



# Employee Retention Credit

presented by: Nick Preusch, CPA, JD, LLM, MSA



# Your Speaker



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# Update

- Turn Around Time
  - Getting a back log
- IRS Audits
  - Paper audits
  - More letters
- Timing on claiming the reduction in wages
- 943 vs 941
- PEOs
- IRS Warnings

3



# Deadlines

- 2020 – 4/15/2024
- 2021 – 4/15/2025

4



## What Is The Credit?

- For wages paid in:
  - 2020 – up to 50% of wages up to \$10,000 of wages per employee
  - 2021 – up to 70% of wages up to \$10,000 of wages per employee per quarter
- Example
  - 2020 – Paid one employee \$12,000 and another employee \$6,000
    - Employee 1 - \$5,000, Employee 2 - \$3,000 = \$8,000 credit
  - 2021 - Paid one employee \$12,000 and another employee \$6,000 in Q1 and Q2
    - Employee 1 - \$7,000 Q1, \$7,000 Q2, Employee 2 - \$4,200 Q1, \$4,200 Q2 = \$22,400 credit



## Penalty Relief on Amended Returns

- This release reminds taxpayers that, consistent with the relief from penalties for failure to timely pay noted in [Notice 2021-49](#), they may be eligible for relief from penalties for failing to pay their taxes if they can show reasonable cause and not willful neglect for the failure to pay. In general, taxpayers may also qualify for administrative relief from penalties for failing to pay on time under the IRS's First Time Penalty Abatement program if the taxpayer:
  1. Did not previously have to file a return or had no penalties for the three prior tax years,
  2. Filed all currently required returns or filed an extension of time to file and
  3. Paid, or arranged to pay, any tax due.



## Reasonable Cause

- Law did not exist when client filed the return;
- Client was not advised they qualified for the ERC when filing their income tax return;
- As soon as the claims were processed, the taxpayer paid all applicable taxes due.

7



## Preparing 941X

This amended 941 is to claim a refund for the Employee Retention Credit that was not claimed on the original 941. This is the only change to be reported. This credit was calculated based on 70% of qualified wages for each employee up to \$10,000. There were 3 employees whose wages exceeded \$10,000 and all wages in excess of that amount were not included in the calculation of the credit. This change affects lines 18 and 26, both the non-refundable and refundable portions of the Employee Retention Credit. All tax payments owed were made at the time they were due, therefore this amended 941 requests a refund of the entire credit in the amount of \$31,925.36.

