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What's News in Tax

Analysis that matters from Washington National Tax

New Employee Retention Credit

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Congress recently passed legislation[1] that provides a federal income tax credit to certain employers who continue to pay their employees during periods of time when their places of business are inoperable due to the effects of one of three recent hurricanes. This article describes the credit, which is available to employers of all sizes as a general business credit that can be carried back one year and forward 20 years.

Basic Rules

The credit is known as the Employee Retention Credit and is available to a trade or business operating inside a federally declared disaster zone for one of the recent hurricanes—i.e., Hurricanes Harvey, Irma, and Maria (each a "Hurricane").

The credit is equal to up to 40 percent of wages paid by the employer to eligible employees (capped at $6,000 per employee) beginning on the date the employer's place of business became inoperable due to the Hurricane and ending on the earlier of:

- The date the business resumes "significant operations," or
- January 1, 2018

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[1] Disaster Tax Relief and Airport and Airway Extension Act of 2017, Pub. L. No. 115-63.

Eligible employees are employees whose principle place of employment was located at the business location that became inoperable as a result of the Hurricane.

Wages eligible for the credit include wages paid to an eligible employee regardless of whether, during the applicable period, the employee performs services at a different location (i.e., outside the disaster zone) or performs services at his or her principal place of employment (during the period before significant operations resume at the location).

For example, suppose an employer had to close a business location within an eligible disaster zone for 12 business days and paid its 10 employees assigned to that location for each working day that the office was closed. If the total wages paid to eligible employees for that period was $20,000, then the employer can claim 40 percent of wages paid, or $8,000, as a tax credit on its 2017 federal income tax return.

If an employer is claiming a Work Opportunity Tax Credit ("WOTC") for an otherwise eligible employee, then it cannot claim the Employee Retention Credit for the same employee if the WOTC is being claimed over the same period.

Filling in the Blanks

The new law for the Employee Retention Credit does not provide a definition of "inoperable."

However, a similar credit was enacted for tornado victims in the Midwest and the IRS provided the following guidance with respect to the definition of "inoperable":

> The statute requires that the business be inoperable "as a result of damage sustained by reason of" the Midwestern Disasters. The damage need not be to the employer's place of business. For this purpose, a business is inoperable if, for example, because of the disaster, the business is physically inaccessible to employees, raw materials, utilities, or customers.[2]

The new law does not provide a definition of what constitutes "significant operations."

The IRS, however, provided the following guidance with respect to the definition of "significant operations" in connection with a similar credit available for tornado victims in the Midwest:

> Whether a business has resumed significant operations is a facts and circumstances determination that takes into account the specific nature of the business. Consequently, there is no single answer for all trades or businesses. In making the determination, an employer should use a reasonable and good faith interpretation of what "significant" means in the context of his or her business. Generally, however, the term would not mean that the level of operations has met or exceeded the pre-hurricane level of operations.[3]

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[2] FAQs for Hurricane Victims—Employee Retention Credit, available at https://www.irs.gov/businesses/small-businesses-self-employed/faqs-for-hurricane-victims-employee-retention-credit.

[3] *Id.*

The IRS has not issued any guidance under the Employee Retention Credit, nor have any federal forms been published to claim the credit.

A similar credit was available for victims of Hurricane Katrina. That credit was reported on Form 5884-A, *Credits for Employers Affected by Hurricane Katrina, Rita, or Wilma*.

Under previous guidance issued by the IRS with respect to similar credits, if a company had two places of business affected by a disaster, and one place of business was able to resume significant operations earlier than another place of business, each place of business was treated separately for purposes of the credit and the two locations had different inoperable periods.

Next Steps

Companies will need to keep proper records in order to claim the Employee Retention Credit. The company will need to prepare a list of:

- Each affected office
- The employees that had their principal place of employment at that office
- The date on which each office became inoperable
- The date on which each office resumed significant operations
- Any otherwise eligible employees for which the WOTC is being claimed during the same period

Employers that intend to claim the Employee Retention Credit will also need to be able to isolate the wages paid to eligible employees during the period.