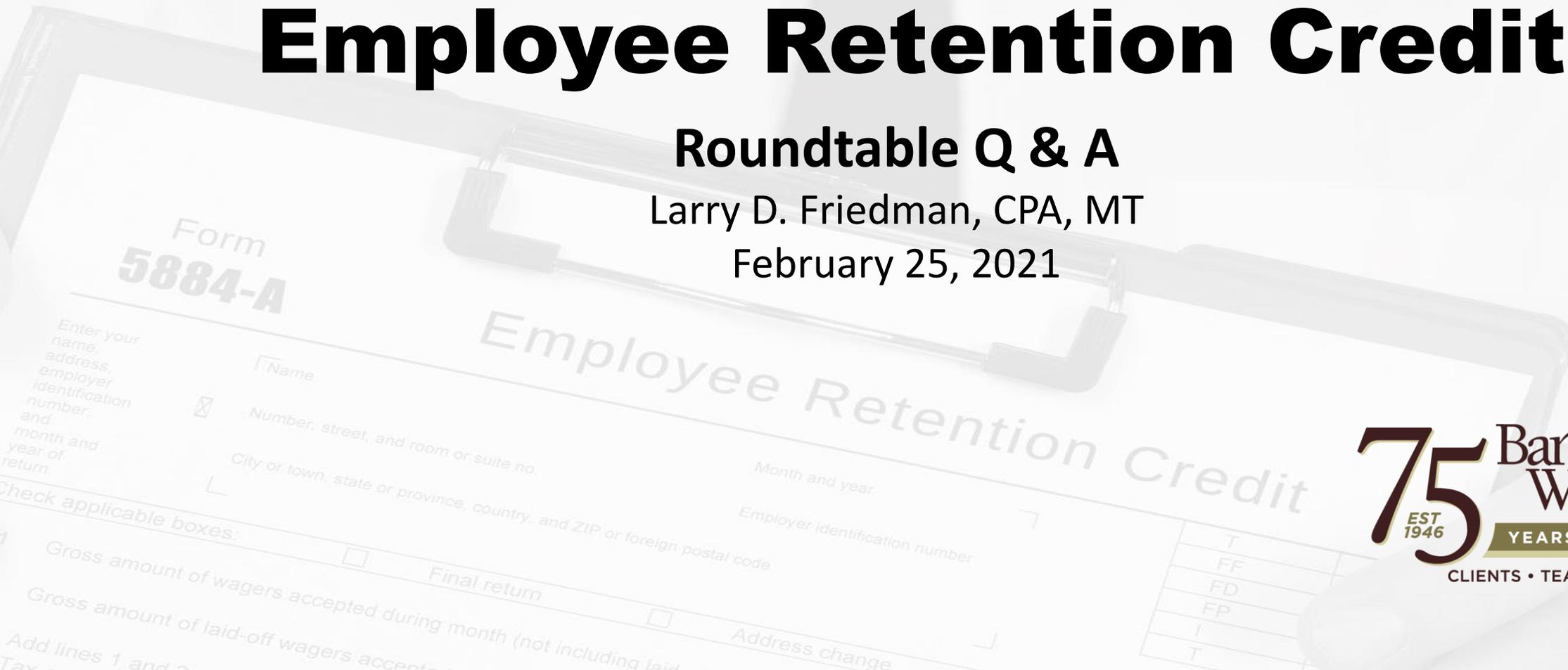


# Employee Retention Credit

## Roundtable Q & A

Larry D. Friedman, CPA, MT

February 25, 2021



# The CARES Act Created the ERTC

- The Coronavirus Aid, Relief, and Economic Security Act (CARES Act) was signed into law on March 27, 2020.
- Among the many tax deductions and credits included in the CARES Act was the ERTC.
  - The ERTC is a refundable payroll tax credit for retaining employees and continuing to pay compensation to them. The credit is fully refundable because the Eligible Employer may get a refund if the amount of the credit is more than certain federal employment taxes the Eligible Employer owes. That is, if for any calendar quarter the amount of the credit the Eligible Employer is entitled to exceeds the employer's share of the social security tax on all wages paid to all employees, then the excess is treated as an overpayment and refunded to the employer.

