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Internal Revenue Code Section 3134(n)

Employee retention credit for employers subject to closure due to COVID-19

(a) In general.

In the case of an eligible employer, there shall be allowed as a credit against applicable employment taxes for each calendar quarter an amount equal to 70 percent of the qualified wages with respect to each employee of such employer for such calendar quarter.

(b) Limitations and refundability.

(1) In general.

(A) Wages taken into account. The amount of qualified wages with respect to any employee which may be taken into account under subsection (a) by the eligible employer for any calendar quarter shall not exceed \$10,000.

(B) Recovery startup businesses. In the case of an eligible employer which is a recovery startup business (as defined in subsection (c)(5)), the amount of the credit allowed under subsection (a) (after application of subparagraph (A)) for any calendar quarter shall not exceed \$50,000.

(2) Credit limited to employment taxes.

The credit allowed by subsection (a) with respect to any calendar quarter shall not exceed the applicable employment taxes (reduced by any credits allowed under sections 3131 and 3132) on the wages paid with respect to the employment of all the employees of the eligible employer for such calendar quarter.

(3) Refundability of excess credit.

If the amount of the credit under subsection (a) exceeds the limitation of paragraph (2) for any calendar quarter, such excess shall be treated as an overpayment that shall be refunded under sections 6402(a) and 6413(b).

(c) Definitions.

For purposes of this section-

(1) Applicable employment taxes.

The term "applicable employment taxes" means the following:

(A) The taxes imposed under section 3111(b).

(B) So much of the taxes imposed under section 3221(a) as are attributable to the rate in effect under section 3111(b).

(2) Eligible employer.

(A) In general. The term "eligible employer" means any employer-

(i) which was carrying on a trade or business during the calendar quarter for which the credit is determined under subsection (a), and

(ii) with respect to any calendar quarter, for which-

(I) the operation of the trade or business described in clause (i) is fully or partially suspended during the calendar quarter due to orders from an appropriate governmental authority limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to the coronavirus disease 2019 (COVID-19),

(II) the gross receipts (within the meaning of section 448(c)) of such employer for such calendar quarter are less than 80 percent of the gross receipts of such employer for the same calendar quarter in calendar year 2019, or

(III) the employer is a recovery startup business (as defined in paragraph (5)). With respect to any employer for any calendar quarter, if such employer was not in existence as of the beginning of the same calendar quarter in calendar year 2019, clause (ii)(II) shall be applied by substituting "2020" for "2019".

(B) Election to use alternative quarter. At the election of the employer-

(i) subparagraph (A)(ii)(II) shall be applied-

(I) by substituting "for the immediately preceding calendar quarter" for "for such calendar quarter", and

(II) by substituting "the corresponding calendar quarter in calendar year 2019" for "the same calendar quarter in calendar year 2019", and

(ii) the last sentence of subparagraph (A) shall be applied by substituting "the corresponding calendar quarter in calendar year 2019" for "the same calendar quarter in calendar year 2019".

An election under this subparagraph shall be made at such time and in such manner as the Secretary shall prescribe.

(C) Tax-exempt organizations. In the case of an organization which is described in section 501(c) and exempt from tax under section 501(a)-

(i) clauses (i) and (ii)(I) of subparagraph (A) shall apply to all operations of such organization, and

(ii) any reference in this section to gross receipts shall be treated as a reference to gross receipts within the meaning of section 6033.

(3) Qualified wages.

(A) In general. The term "qualified wages" means-

(i) in the case of an eligible employer for which the average number of full-time employees (within the meaning of section 4980H) employed by such eligible employer during 2019 was greater than 500, wages paid by such eligible employer with respect to which an employee is not providing services due to circumstances described in subclause (I) or (II) of paragraph (2)(A)(ii), or

(ii) in the case of an eligible employer for which the average number of full-time employees (within the meaning of section 4980H) employed by such eligible employer during 2019 was not greater than 500-

(I) with respect to an eligible employer described in subclause (I) of paragraph (2)(A)(ii), wages paid by such eligible employer with respect to an employee during any period described in such clause, or

(II) with respect to an eligible employer described in subclause (II) of such paragraph, wages paid by such eligible employer with respect to an employee during such quarter.

