PBPA Podcast Transcript
Navigating the ERC: A Guide to Eligibility, Application, and Scam Prevention
(14:15 minutes)

Sireesha (00:00):

Have you recently received an email from an advisor offering to help your nonprofit apply for an employee retention credit? Or have you heard about other organizations bringing in thousands of dollars in tax credits under this program? During this episode of the PBPA Podcast, Williams Stone and Barclay Taylor will help us break down eligibility requirements and the application process for the Employee Retention Credit. They'll also address the unfortunate reality of scams surrounding this government program. Join us in this insightful conversation on how to apply for the Employee Retention Credit while being vigilant against scams.

Sireesha (00:48):

Hello and welcome to the PBPA Podcast. In each episode of the PBPA Podcast, we explore legal questions relevant to Georgia nonprofits. I'm your host Sireesha Ghanta, Counsel and Education Director at the Pro Bono Partnership of Atlanta. PBPA strengthens our community by engaging volunteer attorneys to provide nonprofits with free business legal services. We provide numerous free resources via our website, including articles and webcasts specific to Georgia nonprofits and their business legal concerns. We also provide direct legal services to our clients. For more information on client eligibility requirements, to apply to be a client or to access our vast learning center, visit our website at pbpatl.org. Before we jump into this episode's topic, keep in mind that this podcast is general information, not legal counsel, contact your attorney for guidance on your nonprofits' specific situation.

Sireesha (01:56):

William Stone and Barclay Taylor are tax controversy attorneys with the law firm of Morris Manning and Martin in Atlanta. They regularly advise clients in all phases of federal and state tax controversies, including tax audits, tax appeals, and court proceedings. These guys know tax and they know how to keep your nonprofit from stumbling into a tax controversy under the employee retention credit. Barclay and William, thank you both so much for being here today. So today, let's start off with some general background. William, what is the employee retention credit?

William (02:37):

Yeah, so I'm sure if any of your listeners have been driving in their car around Atlanta, they've heard about the ERC and, and the amount of money you can get from it if you had a business. So the ERCs a refundable tax credit that came from the Coronavirus Aid Relief and Economic Security Act in 2020. So the "Cares Act", as it's typically called, to help businesses and nonprofits recover from the pandemic and the effects that the pandemic had on their businesses from shutdowns or just from, you know, not producing as much income. So the Act's been amended three times by separate acts. We won't get into all of those, but it, the Go government saw a reason that it needed to be changed a little bit. So it's been amended a few times and they just recently issued some regulations. So it's great we're having this talk because it is, it is changing and guidance is coming out. One thing I'll add is the refundable tax credit is portion of it. So a refundable tax credit is a tax credit, which the taxpayer will receive regardless of their, or lack of their, tax liability. So it is truly a, a stimulus to the business. If you, if you qualify for it, you will receive that money to help, again, the effects of the pandemic.

Sireesha (03:57):

And who is eligible for these credits?

Barclay (04:00):

Yeah, so eligible recipients of the E R C are employers or businesses that paid qualified wages to employees, and they experience the hardship under one of two circumstances. The first is that the business's operations were fully or partially suspended due to orders from appropriate governmental authority, which limited commerce, travel, or group meetings due to Covid-19. That's referred to as the government orders test. Um, and the, and the second test is that the business experienced a hardship due to a significant decline in gross receipts. Uh, the gross receipts test is judged on a quarter-by-quarter basis. So you look at the business's gross receipts, um, it's a calculation on a quarter-by-quarter basis, and you look to see in for the year 2020, whether there was a 50% decline in the gross receipts. And for 2021, it's a little bit more liberal standard and it is only a 20% decline in gross receipts.

Barclay (05:05):

There are a number of different ways that you can go about calculating it. So I would recommend that, um, anyone that's thinking about applying for the E R C consult with somebody that is, you know, well-skilled, well-versed in the different rules so that if they don't qualify under one particular method, they might be able to qualify under another. One thing I also wanted to mention is that there are some nuances that relate to state and local governments, and basically originally the E R C was not supposed to apply to any state or local government entities or entities that were considered quote "instrumentalities of the government". And there have been since some carve outs, um, in the regulations. So if you fall under that category, definitely contact somebody that can help you figure out whether you qualify.

Sireesha (05:57):

And can you guys provide, um, maybe a very high level, some background, some information on how this credit is calculated?

Barclay (06:06):

Yeah, so you heard the term "qualified wages", that's a very important term. Qualified wages, um, differ between what's called a small employer and a large employer. Qualified wages for a small employer are wages paid by the employer to any employee under any circumstance. Basically, for a large employer, qualified wages are only wages paid to employees who are not actually providing services. So in other words, large employers can only claim an E R C for the employees they were basically paying to sit at home, paying not to work. If those people were working, um, that doesn't fall into the calculation. The threshold for a small employer I might add is, um, and in 2020 was a hundred, and then in 2020, they raised that to 500 employees. Um, it's important to note that there are certain calculations and analyses that you need to make to determine how an employee counts towards the average number. So that's, that's something important to look at too.

