

# Congress Passes Major New Relief/Stimulus Legislation Includes Significant Modifications to Paycheck Protection Program, Employee Retention Credit, and Other Tax Provisions

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1 Congress has passed and President Trump signed into law major new legislation that includes new  
2 economic stimulus and relief measures as well as significant tax provisions. The legislation, given the  
3 title “Consolidated Appropriations Act, 2021” (which we will refer to hereinafter as “the CAA”),  
4 includes significant modifications to and extensions of the Paycheck Protection Program and the  
5 Employee Retention Credit – two provisions in current law of great interest to the nonprofit sector.

6 Below is a very high-level and greatly abbreviated summary of key provisions of the CAA relevant to  
7 nonprofits...as we currently understand them. *(Note that our understanding of the provisions could*  
8 *change as more guidance becomes available.)*

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## Paycheck Protection Program

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- 9 • **Congress appropriated** a total of \$284 billion for new PPP loans (both “first-draw” (PPP1)  
10 and “second-draw” (PPP2) in total) which are available through March 31, subject to funds  
11 availability.
- 12 • **Churches and religious organizations.** Expresses the sense of Congress that the SBA’s  
13 guidance clarifying the eligibility of churches and religious organizations was proper and  
14 prohibits the application of regulations otherwise rendering ineligible businesses principally  
15 engaged in teaching, instructing, counseling, or indoctrinating religion or religious beliefs.  
16 Codifies that the prohibition on eligibility for religious organizations that normally applies to  
17 SBA lending does not apply for PPP1 and PPP2 loans.
- 18 • **Affiliation rules are waived** for PPP1 and PPP2 loans **for nonprofit organizations that are**  
19 **radio and television broadcasting organizations** (organizations assigned a NAICS code  
20 beginning with 5151).
- 21 • **The SBA allowed lenders to begin accepting applications on January 11, 2021.** Per [SBA](#)  
22 [guidance](#), during a brief initial period, applications are accepted only from borrowers from  
23 underserved communities and groups. Also, a certain portion of funds appropriated by  
24 Congress for new PPP loan funding is set aside for such groups.
- 25 • **The requirement that at least 60% of the loan forgiveness amount must consist of**  
26 **“payroll costs” continues to apply to PPP1 and PPP2 loans.**

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# Original Paycheck Protection Program

## (PPP1) Loans

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- 27 • New loan application Form 2483 – [click here](#).
- 28 • New consolidated SBA rules – [click here](#).
- 29 • **Maximum loan amount is still \$10 million.**
- 30 • **Retroactively defines a “seasonal employer”** to be an eligible recipient which: (1) operates  
31 for no more than seven months in a calendar year, or (2) had gross receipts in any six months  
32 in the prior calendar year that were no more than one third of the gross receipts for the other  
33 six months of that year.
- 34 ○ Expands the period during which seasonal employers may calculate their average  
35 monthly payroll costs to any 12-week period beginning February 15, 2019, and ending  
36 February 15, 2020. (Allows a seasonal employer borrower to apply for an increase in  
37 its existing PPP loan if the new rules would permit a larger loan than the amount it  
38 originally obtained. [Presumably, the initial PPP loan must still be outstanding.]
- 39 ○ It is unclear to us at this point how or to what extent this retroactive definition might  
40 affect borrowers who:
- 41     ▪ reasonably deemed themselves to be seasonal employers when originally  
42     applying for a PPP loan or applying for forgiveness of a PPP loan in the absence  
43     of a legal definition, and
- 44     ▪ do not meet the definition under the new rules.
- 45 • **Adds the following types of expenses** to the list of allowable and forgivable expenses for  
46 Paycheck Protection Program loans:
- 47 (Note – the CAA allows borrowers of PPP1 loans made before, on, or after the enactment of  
48 the CAA to utilize funds for forgivable expenses as expanded by the CAA, except for borrowers  
49 who have already had their loans forgiven.)
- 50 ○ **Other employer-paid group insurance costs.** Payroll costs now include group life,  
51 disability, vision, and dental insurance costs paid by the employer in addition to group  
52 health insurance costs.

