



## Employer Compensation Expense Program

The Employer Compensation Expense Program (ECEP) established a new optional Employer Compensation Expense Tax (ECET) that [employers](#) can elect to pay if they have employees that earn over \$40,000 annually in wages and compensation in New York State. The ECET is being phased in over three years:

For quarters in tax year:	The rate of tax is:
2019	1½%
2020	3%
2021 and after	5%

### Employee Wages Covered by the ECET

An employer that so elects will pay the ECET on the [payroll expense](#) incurred by the employer for New York wages and compensation that exceeds \$40,000 for the calendar year paid to each employee who is employed in New York for whom the employer is required to withhold New York State tax. The tests for determining whether an employee is employed in New York are the same tests used to determine whether an employee is employed in the Metropolitan Commuter Transportation District (MCTD), substituting New York State for the MCTD as the relevant geographic area. If at least one of these tests is met, then an employee is deemed to be employed in New York.

- 1) **Localization** – An employee is employed in New York if the employee performs services either:
  - entirely within New York; or
  - both in and out of New York, but those performed outside New York are incidental to the employee's services performed within New York (for example, the services are temporary or transitory in nature, or consist of isolated transactions).
- 2) **Base of operations** – An employee is employed in New York if the employee's [base of operations](#) is in New York. (This test cannot be met if the employee has either more than one base of operations or no base of operations.)
- 3) **Place of direction and control** – An employee is employed in New York if the [place of direction and control](#) of the employee is in New York, and the employee performs some services within New York.

### Calculating the ECET

An [electing employer](#) is only subject to the ECET on the New York payroll expense paid to each [covered employee](#) that exceeds \$40,000 for the calendar year. If an employee who receives more than \$40,000 in annual wages and compensation from the electing employer is employed by the employer in New York for only part of the calendar year, the employee becomes a covered employee only when he or she is employed in New York as determined under the standards above. The electing employer will be subject to the ECET on the payroll

expense paid to that part-year employee only when and to the extent the wages and compensation paid to the employee for employment in New York exceeds \$40,000.

**Example 1:** *An electing employer has three employees. Two of the employees earn less than \$40,000 annually. The third employee earns \$120,000 annually (\$30,000 each quarter). The third employee is not a covered employee for the purpose of the first quarter ECET filings, but at the time in the second quarter when the employee’s total wages to date exceed \$40,000, the employee is deemed a covered employee and the employer is subject to the ECET. Therefore, the employer must pay \$1,200 in ECET for tax year 2019, as shown below:*

*2<sup>nd</sup> quarter \$20,000 × 1½% = \$300  
3<sup>rd</sup> quarter \$30,000 × 1½% = \$450  
4<sup>th</sup> quarter \$30,000 × 1½% = \$450*

**Example 2:** *Employee X receives an annual salary of \$300,000 from an electing employer. Employee X is employed by an electing employer in California from January 1 until November 30. On December 1, Employee X is transferred to New York State and is then employed by the electing employer in New York. Employee X received \$275,000 in wages while employed in California and \$25,000 in wages while employed in New York. The electing employer is not required to pay ECET on the payroll expense paid to Employee X because Employee X’s wages in New York did not exceed \$40,000.*

**Example 3:** *Employee Y receives an annual salary of \$250,000 from an electing employer. Employee Y is employed by an electing employer in Georgia from January 1 until August 31. On September 1, Employee Y is transferred from Georgia to New York State and is then employed by the electing employer in New York. Employee Y received \$150,000 in wages while employed in Georgia and \$100,000 in wages while employed in New York. The electing employer is required to pay ECET on the payroll expense paid to Employee Y while employed in New York that exceeds \$40,000. The electing employer will be required to pay ECET on \$60,000 of wages paid to Employee Y while employed in New York because Employee Y’s New York wages exceeded \$40,000.*

**Paying the tax and filing the quarterly returns**

The ECET must be paid electronically on the same dates that the electing employer’s withholding tax payments are required to be made.

The quarterly ECET returns are due on the same dates as withholding tax returns as shown below:

<b>Quarter</b>	<b>Due Date</b>
January 1 – March 31	April 30
April 1 – June 30	July 31
July 1 – September 30	October 31
October 1 – December 31	January 31

When the due date falls on a Saturday, Sunday or [legal holiday](#), the return and payment will be due on the next business day. There are no extensions of time to report or pay the ECET.

An employer that overpays the ECET may apply for a refund. However, the department will apply all or part of an overpayment to any past-due legally enforceable debt the employer may owe.<sup>1</sup>

### Penalties and interest

Employers could be subject to ECET-related penalties, including late filing, late payment, and failure to file penalties. Interest will be charged on any tax that is not paid on or before the due date.

