



Federal Credit for Employers Affected by Hurricanes Irma and María

By: Daischa Santana Caraballo

During the months of August and September of 2017, several high intensity hurricanes passed through the Caribbean and several coasts of the United States, leaving significant damage through its path. In the case of Puerto Rico, Hurricane María is the strongest hurricane that has passed through the Island in recent memory and left significant damage. Due to the pass of Hurricanes Irma and María (“Qualified Disasters”) through Puerto Rico, the President of the United States determined that he municipalities of Puerto Rico affected by those *Qualified Disasters* will be considered as *Disaster Areas*.

On September 29, 2017, the President of the United States signed into law the Disaster Tax Relief and Airport and Airway Extension Act of 2017 (the “Act”) providing certain relief for the *Disaster Areas*. The Act provides an employee retention credit (“ERC”) for employers in *Disaster Areas* that paid wages to employees, while the business was inoperable due to the damage sustained by the hurricanes Harvey, Irma and María.

Generally, the *ERC* will be available to employers required to file a Federal Income Tax Return, limited to their income tax liability. However, on February 14, 2018 the Governor

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of Puerto Rico issued a press release informing that the Government of Puerto Rico had entered in an agreement with the Federal Treasury Department that will allow the benefit of the *ERC* to Puerto Rico employers affected by the *Qualified Disasters*, that are not required to file a Federal Income Tax Return. According to the press release, the plan proposes that the *ERC* will be claimed by filing an online application with the Puerto Rico Treasury Department and that the subsequent deposit of the funds will be made through electronic means. However, such online platform has not been made available at the time this bulletin is being issued.

The *ERC* applicable to Puerto Rico employers, that are not required to file a Federal Income Tax Return, will be a refundable tax credit for *Eligible Employers* that paid *Qualified Wages* for *Eligible Employees* after the *Date of the Disaster* (as such terms will be defined below). The amount of the *ERC* will be 40% of the *Qualified Wages* up to \$6,000, for a maximum amount of \$2,400 per *Eligible Employee*.

For purposes of the *ERC*, the terms indicated above have the following meaning:

- *Date of the Disaster*: for (1) Hurricane Irma is September 4, 2017, and for (2) Hurricane María is September 16, 2017.
- *Eligible Employer*: is an employer that (1) conducted an active trade or business as of the *Date of the Disaster*, and (2) for which the active trade or business was rendered inoperable, as a result of the damage sustained by the *Qualified Disasters*, on any day after the *Date of the Disaster* and before January 1, 2018.
- *Eligible Employee*: an employee whose principal place of employment with the *Eligible Employer* on the *Disaster Date* was in the *Disaster Areas*. For purposes of the *ERC*, an employee can only be *Eligible Employee* for one *Qualified Disaster*. This means that an employee

can be an *Eligible Employee* for either Hurricane María or Irma but not both.

- *Qualified Wages*: are wages (as defined under the Federal Unemployment Tax provisions in the U.S. Internal Revenue Code of 1986, as amended), including amounts paid for medical or hospitalization expenses in connection with sickness or accident disability, paid or incurred by an *Eligible Employer* for an *Eligible Employee* on any day after the *Date of the Disaster* and before January 1, 2018. The period will be considered to: (a) begin on the date on which the employer's trade or business first became inoperable at the principal place of employment of the employee immediately before the *Qualified Disasters*, and (b) ending on the date on which the trade or business resumed significant operations at the principal place of employment. *Qualified Wages* "include wages paid without regard to whether the employee performs no services, performs services at a different place of employment than the principal place of employment, or performs services at the principal place of employment before significant operations have resumed".

Note that employers must consider that there are certain payments made to employees that may not fall within the *Qualified Wages* definition for purposes of the *ERC*. Among these, are payments made by the employer to the employees to reimburse or pay reasonable and necessary personal, family, living, or funeral expenses, or to reimburse or pay reasonable and necessary expenses incurred for the repair or rehabilitation of a personal residence or repair or replacement of its contents to the extent that it is attributable to the *Qualified Disasters* ("Disaster Relief Payments"). *Disaster Relief Payments* are excluded from the definition of wages for purposes of Federal Unemployment Tax Act ("FUTA"), and consequently, exempted from the application of those taxes. Therefore, any payment made to an employee, that had not been subject to FUTA, must be excluded from the determination of *Qualified Wages*.

ATBA Comments

The *ERC* provides an opportunity to those employers that paid wages while their businesses were inoperable due to a *Qualified Disaster* to recover part of those

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expenses. However, since the *ERC* may only be claimed for *Eligible Employees* for only one *Qualified Disaster*, it is very important that the employer determine if the period to determine the *Qualified Wages* from Hurricane Irma provides a higher *ERC* for each employee than that of Hurricane María.

Furthermore, the employer will need to determine when it resumes significant operations. We know that for many employers it is not obvious when significant operations resumed, and the Act is not clear on how to make such determination. Therefore, employers must evaluate the nature of their operations per each industry to determine the time frame from which the business was inoperable until it is considered that began significant operations.

Finally, once the employer determines its applicable period, a careful analysis must be made to determine the payments that will be considered as *Qualified Wages*, including the exclusion of any Disaster Relief Payment.

Our professionals can assist you in determining if your business may qualify for the *ERC*, including the analysis of "significant operations" and *Qualified Wages*, as well as providing assistance with the procedures to claim such credit once the online platform is available.

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