- 53 ○ **Covered operations expenditures.** Payments for any business software or cloud  
54 computing service that facilitates business operations, product or service delivery, the  
55 processing, payment, or tracking of payroll expenses, human resources, sales and  
56 billing functions, or accounting or tracking of supplies, inventory, records, and  
57 expenses
- 58 ○ **Covered property damage costs.** Costs related to property damage or looting due to  
59 public disturbances that occurred during 2020 that are not covered by insurance
- 60 ○ **Covered supplier costs.** Expenditures to a supplier pursuant to a contract, purchase  
61 order, or order for goods in effect prior to taking out the loan that are essential to the  
62 recipient's operations at the time which the expenditure was made. Supplier costs of  
63 perishable goods can be made before or during the life of the loan.
- 64 ○ **Covered worker protection expenditures.** Personal protective equipment and  
65 adaptive investments to help a loan recipient comply with federal health and safety  
66 guidelines or any equivalent state and local guidance related to COVID-19 (as defined  
67 in the rules) during the period beginning on March 1, 2020, and continuing through the  
68 end of the national emergency declaration
- 69 ● **Allows a borrower to elect a Covered Period** beginning on the loan funding date and ending  
70 on any date of the borrower's choosing that occurs at least 8 weeks and no more than 24 weeks  
71 after the loan funding date.
- 72 ● Creates a **simplified application process for loans under \$150,000** such that a borrower  
73 shall receive forgiveness if a borrower signs and submits to the lender a certification that is  
74 not more than one page in length, and includes a description of the number of employees the  
75 borrower was able to retain because of the covered loan, the estimated total amount of the  
76 loan spent on payroll costs, and the total loan amount. The borrower must also attest that the  
77 borrower accurately provided the required certification and complied with Paycheck  
78 Protection Program loan requirements. The SBA must establish this form within 24 days of  
79 enactment and may not require additional materials with the application unless necessary to  
80 substantiate revenue loss requirements or to satisfy relevant statutory or regulatory  
81 requirements. Such borrowers will be required to provide substantiation information in  
82 connection with their loan forgiveness applications. Additionally, borrowers are required to  
83 retain relevant records related to employment for four years and other records for three  
84 years. The SBA may review and audit these loans to ensure against fraud.
- 85 ● Prohibits eligible entities that receive a grant under the Shuttered Venue Operator Grants (see  
86 below) from obtaining a PPP loan.
- 87 ● **Expands eligibility to** receive a PPP loan to include **certain 501(c)(6) organizations.**  
88 (Generally, business leagues, trade and professional associations, etc., subject to certain  
89 limitations unique to such organizations.)
- 90 ● **Borrowers who previously returned or did not accept all or part of their PPP loans may**  
91 **reapply for the maximum amount applicable.**

- 92 • Continues to require a good faith certification about current economic uncertainty making the  
93 loan necessary to support ongoing operations.
- 94 • All loans issued after June 5, 2020 and not forgiven mature in five years and bear interest at a rate of 1% annually.

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## “Second Draw” Paycheck Protection Program (PPP2) Loans

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- 95 • New loan application Form 2483-SD – [click here](#).
- 96 • New consolidated SBA rules – [click here](#).
- 97 • **Creates a second loan from the Paycheck Protection Program, called a “PPP Second**  
98 **Draw”** loan for smaller and harder-hit organizations, with a maximum loan amount of \$2  
99 million. Loans are available through March 31, 2021, subject to the funding capacity included  
100 in the legislation. (We refer to these loans herein as “PPP2 loans.”)
- 101 • **The same rules that apply to PPP1 loans generally apply to PPP2 loans, including**  
102 **provisions for forgiveness, except as noted below.**
- 103 • **Eligibility.** In order to receive a PPP2 loan, eligible entities must:
- 104 ○ Employ not more than 300 employees;
- 105 ○ Have obtained an original PPP loan and used the full amount of it only for eligible  
106 expenses; and
- 107 ○ **Demonstrate at least a 25% reduction in gross receipts in any completed calendar**  
108 **quarter of 2020 relative to the same 2019 quarter. Provides applicable timelines for**  
109 **businesses that were not in operation in Q1, Q2, Q3, and Q4 of 2019. (Rules allow a**  
110 **borrower to report at least a 25% reduction in gross receipts annually for 2020 as**  
111 **compared to 2019 for simplicity if the borrower prefers to use an annual comparison.)**
- 112     ▪ The law and rules define the term “gross receipts” for nonprofit organizations  
113 by referencing a provision of the Internal Revenue Code (Section 6033), which  
114 is interpreted by Treasury Regulations (Reg. §1.6033-2(g)(4)).
- 115     The term “gross receipts” means the gross amount received by the organization  
116 during its annual accounting period from all sources without reduction for any  
117 costs or expenses including, for example, cost of goods or assets sold, cost of  
118 operations, or expenses of earning, raising, or collecting such amounts. Thus  
119 “gross receipts” includes, but is not limited to, (i) the gross amount received as

120 contributions, gifts, grants, and similar amounts without reduction for the  
121 expenses of raising and collecting such amounts, (ii) the gross amount received  
122 as dues or assessments from members or affiliated organizations without  
123 reduction for expenses attributable to the receipt of such amounts, (iii) gross  
124 sales or receipts from business activities (including business activities  
125 unrelated to the purpose for which the organization qualifies for exemption, the  
126 net income or loss from which may be required to be reported on Form 990-T),  
127 (iv) the gross amount received from the sale of assets without reduction for cost  
128 or other basis and expenses of sale, and (v) the gross amount received as  
129 investment income, such as interest, dividends, rents, and royalties.

