credit for Small Employer Pension Plan Startup Costs
7. Energy Efficient Home Credit
8. Alternative Motor Vehicle Credit
9. Qualified Plug-in Electric Drive Motor Vehicle Credit
10. Credit for Small Employer Health Insurance Premiums
11. Employer Credit for Paid Family and Medical Leave (IRC Section 45S)
12. Foreign Tax Credit
13. Enhanced Oil Recovery Credit

Federal Business Tax Credits

14. Renewable Electricity, Refined Coal, Indian Coal Production Credit
15. Empowerment Zone Employment Credit
16. Indian Employment Credit
17. Credit for Employer Social Security and Medicare Taxes Paid on Tips
18. Biodiesel and Renewable Diesel Fuels Credit
19. New Markets Credit
20. Credit for Small Employer Pension Plan Startup Costs
21. Credit for Employer-Provided Childcare Facilities and Services
22. Low Sulfur Diesel Fuel Production Credit
23. Qualified Railroad Track Maintenance Credit
24. Credit for Oil and Gas Production from Marginal Wells
25. Distilled Spirits Credit
26. Energy Efficient Home Credit

Federal Business Tax Credits

27. Alternative Motor Vehicle Credit
28. Alternative Fuel Vehicle Refueling Property Credit
29. Credit to Holders of Tax Credit Bonds
30. Mine Rescue Team Training Credit
31. Credit for Employer Differential Wage Payments
32. Carbon Oxide Sequestration Credit

Federal Individual Tax Credits

1. Earned Income Credit
2. Credit for the Elderly or Disabled
3. Foreign Tax Credit
4. Child Tax Credit
5. Child and Dependent Care Credit
6. Fuel Tax Credit
7. Residential Energy Credits
8. Alcohol Used as Fuel Credit
9. Mortgage Interest Credit
10. Credits for Sick and Family Leave for Self-Employed
11. Passive Activity Credit Limitations
12. Credit for Prior Year Minimum Tax
13. Qualified Adoption Expenses

Federal Individual Tax Credits

14. DC Homebuyer Credit
15. American Opportunity Credit
16. Lifetime Learning Credit
17. New Markets Credit
18. Credit for Qualified Retirement Savings Contributions
19. Health Coverage Tax Credit
20. Credit for Oil and Gas Production from Marginal Wells
21. Distilled Spirits Credit
22. Energy Efficient Home Credit
23. Alternative Motor Vehicle Credit
24. Credit to Holders of Tax Credit Bonds
25. Plug-in Electric Drive Motor Vehicle Credit

Work Opportunity Tax Credit

Current Legislation

- The Taxpayer Certainty and Disaster Tax Relief Act of 2020 extended the credit to cover workers who begin work after 2020 and before 2026
- The Hiring Incentive to Return Employment (HIRE) Act of 2021 proposed a WOTC increase from 40% to 50% for the first $10,000 (up from $6,000) in qualified wages, for two years, for all WOTC target groups
- The Revised Build Back Better Bill released by the House last week dropped the proposed increase and expansion to the WOTC

Work Opportunity Tax Credit

How is it Computed?

- A credit for employers who hire and pay wages to individuals who are certified by a local agency as being a member of one of 10 targeted groups in their first year or second year of employment after performing at least 120 to 400 hours of service
- The credit is equal to 40% of up to $6,000 of qualified wages ($2,400) or 25% of up to $6,000 ($1,500) for individuals who perform fewer than 400 hours but at least 120 hours
- For certain qualified veterans, up to $24,000 in wages may be taken into account ($9,600 maximum)
- Wages for the WOTC can't be used to figure other Federal tax credits

Work Opportunity Tax Credit

- Qualified groups (definitions can be found in the Form 8850 instructions):
  - Qualified IV-A Recipient
  - Qualified Veteran
  - Ex-Felon
  - Designated Community Resident
  - Vocational Rehabilitation Referral
  - Summer Youth Employee
  - SNAP Recipient (formally the Food Stamps Program)
  - SSI Recipient
  - Long-Term Family Assistance Recipient
  - Qualified Long-Term Unemployment Recipient

Work Opportunity Tax Credit - Steps for Employers

- What are the steps to claim the WOTC?

1. All new hires should fill out Form 8850, page 1, the employer should fill out page 2, then submit to the State Workforce Agency (SWA) for the state in which the company is operating. This must be done within 28 days after the eligible worker begins work. See the following link for contacts:

   https://www.dol.gov/agencies/eta/wotc/contact/state-workforce-agencies

2. Once certified by the SWA, the employee is considered a qualified employee
3. At year-end, determine the wages of qualified employees and the number of hours worked for the year
4. Form 5884 *Work Opportunity Credit* should be completed and filed with your tax return. (Note: the deduction for wages must be reduced by the amount of the credit and recorded as a permanent book-tax difference on Schedule M-1 or Schedule M-3)

Work Opportunity Tax Credit - Example

- For the current year, the company hired the following qualified and certified employees:
  - Susan –

    Qualified Veteran with service-connected disability and unemployed for at least 6 months in the prior 1-year period

