

## Part III – Administrative, Procedural, and Miscellaneous

### Termination of the Employee Retention Credit under Section 3134 of the Code in the Fourth Calendar Quarter of 2021 for Certain Employers

Notice 2021-65

#### I. PURPOSE

This notice modifies Notice 2021-49, 2021-34 IRB 316, and Notice 2021-24, 2021-18 IRB 1122, to implement statutory changes made by the Infrastructure Investment and Jobs Act (Infrastructure Act), Pub. L. 117-58, 135 Stat. 429 (2021), enacted November 15, 2021.

#### II. BACKGROUND

Section 2301 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. 116-136, 134 Stat. 281 (2020), as originally enacted, provides for an employee retention credit for eligible employers, including tax-exempt organizations, that pay qualified wages, including certain health plan expenses, to some or all employees after March 12, 2020, and before January 1, 2021. Section 206 of the Taxpayer Certainty and Disaster Tax Relief Act of 2020 (Relief Act), enacted as Division EE of the Consolidated Appropriations Act, 2021, Pub. L. 116-260, 134 Stat. 1182 (2020), adopted retroactive amendments and technical changes to section 2301 of the CARES Act for qualified wages paid after March 12, 2020, and before January 1, 2021, primarily expanding eligibility for certain employers to claim the credit. Section 207 of

the Relief Act, effective for calendar quarters beginning after December 31, 2020, further amended section 2301 of the CARES Act to extend the application of the employee retention credit to qualified wages paid after December 31, 2020, and before July 1, 2021, and to modify the calculation of the credit amount for qualified wages paid during that time. Section 9651 of the American Rescue Plan Act of 2021 (ARP), Pub. L. 117-2, 135 Stat. 4, enacted section 3134 of the Internal Revenue Code (Code), effective for calendar quarters beginning after June 30, 2021, and provides an employee retention credit for wages paid after June 30, 2021, and before January 1, 2022.

Prior to the enactment of section 3134, section 2301 of the CARES Act, as amended by sections 206 and 207 of the Relief Act, provided that an employer may be eligible for the employee retention credit with respect to a calendar quarter only if (i) the operation of the employer's trade or business is fully or partially suspended due to orders from an appropriate governmental authority limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to the coronavirus disease 19 (COVID-19),<sup>1</sup> or (ii)(a) for calendar quarters in 2020, the employer experiences a significant decline in gross receipts, or (b) for calendar quarters in 2021, the employer experiences a decline in gross receipts.<sup>2</sup> Section 3134(c)(2) of the Code

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<sup>1</sup> The rules for determining whether an employer's trade or business is fully or partially suspended due to orders from an appropriate governmental authority limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to COVID-19 are set forth in section III.D. of Notice 2021-20, 2021-11 IRB 922 (guidance on the employee retention credit under section 2301 of the CARES Act, as amended by section 206 of the Relief Act).

<sup>2</sup> The rules for determining whether an employer experienced a significant decline in gross receipts in 2020 are set forth in section III.E. of Notice 2021-20. The rules for determining whether an employer experienced a decline in gross receipts in the first or second calendar quarters of 2021 are set forth in section III.C. of Notice 2021-23, 2021-16 IRB 1113 (guidance on the employee retention credit under section 2301 of the CARES Act, as amended by section 207 of the Relief Act).

added “recovery startup businesses” as a third category of employers that are eligible for the employee retention credit for qualified wages paid in the third and fourth calendar quarters of 2021.

Section 3134 also modified the employee retention credit in other respects for qualified wages paid in the third and fourth calendar quarters of 2021. Section 3134(j)(2) limited the amount of the employee retention credit that could be advanced and which employers could request advance payments. In addition, section 3134(j)(3)(B) allows for the direct assessment of certain erroneous refunds of advanced portions of the credit. It provides that if a small eligible employer specified in section 3134(j)(2) receives excess advance payments of the credit, then the taxes imposed under section 3111(b), or so much of the taxes imposed under section 3221(a) as are attributable to the rate in effect under section 3111(b), as applicable, for the calendar quarter are increased by the amount of the excess advance payments. Section 3134(m)(3) provides that the Secretary will issue such forms, instructions, regulations, and other guidance as are necessary to prevent the avoidance of the purposes of the limitations under section 3134.