130 *The rules do not appear to make a distinction between restricted and unrestricted*  
131 *contributions with respect to nonprofit organizations.*

132       ▪ **PPP1 loan forgiveness is not included in gross receipts.**

- 133       • **Good faith certification.** In addition to the requirement for a decline in gross receipts, PPP2  
134 loan applications continue to require a good faith certification about current economic  
135 uncertainty making the loan necessary to support ongoing operations – as was the case with  
136 PPP1 loans.
- 137       • **Loan terms.** In general, borrowers may receive a loan amount of up to 2.5× the average  
138 monthly payroll costs in the one year prior to the loan or the calendar year 2019 or 2020. SBA  
139 prefers borrowers use the calendar year but will allow use of the 12-month period ending  
140 prior to the date the loan is made for borrowers who wish to do so. No loan can be greater  
141 than \$2 million.
- 142       • **Seasonal employers** (as defined above) may calculate their maximum loan amount based on  
143 any consecutive 12-week period beginning February 15, 2019, and ending February 15, 2020.
- 144       • **New entities** (that were in operation on February 15, 2020) may receive loans of up to 2.5×  
145 the average monthly payroll costs for periods as noted in the rules.
- 146       • **Organizations with multiple locations** that are eligible entities under the PPP1  
147 requirements may employ not more than 300 employees per physical location.
- 148       • An eligible entity **may receive only one PPP2 loan.**
- 149       • **Loan forgiveness.** Borrowers of a PPP2 loan are eligible for loan forgiveness equal to the sum  
150 of their payroll costs, as well as covered mortgage, rent, and utility payments, covered  
151 operations expenditures, covered property damage costs, covered supplier costs, and covered  
152 worker protection expenditures incurred during the covered period. The 60/40 cost  
153 allocation between payroll and non-payroll costs in order to receive full forgiveness continues  
154 to apply.
- 155       • **Lender eligibility.** A lender approved to make loans under initial PPP loans may make  
156 covered loans under the same terms and conditions as the initial loans.

## Recap of Permissible Costs for Paycheck Protection Program Loans (PPP1 or PPP2)

- 157 • **Payroll costs** for the applicable Covered Period, which include (only as applicable to  
158 employees whose principal place of residence is in the United States):
  - 159 ○ Cash compensation...including gross wages (before deducting employee deferrals  
160 such as 401(k) or 403(b) contributions, health insurance premiums, etc.), but not  
161 more than the annual compensation limit of \$100,000 prorated for the Covered  
162 Period.
    - 163 ➤ Clergy housing allowances are considered cash compensation for this  
164 purpose.
    - 165 ➤ Do not include in cash compensation any emergency sick leave or  
166 emergency family leave payments that qualify for a credit under the  
167 Families First Coronavirus Response Act.
  - 168 ○ Employer-paid group health care, life, disability, vision, and dental benefits
  - 169 ○ Employer-paid retirement benefits
  - 170 ○ Employer-paid state and local taxes assessed on employee compensation  
171 (generally, unemployment taxes)
- 172 • **Interest** (but not principal) on business real estate mortgages (or their equivalent) or  
173 interest on other collateralized business loans incurred before February 15, 2020
- 174 • **Business lease or rent payments** on real or personal property where such rent or lease  
175 obligations were incurred before February 15, 2020
- 176 • **Utility costs** for utility services that began before February 15, 2020 (electricity, gas,  
177 water, telephone, or internet access)
- 178 • **Covered operations expenditures.** Payments for any business software or cloud  
179 computing service that facilitates business operations, product or service delivery, the  
180 processing, payment, or tracking of payroll expenses, human resources, sales and billing  
181 functions, or accounting or tracking of supplies, inventory, records, and expenses
- 182 • **Covered property damage costs.** Costs related to property damage or looting due to  
183 public disturbances that occurred during 2020 that are not covered by insurance
- 184 • **Covered supplier costs.** Expenditures to a supplier pursuant to a contract, purchase  
185 order, or order for goods in effect prior to taking out the loan that are essential to the  
186 recipient's operations at the time at which the expenditure was made. Supplier costs of  
187 perishable goods can be made before or during the life of the loan.
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- 189

- 190 • **Covered worker protection expenditures.** Personal protective equipment and adaptive  
191 investments to help a loan recipient comply with federal health and safety guidelines or  
192 any equivalent state and local guidance related to COVID-19 (as defined in the rules)  
193 during the period beginning on March 1, 2020, and the end of the national emergency  
194 declaration
- 195 • **The requirement that at least 60% of the loan forgiveness amount must consist of**  
196 **“payroll costs” as defined above continues to apply to PPP1 and PPP2 loans.**

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## Employee Retention Credit

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197 The CAA made significant changes to the Employee Retention Credit (ERC). The most significant  
198 change is that it is **now available to PPP borrowers, subject to other eligibility requirements,**  
199 **and with the proviso that wages funded by forgiven PPP loan proceeds cannot be used as a basis**  
200 **for the ERC.**

201 Additionally, the credit...originally set to expire December 31, 2020...was extended through June  
202 30, 2021. The size and scope of the credit were also increased for the first two quarters of 2021.

