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Employee Retention Credit Available for Businesses That Repay Their PPP by May 14

COVID-19 Resource

The Small Business Administration (SBA) and IRS have issued a badly-needed clarification for businesses that received paycheck protection program (PPP) loans but were having second thoughts as a result of changing SBA eligibility requirements. The good news is that the no-questions-asked safe harbor for repayment of a PPP loan by the May 14 deadline now will be treated as if the PPP loan never happened for purposes of determining eligibility for the Employee Retention Credit (ER Credit) under the CARES Act.

As we have discussed in several articles under the Tax Benefits, Loans & Other Stimuli tab of our [COVID-19 Resource Center](#), many businesses that received PPP loans are taking a closer look at the certification about uncertainty included in the [PPP loan application](#). The SBA has [extended the due date](#) to return PPP loans no-questions-asked to May 14, and has promised more guidance before then on the standards they believe should apply in connection with that certification. When deciding whether to return PPP funds, we have been concerned that the mere receipt of PPP funds – even though subsequently returned – undermined a borrower’s ability to claim the employee retention credit under the CARES Act, which provides that a taxpayer that “receives” a PPP loan may not claim the ER Credit. CARES Act § 2301(j). The FAQs mimicked the statute.¹

Obviously, one cannot return a PPP loan without having received it in the first place.

In a move that hopefully portends a return to resolving ambiguities in favor of expanding relief, on May 6, the SBA published FAQ 45:

Question: Is an employer that repays its PPP loan by the safe harbor deadline (May 14, 2020) eligible for the Employee Retention Credit?

Answer: Yes. An employer that applied for a PPP loan, received payment, and repays the loan by the safe harbor deadline (May 14, 2020) will be treated as though the employer had not received a covered loan under the PPP for purposes of the Employee Retention Credit. Therefore, the

employer will be eligible for the credit if the employer is otherwise an eligible employer for purposes of the credit.

The IRS kindly issued a virtually identical rule in its [FAQ 79](#) on May 7. Accordingly, businesses that return their PPP loans by the May 14 safe harbor deadline can be eligible to receive the ER Credit authorized under section 2301 of the CARES Act. We discuss the benefits of the ER Credit [here](#).

This government largess is extremely welcome for those PPP borrowers who found that they were not *affiliated* with related companies for PPP purposes (because the SBA rules applies its own affiliation standards) but were treated as members of the same *aggregated* group of companies under tax rules.²

In our [article](#) about the updated [IRS FAQs](#) for the ER Credit, we characterized the ER Credit as the relief for businesses too big, too late or too worried to apply for a PPP loan. We can now add a fourth category: businesses that received a PPP loan but timely return the proceeds because of the subsequent, changing eligibility guidance from the SBA. Taking the SBA up on its no-questions-asked PPP return policy is now less detrimental in light of FAQ 45.

[1 FAQ 15 provides:](#)

15. May an Eligible Employer receive both the Employee Retention Credit and a Paycheck Protection Program (PPP) loan that is authorized under the CARES Act?

No. An Eligible Employer may not receive the Employee Retention Credit if the Eligible Employer receives a PPP loan that is authorized under the CARES Act. An Eligible Employer that receives a PPP loan should not claim Employee Retention Credits.

For more information, see [Interaction with Other Credit and Relief Provisions](#).

Similarly, IRS [FAQ 78](#) (previously numbered 78 before the IRS coordinated with the SBA) provides that receipt of a PPP loan makes the borrower ineligible for the retention credit so returning it insufficient:

78. May an Eligible Employer that receives a Paycheck Protection Program (PPP) loan receive the Employee Retention Credit?

No. An employer may not receive the Employee Retention Credit if the employer receives a PPP loan that is authorized under the CARES Act. An Eligible Employer that receives a PPP loan, regardless of the date of the loan, cannot claim the Employee Retention Credit.

[2 FAQ 26](#) provides: The application of the rules that preclude an employer from claiming the Employee Retention Credit if any member of the aggregated group received a Paycheck Protection Program (PPP) loan under the Small Business Act. For more information, see [Interaction with Other Credit and Relief Provisions](#).

Similarly, IRS [FAQ 80](#) provides:

80. If multiple entities are treated as a single employer under the aggregation rules, and only one of these entities has received a Paycheck Protection Program (PPP) loan, does this mean that all of the other entities in the aggregated group are not eligible for the Employee Retention Credit?

Yes. An employer that is treated as a single employer under the aggregation rules, may not receive the Employee Retention Credit if any member of the employer's aggregated group receives a PPP loan. For more information on the aggregation rules, see [Determining Which Entities are Considered a Single Employer Under the Aggregation Rules](#).