



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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OFFICE OF THE CHIEF COUNSEL

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The Honorable Randy Feenstra
Member, U.S. House of Representatives
320 6th Street, Room 112
Sioux City, IA 51101

Attention:

Dear Representative Feenstra:

I apologize for the delay responding to your August 26, 2021 inquiry on behalf of your constituent, . He asked why related employees of a family-owned business may not be eligible for the employee retention credit (ERC).

The following provides general information regarding the application of rules regarding related individuals to the ERC. Please note, this letter is for informational purposes only and does not constitute a ruling. See Rev. Proc. 2022-1, Section 2.04, 2022-1 IRB 1 (Jan. 3, 2022).

Section 2301 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) and Section 3134 of the Internal Revenue Code (Code) established the ERC. Eligible employers, regardless of the type of business involved, may claim the ERC on qualified wages paid to unrelated employees.¹ Notice 2021-49, 2021-34 I.R.B. 316 (enclosed), provides guidance on the ERC and includes several examples of how the rules apply. It is also available at <https://www.irs.gov/pub/irs-drop/n-21-49.pdf>.

Section 2301(e) of the CARES Act and Section 3134(e) of the Code provide that rules similar to the rules of Section 51(i)(1) of the Code apply to the ERC. Section IV,

¹ While the ERC terminated for most employers on September 30, 2021, and for recovery startup businesses on December 31, 2021, eligible employers may still claim the ERC for prior calendar quarters on Form 941-X, *Adjusted Employer's QUARTERLY Federal Tax Return or Claim for Refund* (or relevant adjusted annual employment tax return).

subsection D, of Notice 2021-49 explains how Section 51(i)(1) applies to the ERC. The notice explains:

- Wages paid to a related individual are not qualified wages for purposes of the ERC.
- Related individuals are those individuals who have a relationship described in Section 152(d)(2) of the Code with the eligible employer, or, in the case of a corporation, with the eligible employer's majority owner.
- If the eligible employer is a corporation, a majority owner is an individual who owns more than 50 percent of the value of the outstanding stock of the corporation. Section 267(c) of the Code provides rules regarding the constructive ownership of stock in determining whether an individual is considered to be a majority owner of a corporation.
- Wages paid to an individual who is related taking into account the relationships specified under Section 152(d)(2), and the constructive ownership of stock under Section 267(c) of the Code are not qualified wages for purposes of the ERC.

The ERC is still available to eligible employers organized as corporations for qualified wages paid to unrelated employees. In addition, this result reflects an outcome similar to other businesses not organized as corporations. For example, compensation paid or earnings otherwise distributed to sole proprietors or partners in a partnership are not qualified wages for purposes of the ERC.

I hope this information is helpful. If you have additional questions, please contact me at

Sincerely,

Sydney L. Gernstein
Chief, Employment Tax Branch 1
Office of the Associate Chief Counsel
(Employee Benefits, Exempt Organizations, and
Employment Tax)

Enclosure