Legislative Trends: Understanding Tax Credits, Part 3: Hurricane Disaster Area Employee Retention Credits

The federal government offers several tax credits to help eligible businesses lower their tax liability. Federal tax credits include the Work Opportunity Tax Credit (WOTC), the Empowerment Zone Employment Credit, and the Indian Employment Credit. Other federal incentives are available through economic development credits. Additionally, many states offer tax credits and incentives that focus on training, growth, and new employment. Finding available tax credits and incentives for which your business is eligible mainly touches upon the disciplines of tax, accounting, legal and HR, but it can also impact hiring managers. Deciding where to open a new retail, service or manufacturing facility, for instance, should involve a close look at potential tax credits.

In **Part One** of our series, we focused on the federal Work Opportunity Tax Credit (WOTC). For **Part Two**, we focused on research and development (R&D) tax credits. For Part Three, we'll turn our focus to recently enacted employee retention tax credits for employers impacted by recent hurricanes that affected the United States, Puerto Rico, and the U.S. Virgin Islands.

Background

The United States, Puerto Rico, and the U.S. Virgin Islands were battered by three separate major hurricanes in August and September 2017. Hurricane Harvey struck the coast of Texas on August 23. Hurricane Irma followed, striking Puerto Rico and the Virgin Islands on September 4, then impacting the entire Florida panhandle and parts of Georgia. Lastly, Puerto Rico and the Virgin Islands were victims of Hurricane Maria on September 17. For further details regarding the areas impacted by each hurricane, please reference **www.fema.gov.**

Congress acted relatively quickly in providing tax relief for individuals and businesses impacted by the hurricanes by passing the Disaster Tax Relief and Airport and Airway Extension Act of 2017 (the Act).[1] The Act, which was signed into law on September 29, includes relaxed casualty loss deduction rules, easier access to retirement funds, a suspension of charitable contribution limitations for disaster relief contributions, and an employee retention tax credit for employers who continued to pay employees in the disaster areas during a period of inoperability.

Dating back to 2001, Congress has an established history of enacting short-term regional benefits in response to tragedies and natural disasters. Following the terrorist attacks on New York in 2001, Congress created the New York Liberty Zone and passed a tax relief package that included an expansion of the Work Opportunity Tax Credit to include New York Liberty Zone business employees.[2] The expanded credit was limited to only employers with 200 or fewer

1 Disaster Tax Relief and Airport and Airway Extension Act of 2017, Pub. L. No. 115-63, H.R. 3823.
2 Internal Revenue Code Section 1400L.

employees. In response to Hurricanes Katrina, Rita, and Wilma, which struck parts of Alabama, Florida, Louisiana, Mississippi, and Texas in 2005, Congress passed a variety of tax relief provisions, including the Gulf Opportunity Zone Employee Retention Credit.[3] The retention credit was available to employers, regardless of size, who continued to pay employees in the disaster areas during a period of inoperability. Congress also addressed wide-range flooding in numerous Midwestern states in 2008 with another set of tax relief provisions as part of the Heartland Disaster Tax Act.[4] The 2017 Act follows suit in response to this year's major hurricanes.

The Employee Retention Credit

One of the centerpieces of the Act is an Employee Retention Credit for eligible employers who continued to pay eligible employees during a period of inoperability caused by damage sustained by reason of one of the named hurricanes.[5] The amount of the credit is 40 percent of qualified wages, calculated on up to $6,000 in wages, paid to each eligible employee during the period of inoperability (i.e., up to a $2,400 credit per eligible employee).

To be eligible, the employer must have conducted an active trade or business in the disaster area of one of the hurricanes and must have been rendered inoperable on any day after the effective date of the hurricane and before January 1, 2018, as a result of damage sustained by reason of the hurricane. The effective dates of each hurricane are as follows:

- Hurricane Harvey – August 23, 2017
- Hurricane Irma – September 4, 2017
- Hurricane Maria – September 16, 2017

An "eligible employee" for purposes of the Employee Retention Credit is an employee whose principal place of employment on the date of one of the respective hurricanes was in the hurricane disaster area.

"Qualified wages" are defined as wages paid by an eligible employer to an eligible employee on any day after the date of the respective hurricane and before January 1, 2018, which occurs during the following period:

- Beginning on the date on which the trade or business first became inoperable as a result of the respective hurricane, and
- Ending on the date on which such trade or business resumed significant operations at the impacted location.

Qualified wages include wages paid without regard to whether the employee performed no services, performed services at a different employer location, or performed services at the impacted location before significant operations resumed.

An employer cannot claim the Employee Retention Credit with respect to any employee for whom the employer is also claiming the Work Opportunity Tax Credit during the same period of time and for the same wages.

The Act does not define the terms "inoperable" or "resumed significant operations." The terms are the same terms that were used to establish eligibility for the Gulf Opportunity Zone Employee Retention Credit in 2005, and were also undefined in the context of that credit. An employer therefore has some flexibility in

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3 Internal Revenue Code Section 1400R.
4 Heartland Disaster Tax Relief Act of 2008, Pub. L. No. 110-343.
5 Disaster Tax Relief and Airport and Airway Extension Act of 2017, Pub. L. No. 115-63, H.R. 3823, Sections 501, 503.

making a good faith determination as to how to define "inoperable" or "resumed significant operations" for its particular business, based on its own business metrics and how it was uniquely impacted by each hurricane. An employer should determine if it has locations in each hurricane's declared disaster area and should examine the impact of the hurricane on the affected locations to determine if it may be eligible for the Employee Retention Credit.

Data analytics can be an important tool in determining the period of inoperability and the resumption of significant operations. While determining the dates on which a location within the disaster area closed and reopened might be a simple exercise, other metrics should also be considered. A business could also examine the number of employees unable to reach work due to area damage and dates of power outages in the area. Other factors measuring impacts on the business, such as pre-hurricane and post-hurricane revenue, year-to-year same-day-sales for a retailer, and shipping volume may also be metrics examined by the taxpayer.

For more information on the Hurricane Employee Retention Credit, register for the December 14th webinar, **Maximize Your Tax Credits Capture – From Employee Retention Credit and Beyond.**

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