203 Following is a summary of the Employee Retention Credit requirements and rules, as affected by  
204 the CAA, as we understand them. *(Note that additional guidance is expected from the IRS and SBA*  
205 *further clarifying the rules for applying the credit. Additional guidance may render portions of the*  
206 *information provided below inaccurate.)*

### **For the Period March 13, 2020 through December 31, 2020**

- 207 1. Provides eligible employers – including tax-exempt organizations – a refundable credit  
208 against the employer’s share of Social Security tax [the 6.2% portion – not the 1.45%  
209 Medicare tax]. (As described below, the fact that it is a refundable credit means that it is  
210 simply money from the government – if the amount of the credit exceeds the employer’s  
211 share of Social Security tax against which it is a credit, the organization can reduce the  
212 amount that it deposits to cover other payroll tax obligations. If the credit exceeds all such  
213 taxes owed by the employer, the employer receives a refund of the excess credit amount.)  
214 [The IRS has published [special guidance](#) to address coordination of the ERC with the  
215 employer Social Security tax payment deferral also available under the CARES Act.]  
216
- 217 a. Eligible employers must have carried on a trade or business during 2020 and satisfy  
218 one of two tests (for tax-exempt organizations described in Section 501(c) of the  
219 Internal Revenue Code, all operations of the organization are considered a trade or  
220 business for this purpose):

221 i. Have fully or partially suspended business operations during any calendar  
222 quarter of 2020 due to **orders** from a governmental entity limiting  
223 commerce, travel, or group meetings (for commercial, social, religious, or  
224 other purposes)

225 or

226 ii. Experience a reduction in **gross receipts** of at least 50% in any calendar  
227 quarter of 2020 as compared to the same calendar quarter of 2019 and  
228 continuing through the end of the first subsequent calendar quarter of 2020  
229 for which gross receipts exceed 80% of the amount for the corresponding  
230 quarter of 2019. (If, after declining by more than 50% in a quarter, gross  
231 receipts do not increase for any subsequent quarter in 2020 to more than  
232 80% of the amount for the corresponding quarter in 2019, the credit  
233 continues through the end of 2020.) Gross receipts are defined in the same  
234 manner as for PPP2 loans as described above. *The rules do not appear to*  
235 *make a distinction between restricted and unrestricted contributions with*  
236 *respect to nonprofit organizations.*

237 **Example:** Employer A's gross receipts were \$100,000, \$190,000, \$230,000 and \$250,000 in the  
238 first, second, third, and fourth calendar quarters of 2020, respectively. Its gross receipts were  
239 \$210,000, \$230,000, \$250,000, and \$250,000 in the corresponding calendar quarters of 2019.  
240 Thus, Employer A's 2020 first, second, third, and fourth quarter gross receipts were  
241 approximately 48%, 83%, 92% and 100% of its 2019 corresponding quarterly gross receipts.  
242 Accordingly, Employer A had a significant decline in gross receipts commencing on the first day  
243 of the first calendar quarter of 2020 (the calendar quarter in which gross receipts were less than  
244 50% of the same quarter in 2019) and ending on the last day of the second calendar quarter of  
245 2020 (the first subsequent quarter in 2020 for which the gross receipts were more than 80% of  
246 the amount in the same quarter in 2019). Thus, Employer A is entitled to a retention credit with  
247 respect to the first and second calendar quarters.

248 2. The credit is 50% of the first \$10,000 in wages per employee (including the value of  
249 qualified group health plan benefits). [Note, however, that wages paid with PPP loan funds  
250 that are forgiven may not be used as a basis for the ERC.]

251 **Note** – Wages for purposes of the ERC are generally FICA wages...clergy compensation is not  
252 ordinarily considered FICA wages.

253 3. The credit is reduced by any credits claimed for emergency sick pay or emergency family  
254 leave pay under the Families First Coronavirus Response Act (FFCRA) or for other credits  
255 applicable to the same wages.

256 4. To the extent the credit exceeds the employer's Social Security tax due, the excess is  
257 considered a refundable overpayment.

258 5. For employers with an average of more than 100 full-time employees in 2019, only wages  
259 paid to employees for periods during which they are not currently providing services due  
260 to an economic hardship (either (1) a full or partial suspension of operations by order of a

261 governmental authority due to COVID-19 or (2) a significant decline in gross receipts) are  
262 eligible for the credit. For eligible employers with an average of 100 or fewer full-time  
263 employees in 2019, **all wages** paid to employees during a period of economic hardship (as  
264 defined above) are eligible for the credit.

- 265 a. Aggregation of employee counts of affiliated entities may be required.
- 266 b. Employee counts are made using the [methods applicable under the Affordable Care](#)  
267 [Act](#) in determining whether an employer is an “applicable large employer.” (Note  
268 that only the counting method is applicable...the employee count thresholds for the  
269 Employee Retention Credit are unrelated to the thresholds for the Affordable Care  
270 Act.)

- 271 6. The Employee Retention Credit as described in this section of this article is effective for  
272 wages paid after March 12, 2020, and before January 1, 2021.

