



# TaxNewsFlash

## United States



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## IRS reminds employers of penalty relief related to claims for employee retention credit (COVID-19)

The IRS today issued a release in response to taxpayer requests for penalty relief when additional income tax is owed because the deduction for qualified wages is reduced by the amount of a retroactively claimed employee retention credit, but the taxpayer is unable to pay the additional income tax because the refund payment relating to the employee retention credit has not yet been received.

According to today's IRS release—[IR-2022-89](#) (April 18, 2022)—the IRS and Treasury Department are aware that this situation may arise, in part, due to a backlog in the IRS processing adjusted employment tax returns (e.g., Form 941-X) on which the taxpayers filed claims for the employee retention credit (ERC) retroactively.

### Reminder of penalty relief

Prior IRS guidance provided that an employer must reduce its income tax deduction for the ERC qualified wages by the amount of the ERC for the tax year in which such wages were paid or incurred. Taxpayers that claimed the ERC retroactively and filed an amended income tax return reducing their deduction for the ERC qualified wages paid or incurred in the tax year for which the ERC is retroactively claimed have an increased income tax liability, but may not yet have received their ERC refund.

The IRS release today reminds taxpayers that, consistent with the relief from penalties for failure to timely pay as provided by Notice 2021-49, they may be eligible for relief from penalties for failing to pay their taxes if they can show reasonable cause and not willful neglect for the failure to pay. In general, taxpayers may also qualify for administrative relief from penalties for failing to pay on time under the IRS's first-time penalty abatement program if the taxpayer:

- Did not previously have to file a return or had no penalties for the three prior tax years
- Filed all currently required returns or filed an extension of time to file, and
- Paid, or arranged to pay, any tax due

## Background

As originally enacted by the *Coronavirus Aid, Relief, and Economic Security Act* (CARES Act), the ERC provides a refundable payroll credit for eligible employers, including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 ERC 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.

- Notice 2021-20 was issued in early March 2021 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 ERC for the 2020 calendar year.
- Notice 2021-23 was subsequently issued with guidance concerning the ERC 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 ERC, in determining qualified wages, and for claiming the ERC for 2020 and for the first two quarters of 2021.

Notice 2021-49 (issued in August 2021) addressed changes made by the *American Rescue Plan Act of 2021* to the ERC. These changes—applicable to the third and fourth quarters of 2021—include provisions:

- Making the ERC available to eligible employers that pay qualified wages after June 30, 2021, and before January 1, 2022
- Expanding the definition of eligible employer to include “recovery startup businesses”
- Modifying the definition of qualified wages for “severely financially distressed employers”
- Providing that the ERC does not apply to qualified wages taken into account as payroll costs in connection with a shuttered venue grant or a restaurant revitalization grant

Notice 2021-49 also provided guidance on several miscellaneous issues with respect to the ERC for both 2020 and 2021. Read [TaxNewsFlash](#)

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