March 24, 2021

# Employee Retention Tax Credit Eligibility for Certain Public Entities

The employee retention tax credit (ERTC), which has been an important tool for many employers in the economic fight against the global pandemic, has been expanded to include certain governmental entities, including colleges, universities, and governmental entities primarily providing medical care. See our previous alert for a brief description of the amount of the credit and general eligibility rules for the ERTC. The Coronavirus Aid, Relief, and Economic Security Act (CARES Act) established the ERTC, but it was set to expire at the end of 2020. The Consolidated Appropriations Act 2021 (the "Act") as adopted on December 27, 2020, extended the ERTC measures through July 1, 2021. Likewise, although the ERTC was not available to federal, state, and local governments and their instrumentalities in 2020 (under the CARES Act), the Act expanded eligibility for the following public entities for 2021 if they otherwise qualify as:

i. colleges and universities;

ii. entities with the principal purpose or function of providing medical or hospital care; or

iii. certain tax-exempt corporations organized pursuant to an act of Congress as an instrumentality of the United States.

Furthermore, to determine whether an organization is a government instrumentality, the IRS considers the following factors for ERTC purposes:

i. whether the organization is used for a governmental purpose and performs a governmental function;

ii. whether performance of the organization's function is on behalf of one or more States or political subdivisions;

iii. whether there are any private interests involved, or whether the States or political subdivisions involved have the powers and interests of an owner;

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iv. whether control and supervision of the organization is vested in a public authority or authorities;

v. if express or implied statutory or other authority is necessary for the creation and/or use of such an instrumentality, and whether such authority exists; and

vi. the degree of financial autonomy and the source of its operating expenses.

However, it should be noted that no one factor is determinative. Instead, the organizational status is determined based on all facts and circumstances.

*Gross Receipts of Tax-Exempt Organizations*

The Service has clarified that, for purposes of ERTC, "gross receipts" of a tax-exempt organization is determined as the gross amount received by that organization without reduction for any costs or expenses (including for cost of goods sold, cost of operations, or expenses of earning, raising, or collecting such amounts). Gross receipts include, but are not limited to:

- the gross amount received as contributions, gifts, grants, and similar amounts, without reduction for the expenses of raising and collecting such amounts;
- the gross amount received as dues or assessments from members or affiliated organizations, without reduction for expenses attributable to the receipt of such amounts;
- gross sales or receipts from business activities (including business activities unrelated to the purpose for which the organization qualifies for exemption);
- the gross amount received from the sale of assets, without reduction for cost or other basis and expenses of sale; or
- the gross amount received as investment income, such as interest, dividends, rents, and royalties.

Readers should be advised that, although the Act extended and modified the ERTC for the first two calendar quarters in 2021, the IRS guidance issued to date merely addresses the 2020 rules. The Service intends to release further guidance with respect to changes effective for 2021 which we expect to track this guidance but may contain further updates/refinements.

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