    $27,000 & 1,800 hours
  - Jim –

    Qualified veteran unemployed for at least 4 weeks, but not less than 6 months in the prior 1-year period

    $25,000 & 1,600 hours
  - Dave –

    SNAP Recipient

    $3,000 & 200 hours

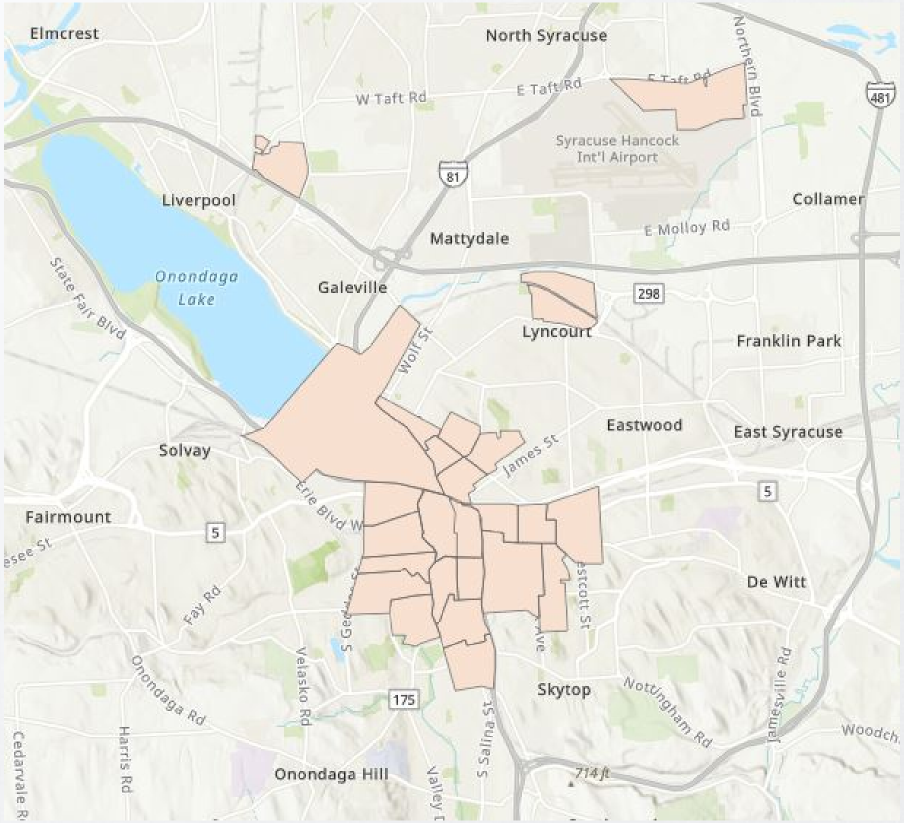
	Wages	Hours	Eligible Credit Wages
Susan	27,000	1,800	24,000
Jim	25,000	1,600	6,000
Dave	3,000	200	3,000
	55,000		33,000

	Eligible Credit Wages	%	Credit Amount
25% Category	3,000	25%	750
40% Category	30,000	40%	12,000
	33,000		**12,750**
			Total Credit

Empowerment Zone Employment Credit

- The Empowerment Zone Credit is claimed on Federal Form 8844
- An extension of this credit was granted through 12/31/2025 by the Consolidated Appropriations Act of 2021
- Employers who operate within a designated Empowerment Zone qualify for a credit based on wages paid to employees who live in an Empowerment Zone
- The credit is equal to 20% of the qualified wages (up to $15,000 in wages per employee)

Empowerment Zone Map - Syracuse Area



Source: arcgis.com

Research and Development Expenses

Current Legislation

- The Tax Cuts and Jobs Act of 2017 (TCJA) brought the most sweeping update to the U.S. Tax Code since the 1986 Tax Act. The centerpiece was a permanent reduction in the corporate tax rate from 35% to 21%. The TCJA was originally seen as favorable for the R&D tax credit, keeping it permanent while a number of other credits and deductions were eliminated to pay for the lowered rates
- However, buried in the Act was a change to the treatment of Section 174 deductions starting with years beginning after December 31, 2021. The TCJA eliminated the ability to deduct R&D expenses currently and requires taxpayers to charge them to a capital account and amortize them over 5 years. Also, any foreign research the amortization period is extended to 15 years

Research and Development Expenses

- Taxpayers that utilized Revenue Procedure 2000-50 to either expense software development costs or amortize them over 36 months are out of luck as well. The new language in Section 174(c)(3) states that any amount paid or incurred in connection with the development of software shall be treated as research and experimental expenditure, forcing it into the new 5-year amortization period starting with years beginning after December 31, 2021
- There are currently legislative proposals in Congress to modify the onerous changes in the Section 174 rules. On March 16, 2021, a Senate bill, The American Innovation and Jobs Act, was released which would eliminate the requirement to spread out research and development deductions over a 5-year period with years beginning after December 31, 2021

