VANDENACK WEAVER LLC

LEGAL | TAX | BUSINESS COUNSEL

We want you to be aware of an immediate deadline that may have significant financial implications for your business. A recent government notice creates this opportunity, **but only until May 14, 2020**.

As you know, the legislative and regulatory response to the economic disruptions resulting from the COVID-19 outbreak have been changing constantly. The Coronavirus Aid Relief and Economic Stability Act ("CARES Act") was signed into law on March 27, but the guidance implementing the various programs has only emerged gradually in the ensuing weeks.

The Paycheck Protection Program ("PPP") loan program has been extremely popular, with as many as 80 percent of small businesses applying and more than $600 billion distributed.

The CARES Act, however, also created a second program to encourage employee retention, known as the Employee Retention Credit ("ERC") under Section 2301 of the CARES Act.

Initially, it was believed that application for a PPP loan would prevent a business from taking the ERC credit. Moreover, the terms of the PPP were widely viewed as more attractive.

Subsequent guidance, however, has called these early assumptions into question.

- First, the Internal Revenue Service has issued a notice that denies the deductibility of expenses used to generate PPP forgiveness. As a result, your business will have fewer deductible expenses, which could result in greater taxable income.
  - Thus, the notion of PPP as "free money" from the government is diminished.
- Second, the Small Business Administration ("SBA") and U.S. Department of the Treasury ("Treasury") have provided regulatory guidance that provides that businesses that repay a PPP in full by May 14 will become eligible to take the ERC credit.
  - Thus, the belief that applying for a PPP ruled out the ERC is no longer valid.
- Finally, the IRS issued guidance that interprets the ERC requirement of a "full or partial suspension of operations." That interpretation may permit more businesses to qualify.

Accordingly, the PPP may now be less advantageous than anticipated and the ERC may be of greater advantage to many employers.

Immediately following adoption of the CARES Act, the very real prospect of PPP running out of funds led many businesses to immediately apply without consideration of the ERC as an alternative.

The new guidance permits businesses to take this one-week period to assess the PPP vs. ERC and repay the PPP with no penalty and make themselves eligible for the ERC. **If this is not completed by May 14, however, the opportunity will be lost.**

We have attached a "Fact Sheet" with summary information on the two options. Please allow us to assist you in making the determination whether to repay your PPP by May 14 in order to take advantage of the ERC.

VANDENACK WEAVER LLC

LEGAL | TAX | BUSINESS COUNSEL

PPP vs. ERC Fact Sheet

	PPP	*ERC*
Form of Assistance	Forgivable Loan	Fully Refundable Employment Tax Credit
Per-Employee Calculation	8 weeks of "payroll costs" up to $100,000 of salary – can add health insurance and retirement payments	½ of first $10,000 of "qualified wages" paid during an impacted calendar quarter – health insurance cost counted as wages
Per-Employee Maximum	$15,385 + 8 weeks of health insurance and retirement	$5,000
Impact of Deductibility	IRS has issued notice that expenses will not be deductible, thus diminishing economic value[1]	IRS not expected to exclude deductibility of related expenses
Eligibility – Size	Fewer than 500 employees or otherwise meet "small business" test	No limit, but employers with fewer than 100 employees will obtain greater advantage[2]
Eligibility – Necessity	Must certify as to "necessity" – all loans over $2M will be scrutinized	Must be subject to: (1) "full or partial suspension of operations" due to COVID-19 pandemic[3]; or (2) greater than 50% decline in gross revenues compared to same calendar quarter in 2019
Liquidity	Direct disbursement to borrower, can be used to pay rent, interest on debt or utilities up to 25% of forgiveness amount	Indirect, as credit against or refund from quarterly payroll tax obligation – no restrictions on use

[1] There is political interest in repealing the IRS Notice, but the outcome of such debate will not be known prior to May 14.

[2] Employers with more than 100 employees in 2019 will be limited to a credit for employees who are compensated despite "not providing services."

[3] The IRS has provided guidance on what will constitute a "partial suspension of operations."

If You Qualify for Both ...

- You have until May 14 to repay your PPP and make yourself eligible for the ERC.

- You may prefer the PPP if:

  - You are in need of liquidity from your PPP to meet payroll and pay rent or utilities.

  - You have a smaller number of employees and a significant portion of your payroll is for employees making over $40,000 per year.

- You may prefer the ERC if:

  - You can repay the PPP and retain liquidity.

  - You have a larger number of employees mostly making under $40,000 per year.

  - You are concerned that your PPP loan may not meet the “necessity” or “small business” tests.