273 The Internal Revenue Service provides a [list of FAQs](#) related to the Employee Retention Credit.  
274 (As of the date this article was written, the IRS’s FAQs did not reflect changes to the ERC made by  
275 the CAA.)

### 276 **Observations for Churches, Schools, and Other Organizations Subject to Mandatory** 277 **Suspension of Group Meetings**

278 Thankfully, few churches, schools, and charities have experienced revenue declines in a calendar  
279 quarter of 2020 in excess of 50% of that in 2019 – so that aspect of ERC eligibility has limited  
280 application. We note, however, that churches, schools, and other organizations that were subject  
281 to **mandatory** full or partial suspension of operations or group meetings seem to be eligible for  
282 the Employee Retention Credit regardless of whether they were able to continue carrying on  
283 certain of their activities via remote participation. While available IRS guidance does not  
284 specifically address this scenario, a straight reading of the law seems to support such an  
285 interpretation.

286 Applying this interpretation would require the organization to evaluate whether it had  
287 “operations that were **fully or partially suspended** during any calendar quarter in 2020 due to  
288 **orders** from an appropriate governmental authority limiting commerce, travel, or group  
289 meetings (for commercial, social, religious, or other purposes) due to COVID-19.” Such a  
290 determination may not be easy to make in every instance, since certain safety protocol  
291 communications made by government officials or agencies may not have reached the level of  
292 authority of “**orders.**” Additionally, language in the IRS FAQ document (FAQ #33) states that if  
293 the “employer is able to continue operations comparable to its operations prior to the closure by  
294 requiring its employees to telework, the employer’s operations are not considered to have been  
295 fully or partially suspended as a consequence of a governmental order.”

296 While it may be tempting to assume that such language means that churches that offered virtual  
297 worship services were able to “continue operations comparable to its operation prior to the  
298 closure,” we would argue strongly that such is not the case. Not only are virtual worship services  
299 not comparable to regular in-person worship meetings, most churches stopped other significant  
300 aspects of their operations in addition to in-person worship services...such as children’s

301 ministries, Sunday Schools, fellowship events, and more. Similarly, even though schools may have  
302 continued conducting classes online, many other school functions were stopped...including  
303 athletics and other extracurricular activities. Our firm believes that, until and unless additional  
304 official contrary guidance is published, the position we have described herein with respect to  
305 churches and schools is reasonable.

306 **Assuming the IRS agrees with the interpretation described in the preceding paragraph, the**  
307 **Employee Retention Credit could represent a significant financial benefit to churches,**  
308 **schools, and other entities required to suspend group meetings – particularly those with**  
309 **100 or fewer full-time employees in 2019.** The reason is that for such organizations, the credit  
310 is half of the first \$10,000 in wages paid to **all** employees during the applicable period, regardless  
311 of whether such employees are providing services for the organization or not. That treatment  
312 contrasts dramatically with the treatment of organizations with more than 100 full-time  
313 employees in 2019. For those organizations, the credit is half of the first \$10,000 in wages paid  
314 during the applicable period **only to employees while they are not currently providing**  
315 **services to the organization.**

#### 316 **Example – Church with 85 Full-Time Employees in 2019 and 2020**

317 *Note – The IRS and/or SBA are expected to publish guidance on the interaction between the ERC*  
318 *and PPP loan rules as they relate to identifying the wages applicable to each. The ERC cannot be*  
319 *claimed with respect to wages paid with PPP loan funds that are forgiven. This example assumes*  
320 *that the rules allow the organization to ignore wages paid with PPP loan funds in calculating the*  
321 *ERC, notwithstanding the general requirement that the ERC applies to the “first” qualifying*  
322 *wages paid to employees.*

323 Oak Church obtained a PPP1 loan that was fully forgiven in 2020. It does not qualify for any  
324 wage-related credits other than the ERC. Oak Church had 85 full-time non-clergy employees  
325 in 2019 and 2020 and no part-time employees. On March 15, 2020, Oak Church was ordered  
326 by government officials to stop holding in-person worship services. That mandate continued  
327 through May 31, 2020, at which time government officials permitted the church to hold  
328 limited-capacity worship services. The mandate for limited capacity worship services  
329 continued through December 31, 2020, and included a prohibition against conducting certain  
330 of the church’s other activities involving gatherings. Oak Church continued to pay all of its  
331 employees for the entire time during which in-person worship services were prohibited or  
332 limited.

333 Ten of its employees (other than clergy) performed no services for Oak Church during the  
334 period from March 15 through May 31, 2020 (due to government orders to cease holding  
335 worship services), but were paid, nonetheless. During the period from March 15, 2020  
336 through December 31, 2020, Oak Church paid its 85 non-clergy employees \$42,000 each in  
337 wages (including qualified health plan benefits). Oak Church ignored the wages it paid  
338 employees with PPP loan funds. Half of the first \$10,000 of non-PPP wages paid to each of its  
339 employees during the applicable period is \$5,000 per employee. Oak Church is entitled to an  
340 Employee Retention Credit of \$425,000 (85 x \$5,000). The credit is refundable. To the extent  
341 that the credit exceeds Oak Church’s employer Social Security tax due on its Form 941s for the  
342 applicable quarters of 2020, Oak Church will receive a refund of the excess in the form of a  
343 reduction in required deposits for other payroll taxes owed.