Research and Development Expenses

- Draft legislation of President Biden's Build Back Better Act includes a proposal to delay the requirement to amortize research and development expenses instead of taking immediate deductions, to begin after 2025 instead of after 2021
- **New Reporting Requirements for Refund Claims**
- On October 15, 2021, the IRS released IR-2021-203 which sets forth required information for a valid research credit claim for refund. This Chief Counsel legal advice is the result of ongoing efforts to manage research credit issues and resources in the most effective and efficient manner

Research and Development Expenses

- The opinion provides that for a Section 41 research credit claim for refund to be considered a valid claim, taxpayers are required to provide the following information at the time the refund is filed with the IRS:
  - Identify all the business components to which the Section 41 research credit claim relates for the year
  - For each business component, identify all research activities performed and name the individuals who performed the research activity, as well as the information each individual sought to discover
  - Provide the total qualified employee wage expenses, total qualified supply expenses, and total qualified contract research expenses for the claim year. This may be done using Form 6765, Credit for Increasing Research Activities

Research and Development Expenses

- The opinion goes on to say that taxpayers who have a credit study prepared do not need to submit the study with their claims. However, if one is submitted, the taxpayer must identify the specific facts and pages in the study that addresses the required information outlined above
- When a claim is filed not meeting the minimum requirements, the opinion directs the IRS to reject it as invalid. Such a rejection may preclude the taxpayer from perfecting the claim. In effect, the IRS is saying that a deficient claim may leave the taxpayer with no remedy whatsoever to amend or perfect it, or for judicial review. This is a very aggressive position by IRS and likely to produce significant litigation. However, we recommend taxpayers be prepared to follow the guidance IRS provided

Research and Development Expenses

- The IRS will provide a grace period (until January 10, 2022) before requiring the inclusion of this information with the timely filed Section 41 research claims for refund. Upon expiration of the grace period, there will be a 1-year transition period during which taxpayers will have 30 days to perfect a research credit claim for refund prior to the IRS final determination on the claim. Further details will be forth coming; however, taxpayers are recommended to immediately begin providing this information

Credit for Increasing Research Activities

<u>What Qualifies and How is it Computed?</u>

- The research & development tax credit is claimed on Federal Form 6765 and is allowed for expenses paid or incurred for qualified research. Qualified research means research for which expenses may be treated as section 174 expenses
- This research must be undertaken for discovering information that is technological in nature, and its application must be intended for use in developing a new or improved business component or process of the taxpayer
- In addition, substantially all of the activities of the research must be elements of a process of experimentation relating to a new or improved function, performance, reliability, or quality

Section B - Alternative Simplified Credit

Section B - Alternative Simplified Credit

Line 24	Wages for Qualified Services	$ 875,000
Line 25	Cost of Supplies	150,000
Line 26	Rental or Lease Costs of Computers	-
Line 27	Enter the Applicable Percentage of Contract Research Expenses	250,000
Line 28	Total Qualified Research Expenses. Add Lines 24 through 27	1,275,000
Line 29	Enter Your Total Qualified Research Expenses for the Prior Three Years	3,670,000
	2014 1,250,000 **PYTR**	
	2013 1,270,000 **PYTR**	
	2012 1,150,000 **PYTR**	
Line 30	Divide Line 29 by 6	611,667
Line 31	Subtract Line 30 from Line 28	663,333
Line 32	Multiply Line 31 by 14%	92,867
Line 34	Multiply Line 32 by 65% for the Reduced Credit under IRC Section 280C	$ 60,363

Update on New York Tax Credits

New York State Business Credits

1. Alcoholic beverage production credit
2. Alternative fuels and electric vehicle recharging property credit
3. Automated external defibrillator credit
4. Biofuel production credit
5. Brownfield credits
6. Clean heating fuel credit
7. Conservation easement credit
8. Economic Transformation and Facility Redevelopment Program tax credit
9. Empire State apprenticeship tax credit
10. Empire State commercial production credit
11. Empire State film production credit
12. Empire State film post-production credit
13. Empire State Jobs Retention Program credit
14. Empire State musical and theatrical production credit

New York State Business Credits

15. Empire Zone (EZ) Credits
16. EZ employment incentive credit
17. EZ investment tax credit
18. EZ employment incentive credit for the financial services industry
19. EZ investment tax credit for the financial services industry
20. Employee Training Incentive Program (E-TIP) tax credit
21. Employer-provided childcare credit
22. Employment incentive credit
23. Employment incentive credit for the financial services industry
24. Employment of persons with disabilities tax credit
25. Excelsior Jobs Program tax credit
26. Farmers school tax credit
27. Farm donations to food pantries credit
28. Farm workforce retention credit

New York State Business Credits

29. Hire a veteran credit
30. Investment tax credit
31. Employer incentive credit
32. Investment tax credit for the financial services industry
33. Life sciences research and development tax credit
34. Long-term care insurance credit
35. Low-income housing credit
36. Manufacturer's real property tax credit
37. Minimum wage reimbursement credit
38. New York Youth Jobs Program tax credit
39. QETC credits
40. QETC capital tax credit
41. QETC employment credit
42. QEZE credits