**NOTE:**

***I will cover the changes made to the ERTC by the 2021 Consolidated Appropriations Act (2021 CAA) later in the presentation but first will review the CARES Act rules***



# Qualified Wages: Time Period & Employer Type

- If you meet specified circumstances, wages paid from March 13, 2020 to Dec. 31, 2020 are qualified wages. The circumstances depend on the type of employer; small or large:
  - Large employer definition – for the period March 13 to Dec.31, 2020 you had **more than 100 employees** in 2019 on average
  - Small employer definition – for the period March 13 to Dec. 31, 2020 you had **up to 100 employees** in 2019 on average.
    - The definition of full-time employee for these purposes looks to full-time equivalents, 30 hours of service per week or 130 hours of service per month

# Large Employer Qualified Wages

- For large employers, qualified wages are those an employer pays to an employee for a quarter ***even though the employee is not providing services*** because the employer fulfilled either the ***business suspension condition*** or the ***gross receipts condition***.
- The qualified wages paid to the employee in a quarter when the employee is not performing services cannot exceed the amount the employee would have been paid for working for an equivalent duration in the 30 days before the period of not providing services.
- Qualified wages do not include qualified leave wages required to be provided under the Families First Coronavirus Response Act (FFCRA). The FFCRA requires certain employers to provide their employees with up to 80 hours of paid sick leave or expanded family and medical leave for specified reasons related to COVID-19.
- However, qualified wages include qualified health-plan expenses of the employer that are expended to maintain a group health plan and that are excluded from employees' gross income under I.R.C. Section 106(a).

# Small Employer Qualified Wages

- For small employers, qualified wages are those an employer pays to an employee, **regardless of whether the employee ceased providing services**, while the employer fulfilled either the **business suspension condition** or the **gross receipts condition**.
- Like the Large Employer definition the following apply:
  - Qualified wages do not include qualified leave wages required to be provided under the Families First Coronavirus Response Act (FFCRA). The FFCRA requires certain employers to provide their employees with up to 80 hours of paid sick leave or expanded family and medical leave for specified reasons related to COVID-19.
  - However, qualified wages include qualified health-plan expenses of the employer that are expended to maintain a group health plan and that are excluded from employees' gross income under I.R.C. Section 106(a).

# Wages that do not apply under The Cares Act

- The CARES Act prohibited an employer to take the ERTC if the employer acquired a loan through the Paycheck Protect Program (PPP)

Form  
**5884-A**

Employee Retention Credit

Enter your name, address, employer identification number, and month and year of return.

Name

Number, street, and room or suite no.

City or town, state or province, country, and ZIP or foreign postal code

Month and year

Employer identification number

Check applicable boxes:

