



# TaxNewsFlash

## United States



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## Notice 2021-65: Termination of employee retention credit, guidance for fourth quarter 2021 (COVID-19)

The IRS today released an advance version of Notice 2021-65 providing guidance for employers regarding the retroactive termination of the employee retention credit for wages paid in the fourth quarter of 2021.

[Notice 2021-65](#) [PDF 105 KB] provides guidance reflecting a legislative change (enacted in November 2021) with regard to the employee retention credit—that is, the refundable payroll credit provided to eligible employers, including tax-exempt organizations, whose business was affected by the coronavirus (COVID-19) pandemic.

Notice 2021-65 generally addresses employers that paid wages after September 30, 2021 (that is, in the fourth quarter of 2021) and that:

- Received an advance payment of the employee retention credit for those wages, or
- Reduced employment tax deposits in anticipation of the credit for the fourth quarter of 2021, but are now ineligible for the credit due to the change in the law by the November 2021 legislation

Today's notice also addresses how the rules apply to "recovery startup businesses" during the fourth quarter of 2021.

### Background

As originally enacted by the *Coronavirus Aid, Relief, and Economic Security Act* (CARES Act), the employee retention credit provided a refundable payroll credit for eligible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

Subsequent legislation extended and expanded the employee retention credit ultimately through December 31, 2021.

However, the *Infrastructure Investment and Jobs Act* (enacted November 15, 2021) amended the law so that the employee retention credit applies only to wages paid before October 1, 2021, unless the employer is a “recovery startup business.”

### **Prior IRS notices**

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) with respect to the employee retention credit for the 2020 calendar year. Read [TaxNewsFlash](#)

The IRS then issued Notice 2021-23 as guidance concerning the employee retention credit for qualified wages paid for the first two quarters of 2021. Read [TaxNewsFlash](#)

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.

The IRS then in August 2021 issued Notice 2021-49 as further employee retention credit guidance for employers that pay qualified wages for the third and fourth quarters of 2021 (that is, after June 30, 2021, and before January 1, 2022). Read [TaxNewsFlash](#).

Then, as briefly noted above, legislation was enacted in November 2021 that changed the applicable date for the employee retention credit so that it only applied for wages paid before the fourth quarter of 2021.

### **Notice 2021-65**

Today’s notice provides that pursuant to the November 2021 legislative changes, employers (except for certain recovery startup businesses) are not entitled to the employee retention credit for wages paid on or after October 1, 2021 (the fourth quarter of 2021).

Accordingly, Notice 2021-65 sets forth that the rules provided by the prior IRS guidance no longer apply for the fourth calendar quarter of 2021. However, today’s notice clarifies that all other rules provided by Notice 2021-49 continue to apply for the fourth calendar quarter of 2021 with regard to “recovery startup businesses.”

Notice 2021-65 also specifies that employers (other than recovery startup businesses) must repay certain amounts of **advance payments** of the employee retention credit for wages paid in the fourth calendar quarter of 2021 (that is, prior to enactment of the November 2021 legislation) by the due date of their applicable employment tax return. A failure to repay such advance payments by the due date of the applicable employment tax return may result in the imposition of failure to pay penalties under section 6651.

Finally, Notice 2021-65 and a related IRS release—[IR-2021-242](#)—explain that because of the termination of the employee retention credit for wages paid in the fourth quarter of 2021 (if not recovery startup businesses), the IRS will no longer waive failure to deposit penalties for employers that reduce deposits in anticipation of the employee retention credit after December 20, 2021. The notice states that for deposits due on or before December 20, 2021, with respect to wages paid on or after October 1, 2021, but before January 1, 2022, these employers will not be subject to a penalty under section 6656 if certain conditions are satisfied, including:

- The employer reduced deposits in anticipation of the employee retention credit, consistent with the rules in [Notice 2021-24](#) [PDF 110 KB]
- The employer deposits the amounts initially retained in anticipation of the employee retention credit on or before the relevant due date for wages paid on December 31, 2021 (regardless of whether the employer actually pays wages on that date), and

- The employer reports the tax liability resulting from the termination of the employer's employee retention credit on the applicable employment tax return or schedule that includes the period from October 1, 2021, through December 31, 2021.

Nevertheless, if an employer does not qualify for relief under Notice 2021-65, the IRS may consider reasonable cause relief pursuant to section 6656(a).

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