New York State Business Credits

43. QEZE credit for real property taxes
44. QEZE tax reduction credit
45. Recovery tax credit
46. Rehabilitation of historic properties credit
47. Restaurant return-to-work tax credit
48. Security officers training tax credit
49. Servicing mortgages
50. Special additional mortgage recording tax credit
51. START-UP NY Program
52. START-UP NY tax elimination credit
53. START-UP NY telecommunication services excise tax credit
54. Taxicabs and livery service vehicles accessible to persons with disabilities tax credit
55. Workers with disabilities tax credit

New York State Individual Credits

1. Household Credit
2. Credit Against Separate Tax on Lump-Sum Distributions (Form IT-112.1)
3. Credit for Taxes Paid to a Province of Canada (Form IT-112-C)
4. STAR Credit Advance Payment Reconciliation (Form IT-119)
5. Noncustodial Earned Income Credit (Form IT-209)
6. Investment Credit (Form IT-212)
7. Empire State Child Credit (Form IT-213)
8. Child and Dependent Care Credit (Form IT-216)
9. Contributions to Certain Funds Credit (Form IT-228)
10. Clean Heating Fuel Credit (Form IT-241)
11. Claim for Volunteer Firefighters' and Ambulance Workers' Credit (Form IT-245)

New York State Individual Credits

12. Long-Term Care Insurance Credit (Form IT-249)
13. Claim for Credit for Purchase of an Automated Ext Defibrillator (IT-250)
14. Credit for Employment of Persons with Disabilities (Form IT-251)
15. ITC for the Financial Services Industry (Form IT-252)
16. Claim for Solar Energy System Equipment Credit (Form IT-255)
17. Special Additional Mortgage Recording Tax Credit (Form IT-256)
18. Claim of Right Credit (Form IT-257)
19. Nursing Home Assessment Credit (Form IT-258)
20. College Tuition Credit (Form IT-272)
21. Claim for EZ Wage Tax Credit Including ZEA Wage Tax Credit (Form IT-601)
22. EZ Capital Tax Credit (Form IT-602)

New York State Individual Credits

23. EZ ITC and EZ EIC (Form IT-603)
24. QEZE Tax Reduction Credit (Form IT-604)
25. QEZE Credit for Real Property Taxes (Form IT-606)
26. Claim for Excelsior Jobs Program Tax Credit (Form IT-607)
27. Empire State Jobs Retention Program Credit (Form IT-634)
28. New York Youth Jobs Tax Credit (Form IT-635)
29. Alcoholic Beverage Production Credit (IT-636)
30. Manufacturer's Real Property Tax Credit (IT-641)
31. Farm Workforce Retention Credit (IT-647)
32. Farm Donations to Food Pantries Credit (IT-649)
33. Recovery Tax Credit (IT-651)

New York State Individual Credits

34. Employer-Provided Childcare Credit (IT-652)
35. Income Earned While a NY Resident (Part-year Resident Only) - Override
36. Resident Credit Against Separate Tax on Lump-Sum Distributions - Override
37. Accumulation Distribution Credit
38. Solar and Wind Energy Credit Carryover
39. Residential Fuel Oil Storage Tank Credit Carryover
40. Employer Compensation Expense Program Wage Credit Carryover (IT-226)
41. Taxicabs and Livery Service Vehicles Accessible to Persons with Disabilities Credit
42. Historic Homeownership Rehabilitation Credit
43. Rehabilitation of Historic Properties Credit
44. Handicapped-Accessible Taxicabs and Livery Service Vehicles

New York State Individual Credits

45. Empire State Commercial Production Credit
46. Alternative Fuels Credit
47. Fuel Cell Electric Generating Equipment Credit
48. FSI EZ Investment Tax Credit and FSI EZ Employment Incentive Credit
49. QETC Capital Tax Credit
50. Alternative Fuels and Electric Recharging Property Credit
51. Hire a Veteran Credit (IT-643)
52. Workers with Disabilities Tax Credit (IT-644)
53. Low Income Housing Credit
54. Green Building Credit
55. Refundable Credits

New York State Individual Credits

56. Refundable Empire State Film Production Credit
57. EZ Investment and Employment Incentive Credit for New Businesses
58. Security Officer Training Credit
59. Economic Transformation and Facility Redevelopment Credit
60. Manufacturer's Real Property Tax Credit (IT-641)
61. Empire State Musical and Theatrical Production Credit (IT-642)
62. Employee Training Incentive Program Tax Credit (IT-646)
63. Farm Workforce Retention Credit
64. QETC Employment Credit for New Businesses
65. Brownfields Credit Form Used
66. Drive clean rebate for electric cars (not a tax credit, part of contract at the NYS dealership)

Investment Tax Credit (ITC)

- Credit for the cost basis of qualified manufacturing assets placed in service during the tax year
- Credit is equal to between 4% and 5% for qualified property (other than qualified R&D property), and between 7% and 9% on qualified R&D property

Employer Incentive Credit (EIC)

- Credit for qualified manufacturers who have claimed the ITC and have experienced an increase of more than 101% in employment in the current year when compared to the base years on the annual amount calculated by using the average number of employees in each quarter
- Base years are typically the two prior years that the ITC was claimed
- Credit Rate:
- 101%<102% employment increase - 1.5% Credit Rate
- 102%<103% employment increase - 2% Credit Rate
- ≥103% employment increase - 2.5% Credit Rate