Final return

Address change

T
FF
FD
FP
I
T

1 Gross amount of wages accepted during month (not including laid-off wages accepted during month)

Gross amount of laid-off wages accepted during month

Add lines 1 and 2

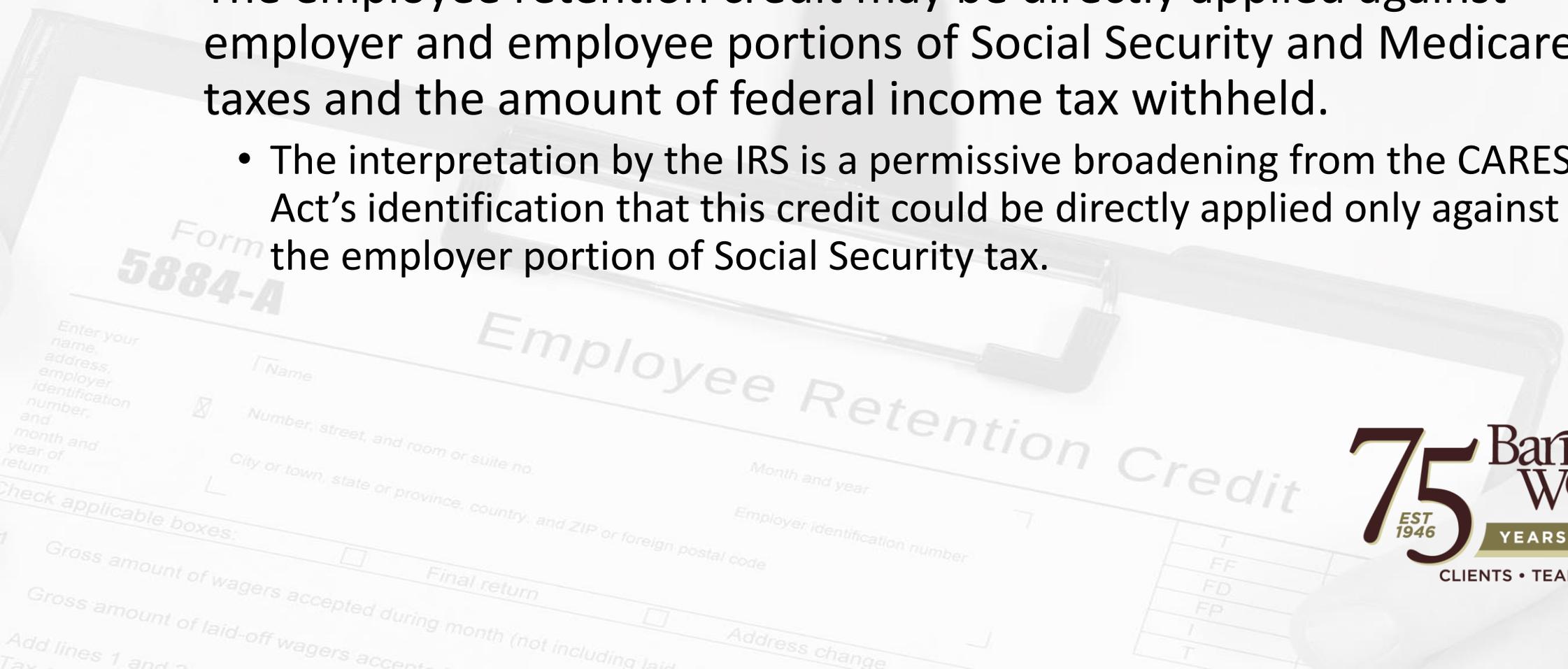
Tax

# Calculation of ERTC

- Effective from March 13 to Dec. 31, 2020, the amount of the ERTC available for a quarter generally is equal to:
  - One-half of the qualified wages that the employer paid to employees for that quarter, but is limited on a calendar year 2020 basis
  - Up to \$10,000 in qualified wages paid per employee during the whole period from March 13 to Dec. 31, 2020 can be taken into account for determining the total amount of the ERTC across the four quarters of 2020 (so the maximum employee retention credit per employee for 2020 is \$5,000).

# What Taxes Can Be Refunded?

- The employee retention credit may be directly applied against employer and employee portions of Social Security and Medicare taxes and the amount of federal income tax withheld.
  - The interpretation by the IRS is a permissive broadening from the CARES Act's identification that this credit could be directly applied only against the employer portion of Social Security tax.

