Hospitality and Restaurant Industry – New York and Federal Tax Credits

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The hospitality and restaurant industry continues to be among those hardest hit by the COVID-19 pandemic. Restrictions on the ability of these businesses to operate went into effect at the onset of the pandemic, and while capacity restrictions finally have been lifted, eating establishments are seeing new restrictions on entry, such as proof of vaccination. In looking to find support to continue operations, it is important that hospitality businesses consider their qualifications for available tax credits, including a recently-announced program specifically for New York businesses as well as the still available employee retention credit (ERC).

The New York Restaurant Return-to-Work Tax Credit Program

The Restaurant Return-to-Work Tax Credit Program offers tax credits to qualifying food and/or beverage establishments that increase the number of their employees during 2021. In total, there is a maximum of $35 million available for tax credits under the Program. Qualifying businesses are eligible for a tax credit of $5,000 per new worker hired, up to $50,000 per business.

To be eligible, businesses must meet the following requirements:

- Must be a “small business” – an independently owned and operated business with less than 100 FTEs (full-time equivalents). Independently owned means not a publicly-traded entity (or a subsidiary thereof) or a franchise.
- Businesses must demonstrate either a 40% decline in gross receipts or a 40% decline in employment, comparing either the 2nd or 3rd quarter of 2019 and the same quarter of 2020.
- Eligible restaurants must be located anywhere in the City of New York, or in another area of New York State that was subject to additional in-person dining restrictions due to its area designation as an Orange and/or Red Zone for at least 30 consecutive days.
- Businesses and qualifying restaurant locations must achieve a net employee increase (i.e., add at least one average employee), when comparing January-March 2021 to either April-August 2021 or April-December 2021.

The business must be intended primarily for food and/or beverage service. While that would seem to eliminate hotels, businesses with distinct Employer Identification Numbers (EINs) are considered separately. Thus, if an owner operates a hotel and restaurant under separate EINs, the restaurant should be eligible for the credit if it meets the other criteria.

If a restaurant has multiple locations, each with its own EIN, each restaurant is considered separately in determining qualification; however, if the locations are all owned under one EIN, they are considered together.

Applications can be made through the Empire State Development website. A business may apply for an advance credit before November 15, 2021 (using a net employee increase for the period ending August 2021); otherwise, the application can be made after the business files its 2021 tax return.

The Employee Retention Credit

You may have seen our previous articles about the employee retention credit (ERC), including this one, but we think it's worth reminding you that the ERC is still available through the end of Q4 2021 if your business continues to qualify. The ERC can be claimed on a taxpayer's quarterly employment tax return (Form 941 or similar), or an amended payroll tax return. A business has three years from the date of the original filing of its payroll tax return to apply for the ERC. Thus, even if you have not claimed the credit for prior eligible periods, there's still time to do so.

Businesses qualify for the ERC in one of two ways, both of which are likely to apply to many hospitality businesses and restaurants.

1. **Operations were fully or partially suspended on orders from a governmental authority due to COVID-19 (COVID-19 Shutdown)** – This includes not just times when restaurants were fully shut down, but also when they were subject to capacity restrictions, as long as the capacity restrictions limited the ability to serve customers by at least 10%. Since the required shut down is partial, hotels with restaurants that are a more than nominal part of their business operations would also qualify under this standard. Qualification ends when the order is lifted (i.e., May 19, 2021 in New York).

2. **For 2020, your business experienced a 50% reduction in gross receipts for a calendar quarter in 2020 as compared to the same calendar quarter in 2019 (Gross Receipts Decline). For 2021, the reduction in gross receipts required is only 20% in the quarter, compared to the same calendar quarter in 2019.** See prior articles for full description of the rules relating to the gross receipts decline as well as other PPP updates and related guidance.

The IRS has confirmed that tips included in taxable wages are qualified wages for the ERC. In addition, the tip credit available for income tax purposes may be claimed along with the ERC on the same wages. This means that restaurants and other tip-based businesses can claim the ERC with confidence that it will not negatively affect their income tax position as it relates to tips.

Next Steps

Given the possibility of the New York Restaurant Return-to-Work Tax Credit being depleted, it's worth considering now whether your hospitality business qualifies and may be able to apply for an advance credit. And while there's plenty of time to claim the ERC if you qualify, maximizing the ERC along with your PPP2 forgiveness is an analysis that every PPP2 borrower should do before filing for this round of forgiveness.

Contact Us

PKF O'Connor Davies offers an array of services and expertise to the hospitality industry. If you have any questions on these or other topics relating to the hospitality industry, we invite you to contact our hospitality industry specialists.

If you have questions about either credit, contact your client service partner or:

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