Season 2, Episode 2

Tax Planning: The Employee Retention Credit
Featuring Carole Foos, CPA

David Mandell:

Hello, I'm David Mandell, host of the podcast. Thanks for joining us. We've got a special podcast today. I wanted my partner Carole to come on and talk about a subject that's very timely because, for many of you listening, it may be a tax saving opportunity you can take advantage of and there's some timing elements to it. So, we wanted to get this out as we started season two. So, before Carole comes on, let me just give you a brief bio. Most people listening probably know her because she's been on before. She's has been my partner for a long time and a co-author of all of our books.

David Mandell:

Carole Foos is a certified public accountant and a tax consultant to OJM clients, including physicians, professionals and their businesses. She has over 25 years of experience in accounting, tax planning and financial consulting. She was formerly a manager in the tax department of a Big Four firm and spent several years in public accounting at local firms. She's a co-author of pretty much all the books we've done, including Wealth Planning for the Modern Physician, the namesake of the podcast, Wealth Management Made Simple and Risk Management for the Practicing Physician, our CME monograph. So not only that, she does my personal returns, so I can't give her a better endorsement than that. Her full bio, we'll put in the links in the show notes, for those of you don't know her, but with that, Carole, welcome to the program.

Carole Foos:

Thanks, David. Appreciate it.

David Mandell:

All right. So, we're going to jump into this topic, the Employee Retention Credit. So, we call it the ERC, I guess that's what folks call it. So, big picture, before we dive into some details. What is the ERC and what is the potential benefit for a medical practice?

Carole Foos:

So, essentially the Employee Retention Credit, the ERC, was first passed as part of the Cares Act back in March of 2020, basically as an incentive for employers to keep employees on their payroll, even through shutdowns, partial shutdowns, decreased business. So, it's a credit that employers could apply for against what they call [inaudible 00:02:9] wages that were paid to employees. And when it first passed in the Cares Act, the maximum credit per employee was $5,000 or 50% of a maximum $10,000 in wages. So, if you were an employer who had 10 employees back in 2020, and you suffered some of the required losses or decreases in revenue, you could get up to a $50,000 credit from the government for continuing to pay wages to those employees.

David Mandell:

That makes sense in terms of why they put in place, to try to keep people employed and, again, high level, and we're not obviously giving any specific advice to anybody on this podcast, but physicians were one of those groups that did have some limitations in what they do and some government sort of sanctioned, I wouldn't say sanctioned, government dictated either slowdowns or shutdowns.

Carole Foos:

Absolutely. So, think about all the physicians who elective surgeries were not allowed during that time. Even for many physicians, I know for many of our clients, even if perhaps their practice wasn't shut down, they saw a lot of decrease in patients coming in because people were kind of afraid to come to the doctor, to be around other people, to publicly come. So, they did see a huge decline in revenues. So, they would absolutely potentially be eligible to claim this credit.

David Mandell:

Got it. So, it's not just mandated shutdowns. It's also just loss of revenue, loss of business.

Carole Foos:

Correct.

David Mandell:

Now under the Cares Act, I know we'll get to the '21 changes, but going back to '20, what if a practice had multiple businesses? I know a lot of our clients have the main practice and they might have a surgery center or some other ancillary. How did that tie into or play out with that?

Carole Foos:

Right. So, back when it first passed in 2020, there were a couple of different ways or tests that employers met to claim the credit. So, as an example of that, in 2020, if an employer had fewer than 100 employees, they could claim the credit for wages paid to employees, whether the employees were working and providing services or whether the employees were no longer working for them but were still on the payroll. If a company or a business had greater than 100 employees, they could only claim the credit if they were paying employees who were no longer providing services. So, when you're looking at that count of 100 employees, common ownership does play a role in that. So, if there's greater than 50% common ownership, you'd have to look at all of the entities in your group. So, your practice, your surgery center, even if you own the building and you employ someone to manage that building, any of your employees would count as one group in making that 100 employee determination.

David Mandell:

Got it. Okay. And I know that maybe some of that may have changed and we'll talk about '21, some of the rules there. But, the other thing was something we talked about, I know you did a lot of talks on for different medical societies last year, was the PPP. And that's obviously a different program, but how did that impact or interact with this program back in 2020?