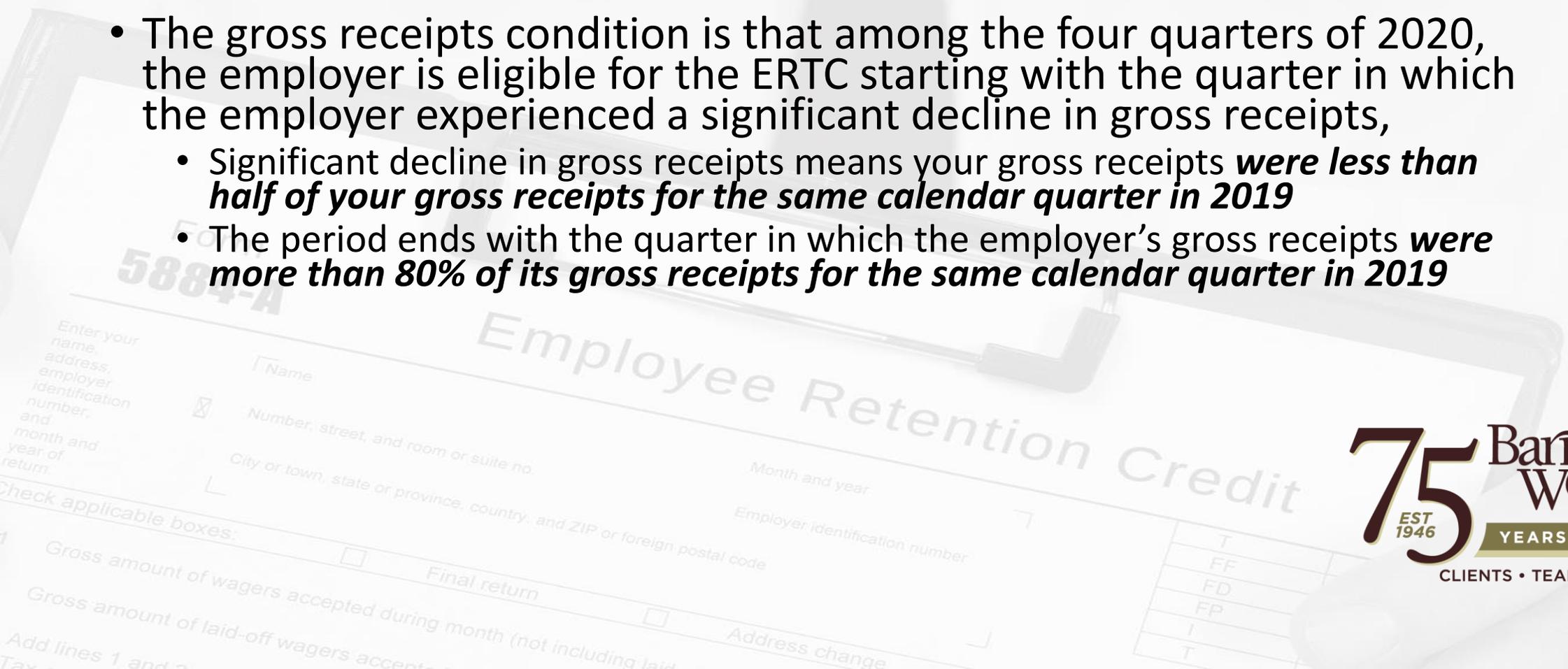


# Business Suspension Definition

- The business suspension condition is met if the employer is carrying on a trade or business during a quarter & needed to fully or partially suspend its business operations for the quarter because of a governmental order issued in response to the coronavirus outbreak that limited commerce, travel, or the size of group meetings.
- FAQs on IRS website:
  - The operation of a trade or business is partially suspended if an appropriate governmental authority imposes restrictions on the employer's operations by limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to COVID-19 such that the employer can still continue some, but not all of its typical operations.
  - An employer that reduces its operating hours due to a governmental order is considered to have partially suspended its operations since the employer's operations have been limited by a governmental order.
  - An employer with an essential business may be considered to have a full or partial suspension of operations if the business's suppliers are unable to make deliveries of critical goods or materials due to a governmental order that causes the supplier to suspend its operations.

# Gross Receipts Condition

- Effective from March 13 to Dec. 31, 2020:
- The gross receipts condition is that among the four quarters of 2020, the employer is eligible for the ERTC starting with the quarter in which the employer experienced a significant decline in gross receipts,
  - Significant decline in gross receipts means your gross receipts ***were less than half of your gross receipts for the same calendar quarter in 2019***
  - The period ends with the quarter in which the employer's gross receipts ***were more than 80% of its gross receipts for the same calendar quarter in 2019***