Barclay (07:14):

In 2020, uh, just talking about calculations in 2020, the E R C applied to 50% of qualified wages with the qualified wages being limited to $10,000 per employee. So 50% times 10,000 is 5,000. So the limit was in 2020 was $5,000 per employee for the whole calendar year. So you analyze that on a quarter-by-quarter basis, but it's the max is 5,000 per employee per calendar year. It's a much more generous standard in

2021 when the qualified wage percentage goes up to 70%. So you can get and the, of the $10,000, so you can get $7,000 per employee and that is per quarter. So you can get $7,000 per quarter and it applies to the first, second and third quarters. So it's 7,000 times three is 21,000. So if you're an employee, qualifies in Q one, Q two and q3 you can get $21,000. And some people ask for the $26,000 per employee comes from, well, it's the $5,000 for 2020 and the maximum $21,000 for 2021.

William (08:26):

And, and I'll add to that, just that, so the time period for qualified wages to be paid, it began March 12th, 2020 through September 30th, 2021. Uh, and then there is an exception for a, a startup business exception that we won't get into today, but that also could apply to the fourth quarter of '21. So if you think you fall into that, that would be something to look into

Barclay (08:49):

Too. Thank you, William. That's a great point. Um, one other thing I wanted to add is that, well, two things. One, there, there are some different reductions. So it, it is a fairly detailed calculation, so you need to have someone that knows how to do the calculation, do it for you. And the second, when the ERC was first passed by Congress, businesses that received PPP funds were not allowed to also claim the ERC. Well, um, that was later amended and now businesses can claim both. However, they cannot claim the employee retention credit on the same wages that they claimed PPP funds from.

Sireesha (09:27):

Is this E R C income taxable?

Barclay (09:30):

Um, the short answer is no. It is not taxable income. It's a credit. However, the employer, uh, receiving the credit has to reduce their deductible wage expense by the amount of the ERC claimed years ago, you could, you could do that on your 941 proactively, but now that the 2020 and 2021 employment tax returns have already been due, employers have to file a, an amended return, a 941X, making the claim and reducing the wage expense. Um, the deadline to do that for 2020 is April 15th, 2024. So folks still have some time. And for the big credit, 2021, the deadline to file those and then it returns is April 15th, 2025.

Sireesha (10:19):

And I guess with the recent announcement of these deadlines, uh, there seems to be more of an interest in getting these amendments in and there are a lot of companies out there offering to help employers claim their E R C.

William (10:35):

Yeah. So the ERC is, it is possible. It, it is a real tax credit. It's a legitimate tax credit. It was an incentive passed by Congress through the Caress Act to help businesses post pandemic during the pandemic. Uh, and and like anything filing your tax returns or anything you should seek out trusted professionals get with your CPA, they might have an in-house ERC expert or a, they might outsource it to an ERC expert and go through the process. The things to look for would be, if you have someone who, without giving them any information other than, Hey, I run a nonprofit here in Atlanta, you qualify for the E R C, there's no way to know that from just that information. It is a extensive list of information that, that the professional will need.

William (11:22):

So if you have someone promising you that you qualify for the credit with little to no information about your business or what happened during 20 20, 20 21, that that's a good indicator that maybe this isn't, that doesn't mean you don't qualify for it, but maybe you should seek additional [advice]. Like anything if, if it seems too good to be true in your business and you know, inherently that, well, our wages really didn't go down, or whatever the case may be. I, I would say the IRS on irs.gov have a lot of information about this. You can kind of do a self sanity check, if you will, and check that out. But again, I think the main thing is working with professionals and making sure that that professional needs you to provide all the documentation and go through all of the information about your business and the hardships that it incurred during the pandemic.

William (12:17):

And once that's done, looking at what they provide you and making sure again, that it makes sense that, that you see what you've provided and what they say, this is what you qualify for, seems to, to make sense to you. But in short, the ERC is a, is a great way to help out businesses that were hurt. Uh, that does not mean that there isn't scams out there. That's why it's on the IRS "Dirty Dozen "list. And the dirty dozen list is their big issue, you know, their enforcement initiatives. And so there definitely are scams out there, but it is something that it can be a big benefit to a nonprofit, to a smaller business that was really hurt during the pandemic. So I, I would encourage people to go out and do their due diligence to see if they qualify for it. Uh, but know that not everybody does qualify for it. Again, just hire professionals and check it yourself. If it seems too good to be true or you know that you don't meet some of the requirements, but this person is saying you do, you, you should know.

Sireesha (13:14):

Um, well, Barclay and William, this has all been great information and I know it will be very helpful for our nonprofit listeners who are interested and curious about the E R C. So thank you both so much for sharing this information with us today.

Barclay (13:30):

Thank you.

William (13:30):

Thanks for having us.

Sireesha (13:33):

We hope that you found this episode of the PBPA Podcast to be informative and helpful. We add new episodes every month with short conversations about general, yet important legal information for Georgia nonprofits. Remember that this is not legal counsel. Talk to your attorney about your organization's specific concerns. Thanks for tuning into the PBPA Podcast. And to all nonprofits listening out there, thank you for all the good work you continue to do in our community.