8

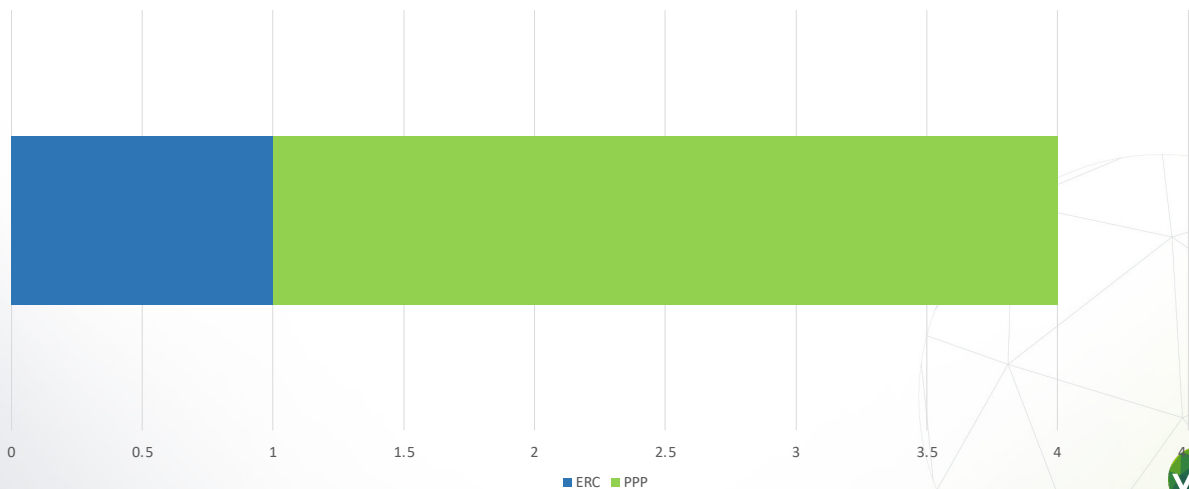


## Interaction with PPP

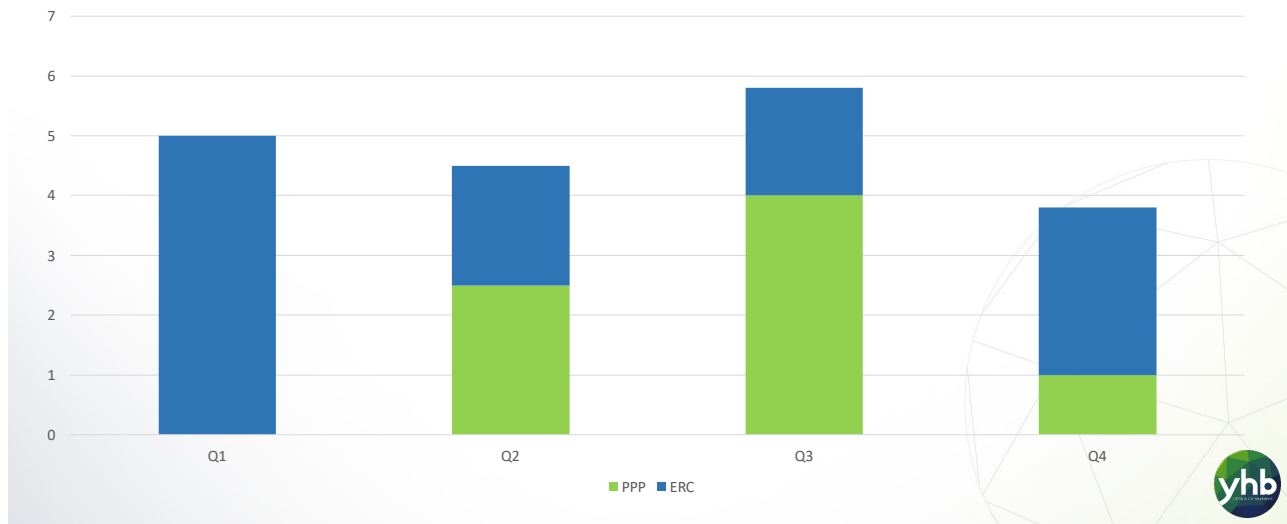
- For a business that received PPP funds
- Cannot use same wages for ERC and PPP
- Need to use as many non-wages for PPP forgiveness as possible
- Then allocate any wages not eligible for ERC to PPP



## Linear Allocation



# Consecutive Allocation



# PPP Wage Limitations

- Regular employees \$46,154 over a 24-week period
- Owners are the lesser of:
  - 2019 wages / 52 \* covered period weeks
  - Actual amount paid in covered period
  - \$20,833
  - These are W-2 wages for S Corps and self-employment tax on K-1 for partners

## How To Qualify

- Significant Decline in Gross Receipts; OR
- Full or Partial Government Shut Down
- For 2021 ONLY - Recovery Start Up



## Significant Decline in Gross Receipts

- 2020 – 50% drop between any quarter in 2020 compared to 2019
  - If you qualify for one quarter, you will continue to qualify until the quarter after you have less than a 20% drop in gross receipts compared to 2019
- 2021 – 20% drop between any quarter in 2021 compared to 2019
  - If you qualify for one quarter, you will qualify for the next quarter



# Aggregation Rules

- Control Groups need to be aggregated
- Look at aggregated GR
- Allows for wages in other companies to count if the aggregated gross receipts qualify.
- If government shut down, one shut down will qualify the entire aggregation group.



