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Rev. Proc. 2021-33: Safe harbor for employers to exclude amounts for determining employee retention credit eligibility

The IRS today released an advance version of Rev. Proc. 2021-33 providing a safe harbor allowing employers to exclude certain items from their gross receipts solely for determining eligibility for the employee retention credit.

The safe harbor provided under [Rev. Proc. 2021-33](#) [PDF 129 KB] permits employers to exclude certain amounts from gross receipts solely for determining eligibility for the employee retention credit—specifically:

- The amount of the forgiveness of a paycheck protection program (PPP) loan
- Shuttered venue operators grants (SVOG) under the “Economic Aid to Hard-Hit Small Businesses, Non-Profits, and Venues Act”
- Restaurant revitalization grants under the “American Rescue Plan Act of 2021”

According to Rev. Proc. 2021-33, an employer elects to apply the safe harbor by excluding these amounts solely for determining whether it is an eligible employer for a calendar quarter for purposes of claiming the employee retention credit on its employment tax return.

Background

As originally enacted by the “Coronavirus Aid, Relief, and Economic Security Act” (CARES Act), the employee retention credit provides a refundable payroll credit for eligible employers, including tax-exempt organizations, whose business has been affected by the coronavirus (COVID-19) pandemic for qualified wages paid after March 12, 2020, and before January 1, 2021.

Retroactive changes were made to the employee retention credit by a provision of the “Taxpayer Certainty and Disaster Tax Relief Act of 2020” (a division of the Consolidated Appropriations Act, 2021). The changes generally have an effective date of January 1, 2021.

The IRS in early March 2021 issued Notice 2021-20 to formalize and clarify previously issued information contained in a set of “frequently asked questions” (FAQs) available on the IRS website with respect to the employee retention credit for the 2020 calendar year.

Notice 2021-23 was subsequently issued with guidance concerning the employee retention credit for qualified wages paid for the first two quarters of 2021. When read together, Notice 2021-20 and Notice 2021-23 provided employers with information to assist in evaluating eligibility for the employee retention credit, in determining qualified wages, and for claiming the employee retention credit for 2020 and for the first two quarters of 2021.

Last week, the IRS issued Notice 2021-49 providing guidance regarding the employee retention credit claims for the third and fourth quarters of 2021.

Rev. Proc. 2021-33

As explained in a related IRS release—[IR-2021-167](#)—Rev. Proc. 2021-33 requires employers to apply the safe harbor consistently for determining eligibility for the employee retention credit.

- The employer must exclude the amounts from their gross receipts for each calendar quarter in which gross receipts are relevant to determining eligibility to claim the employee retention credit.
- The employer claiming the credit must also apply the safe harbor to all employers treated as a single employer under the aggregation rules.

The IRS noted that an employer is not required to apply this safe harbor, and the safe harbor does not permit the exclusion of these amounts from gross receipts for any other federal tax purpose.

Rev. Proc. 2021-33 updates and amplifies the guidance provided in Notice 2021-20, Notice 2021-33, and Notice 2021-49.

KPMG observation

The safe harbor provided by today’s revenue procedure—that excludes PPP loan forgiveness, SVOG grants, and restaurant revitalization grants from gross receipts in the relevant quarter of 2020 or 2021—may make it easier for employers to meet the eligibility test for the employee retention credit based on a reduction in gross receipts relative to the same quarter in 2019 and may potentially allow more taxpayers to be eligible to receive the employee retention credit. For 2021, the employee retention credit provides eligible employers paying qualifying wages a refundable credit to employees up to \$7,000 per employee per quarter. Read a [KPMG report](#) [PDF 389 KB] for information about the employee retention credit.

With today’s guidance, employers that previously did not perceive they could qualify for the employee retention credit may want to reconsider and re-evaluate their eligibility for the credit.

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