### Election

An employer must make an affirmative election to participate in the ECEP annually by December 1<sup>st</sup> to opt in for the next calendar year. The initial annual employer election must be made no later than December 1, 2018, to participate in the ECEP for 2019. If an election is made after the December 1<sup>st</sup> deadline, it will not take effect until the second succeeding calendar year. For example, if an employer makes an initial election on December 20, 2018, that employer will not be eligible to participate in the ECEP until calendar year 2020. The department will be providing a web-based registration system to accommodate the employer election into the ECEP.

The person authorized to make the election will vary by the type of entity:

<b>If the employer is:</b>	<b>The election is made by:</b>
a corporation (for profit or not for profit)	an authorized officer or manager. <sup>2</sup>
not a corporation (including a sole proprietorship and a partnership)	any member, owner, or other individual with authority to bind the entity or sign returns.
a trust	the unanimous consent of all the trustees.
a government entity	the chief executive officer.

### Other procedural information

An employer may not deduct or withhold from an employee's wages any portion of the ECET paid. Additionally, no tax credit(s) may be used to reduce the amount of the ECET due from an electing employer.

All requirements under the ECEP, including employer elections, quarterly filings, and payments, must be filed electronically.

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<sup>1</sup> This includes, but is not limited to, a debt to a NYS agency, a NYS or NYC tax warrant debt, or a debt to another state which has entered into a reciprocal agreement with NYS.

<sup>2</sup> "Authorized" means the officer or manager is authorized to make the election under the law of the state where the corporation is incorporated or under the employer's organizational documents.

Additional information on the requirements and procedures for electing into the ECEP and reporting and paying the tax will be made available on the department's website. To receive e-mail notifications on newly posted information, sign up for the ECEP [Subscription Service](#).

### **Other issues for employers**

There will be no change to the withholding tables for electing employers. However, the 2019 Form IT-2104, *Employee's Withholding Allowance Certificate* will be updated to allow employees whose wages are subject to the ECET to adjust their tax withholding accordingly.

Employers should:

- Tell employees that they opted into ECET.
- Encourage their covered employees to review their Form IT-2104 and adjust their withholding.
- Communicate to their covered employees at the end of the year the amount of wages subject to ECET. The department will be providing, through the department's website, a sample template that can be used to communicate such amount to covered employees.

### **Definitions**

*Base of operations* means the place at which the employee is continuously located, or if not continuously located, from which the employee customarily starts out to perform his or her functions in or out of New York. The *base of operations* is where the employee customarily returns in order to receive instructions from his or her employer, communicates with other persons, or to replenish stock and materials, to repair equipment used, or to perform any other function necessary in the exercise of his or her trade or profession.

*Covered employee* means an employee of an electing employer whose wages are subject to the ECET.

*Employer* means an employer that is required to deduct and withhold taxes from wages under Tax Law § 671.

*Electing employer* means an employer that has made the affirmative annual election under Tax Law § 851.

*Payroll expense* means wages and compensation as defined in IRC §§ 3121 and 3231, without regard to IRC §§ 3121(a)(1) and 3231(e)(2)(A)(i), paid to covered employees.

IRC § 3121 defines wages subject to federal social security taxes. However, in computing the payroll expense subject to the ECET, the cap on the amount of wages subject to social security taxes contained in IRC § 3121(a)(1) does not apply. Accordingly, the payroll expense paid to covered employees with wages subject to federal social security taxes is the amount of the employee wages or other compensation that is subject to the Medicare tax.

IRC § 3231 defines compensation subject to railroad retirement tax. However, in computing the payroll expense paid to covered employees, the cap on the amount of wages subject to railroad retirement tax contained in IRC § 3231(e)(2)(A)(i) does not apply.

*Place of direction and control* means the place from which the employer directs and controls the activities of the employees. It is not necessarily the location of the principal office, but rather the point from which basic authority over the supervision of services emanates (for example, the place from which job assignments are made and/or instructions are issued, or the place at which personnel and payroll records are maintained).

## References

Part MM of Chapter 59 of the Laws of 2018  
Tax Law Article 24  
Tax Law §§ 850-857, 606(ccc), 171-a

**Note:** A TSB-M is an informational statement of existing department policies or of changes to the law, regulations, or department policies. It is accurate on the date issued. Subsequent changes in the law or regulations, judicial decisions, Tax Appeals Tribunal decisions, or changes in department policies could affect the validity of the information presented in a TSB-M.