# Example

- Employer Group M is a restaurant chain that operates a single trade or business through multiple subsidiary corporations located in various jurisdictions. Employer Group M is treated as a single employer under the aggregation rules for purposes of the employee retention credit. Certain members of Employer Group M's operations are fully suspended due to a governmental order, while other members of Employer Group M's operations are not subject to a governmental order and remain open. Because Employer Group M is treated as a single employer for purposes of the employee retention credit, the operations of all members of Employer Group M are treated as fully or partially suspended due to governmental orders suspending the operations of certain of Employer Group M members.





## Government Shut Down

- Facts and circumstances based
- Need to point to an actual government order and explain how that affected you
- For a partial shut down, it needs to be more than nominal
- IRS defined nominal as a business segment that is comprised of more than 10% of the business's gross receipts
  - Note this does not mean there needs to be a 10% drop in gross receipts, just that an operation which accounts for more than 10% of gross receipts sees a decline



## What Government Orders Count

- Governmental orders include:
  - An order from the city's mayor stating that all non-essential businesses must close for a specified period;
  - A State's emergency proclamation that residents must shelter in place for a specified period, other than residents who are employed by an essential business and who may travel to and work at the workplace location;
  - An order from a local official imposing a curfew on residents that impacts the operating hours of a trade or business for a specified period;
  - An order from a local health department mandating a workplace closure for cleaning and disinfecting.



## Example 1

- **Example 1:** Governor of State Y issues an order that all non-essential businesses must close from March 20, 2020 until April 30, 2020. The order provides a list of non-essential businesses, including gyms, spas, nightclubs, barber shops, hair salons, tattoo parlors, physical therapy offices, waxing salons, fitness centers, bowling alleys, arcades, racetracks, indoor children's play areas, theaters, chiropractors, planetariums, museums, and performing arts centers. Employers that provide essential services may remain open. The governor's order is a governmental order limiting the operations of non-essential businesses, entitling employers with non-essential businesses to claim the Employee Retention Credit for qualified wages.



## Example 2

- **Example 2:** Mayor of City Y holds a press conference in which she encourages residents to practice social distancing to prevent the spread of COVID-19. The statement during the press conference is not an order limiting commerce, travel, or group meetings. Accordingly, the mayor's statement would not be a governmental order for purposes of the Employee Retention Credit.



## Voluntary Shut Down?

- If you shut down voluntarily and there is no government order to support the shut down, then it will not count for the ERC.



## Partial Shut Down – Suppliers

- If suppliers cannot make deliveries of critical goods or materials
- Must be due to government order
- Example – auto parts manufacturer's supplier of raw materials is required to shut down due to a government order.
- Auto parts manufacturer cannot get their needed supplies
- Auto parts manufacturer is partially suspended



## Partial Shut Down – Customers/ Telework

- What if customers are under a stay-at-home order?
  - No – these do not qualify
- What if order requires shut down, but you can do everything through telework?
  - No – these do not qualify



## Partial Shut Down – Part of Company Shut Down

- What if the company can operate but not how it normally operates?
- Usually, will qualify
  - Example – restaurant can only serve outdoor dining – Qualifies
  - Example – restaurant has capacity limitations – Qualifies
- The segment closed needs to usually be 10% or more of the gross receipts



## Partial Shut Down – Multiple Locations

- What if you have a shut down order in one state that affects business, but not in another state?
  - If shutdown in any state, then all of the locations will qualify



## Example

- For example, an employer that maintains both essential and non-essential business operations, each of which are more than nominal portions of the business operations, may be considered to have a partial suspension of its operations if a governmental order restricts the operations of the non-essential portion of the business, even if the essential portion of the business is unaffected. In addition, an essential business that is permitted to continue its operations may, nonetheless, be considered to have a partial suspension of its operations if a governmental order requires the business to close for a period of time during normal working hours



## Example

- Employer A operates an auto parts manufacturing business. Employer A's supplier of raw materials is required to fully suspend its operations due to a governmental order. Employer A is unable to procure these raw materials from an alternate supplier. As a consequence of the suspension of Employer A's supplier, Employer A is not able to perform its operations for a period of time. Under these facts and circumstances, Employer A would be considered an eligible employer during this period because its operations have been suspended due to the governmental order that suspended operations of its supplier