344 *[Note that if Oak Church had an average of more than 100 employees in 2019, the credit would*  
345 *apply only with respect to the wages paid to the 10 employees who did not provide services and*  
346 *only during the period in which they were paid while not providing services. As mentioned above,*  
347 *we note that churches, schools, and other organizations that were subject to mandatory full or*  
348 *partial suspension of operations or group meetings seem to be eligible for the Employee*  
349 *Retention Credit regardless of whether they were able to continue carrying on certain of their*  
350 *activities via remote participation. While available IRS guidance does not specifically address*  
351 *this scenario, a straight reading of the law seems to support such an interpretation. Assuming*  
352 *the IRS agrees with the interpretation described in the preceding paragraph, the Employee*  
353 *Retention Credit could represent a significant financial benefit to churches, schools, and other*  
354 *entities required to suspend group meetings – particularly those with 100 or fewer full-time*  
355 *employees in 2019.]*

### 356 **For the Period January 1, 2021 through June 30, 2021**

357 1. Provides eligible employers – including tax-exempt organizations – a refundable credit  
358 against the employer’s share of Social Security tax [the 6.2% portion - not the 1.45%  
359 Medicare tax]. (As described below, the fact that it is a refundable credit means that it is  
360 simply money from the government – if the amount of the credit exceeds the employer’s  
361 share of Social Security tax against which it is a credit, the organization can reduce the  
362 amount that it deposits to cover other payroll tax obligations. If the credit exceeds all such  
363 taxes owed by the employer, the employer receives a refund of the excess credit amount.)  
364 [The IRS has published [special guidance](#) to address coordination of the ERC with the  
365 employer Social Security tax payment deferral also available under the CARES Act.]

366 a. Eligible employers must have carried on a trade or business during 2020 and satisfy  
367 **one of two tests** (for tax-exempt organizations described in Section 501(c) of the  
368 Internal Revenue Code, all operations of the organization are considered a trade or  
369 business for this purpose):

370 i. Have fully or partially suspended business operations during either the **first**  
371 **or second quarter of 2021** due to **orders** from a governmental entity  
372 limiting commerce, travel, or group meetings (for commercial, social,  
373 religious, or other purposes)

374 or

375 ii. **Experience a reduction in gross receipts of at least 20% in either the first**  
376 **or second quarter of 2021** as compared to the same calendar quarter of  
377 **2019.** (Special rules apply for organizations not in operation during the  
378 applicable quarter of 2019 and for seasonal employers.) Gross receipts are  
379 defined in the same manner as for PPP2 loans as described above. *The rules*  
380 *do not appear to make a distinction between restricted and unrestricted*  
381 *contributions with respect to nonprofit organizations.*

**Example:** Employer A's gross receipts were \$150,000 and \$190,000 in the first and second calendar quarters of 2021, respectively. Its gross receipts were \$210,000 and \$230,000 in the first and second calendar quarters of 2019, respectively. Thus, Employer A's 2021 first and second quarter gross receipts were approximately 71% and 83% of its 2019 first and second quarter gross receipts, respectively. Accordingly, Employer A had a qualifying decline in gross receipts for first calendar quarter of 2021 (the calendar quarter in which gross receipts were less than 80% of the amount in the same quarter in 2019) but not for the second quarter of 2021 (because gross receipts for that quarter were not less than 80% of the amount in the same quarter of 2019). Thus, Employer A is entitled to an Employer Retention Credit with respect to the first quarter of 2021.

2. The credit is 70% of the first \$10,000 in wages per employee (including the value of qualified health plan benefits) paid during each of the first two calendar quarters of 2021 during which the employer qualifies.

**Note** – Wages for purposes of the ERC are generally FICA wages...clergy compensation is not ordinarily considered FICA wages.

3. The credit is reduced by any credits claimed for emergency sick pay or emergency family leave pay under the Families First Coronavirus Response Act (FFCRA) or for other credits applicable to the same wages.
4. To the extent the credit exceeds the employer's Social Security tax due, the excess is considered a refundable overpayment.
5. For employers with an average of more than 500 full-time employees in 2019, only wages paid to employees for periods during which they are not currently providing services due to an economic hardship (either (1) a full or partial suspension of operations by order of a governmental authority due to COVID-19 or (2) a significant decline in gross receipts) are eligible for the credit. For eligible employers with an average of 500 or fewer full-time employees in 2019, **all wages** paid to employees during a period of economic hardship (as defined above) are eligible for the credit.
  - a. Aggregation of employee counts of affiliated entities may be required.
  - b. Employee counts are made using the [methods applicable under the Affordable Care Act](#) in determining whether an employer is an "applicable large employer." (Note that only the counting method is applicable...the employee count thresholds for the Employee Retention Credit are unrelated to the thresholds for the Affordable Care Act.)