(B) Special rule for employers not in existence in 2019. In the case of any employer that was not in existence in 2019, subparagraph (A) shall be applied by substituting "2020" for "2019" each place it appears.

(C) Severely financially distressed employers.

(i) In general. Notwithstanding subparagraph (A)(i), in the case of a severely financially distressed employer, the term "qualified wages" means wages paid by such employer with respect to an employee during any calendar quarter.

(ii) Definition. The term "severely financially distressed employer" means an eligible employer as defined in paragraph (2), determined by substituting "less than 10 percent" for "less than 80 percent" in subparagraph (A)(ii)(II) thereof.

(D) Exception. The term "qualified wages" shall not include any wages taken into account under sections 41, 45A, 45P, 45S, 51, 1396 , 3131, and 3132.

(4) Wages.

(A) In general. The term "wages" means wages (as defined in section 3121(a)) and compensation (as defined in section 3231(e)). For purposes of the preceding sentence, in the case of any organization or entity described in subsection (f)(2), wages as defined in section 3121(a) shall be determined without regard to paragraphs (5), (6), (7), (10) , and (13) of section 3121(b) (except with respect to services performed in a penal institution by an inmate thereof).

(B) Allowance for certain health plan expenses.

(i) In general. Such term shall include amounts paid by the eligible employer to provide and maintain a group health plan (as defined in

section 5000(b)(1)), but only to the extent that such amounts are excluded from the gross income of employees by reason of section 106(a).

(ii) Allocation rules. For purposes of this section, amounts treated as wages under clause (i) shall be treated as paid with respect to any employee (and with respect to any period) to the extent that such amounts are properly allocable to such employee (and to such period) in such manner as the Secretary may prescribe. Except as otherwise provided by the Secretary, such allocation shall be treated as properly made if made on the basis of being pro rata among periods of coverage.

(5) Recovery startup business.

The term "recovery startup business" means any employer-

(A) which began carrying on any trade or business after February 15, 2020,

(B) for which the average annual gross receipts of such employer (as determined under rules similar to the rules under section 448(c)(3)) for the 3-taxable-year period ending with the taxable year which precedes the calendar quarter for which the credit is determined under subsection (a) does not exceed \$1,000,000, and

(C) which, with respect to such calendar quarter, is not described in subclause (I) or (II) of paragraph (2)(A)(ii).

(6) Other terms.

Any term used in this section which is also used in this chapter or chapter 22 shall have the same meaning as when used in such chapter.

(d) Aggregation rule.

All persons treated as a single employer under subsection (a) or (b) of section 52, or subsection (m) or (o) of section 414, shall be treated as one employer for purposes of this section.

(e) Certain rules to apply.

For purposes of this section, rules similar to the rules of sections 51(i)(1) and 280C(a) shall apply.

(f) Certain governmental employers.

(1) In general.

This credit shall not apply to the Government of the United States, the government of any State or political subdivision thereof, or any agency or instrumentality of any of the foregoing.

(2) Exception.

Paragraph (1) shall not apply to-

(A) any organization described in section 501(c)(1) and exempt from tax under section 501(a), or

(B) any entity described in paragraph (1) if-

(i) such entity is a college or university, or

(ii) the principal purpose or function of such entity is providing medical or hospital care.

In the case of any entity described in subparagraph (B), such entity shall be treated as satisfying the requirements of subsection (c)(2)(A)(i).

(g) Election to not take certain wages into account.

This section shall not apply to so much of the qualified wages paid by an eligible employer as such employer elects (at such time and in such manner as the Secretary may prescribe) to not take into account for purposes of this section.

(h) Coordination with certain programs.

(1) In general.

This section shall not apply to so much of the qualified wages paid by an eligible employer as are taken into account as payroll costs in connection with-

(A) a covered loan under section 7(a)(37) or 7A of the Small Business Act,

(B) a grant under section 324 of the Economic Aid to Hard-Hit Small Businesses, Non-Profits, and Venues Act, or

(C) a restaurant revitalization grant under section 5003 of the American Rescue Plan Act of 2021.