Carole Foos:

Back in 2020, again, when it was first passed under the Cares Act, they set a rule that the employee retention credit could not be claimed if the business or the medical practice received a PPP loan, even if the business had wages above what that PPP loan was paying for. So, a lot of our clients, because of that provision, because they had received PPP loans, did not claim the Employee Retention Credit, even though they may have had qualifying wages that, absence of that provision, they would have been able to claim it.

David Mandell:

And that's really crucial. I think that's one of the main points I want people to hear here is they might say, Oh, the ERC, we couldn't take advantage of that because we did the PPP. And we're going to talk about how that's changed. But that's why a lot of folks, I think a little bit in one ear out the other, and that they heard, Oh, you can't do both, the PPP was essentially low interest or free money, right?

Carole Foos:

Right, exactly.

David Mandell:

Because a lot of times, you didn't have to pay it back. So people said, Well, I'll take the free cash rather than any tax credit. And that was probably the right decision for most people under the 2020 rules.

Carole Foos:

Right, right.

David Mandell:

Okay, now let's shift to 2021, -- and this is really what I want people to understand -- is there's the Consolidated Appropriations Act of 2021, which we'll call a CAA. There's a lot of initials, but how did the CAA change the ERC with perspective to the PPP? How did this new law change this tax credit, vis-a-vis the PPP, which should we just were saying last year, if you got that, you couldn't do the tax credit. Things have changed, correct?

Carole Foos:

Right. Absolutely. It changed relatively significantly. First off, originally in the Cares Act, that Employee Retention Credit ended at the end of 2020. So, one thing the CAA did was extended it until June of 2021. Said, okay, we're going to... And they made some increases, which we'll talk about in a few minutes. But also specifically when that CAA was passed back in December, they also said, By the way, even if you received a PPP loan, you, the employer, could still qualify for the Employee Retention Credit. Now there've been a couple notices the IRS has put out and what you can't do is you can't say, Okay, I paid this employee $10,000. And I got all of that $10,000 that I paid was actually covered by my PPP loan proceeds. So, you can't take that same $10,000 and claim the Employee Retention Credit on it. No double-dipping. However, if you paid that employee $20,000 and only $10,000 of it was

covered by your PPP loan proceeds, then that other $10,000 that you paid them could be, and I say could, right?

David Mandell:

Right.

Carole Foos:

We want everybody talks to their own advisors about it, but could be eligible for the Employee Retention Credit. So again, can't use the exact same wages for both, but you could potentially use wages for that same employee and get the PPP proceeds forgiven, and still claim the Employee Retention Credit.

I was just going to say if, for instance, some of your PPP proceeds weren't forgiven, then that's another way to use the Employee Retention Credit to get some more of that money back.

David Mandell:

That's big, right? Because it's not now an absolute, it's not mutually exclusive, it's not a deal breaker. It's a get with your advisor, with your tax preparer the person who advised you on the PPP, et cetera, who knows the numbers, knows your, your employee numbers and what was forgiven and what you applied for, et cetera. And see is there an excess, is there a potential to get this tax credit, even if you got the PPP. For some, it may be no. And for some, it may be yes. And that's really what we're trying to do here is get people aware that there's this opportunity that's out there that it could be beneficial.

Carole Foos:

And I think as probably most of our listeners who did receive a PPP loan found or remember, when the PPP first came out, if people kind of got it in that first traunch of PPP money, they were, at that time, saying, it was for eight weeks of wages. Then it got extended to 26 weeks, I think, or 23 weeks, something like that. So, the amount that a lot of employers got for their PPP loans did not cover in any way, shape or form all the wages that they paid. So, I do think there's a lot of opportunity for medical practices that are listening to go back and say, Hey, my CPA, here's what we used for the PPP loan. You probably had your CPA help you with those calculations. What about all those extra wages? Can we go back and request this Employee Retention Credit?

David Mandell:

Yeah, absolutely. And not only in terms of the PPP, but the new law, the CAA in 2021, also changed the economics, how this worked, for the better.

Carole Foos:

Yes. Absolutely. So, lots of changes. First of all, as I mentioned, back in 2020 under the Cares Act, the maximum credit you could get per employee for 2020 was $5,000 or 50% of $10,000 in wages per employee. The CAA increased that credit to say, we're going to give you a credit on 70% of wages paid and it's going to be eligible wages will be wages paid to each employee of $10,000 per quarter.