The Internal Revenue Service provides a [list of FAQs](#) related to the Employee Retention Credit. (As of the date this article was written, the IRS's FAQs did not reflect changes to the ERC made by the CAA.)

419 **Observations for Churches, Schools, and Other Organizations Subject to Mandatory**  
420 **Suspension of Group Meetings**

421 Some churches, schools, and charities may experience revenue declines in the first or second  
422 calendar quarter of 2021 in excess of 20% as compared to the same quarter of 2019 and may  
423 qualify for the credit accordingly. Additionally, churches, schools, and other organizations that  
424 were subject to **mandatory** full or partial suspension of operations or group meetings seem to be  
425 eligible for the Employee Retention Credit regardless of whether they were able to continue  
426 carrying on certain of their activities via remote participation. While available IRS guidance does  
427 not specifically address this scenario, a straight reading of the law seems to support such an  
428 interpretation.

429 Applying this interpretation would require the organization to evaluate whether it had  
430 “operations that were **fully or partially suspended** during any applicable calendar quarter due  
431 to **orders** from an appropriate governmental authority limiting commerce, travel, or group  
432 meetings (for commercial, social, religious, or other purposes) due to COVID-19.” Such a  
433 determination may not be easy to make in every instance, since certain safety protocol  
434 communications made by government officials or agencies may not have reached the level of  
435 authority of “**orders.**” Additionally, language in the IRS FAQ document (FAQ #33) states that if  
436 the “employer is able to continue operations comparable to its operations prior to the closure by  
437 requiring its employees to telework, the employer’s operations are not considered to have been  
438 fully or partially suspended as a consequence of a governmental order.”

439 While it may be tempting to assume that such language means that churches that offered virtual  
440 worship services were able to “continue operations comparable to its operation prior to the  
441 closure,” we would argue strongly that such is not the case. Not only are virtual worship services  
442 not comparable to regular in-person worship meetings, most churches stopped other significant  
443 aspects of their operations in addition to in-person worship services...such as children’s  
444 ministries, Sunday Schools, fellowship events, and more. Similarly, even though schools may have  
445 continued conducting classes online, many other school functions were stopped...including  
446 athletics and other extracurricular activities. Our firm believes that, until and unless additional  
447 official contrary guidance is published, the position we have described herein with respect to  
448 churches and schools is reasonable.

449 **Assuming the IRS agrees with the interpretation described in the preceding paragraph, the**  
450 **Employee Retention Credit could represent a significant financial benefit to churches,**  
451 **schools, and other entities required to suspend group meetings – particularly those with**  
452 **500 or fewer full-time employees in 2019.** The reason is that for such organizations, the credit  
453 is 70% of the first \$10,000 in wages paid to **all** employees during the applicable quarter,  
454 regardless of whether such employees are providing services for the organization or not. That  
455 treatment contrasts dramatically with the treatment of organizations with more than 500 full-  
456 time employees in 2019. For those organizations, the credit is 70% of the first \$10,000 in wages  
457 paid during the applicable quarter **only to employees while they are not currently providing**  
458 **services to the organization.**

**Example – Church with 285 Full-Time Employees in 2019 and 2021**

Oak Church obtained and fully spent a PPP1 loan in 2020. It did not obtain a PPP2 loan. It does not qualify for any wage-related credits other than the ERC. Oak Church had 285 full-time non-clergy employees in 2019, 2020, and 2021 and no part-time employees. On March 15, 2020, Oak Church was ordered by government officials to stop holding in-person worship services. That mandate continued through May 31, 2020, at which time government officials permitted the church to hold limited-capacity worship services. The mandate for limited capacity worship services continued through March 31, 2021, and included a prohibition against conducting certain of the church's other activities involving gatherings. Oak Church continued to pay all of its employees for the entire time during which in-person worship services were prohibited or limited.

80 of its employees (other than clergy) performed no services for Oak Church during the period from March 15 through May 31, 2020 (due to government orders to cease holding worship services), but were paid, nonetheless. During the period from January 1, 2021 through March 31, 2021, Oak Church paid its 285 non-clergy employees \$12,000 each in wages (including qualified health plan benefits). 70% of the first \$10,000 of wages paid to each of its employees during the first quarter of 2021 is \$7,000 per employee. Oak Church is entitled to an Employee Retention Credit of \$1,995,000 (285 x \$7,000). The credit is refundable. To the extent that the credit exceeds Oak Church's employer Social Security tax due on its Form 941s for the first quarter of 2021, Oak Church will receive a refund of the excess in the form of a reduction in required deposits for other payroll taxes owed.

