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Borrowers who return Paycheck Protection Program funds can still claim Employee Retention Credit: Evaluating your options

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This alert has been updated to reflect new guidance from the Treasury Department that PPP loan recipients who pay back the loan by May 14, 2020, will be eligible to claim the Employee Retention Tax Credit ("ERC").

The Paycheck Protection Program ("PPP") has been so popular that the first tranche ($349 billion) was exhausted in a few days, and for good reason: the promise of free money. Congress resupplied the PPP with an additional $321 billion on Friday (April 24). The SBA announced that it will begin accepting new PPP applications on Monday morning.

While struggling businesses have grappled with the complex qualification and application rules of the PPP, those businesses should also consider the ERC. In many instances, the ERC will be **a better choice**. These two options are, however, mutually exclusive. Receipt of a PPP loan can render an employer ineligible to claim the ERC. But, in a FAQ published on May 6, the Treasury Department announced that PPP recipients who pay back the loan by May 14, 2020, are eligible to receive the ERC. Therefore, it makes sense for business that are considering applying for a PPP loan, as well as those that have *already* received PPP funds, to crunch their numbers to which program will provide the most value to the business.

The ERC is available to businesses of all sizes, although it offers the most flexibility to those with 100 or fewer employees. The amount of the tax credit provided by the ERC can be up to $5,000 per employee. A business is eligible if either (i) its operations have been fully or partially suspended due to government orders limiting commerce, travel, or group meetings due to COVID-19, or (ii) its gross receipts for the calendar quarter for which the credit is claimed are less than 50% of the gross receipts for the same calendar quarter in the prior year.

A business that qualifies for the ERC can simply reduce its tax deposits by the amount of the credit. To the extent that does not provide the full relief of the calculated credit, the business can apply for an accelerated tax refund. Although this means that the cash benefit of the ERC is somewhat deferred (until the business's quarterly payment is due or it receives a refund, as applicable), a business that uses the ERC will have a clear idea of the true value of the credit at the outset.

What does this mean? It means that businesses considering a PPP loan — especially businesses that may be concerned about their ability to meet the PPP's forgiveness criteria for the maximum permitted amount of their proposed loans — should crunch the numbers to determine whether the ERC is a better option.

Not only is it easier to qualify for the ERC than the PPP — there is no loan application or forgiveness process, no limited pool of money, and no requirement that a certain amount be spent within a compressed eight-week period on specified expenses — but the ERC also generally offers more flexibility for businesses to decide when to bring back employees, and how many (up to 100). Re-opening can thus be done with the ERC in a measured and intelligent way.

In an effort to help our clients understand the pros and cons of a PPP loan or the ERC better so they can get the most value for their businesses, Nixon Peabody tax attorneys have prepared a model that, using answers to a brief questionnaire, can calculate the approximate expected benefit of a PPP loan versus an ERC credit.

If you are interested in taking a closer look at the ERC, or if you would like to compare the benefits of a PPP loan to an ERC credit, please contact your regular Nixon Peabody LLP representative.

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