David Mandell:

Wow.

Carole Foos:

So, now we have, the CAA passed and then the American Rescue Plan Act passed, which extended, I mentioned the CAA extended the period to June 30th of '21, that American Rescue Plan extended the period all the way out to December of 2021. So, employers can now get a credit, for 2021, of up to $28,000 per employee. Because, it's 70% of $10,000 wages per quarter, so $7,000 per quarter, $28,000 for the year. So, it's big money.

David Mandell:

That is big money. And it's a huge percentage. I mean, going from $5,000 to $28,000.

Carole Foos:

Yeah, exactly.

David Mandell:

That's quintupling it. So, again, worth the effort of talking with your CPA and paying them a couple hours of time to do these calculations. Because, even if you've got one employee that it worked for, you'd have a pretty good windfall there, tax benefit.

Carole Foos:

Right.

David Mandell:

Any other specific things that we should know about in terms of how things changed?

Carole Foos:

Yeah. I think one thing we need to also talk about. There were a couple of factors that you could qualify for under the original act and then as it got expanded. So, originally under the Cares Act, in order for a company to qualify, you had to either have that partial or full government shutdown or a 50% decline in your gross receipts in a given quarter as compared to that same quarter of 2019. So, that was the definition. And then what the Cares Act said was once you qualify in a quarter, you will continue to qualify until the quarter after your receipts basically get back up to an 80% level. So, as an example, if you qualified in quarter two of 2020, because your 2020 Q2 gross receipts were $48,000 as compared to a $100,000 in that same quarter of 2019. There's a more than 50% drop.

David Mandell:

And that's probably the quarter most people would have seen the drop.

Carole Foos:

Exactly. If your receipts go up to $81,000 in quarter three, so now they're back up above that 80% level, you would still qualify in quarter three, but you would no longer be eligible in quarter four of 2020. So, that was under the Cares Act, that's what affected 2020 calculations. CAA comes along, not only does it say now we're going to say 70% of $10,000 per quarter in wages, but we're also going to say the gross receipts, that threshold of decline, has dropped to a 20% decline. So, that's huge. And in addition, I mentioned before that 100 employee threshold which said, if you have less than a 100 employees, you could get the credit on anything you paid them. If you were over a 100, it was only for employees you were paying essentially not to work. That number increased to 500 employees under the CAA. So, I would think for the vast majority of our listeners for 2021, they would fall under that 500 employees, even in a combined group, common ownership situation.

David Mandell:

For sure.

Carole Foos:

So, that's also important.

David Mandell:

Yeah, that first point is really big, though, because, I think there are a lot of practices that maybe had to shut down for a bit in March and April, but they might not have hit the 50% threshold. They might've come back pretty strong in May, June for that quarter, but they probably will hit that 80%, meaning a lot of people were down at least 20. And so, if we're saying that's the key number now, then, I think, again, that just opens the world a lot greater.

Carole Foos:

Right. And I think the other thing for our medical practice owners or managers to realize is that there's some language in these new bills that says employers can now qualify if their business was more than nominally impacted by government orders, including full or partial shutdowns. So, there's been a lot of talk and articles written about this that would say, even if you didn't have that revenue loss, you may still qualify because, for instance, you may make the argument, Hey, I typically get X number of new patients per year. Right. My practice is growing, whatever.

So even though I didn't have quite that revenue loss to meet the standards, I did have a more than nominal impact because I saw no growth, I was not able to see new patients. For non medical practice businesses, certainly they might say, I couldn't go out and prospect with new clients, I couldn't do any of that.

David Mandell:

Right.

Carole Foos:

So, again, that's why I think more important than anything for our listeners is talk to your financial professional, your CPA, about whether there may be a way for you to qualify and look into that.

David Mandell:

Yeah, for sure. Yeah, because that that's classic sort of statute language, that's pretty broad, that can be interpreted a lot of ways and I'm sure some expert firms are just doing this all day long, who are interpreting that in a pretty broad way.

Carole Foos:

Right.

David Mandell:

And if they are successful, then why not take advantage of it? So, we're recording this in August, 2021. There was just a notice that the IRS came out with, that has an impact here. So, can you tell us a little bit about what the new news is?