# 2021 CAA Changes

- The 2021 CAA was signed into law on Dec. 27, 2020 and introduced a variety of changes to the ERTC, including, but not limited to:
  - The period for taking the credit was extended to wages paid to June 30, 2021
  - The maximum amount of wages paid to each employee that may be treated as qualified wages for calculating the credit
  - The percentage of qualified wages counted toward the credit
  - The definition of large employer for determining what payments count as qualified wages.
    - The CAA's changes to how the employee retention credit works are in effect for the first and second quarters of 2021, but do not affect any of the quarters of 2020

# 2021 CAA Definition of Large Employers

- Effective from Jan. 1 to June 30, 2021, large employers are those that had more than 500 employees in 2019 on average and small employers are those that had up to 500 employees in 2019 on average.
- Look back to prior slide about the differences between small vs. large employer in definition of qualified wages

# 2021 CAA Calculation of ERTC

- Effective from Jan. 1 to June 30, 2021, the amount of the ERTC available for a quarter generally is equal to:
- 70% of the qualified wages that you paid to employees for that quarter
- The maximum amount of qualified wages paid per employee that an employer may take into account for calculating the ERTC is now **\$10,000 in qualified wages paid per quarter** (so the maximum ERTC per employee for 2021 is \$14,000, which is two quarters' worth of \$10,000 in qualified wages, i.e., a total of \$20,000, being multiplied by 70%).

# 2021 CAA Gross Receipts Condition

- Effective from Jan. 1 to June 30, 2021:
- The gross receipts condition is that an employer is eligible for the ERTC for a quarter if the employer's gross receipts for that quarter **are less than 80% of its gross receipts for the same relative calendar quarter in 2019, or, upon the employer's choice to use this comparison instead, the employer's gross receipts for the immediately preceding quarter are less than 80% of its gross receipts for the corresponding calendar quarter in 2019.**
- If the employer did not exist as of the start of a 2019 calendar quarter that would be used for either of these comparisons, the comparison may be performed using the calendar quarter in 2020 that is the fourth quarter after the quarter in 2019 that would have been used for the comparison.

# 2021 CAA Eliminated the Absolute PPP Prohibition

- The 2021 CAA contains multiple provisions that together had the effect of eliminating the absolute preclusion on an employer being able to use the employee retention credit if the employer acquires a PPP loan, while also providing that there are limitations on treating some PPP loan amounts as qualified wages in the context of the employee retention credit.
- These provisions were retroactively effective “as if included in the provisions of the CARES Act to which they relate,” and as such, the ability to have used the employee retention credit while also having acquired a PPP loan is now retroactively in effect as of March 13, 2020, which under Section 2301(m) of the CARES Act is the first day for which the employee retention credit could apply.

# 2021 CAA Change to PPP Prohibition (Continued)

- An employer may treat amounts of a PPP loan that were not forgiven (and that the employer does not anticipate will be forgiven) and that were expended on types of payroll costs eligible to be covered by a PPP loan as qualified wages for the purpose of the ERTC, subject to the maximum amount of qualified wages upon which the credit may be based.
- PPP loans may be partially forgiven and partially not forgiven and PPP loan amounts may be spent on either eligible payroll costs or eligible nonpayroll costs, so even if part of the total amount of a PPP loan was used for payroll costs and not forgiven (and the employer does not anticipate the amount will be forgiven), therefore making that part able to be treated as qualified wages for the ERTC,
- PPP loan amounts that were used to cover eligible payroll costs and that were forgiven (or that the employer anticipates will be forgiven) and PPP loan amounts that were used to cover eligible nonpayroll costs would not be able to be treated as qualified wages in the context of the employee retention credit.

# 2021 CAA Change to PPP Prohibition (Continued)

- A PPP loan amount that potentially could be treated either as qualified wages for the ERTC or as a forgiven PPP loan amount can have one of these treatments, but not both, with the employer having the discretion of which treatment is used.
- Also, before enactment of the 2021 CAA, if an employer had acquired a PPP loan and fully repaid the loan by May 18, 2020, the employer would be eligible to apply the ERTC upon its employment tax liability because in repaying the loan by that date, it would be treated for purposes of the credit as through it had not acquired the loan.