*[Note that if Oak Church had an average of more than 500 employees in 2019, the credit would not apply. For employers of that size, the credit would apply only with respect to the wages paid to employees who did not provide services and only during the period in which they were paid while not providing services. Oak Church did not have employees who were paid while not providing services during the first quarter of 2021. As mentioned above, we note that churches, schools, and other organizations that were subject to mandatory full or partial suspension of operations or group meetings seem to be eligible for the Employee Retention Credit regardless of whether they were able to continue carrying on certain of their activities via remote participation. While available IRS guidance does not specifically address this scenario, a straight reading of the law seems to support such an interpretation. Assuming the IRS agrees with the interpretation described in the preceding paragraph, the Employee Retention Credit could represent a significant financial benefit to churches, schools, and other entities required to suspend group meetings – particularly those with 500 or fewer full-time employees in 2019 (with respect to the 2021 version of the credit).]*

For more information, go to <https://www.irs.gov/coronavirus/employee-retention-credit> (At the time this article was written, the IRS's information page on the Employee Retention Credit had not yet been updated to reflect changes made by the CAA.)

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## Grants for Shuttered Venue Operators

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- 497 • Authorizes \$15 billion for the SBA to make grants to eligible live venue operators or  
498 promoters, theatrical producers, live performing arts organization operators, museum  
499 operators, motion picture theatre operators, or talent representatives who demonstrate a  
500 25% reduction in revenues.
  
- 501 • There is a set-aside of \$2 billion for eligible entities that employ not more than 50 full-time  
502 employees, and any amounts from this set-aside remaining after sixty days from the date of  
503 implementation of this program shall become available to all eligible applicants under this  
504 section.
  
- 505 • The SBA may make an initial grant of up to \$10 million dollars to an eligible person or entity  
506 and a supplemental grant that is equal to 50% of the initial grant.
  
- 507 • In the initial 14-day period of implementation of the program, grants shall only be awarded to  
508 eligible entities that have faced 90% or greater revenue loss. In the 14-day period following  
509 the initial 14-day period, grants shall only be awarded to eligible entities that have faced 70%  
510 or greater revenue loss. After these two periods, grants shall be awarded to all other eligible  
511 entities.
  
- 512 • Such grants shall be used for specified expenses such as payroll costs, rent, utilities, and  
513 personal protective equipment.
  
- 514 • Recipients of these grants are not eligible for PPP loans.

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## Other Key Provisions Relevant to Nonprofits

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- 515 • Provides a **separate employee retention credit for employers affected by “qualified**  
516 **disasters.”** The credit is 40% of qualified wages (up to \$6,000 of wages per employee) paid  
517 by a qualified employer to a qualified employee. Generally, the employer must have conducted  
518 operations in a “**qualified disaster zone.**” Applicable period appears to be 2020.
  
- 519 • **Extends certain federal unemployment assistance** generally through March 14, 2021,  
520 including assistance for nonprofit organizations paying their state unemployment obligations  
521 under the reimbursement method.
  
- 522 • **Extension of certain deferred payroll taxes.** On August 8, 2020, President Trump issued a  
523 memorandum to allow employers to defer withholding employees’ share of Social Security

- 524 taxes from September 1, 2020 through December 31, 2020, and required employers to  
525 increase withholding and pay the deferred amounts ratably from wages paid between January  
526 1, 2021 and April 30, 2021. Beginning on May 1, 2021, penalties and interest on any deferred  
527 unpaid tax liability will begin to accrue.
- 528       ○ The provision extends the repayment period **through December 31, 2021**. Penalties  
529 and interest on any deferred unpaid tax liability will not begin to accrue until January  
530 1, 2022.
- 531 • Gross income does not include any amount that would otherwise arise from the forgiveness  
532 of a PPP loan. **Deductions are allowed for otherwise deductible expenses paid with the**  
533 **proceeds of a PPP loan that is forgiven**, and the tax basis and other attributes of the  
534 borrower's assets will not be reduced as a result of the loan forgiveness. The provision is  
535 effective as of the original date of enactment of the CARES Act. The provision provides similar  
536 treatment for PPP2 loans, effective for tax years ending after the date of enactment of the  
537 provision.
- 538 • **Extends the refundable payroll tax credits for paid sick and family leave**, enacted in the  
539 Families First Coronavirus Response Act (FFCRA), through the end of March 2021. **Payment**  
540 **of sick and family leave required during 2020 under FFCRA is not required after**  
541 **December 31, 2020**, but for employers who voluntarily make such payments in 2021, the  
542 credit is available through March of 2021.
- 543 • **Charitable contributions** to qualifying organizations are **deductible** in **2021** by individual  
544 taxpayers who **do not itemize** deductions up to \$300 per person and **\$600 for a married**  
545 **couple filing jointly**. (Does not change the limit of \$300 for a single person or married couple  
546 for 2020.)
- 547 • **The increased limits on charitable contribution deductions that apply to individual**  
548 **taxpayers who itemize deductions and corporations for 2020 are extended through**  
549 **2021**.
- 550 • **Business meals provided by restaurants are fully tax-deductible as business expenses**  
551 **for 2021 and 2022**.

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