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# EVALUATING THE PAYCHECK PROTECTION PROGRAM VERSUS THE EMPLOYEE RETENTION CREDIT

April 25, 2020

*Coronavirus Stimulus and Relief Alert*

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While struggling businesses have grappled with the complex qualification and application rules of the Paycheck Protection Program, those businesses should also consider the Employee Retention Credit.

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The Paycheck Protection Program (PPP) has been so popular that the first tranche (\$349 billion) was exhausted in a few days, and for good reason: the promise of free money. Congress resupplied the PPP with an additional \$321 billion on Friday (April 24). The SBA announced that it will begin accepting new PPP applications on Monday morning.

While struggling businesses have grappled with the complex qualification and application rules of the PPP, those businesses should also consider the Employee Retention Credit (ERC). In



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many instances, the ERC will be a **better choice**. These two options are, however, mutually exclusive. Receipt of a PPP loan can render an employer ineligible to claim the ERC.

The ERC is available to businesses of all sizes, although it offers the most flexibility to those with 100 or fewer employees. The amount of the tax credit provided by the ERC can be up to \$5,000 per employee. A business is eligible if either (i) its operations have been fully or partially suspended due to government orders limiting commerce, travel, or group meetings due to COVID-19, or (ii) its gross receipts for the calendar quarter for which the credit is claimed are less than 50% of the gross receipts for the same calendar quarter in the prior year.

A business that qualifies for the ERC can simply reduce its tax deposits by the amount of the credit. To the extent that does not provide the full relief of the calculated credit, the business can apply for an accelerated tax refund. Although this means that the cash benefit of the ERC is somewhat deferred (until the business's quarterly payment is due or it receives a refund, as applicable), a business that uses the ERC will have a clear idea of the true value of the credit at the outset.

What does this mean? It means that businesses considering a PPP loan—especially businesses that may be concerned about their ability to meet the PPP's forgiveness criteria for the maximum permitted amount of their proposed loans—should crunch the numbers to determine whether the ERC is a better option.

Indeed, it may make sense for businesses that have *already* applied for a PPP loan to crunch their numbers. To date, no guidance has been issued about whether a business that applied for a PPP loan, or even received the loan, but later withdrew its application or returned the proceeds of the loan, can claim the ERC. Nixon Peabody attorneys are watching closely for further guidance from the SBA and Treasury on this issue. There is some reason to believe (given, for example, the May 20 "safe harbor" in the recent FAQ for PPP loans that may have been inappropriately requested,<sup>[1]</sup> that guidance or analysis may permit the use of the ERC by a business that cancels or quickly returns PPP proceeds.

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Not only is it easier to qualify for the ERC than the PPP—there is no loan application or forgiveness process, no limited pool of money, and no requirement that a certain amount be spent within a compressed eight-week period on specified expenses—but the ERC also generally offers more flexibility for businesses to decide when to bring back employees, and how many (up to 100). Re-opening can thus be done with the ERC in a measured and intelligent way.

In an effort to help our clients understand the pros and cons of a PPP loan or the ERC better so they can get the most value for their businesses, Nixon Peabody tax attorneys have prepared a model that, using answers to a brief questionnaire, can calculate the approximate expected benefit of a PPP loan versus an ERC credit.

If you are interested in taking a closer look at the ERC, or if you would like to compare the benefits of a PPP loan to an ERC credit, please contact your regular Nixon Peabody LLP representative.

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- See [“New guidance from Small Business Administration emphasizes ‘need’ in Paycheck Protection Loans,”](#) which contains a link to the FAQ, April 24, 2020.

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#### PDF: PAYCHECK PROTECTION PROGRAM VS. EMPLOYEE RETENTION CREDIT

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