Manufacturer's Real Property Tax Credit

- Credit for qualified manufacturers who pay real property taxes in New York State on real property that is owned or leased by the business
- Equal to 20% of the eligible real property taxes
- Eligible real estate taxes are reduced by property taxes that apply to areas of the property not used in eligible manufacturing (common areas, vacant land and parking lots)

SUNY Tax-Free Areas to Revitalize and Transform New York (START-UP New York)

Overview of START-UP New York

- The START-UP NY program provides tax benefits to approved businesses that locate in vacant space or land of approved New York State public and private collages and universities, approved strategic state assets, and New York State incubators affiliated with private universities or colleges that are designated as tax-free NY areas. This program will promote entrepreneurialism and job creation by creating tax-free communities across the state
- START-UP NY is administered by New York State's Empire State Development (ESD)
- The program is intended to help companies in the high-tech or emerging industries sectors to start, grow, and stay in New York
- The University will determine the "Tax-Free NY Area(s)" where the company will operate

Ineligible Businesses

- Retail and wholesale businesses
- Restaurants
- Law and accounting firms
- Medical or dental practices
- Real estate management companies/brokers
- Hospitality
- Retail banking
- Utilities and energy production
- Finance and financial services
- Businesses providing personal services
- Businesses providing business administration support and services

START-UP NY Tax Benefits

START-UP NY business tax benefits:

- Metropolitan commuter transportation mobility tax (MCTMT) - exemptions for employers and self-employed individuals (including partners)
- Organization tax and license and maintenance fees - exemption
- Real estate transfer tax - exemption for leases
- Sales tax - credit or refund
- Tax Elimination Credit - corporation and income tax
- Telecommunication Services Excise Tax Credit

START-UP NY personal income tax benefit:

- Wage exclusion tax benefit for eligible employees

Sales and Use Credit

- Once certified, a business would apply to the Tax Department to receive a credit or refund for sales and use taxes paid for goods and services used or consumed by the business's operation in a tax-free area

Tax Elimination Credit (Income Taxes)

- Credit would be calculated by the business when filing its tax return for the first 10 years of operation
- For businesses with 100% of their operations (assets and payroll) in a tax-free area, the credit would eliminate any tax liability
- For businesses with operations in and out of a tax-free area, the credit would be prorated based on the percentage of assets and payroll within a tax-free area

Employee Personal Income Exclusion

- Wages received by an individual as an employee of a business located within a TFA are eligible for the Personal Income Tax Exclusion for the first 5 years, based on the business' 10-year tax-free period
- During the second 5 years of a business's 10-year tax-free period, employees will pay no taxes on income up to $200,000 for individuals, $250,000 for a head of household and $300,000 for taxpayers filing a joint return
- There is an annual cap per business on the number of employees that qualify for this exemption and an annual cap statewide of 10,000 net new jobs. For example, there will be a maximum of 10,000 tax-free jobs after year one, 20,000 tax-free jobs after year two, etc.

How to Apply

- Find the right school for you to partner with based on geography and academic mission. There is a directory of qualified schools at the following link:
- https://esd.ny.gov/university-directory?tid_cd_region=All&tid_cd_industry=All&tid_cc_startup[]=1
- Contact and work directly with the school of choice to apply

New York Paid Family Leave (PFL)

New York Paid Family Leave

- In 2016, New York enacted the nation's strongest and most comprehensive Paid Family Leave policy which has been in effect since 2018. Today, working families no longer have to choose between caring for their loved ones and risking their economic security.
- New York provides eligible employees with 12 weeks (3 months!) of job-protected, paid time off to bond with their new child (including fathers and other gender spouses and grandparents), care for a family member with a serious health condition, or assist family members when a household member is deployed abroad on active military service
- A child can be biological, adopted, foster, stepchild, or child of a domestic partner
- A family member can be a spouse, domestic partner, child/stepchild of whom the employee has legal custody, parent/stepparent, parent-in-law, grandparent, or grandchild

Employee Qualifications

- Employees must:
  - Work for a private employer in New York State or a public employer who has opted in
  - Have worked full-time after 26 consecutive weeks of employment (≥20 hours/week) or part-time after working 175 days (<20 hours/week)

Amount of Benefits Received

- For 2022, employees taking PFL will receive 67% of their average weekly wage based on their prior 8 weeks of work (including the pro-rata portion of bonuses over the previous year) up to the maximum weekly benefit of $1,068.36 ($1,594.57 statewide average times 67%)
- The 12-week period can be taken all at once, or in full day increments

Amount of Benefits Received

Here are some contribution and benefit examples at different income levels:

1. Employees earning $519 a week (about $27,000 a year) will pay about $2.65 per week: $519 x 0.511%. When taking the benefit, these employees will receive $347.73 per week, up to a maximum total benefit of $4,172.76
2. Employees earning $1,000 a week ($52,000 a year) will pay $5.11 per week: $1,000 x 0.511%. When taking the benefit, these employees will receive $670 per week, up to a maximum total benefit of $8,040
3. Employees earning the SAWW of $1,594.57 (about $83,000 a year) or more will pay 0.511% x their gross wages each pay period until they reach the maximum of $423.71. When taking the benefit, these employees will receive $1,068.36 per week, up to a maximum total benefit of $12,820.32