On March 31, 2020, the Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) issued Notice 2020-22, 2020-17 IRB 664, which provides penalty relief under section 6656 to employers entitled to certain refundable tax credits provided under the Families First Coronavirus Response Act (Families First Act), Pub. L. 116-127, 134 Stat. 178 (2020) and the CARES Act for an employer’s

failure to timely deposit Employment Taxes<sup>3</sup> with the IRS.<sup>4</sup> On April 13, 2021, the Treasury Department and the IRS issued Notice 2021-24, which extended the penalty relief provided under Notice 2020-22 to employers claiming certain other credits under ARP, including the employee retention credit under section 3134. On August 4, 2021, the Treasury Department and the IRS issued Notice 2021-49, providing guidance on the employee retention credit under section 3134. Notice 2021-49 amplified Notice 2021-20,<sup>5</sup> which provides guidance on the employee retention credit under section 2301 of the CARES Act, as amended by section 206 of the Relief Act, and Notice 2021-23,<sup>6</sup> which provides guidance on the employee retention credit under section 2301 of the CARES Act, as amended by section 207 of the Relief Act.<sup>7</sup>

On September 10, 2021, the Treasury Department and the IRS published TD 9953, 86 FR 50,637, setting forth temporary regulations on the Recapture of Excess Employment Tax Credits under the American Rescue Plan Act of 2021. The temporary regulations, in part, authorize the assessment and collection of any erroneous refund of certain credits, including the employee retention credit under section 3134 of the Code, in the normal course of processing applicable employment tax returns.

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<sup>3</sup> For purposes of this notice, “Employment Taxes” means withheld income taxes, taxes under the Federal Insurance Contributions Act (FICA), and taxes under the Railroad Retirement Tax Act (RRTA).

<sup>4</sup> Relief from the failure to deposit penalty imposed by section 6656 is provided to the extent the amounts not deposited are equal to or less than the anticipated amount of refundable tax credits to which the employer is entitled under the Families First Act and CARES Act and for which no advance payment was sought.

<sup>5</sup> *Supra* note 1.

<sup>6</sup> *Supra* note 2.

<sup>7</sup> Notice 2021-49 also provides additional guidance on issues regarding the employee retention credit under both section 3134 and section 2301 of the CARES Act, as amended by sections 206 and 207 of the Relief Act.

Section 80604 of the Infrastructure Act amended section 3134(n) of the Code to provide that the employee retention credit under section 3134 shall apply only to wages paid after June 30, 2021, and before October 1, 2021 (or, in the case of wages paid by an eligible employer which is a recovery startup business, January 1, 2022).

Additionally, effective for calendar quarters beginning after September 30, 2021, section 80604 of the Infrastructure Act amended the definition of recovery startup business under section 3134(c)(5) of the Code to remove the requirement that a recovery startup business not otherwise be an eligible employer due to a full or partial suspension of operations or a decline in gross receipts.

### III. GUIDANCE

In accordance with the amendments made by section 80604 of the Infrastructure Act to section 3134(n) of the Code, employers, other than recovery startup businesses, are not entitled to the employee retention credit for wages paid on or after October 1, 2021. The Infrastructure Act amendments require the modification of guidance related to the employee retention credit for the fourth calendar quarter of 2021.

#### **A. Termination of Employee Retention Credit for Employers other than Recovery Startup Businesses**

Section I of Notice 2021-49 provides that the rules set forth in Notice 2021-20 and Notice 2021-23 addressing CARES Act provisions that are the same as those provided under section 3134 of the Code continue to apply for the third and fourth calendar quarters of 2021. Due to the amendments made by section 80604 of the

Infrastructure Act, rules for determining whether an employer is an eligible employer due to a full or partial suspension of operations (section III.D. of Notice 2021-20) or a decline in gross receipts (section III.C. of Notice 2021-23) no longer apply for the fourth calendar quarter of 2021. Any rules based upon the determination that an employer is an eligible employer due to a full or partial suspension of operations or a decline in gross receipts, such as rules relating to “severely financially distressed employers” discussed in section III.E. of Notice 2021-49, also no longer apply for the fourth calendar quarter of 2021. Further, references in Notice 2021-49 to eligible employers claiming the employee retention credit for qualified wages paid in the fourth calendar quarter of 2021 no longer apply unless the employer is a recovery startup business.