Carole Foos:

There was. So, the IRS has come out in 2021 with three different notices, which again, I'm sure as listeners are speaking to their CPAs about it, they'll hear about this. But most recently, on August 4th, a notice called Notice 2021-49 came out. And it's long, as you said, we're just recording this it's less than a week old. But, one of the crazy things that it talks about is whether wages paid to a greater than 50% owner of a business can be treated as qualified wages and therefore eligible for the credit. So, for those practice owners who are listening, are the wages you paid to yourself eligible, in addition to wages you paid your employee? There's a lot of, in the CPA world, in the accounting world, what we call attribution rules, where if I'm a 50% or 51% owner of my business, that ownership is attributed to my spouse, to my parents, to my children.

You know, there are different attribution rules all through the internal revenue code that qualify. But, one of the, just sort of crazy things, and there's an example in this notice that states, there are about four examples in the notice that kind of state, here's how an entity is owned, here's who works there, my kid works there, my spouse works there or whatever it is, what wages qualify. If the majority owner has no living whole or half brothers or sisters, no living parents or grandparents or no living children, then neither the majority owner nor the spouse is considered a related individual and all of the wages paid to them will be qualified wages.

So, and you know, what I love to say is crazy stuff that comes from the IRS, this is one of them because, on the reverse, if that majority owner does have a living sibling, child, parent, then through these crazy attribution rules, wages paid to them will not be qualifying wages.

David Mandell:

Interesting.

Carole Foos:

So, that's going to be another thing that you want to certainly speak to CPA about. Again, there's a Forbes article on it that was interesting that I read yesterday. Whether that comes out with, there's another clarification on that, it really doesn't make any sense the way it's currently written, but we'll see what happens with that.

David Mandell:

We're not advocating getting rid of all your family members for a tax credit.

Carole Foos:

No, exactly.

David Mandell:

We're not saying that, but it might actually work out that way, the lone wolves out there.

Carole Foos:

Takes a whole new meaning to that pain of a family.

David Mandell:

Yeah, exactly. And, like you said, it's new, but there's opportunities in there and you want to be in touch with your a tax advisor on what you might be able to take advantage of. So, that leads me to my last question. What, and I think we've kind of answered it, but let's talk about it. What should practice owners be doing now? I mean, what's the next step for them, if they're listening.

Carole Foos:

I mean, first and foremost, certainly, you're going to want to call your CPA. They're going to want to have that CPA gather their payroll information, look at the payroll, determine your full-time employees, full-time equivalent employees, what were the wages paid? What did I use for my forgiveness application for my PPP loan? Keep in mind, much like the PPP, it's wages and qualified health plan expenses paid by the employer are considered qualifying wages. If they realize a) they could have claimed the credit in 2020, or in an earlier quarter of 2021, or which they've already filed their form 941 to submit

payroll taxes, they can go back and amend that 941, file a 941X to claim the credit.

If they find, Hey, I'm going to also qualify for quarter three and quarter four of 2021, they can actually claim the credit right on the originally filed 941 for this quarter and the next quarter. And I think, from everything I've read, that's a faster way to get the money back than the amended returns obviously are taken a lot longer because the IRS is receiving a lot of them and having to read them.

David Mandell:

Makes sense. Well, I hope everybody listened up and takes the next step because, it seems to me, and this is why we wanted to do this, that there's a lot of physicians out there who may have some good opportunity to get some significant tax savings. These rules have only gotten better and better and better. So again, big picture, if you heard about the ERC last year, and you said, ah, it doesn't apply, or we looked into that. It's worth looking into it again. Because these rules, as we just said, as recent as last week, are coming out, but the 2021 rules are much more generous than what was there in 2020. So, you want to really go down the road and make sure you either qualify or don't, but you don't want to ignore it and then wish that you had, because this isn't going to be around forever.

Carole Foos:

Exactly.

David Mandell:

Excellent. Well, Carole, thanks so much for being on and thanks for everybody for listening. Hopefully, some of you can take advantage of it and save some taxes, that would be great. And look for our next episode again, two weeks on a Thursday. And thanks for listening.

Carole Foos:

Absolutely. Thanks, David.