# IRS form to Apply for ERTC

- **Form 7200, Advance Payment of Employer Credits Due to COVID-19**, can be used to request advances of the portion of their combined amount of the three new refundable credits that would exceed their employment tax liability with respect to a quarter.
- An employer can file Form 7200 multiple times for a quarter with respect to claiming refundable advances based on the amounts by which their total COVID-19 payroll tax credit amount so far accumulated for the quarter (equivalent to the sum of the amount of qualified sick and family leave wages paid, qualified health expenses based on the qualified leave wages, the employer portion of Medicare tax on the qualified leave wages, and the employee retention credit) exceeds the total of their employment tax liability (the employer and employee portions of Social Security and Medicare taxes, plus federal income tax withheld) so far accumulated for the quarter.

# IRS form to Apply for ERTC (Continued)

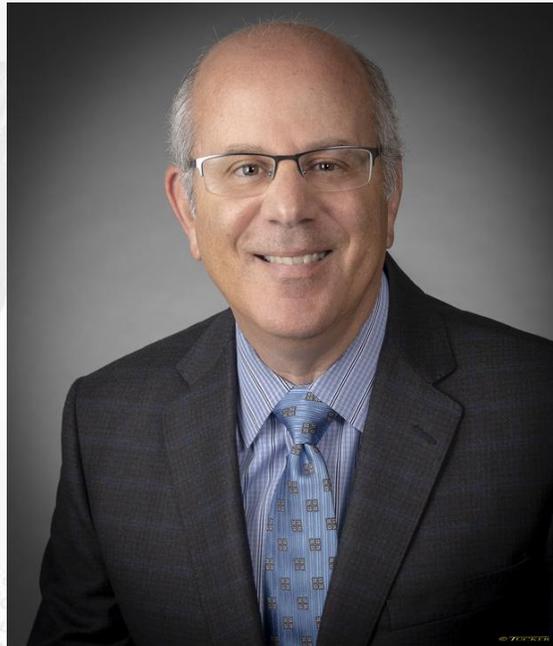
- As an alternative to filing Form 7200, employers could forgo advances of the excess credit amounts and instead claim the refundable portions using **Form 941** or another employment tax return applicable to the employer. Employers would not be required to use Form 7200 unless they want to acquire advance payments pertaining to the credits.
- Form 7200 with respect to credit amounts for a quarter must be filed by the last day of the month following that quarter, but an employer cannot file a Form 7200 for a quarter after it has filed its Form 941 for that quarter.
- Unlike many other forms currently able to be filed with the IRS, the only way that the IRS has identified to file Form 7200 is by **fax, according to the text of the form itself and its instructions. An employer would fax Form 7200 to 855-248-0552 to file the form.**

# Senate Letter to IRS Requesting ERTC Guidance & IRS Statement

- In a February 10, 2021 letter to the Treasury & IRS, Senators requested quickly issued guidance about the ERTC for employers who participated in the PPP.
  - They pointed out employers are eligible for the PPP and ERTC as long as they do not “double dip” by receiving PPP forgiveness and ERTC on the same wages. The issue applies to 2020 wages as well.
  - Finally, the Senators said it was not intended that PPP forgiveness applications constitute an election to forego ERTC for the amount of wages exceeding the amount necessary for loan forgiveness
- IRS Statement said, “I can’t say when, and I can’t say exactly the format, but I think it is safe to say that there will be other guidance in some format coming as soon as we possibly can,” said Janine Cook, deputy associate chief counsel for employee benefits, exempt organizations and employment taxes at the IRS.
  - The forthcoming guidance will address a change in the December law that allows businesses to retroactively claim the employee retention credit, even if they also received a forgivable Paycheck Protection Program loan, as long the same wages aren’t used for both, Cook said Thursday during a virtual conference hosted by the American Bar Association tax section.
  - Some tax professionals have asked the IRS to release formal guidance, such as regulations, on the credit that would be legally binding, unlike the online FAQs the agency has already posted.



# Stay Tuned



Barnes Wendling will keep you updated on the latest ERTC updates.

For further questions regarding the credit contact me:

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