The rules related to recovery startup businesses in section III.D. of Notice 2021-49 include the requirement that a recovery startup business not otherwise be an eligible employer due to a full or partial suspension of operations or a decline in gross receipts. Section 80604 of the Infrastructure Act removes this requirement for the fourth calendar quarter of 2021. Accordingly, this requirement no longer applies to recovery startup businesses in the fourth calendar quarter of 2021.

All other rules set forth in Notice 2021-20 and Notice 2021-23 addressing CARES Act provisions that are the same as those provided under section 3134 of the Code continue to apply for the fourth calendar quarter of 2021 to recovery startup businesses. Similarly, all other rules set forth in Notice 2021-49 continue to apply for the fourth calendar quarter of 2021 to recovery startup businesses.

**B. Repayment of Advance Payments for Employers other than Recovery Startup Businesses**

Employers may have requested advance payments of the employee retention credit for wages paid in the fourth calendar quarter of 2021 prior to the enactment of the Infrastructure Act. An advance payment of any portion of the employee retention credit to a taxpayer in excess of the amount to which the taxpayer is entitled is an erroneous refund that the employer must repay. Accordingly, if an employer requested and received an advance payment of the employee retention credit for wages paid in the fourth calendar quarter of 2021, and the employer is not a recovery startup business, the employer is not eligible for an employee retention credit and must repay the amount of the advance. Employers who need to repay these excess advance payments of the employee retention credit must do so by the due date for the applicable employment tax return that includes the fourth calendar quarter of 2021. Employers should refer to the instructions to the applicable employment tax form for additional information. Failure to repay the advance payment by the due date of the applicable employment tax return may result in the imposition of failure to pay penalties under section 6651.

**C. Failure to Deposit Penalties for Employers other than Recovery Startup Businesses**

Prior to the enactment of the Infrastructure Act, in accordance with the guidance provided in Notice 2021-24, employers may have reduced deposits of Employment Taxes by the amount of the employee retention credit the employer anticipated for the fourth calendar quarter of 2021 based on a full or partial suspension of operations or a

decline in gross receipts. Due to the termination of the employee retention credit for wages paid in the fourth calendar quarter of 2021 for employers that are 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, unless the employer is a recovery startup business.

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, an employer that is not a recovery startup business will not be subject to a penalty under section 6656 for failing to deposit Employment Taxes for the fourth calendar quarter of 2021 if—

1. The employer reduced its deposits in anticipation of the employee retention credit, consistent with the rules provided in section 3.b. of Notice 2021-24; and
2. 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).<sup>8</sup> Deposit due dates will vary based on the deposit schedule of the employer; and
3. The employer reports the tax liability resulting from the termination of the employer's employee retention credit on the applicable employment tax return

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<sup>8</sup> If the amounts initially retained in anticipation of the employee retention credit total \$100,000 or more with or without any additional liability on that date, then the employer is subject to the \$100,000 One-Day rule of § 31.6302-1(c)(3) (also referred to as the "Next-Day Deposit Rule").



or schedule that includes the period from October 1, 2021 through December 31, 2021. Employers should refer to the instructions to the applicable employment tax return or schedule for additional information on how to report the tax liability.

If an employer does not qualify for relief under this Notice, it may reply to a notice about a penalty with an explanation and the IRS will consider reasonable cause relief pursuant to section 6656(a).

#### IV. EFFECT ON OTHER DOCUMENTS

Notice 2021-49 is modified as provided in this notice. Notice 2021-24 is modified as provided in this notice.

#### V. PAPERWORK REDUCTION ACT

Any collection of information associated with this notice has been submitted to the Office of Management and Budget for review under OMB control number 1545-0029 in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a valid OMB control number.

#### VI. DRAFTING INFORMATION

The principal authors of this notice are Danchai Mekadenaumporn of the Office of the Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes) and Michael A. Franklin of the Office of the Associate Chief

Counsel (Procedure and Administration), although other Treasury Department and IRS officials participated in its development. For further information on the provisions of this notice, please contact Mr. Mekadenaumporn at 202-317-6798 (not a toll-free call) or Mr. Franklin at 202-317-6844 (not a toll-free call).