Employee Protections

- Employees are guaranteed:
  - Job protection (same or similar role as prior to leave)
  - Health insurance coverage (same conditions as when working, i.e. employee covers their portion)
  - Protection from discrimination and retaliation from employers

Family and Medical Leave Act (FMLA)

- The Federal Family and Medical Leave Act (FMLA) (https://www.dol.gov/general/topic/benefits-leave/fmla) is a United States labor law that provides job-protected, **unpaid** leave for employees for qualified medical and family reasons.
- If an employee has an event that qualifies for leave under both FMLA and Paid Family Leave, and the employer is covered under both laws, the employer can require them to run concurrently. In order for the two types of leaves to run together, the employer must notify the employee that the leave qualifies for both FMLA and Paid Family Leave, and that it will be designated as such.

How are NY Paid Family Leave and the Federal Family and Medical Leave Act (FMLA) Different?

	PFL	FMLA
Benefits	PAID	UNPAID
Coverage	• Most private employers • Public employers may opt in • One or more employees	• Public and private employers • 50 or more employees in a 75-mile radius
Eligibility	• After 26 consecutive weeks of employment if regularly working 20 or more hours per week • After 175 days worked if regularly working less than 20 hours per week	• 12 months of employment • 1,250 hours of work in the 12-month period preceding leave
Reason for Leave	• Employees cannot use for own serious health condition • Can be used to care for a child of any age	• Employee can use for own serious health condition • Can only be used to care for a child if the child is under 18 years old, or "incapable of self-care because of a mental or physical disability"
Length of Leave	• Only in full-day increments	• Hourly basis
Paid Time Off	• Employers cannot require employees use paid time off while on PFL	• Employers can compel an employee to use paid time off while on FMLA

On the Horizon

- Governor Kathy Hochul signed a bill (S.2928-A/A.06098-A) that expands New York State's Paid Family Leave legislation to allow caring for siblings. Under current law, employees cannot take leave to care for a sibling with a serious health condition
- Section 130001 The Build Back Better Act included a provision that would provide 12 weeks of Federal Universal Paid Family and Medical Leave (UPFML) beginning July 2023 by amending the Social Security Act
- Full and Part-Time workers, including gig and other self-employed workers would have been eligible
- Further negotiations in Congress decreased the 12 weeks to 4 weeks.
- With the scale down from the original $3.5 trillion in appropriations, the UPFML provision was cut despite positive polling results from some news organizations; however, it may be put back in

Employee Retention Credit (ERC)

Employee Retention Credit - Timeline

- Enacted by the Coronavirus Aid, Relief, and Economic Security (CARES) Act, P.L. 116-136 on March 27, 2020
  - ERC Period: March 13, 2020 - December 31, 2020
- Amended by the Taxpayer Certainty and Disaster Tax Relief Act of 2020, P.L. 116-260 on December 27, 2020
  - ERC Extension: January 1, 2021 - June 30, 2021
  - Allowed businesses that received PPP loans to claim ERC (not eligible under CARES Act)

Employee Retention Credit - Timeline

- Amended by the American Rescue Plan Act of 2021, H.R. 1319 on March 11, 2021
  - ERC Extension: July 1, 2021 - December 31, 2021
- Infrastructure Investment and Jobs Act, H.R. 3684, or "Bipartisan Infrastructure Bill" will terminate the ERC effective September 30, 2021
  - Bill passed Senate vote 69-30 on August 10, 2021
  - Bill passed House vote 228-206 on November 5, 2021

Employee Retention Credit (ERC)

What is the Employee Retention Credit (ERC)?

- The Employee Retention Credit (ERC) is a fully refundable payroll tax credit for eligible employers based upon eligibility and payment of qualified wages and health plan expenses
- ERC applies to qualified expenses paid after March 12, 2020 through expiration on September 30, 2021
  - A "Recovery Startup Business" (defined later) is still eligible for ERC through December 31, 2021

Employee Retention Credit - Credit Amount

What is the ERC credit amount for 2020?

- For **2020**, the ERC is **50 percent** of the eligible expenses paid to employees by an eligible employer
- For **2020**, eligible expenses are limited to $10,000 per employee, or an ERC of $5,000 per employee for 2020
  - $10,000 x 50% = **$5,000** ERC per employee for 2020 year

Employee Retention Credit - Credit Amount

What is the ERC credit amount for 2021?

- For **2021**, the ERC is **70 percent*** of the eligible expenses paid to employees by an eligible employer

  * Taxpayer Certainty and Disaster Tax Relief Act of 2020 (12/27/20)

- For **2021**, eligible expenses are limited to $10,000 per employee, per quarter, or an ERC of $7,000 per employee, per quarter for 2021 (through September 30, 2021)
  - $10,000 x 70% = **$7,000** ERC per employee, **per quarter** in 2021 (maximum of **$21,000** per employee)

Employee Retention Credit - Credit Amount

2020

- 50% of Qualified Wages
- Maximum $10,000 of Qualified Wages per employee
- $5,000 maximum credit per employee from March 13, 2020 through December 31, 2020

2021

- 70% of Qualified Wages
- Maximum $10,000 of Qualified Wages per employee
- $7,000 maximum credit per employee/per quarter (up to $21,000 credit per employee)

Employee Retention Credit - Eligibility

What is an Eligible Employer?