## Example

- Employer C, a software development company, maintains an office in a city where the mayor has ordered that only essential businesses may operate. Employer C's business is not essential under the mayor's order, and therefore Employer C is required to close its office. Prior to the governmental order, all employees at the company teleworked once or twice per week, and business meetings were held at various locations. Following the governmental order, the company ordered mandatory telework for all employees and limited client meetings to telephone or video conferences. Employer C's business operations are not considered to be fully or partially suspended due to the governmental order because the employer is able to continue its business operations in a comparable manner



## Example

- Employer D operates a physical therapy facility in a city where the mayor has ordered that only essential businesses may operate. Employer D's business is not considered essential under the mayor's order, and therefore Employer D is required to close its workplace. Prior to the governmental order, none of Employer D's employees provided services through telework and all appointments, administration, and other duties were carried out at Employer D's workplace. Following the governmental order, Employer D moves to an online format and is able to serve some clients remotely, but employees cannot access specific equipment or tools that they typically use in therapy and not all clients can be served remotely. Employer D's business operations are considered to be partially suspended due to the governmental order because Employer D's workplace, including access to physical therapy equipment, is central to its operations, and the business operations cannot continue in a comparable manner.



## Example

- Employer E, a scientific research company with facilities in a state in which the governor has ordered that only essential businesses may operate, conducts research in a laboratory setting and through the use of computer modeling. Employer E's business is not essential under the governor's order, and therefore Employer E is required to close its workplace. Prior to the governmental order, Employer E's laboratory-based research operations could not be conducted remotely (other than certain related administrative tasks) and employees involved in laboratory-based research worked on-site. Employer E's computer modeling research operations could be conducted remotely, and employees who engaged in this portion of the business often teleworked. Following the governmental order, the employees engaged in the laboratory-based research cannot perform their work while the facility is closed and are limited to performing administrative tasks during the closure. In contrast, all employees engaged in computer modeling research are directed to telework, and those business operations are able to continue in a comparable manner. Employer E's business operations are considered to be partially suspended due to the governmental order because Employer E's laboratory-based research business operations cannot continue in a comparable manner.



## Example

- Employer F, a restaurant business, must close its restaurant to onsite dining due to a governmental order closing all restaurants, bars, and similar establishments for sit-down service. Employer F is allowed to continue food or beverage sales to the public on a carry-out, drive-through, or delivery basis. On-site dining is more than a nominal portion of Employer F's business operations. Employer F's business operations are considered to be partially suspended because, under the facts and circumstances, more than a nominal portion of its business operations—its indoor and outdoor dining service—is suspended due to the governmental order



## Example

- Same facts as Example 1, except that two months later, under a subsequent governmental order, Employer F is permitted to offer sit-down service in its outdoor space, but its indoor dining service continues to be closed. During this period, Employer F is allowed to operate only its outdoor sit-down and carry-out service in accordance with the order. Indoor dining is more than a nominal portion of Employer F's business operations. Employer F's business operations are considered to be partially suspended because, under the facts and circumstances, more than a nominal portion of its business operations – its indoor dining service – is suspended due to a governmental order. The following month, under a further governmental order, Employer F is permitted to offer indoor dining service, in addition to outdoor sit-down and carry-out service, provided that all tables in the indoor dining room must be spaced at least six feet apart. This spacing constraint has more than a nominal effect on Employer F's business operations. During this period, even though Employer F resumed all categories of its business operations, Employer F's business operations continue to be partially suspended because, under the facts and circumstances, the governmental order restricting its indoor dining service has more than a nominal effect on its operations





## Example

- Employer G, a retail business, must close its retail storefront locations due to a governmental order. The retail business also maintains a website through which it continues to fulfill online orders; the retailer's online ordering and fulfillment system is unaffected by the governmental order. The retail storefront locations are more than a nominal portion of Employer G's business operations. Employer G's business operations are considered to have been partially suspended due to the governmental order requiring it to close its retail storefront locations, which are more than a nominal portion of its business operations