(2) Application where ppp loans not forgiven.

The Secretary shall issue guidance providing that payroll costs paid during the covered period shall not fail to be treated as qualified wages under this section by reason of paragraph (1) to the extent that-

(A) a covered loan of the taxpayer under section 7(a)(37) of the Small Business Act is not forgiven by reason of a decision under section 7(a)(37)(J) of such Act, or

(B) a covered loan of the taxpayer under section 7A of the Small Business Act is not forgiven by reason of a decision under section 7A(g) of such Act.

Terms used in the preceding sentence which are also used in section 7A(g) or 7(a)(37)(J) of the Small Business Act shall, when applied in connection with either such section, have the same meaning as when used in such section, respectively.

(i) Third party payors.

Any credit allowed under this section shall be treated as a credit described in section 3511(d)(2).

(j) Advance payments.

(1) In general.

Except as provided in paragraph (2), no advance payment of the credit under subsection (a) shall be allowed.

(2) Advance payments to small employers.

(A) In general. Under rules provided by the Secretary, an eligible employer for which the average number of full-time employees (within the meaning of section

4980H) employed by such eligible employer during 2019 was not greater than 500 may elect for any calendar quarter to receive an advance payment of the credit under subsection (a) for such quarter in an amount not to exceed 70 percent of the average quarterly wages paid by the employer in calendar year 2019.

(B) Special rule for seasonal employers. In the case of any employer who employs seasonal workers (as defined in section 45R(d)(5)(B)), the employer may elect to apply subparagraph (A) by substituting "the wages for the calendar quarter in 2019 which corresponds to the calendar quarter to which the election relates" for "the average quarterly wages paid by the employer in calendar year 2019".

(C) Special rule for employers not in existence in 2019. In the case of any employer that was not in existence in 2019, subparagraphs (A) and (B) shall each be applied by substituting "2020" for "2019" each place it appears.

(3) Reconciliation of credit with advance payments.

(A) In general. The amount of credit which would (but for this subsection) be allowed under this section shall be reduced (but not below zero) by the aggregate payment allowed to the taxpayer under paragraph (2). Any failure to so reduce the credit shall be treated as arising out of a mathematical or clerical error and assessed according to section 6213(b)(1).

(B) Excess advance payments. If the advance payments to a taxpayer under paragraph (2) for a calendar quarter exceed the credit allowed by this section (determined without regard to subparagraph (A)), the tax imposed under section 3111(b) or so much of the tax imposed under section 3221(a) as is attributable to the rate in effect under section 3111(b) (whichever is applicable) for the calendar quarter shall be increased by the amount of such excess.

(k) Treatment of deposits.

The Secretary shall waive any penalty under section 6656 for any failure to make a deposit of any applicable employment taxes if the Secretary determines that such failure was due to the reasonable anticipation of the credit allowed under this section.

(l) Extension of limitation on assessment.

Notwithstanding section 6501, the limitation on the time period for the assessment of any amount attributable to a credit claimed under this section shall not expire before the date that is 5 years after the later of-

(1) the date on which the original return which includes the calendar quarter with respect to which such credit is determined is filed, or

(2) the date on which such return is treated as filed under section 6501(b)(2).

(m) Regulations and guidance.

The Secretary shall issue such forms, instructions, regulations, and other guidance as are necessary-

(1) to allow the advance payment of the credit under subsection (a) as provided in subsection (j)(2), subject to the limitations provided in this section, based on such information as the Secretary shall require,

(2) with respect to the application of the credit under subsection (a) to third party payors (including professional employer organizations, certified professional employer organizations, or agents under section 3504), including regulations or guidance allowing such payors to submit documentation necessary to substantiate the eligible employer status of employers that use such payors, and

(3) to prevent the avoidance of the purposes of the limitations under this section, including through the leaseback of employees. Any forms, instructions, regulations, or other guidance described in paragraph (2) shall require the customer to be responsible for the accounting of the credit and for any liability for improperly claimed credits and shall require the certified professional employer organization or other third party payor to accurately report such tax credits based on the information provided by the customer.

 (n) Application.

This section shall only apply to wages paid after June 30, 2021, and before January 1, 2022.