- An eligible employer is any employer carrying on a "trade or business" during the ERC period (March 13, 2020 through September 30, 2021), that **either**:

  a) Fully or partially suspended operation during any calendar quarter during the ERC period due to orders from an appropriate governmental authority limiting commerce, travel, or group meetings, due to COVID-19; **or**

  b) Experience a "significant decline in gross receipts" during the calendar quarter

Employee Retention Credit - Eligibility

What is an Eligible Employer?

- The American Rescue Plan Act of 2021 also made "Recovery Startup Businesses" eligible for the ERC for 2021 Q3 and 2021 Q4. Generally, to qualify a business:
    1. Must have 1 or more employee(s);
    2. Must have started operations on or after February 15, 2020;
    3. Must have gross receipts under $1M for 2020 and 2021; and
    4. Must evaluate predecessor business and affiliated group rules to ensure Recovery Startup Business status
- Recovery Startup Businesses are limited to an ERC of $50,000 for each of the 3rd and 4th quarters of 2021

Employee Retention Credit - Eligibility

Fully or partially suspended operations

- A fully or partially suspended operation during any calendar quarter means that an employer's trade or business operations are fully or partially suspended due to a **governmental order**, which include:
  - An order from the city's mayor stating that all non-essential businesses must close for a specified period
  - A state's emergency proclamation that residents must shelter in place for a specified period, other than residents who are employed by an essential business and who may travel to and work at the workplace location
  - An order from a local official imposing a curfew on residents that impacts the operating hours of a trade or business for a specified period
  - An order from a local health department mandating a workplace closure for cleaning and disinfecting

Employee Retention Credit - Eligibility

Fully or partially suspended operations

- IRS Notice 2020-21 provides that "orders, proclamations, or decrees from the Federal government or any state or local government may be taken into account by an employer as "orders from an appropriate governmental authority" only if they limit "commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to the coronavirus disease 2019 (COVID-19)" and relate to the suspension of an employer's operation of its trade or business."
- IRS Notice 2020-21 also provides that a "state of emergency" declaration is not sufficient to rise to the level of a government order if it does not limit commerce, travel, or group meetings in any manner.

Employee Retention Credit - Eligibility

Fully or partially suspended operations

- The IRS posted additional guidance on the suspension of operations in their COVID-19 resources. In the guidance, the following may result in eligibility:
    - Government order causes suppliers to suspend their operations, which may result in suspended operations of operating business due to facts and circumstances.
    - A business forced to close some operations but may remain open for limited purposes (example - restaurant able to do take-out only with no dine-in services, is considered having partially suspended operations)
    - Business forced to reduce business hours due to governmental order.
    - Business with multiple locations is forced to close one location (others remain open) is considered having partially suspended operations for all locations.

Employee Retention Credit - Eligibility

A “Significant Decline in Gross Receipts” for 2020

- For **2020**, the eligibility based on a “significant decline in gross receipts” is governed by the CARES Act rules.
- For **2020** eligibility, a business is considered to have a significant decline in a 2020 calendar quarter for which:
    - Gross receipts in the 2020 calendar quarter are less than 50 percent of gross receipts from the same calendar quarter in 2019
        - 2020 Q1 (January - March) gross receipts vs. 2019 Q1 (January - March) gross receipts
        - Gross receipts use “tax basis” rules (IRC Section 448(c))

Employee Retention Credit - Eligibility

A "Significant Decline in Gross Receipts" for 2020

- For **2020**, once determined eligible under the 50% test, eligibility will end with the earlier of:
  - January 1, 2021; or
  - The end of the next calendar quarter for which gross receipts are greater than 80 percent of gross receipts for the same quarter in 2019
    - **Example**: Eligibility is met in 2020 Q2 (50% test). Eligibility will continue until the end of 2020 Q3, and if gross receipts in 2020 Q3 are greater than 80 percent of 2019 Q3 gross receipts, eligibility will end on September 30, 2020 (end of Q3), or else continue through 2020 Q4

Employee Retention Credit - Eligibility

A "Significant Decline in Gross Receipts" for 2021

- For **2021**, the eligibility based on a "significant decline in gross receipts" is governed by the Taxpayer Certainty and Disaster Tax Relief Act of 2020 rules
- For **2021** eligibility, a business is considered to have a significant decline in a 2021 calendar quarter for which:
    - Gross receipts in the 2021 calendar quarter are less than 80 percent of gross receipts from the same calendar quarter in **2019** (not 2020)
        - 2021 Q1 (January - March) gross receipts vs. 2019 Q1 (January - March) gross receipts
        - Businesses may also elect to measure the decline in gross receipts using the immediately preceding calendar quarter compared to the same quarter in 2019 ("Alternative Quarter Election")