## Example

- Employer H, a hospital, is considered to be operating an essential business under a governmental order with respect to its emergency department, intensive care, and other services for conditions requiring urgent medical care. However, the governmental order treats Employer H's elective and non-urgent medical procedures as non-essential business operations and prevents Employer H from performing these services. Employer H suspends operations related to elective and non-urgent medical procedures, which are more than a nominal portion of Employer H's business operations. Although Employer H is an essential business, Employer H is considered to have a partial suspension of operations due to the governmental order that prevents Employer H from performing elective and non-urgent medical procedures, which are more than a nominal portion of its business operations under the facts and circumstances



## Example

- Employer I, a grocery store, is considered to be operating an essential business under a governmental order. However, the governmental order requires grocery stores to discontinue their self-serve offerings, such as salad bars, though they may offer prepared or prepackaged food. Employer I modifies its operations to close its salad bar and other self-serve offerings and instead offers prepackaged salads and other items. The salad bar and other self-serve offerings are not more than a nominal portion of Employer I's business operations. Further, the governmental order requiring Employer I to discontinue its self-serve offerings does not have more than a nominal effect on Employer I's business operations under the facts and circumstances, even though Employer I was required to modify its business operations. Accordingly, Employer I's business operations are not considered to be partially suspended due to a governmental order.



## Example

- Employer J, a large retailer, is required to close its storefront location due to a governmental order, but is permitted to provide customers with curbside service to pick up items ordered online or by phone. The retail storefront location is more than a nominal portion of Employer J's business operations. During this period, Employer J's business operations are considered to have been partially suspended due to the governmental order requiring it to close its storefront location. Two months later, under a subsequent governmental order, Employer J is permitted to reopen its storefront location. Under the subsequent governmental order, however, Employer J must enforce social distancing guidelines that require Employer J to admit only a specified number of customers into the store per 1,000 square feet. While the governmental order results in customers waiting in line for a short period of time to enter the store during certain busy times of the week, the size of Employer J's storefront is large enough that it is able to accommodate all of its customers after these short waits outside the store. The governmental order requiring Employer J to enforce social distancing guidelines does not have more than a nominal effect on Employer J's business operations under the facts and circumstances, even though Employer J is required to modify its business operations. During this period, Employer J's business operations are not considered to be partially suspended due to the governmental order because the governmental order requiring enforcement of social distancing guidelines does not have more than a nominal effect on its operations.



## Shutdowns – Wages That Qualify

- If we qualify for the ERC under the shutdown rules, then
  - Only wages paid during shutdown are eligible for ERC



## Example

- State Y issued a governmental order for all non-essential businesses to close from March 10, 2020, through April 30, 2020, and the governmental order was not extended. Pursuant to the order, Employer N, which operates a non-essential business in State Y, closes from March 10 through April 30. Employer N is a large eligible employer in the first quarter and second quarter of 2020, but may claim the credit only for qualified wages paid from March 13, 2020, the effective date of section 2301 of the CARES Act, through April 30, 2020, with respect to employees who were not providing services during this period because of the suspension of operations due to State Y's governmental order.



## Recovery Start Up

- Began operations on or after 2/15/20
- Average annual gross receipts less than \$1,000,000
- Automatically qualifies for Q3 and Q4 2021
- Can get up to \$50,000 in credits each quarter – total \$100,000
- Loophole?



## Owner's Wages

- IRS has basically stated it will not qualify for more than 50% owner's wages unless the owner has no living ancestors or descendants
- Could possibly be changes – stay tuned!



## How To File

- Form 7200
- Form 941
- Form 941X – ONLY WAY NOW



## Does It Change Your Taxes?

- Yes – you need to decrease your wage deduction for each dollar of credit you receive
- Reduction is in year of the wages paid, i.e., if you get the ERC on 2020 wages and don't receive the credit until 2022, then you will need to amend your 2020 taxes
- You may need to amend your 2020 return





Thank You!