

CHARTER SCHOOL ELIGIBILITY MEMO – EMPLOYEE RETENTION CREDIT

Below is a summary analysis of charter schools' (each a "School") eligibility to file and successfully receive refund claims related to the Employee Retention Credit ("ERC"). Note that this analysis is based on the premise that the School has fewer than 500 full-time employees.

Short Answer

Assuming the School can demonstrate it meets the qualifications of a "partial shutdown"¹ (e.g., reduced curriculum offerings and/or hours of service provided); a School has a reasonable reporting position to file amended payroll tax returns to claim refunds related to the ERC.

ERC Summary Analysis

The ERC is a refundable tax credit created as part of the CARES Act to encourage employers to keep their employees on payroll. The ERC is available to qualifying employers for qualifying wages paid during the periods March 13, 2020 – September 30, 2021; it can be obtained whether or not an employer was deemed "essential" or previously received one or more PPP loans from the SBA. The total amount of the ERC is up to \$26,000 total per employee, equivalent to 50% of qualified wages up to \$10,000 paid to each employee in calendar year 2020 and 70% of qualified wages up to \$10,000 paid to each employee in the first three quarters of 2021. When filed retroactively, approved ERC refund claims result in direct payments to employers.

The ERC is available to both for-profit and tax-exempt employers that experienced either:

- 1) fully or partially suspended operations due to federal, state or local governmental orders or proclamations limiting commerce, travel, or group meetings due to COVID-19; or
- 2) a significant decline in gross receipts during the calendar quarter.

Fully suspended operations generally means that an organization could not open its doors. A partially suspended operation requires more of a qualitative analysis, and the following example may be helpful: The IRS has provided guidance that if you operate a full-service restaurant and, during COVID-19 were prohibited from having in-person dining and/or had to limit your operating hours, but were still allowed to provide outdoor dining, takeout and delivery services, this should qualify you for the ERC. To date, the IRS has not provided specific guidance for K-12 charter or private schools.

Charter School Analysis

Many, if not most, Schools do not meet the ERC criteria regarding revenue loss, so to qualify a School must satisfy the qualitative analysis of a full or partial shutdown. When considering whether a school was partially shut down, it is important to identify, review and document restrictions implemented by relevant state, local and/or federal government authorities. While certain geographic jurisdictions implement unique regulations relevant to the populations they serve, in general Schools have documented restrictions placed on their schools that should rise to the level of a partial shutdown for the period starting March 13, 2020 through the end of July 2021 (the "Period") including, but not limited to, restrictions, reductions or prohibitions to:

- 1) **Operating hours:** Schools were generally required to modify their operating hours each day of the week for at least one (1) hour per day, with nearly one entire additional day per week devoted to "autonomous learning," or an independent student work day. During fully remote learning at the end of the 2019-20 academic year, this reduction in hours resulted in a significant loss (at least

¹ IRS Notice 2021-20.

10%, and in many cases far more) of instructional (operational) hours. For those periods in which some students were allowed on campus, the reduction in operational hours persisted.

- 2) **Virtual/hybrid learning:** During the Period, Schools generally moved to a fully-remote or hybrid schedule where generally students participated in their in-person classrooms for only part of a typical week, the remainder required to be done independently. Numerous studies have indicated that both virtual learning and independent learning are far inferior instructional methods. Moreover, even when students attended class in person in late 2020-21 academic year, students were largely prohibited from certain classroom activities (e.g., science labs, group work and many essential instructional routines) were curtailed.
- 3) **Athletics, Cultural Events, and Extracurricular Activities:** During the Period, many sports (e.g. basketball, track, soccer, football, volleyball, etc.) had their seasons completely canceled, or at a minimum significantly modified. Extracurriculars that required high degrees of engagement like theater, dance, and music were also canceled. Many activities designed to solidify social-emotional health to promote learning, such as field trips, dances, and celebrations were also canceled.
- 4) **Outreach and Recruitment Activities:** During the Period, Schools' marketing activities were severely curtailed. The loss of these marketing activities often resulted in over 10% enrollment drop at schools, which can be considered a significant disruption of student supply to Schools

Each of these taken individually should sufficiently meet the partial shutdown requirements as outlined by ERC regulation.

Conclusion

Provided the School's facts and circumstances align in whole or in part with the above analysis, it has a reasonable reporting position to file amended payroll tax returns to claim refunds related to the ERC. Each School will need to make an additional assessment of which wages can be considered "qualified" for purposes of ERC to ensure proper ERC calculations.