Employee Retention Credit - Eligibility

Employer Size and Employee Eligibility

- Employers of any size are eligible to claim Employee Retention Credits
- However, employer size does impact the calculation of the ERC and determination of which employee wages are eligible for the ERC
- For **2020**, a "large eligible employer" is an employer averaging over 100 full-time employees during the **2019** calendar year
- For **2021**, a "large eligible employer" is an employer averaging over 500 full-time employees during the **2019** calendar year
- **Note**: Only full-time employees are considered with the 100/500 employee test, and part-time employees are excluded from the test. For ERC purposes, a full-time employee works on average at least 30 hours per week

Employee Retention Credit - Eligibility

Employer Size and Employee Eligibility

- For a "large eligible employer" (over the 100/500 FT employee test), qualified wages for the ERC are wages paid to an employee (full-time or part-time) that are not performing services
  - Employees not performing services are those employees that are being kept on the payroll but are not working
- For a "small eligible employer" (under the 100/500 FT employee test), the eligible wages paid to **all employees*** may be used in determining the ERC
  - Employees are eligible whether they are providing services or not providing services to the employer

* **Note** - Related party rules do apply that may exclude business owners and certain family members from claiming the ERC

Employee Retention Credit - Eligibility

Related Party Rules and ERC

- Wages paid to "related individuals" are not allowable for ERC. A related individual has any of the following relationships to the employer:
  - 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
  - An individual who, for the taxable year of the taxpayer, has the same principal place of abode as the taxpayer and is a member of the taxpayer's household
- 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 (corporation) or capital and profits interest (other than a corporation)

Employee Retention Credit - Qualified Wages

- Qualified wages are defined as wage compensation (IRC Section 3121(a)) paid by an eligible employer
  - Tips are also treated as wages paid by the employer
- Qualified wages also includes an eligible employer's qualified health plan expenses for employees (generally employer paid health insurance premiums)
- Coordination with other benefits must be analyzed

Employee Retention Credit - Qualified Wages

Coordination with Other Benefits

- An employer cannot claim the ERC and other wage-based benefit programs on the same wages:
  - PPP loans (both first and second draw loans)
  - Restaurant Revitalization Grant
  - Qualified Sick or Family Leave Wages (FFCRA)
  - Work Opportunity Tax Credit (WOTC)
  - Paid Family Medical Leave (Section 45S)

Employee Retention Credit - Qualified Wages

Coordination with PPP Loan Forgiveness

- For PPP loan forgiveness, the PPP forgiveness application is important when coordinating with the ERC
- Maximize allowable "other" PPP expenses (do not claim only wages on PPP forgiveness application)
  - Wages used for PPP forgiveness are <u>not</u> "qualified wages" for ERC

Employee Retention Credit - Qualified Wages

Coordination with PPP Loan Forgiveness - Example

- Employer PPP Loan of $200,000
- Employer Paid $200,000 of qualified wages
- PPP Forgiveness filed with only $200,000 of wages, despite having additional $70,000 of eligible costs
- Employer must use $200,000 of wages allocable to PPP when determining ERC wages
  - Loss of $70,000 in potential ERC wages for a potential ERC of up to **$49,000**

Employee Retention Credit - Qualified Wages

Coordination with PPP Loan Forgiveness - Example

- Employer PPP Loan of $200,000
- Employer Paid $200,000 of qualified wages
- PPP Forgiveness filed with $200,000 of wages and additional $70,000 of eligible costs
- Employer can reduce PPP wages to $130,000 when determining ERC wages ($70,000 ERC wages)

Employee Retention Credit - Example

2021 ERC Calculation – Example (One Quarter)

	A	B	A+B	$10,000 Limit	70% Credit
Employee	Gross Wages	Employer Health Costs	Subtotal - Payroll Costs	Allowable ERC Wages	ERC
Employee A	$ 12,000	$ 1,800	$ 13,800	$ 10,000	$ 7,000
Employee B	8,500	2,700	11,200	10,000	7,000
Employee C	6,000	-	6,000	6,000	4,200
Employee D	7,500	1,800	9,300	9,300	6,510
Employee E	6,000	-	6,000	6,000	4,200
	$ 40,000	$ 6,300	$ 46,300	$ 41,300	**$ 28,910**

Employee Retention Credit - Claiming the Credit

- For prior quarter ERC claims, refund claim is filed via “amended” Form 941 quarterly payroll tax return
- For “current” ERC claims (no Form 941 filed), employer is able to reduce required payroll deposits and excess ERC (if any) is refunded
- Employers can request “advance payment” of the credit on Form 7200

Employee Retention Credit - After the Claim

- The ERC (credit generated) is not includible in gross income of the employer
- However, the employer must reduce wage expense for income tax purposes
  - Effectively, the ERC amount is taxed due to required reduction in otherwise deductible wage expenses
- The ERC must reduce the wage expense of the employer <u>in the year the wage expenses are incurred</u>
  - For example, a 2020 ERC claim on an Amended Form 941 would require the employer to amend 2020 tax returns and reduce 2020 wage expenses by the ERC amount

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Questions

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