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## What to Know About the Withdrawal of ERC Claims from the IRS

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Everyone has probably heard or seen multiple radio or TV ads in the last six months touting the “free money” the federal government is allegedly giving out to businesses under the Employee Retention Credit (ERC) program that Congress enacted in response to the COVID-19 pandemic.

ERC can indeed provide significant funds but only to “qualified employers.”

Under ERC, a “qualified employer” can receive a refundable tax credit up to \$26,000 for each “eligible employee,” i.e., \$5,000 per year for 2020 and \$7,000 per quarter for the first three quarters of 2021. A “qualified employer” is one who had no more than a certain number of average monthly full-time employees in the 2019 test period (either 100 for 2020 or 500 for 2021) and paid “qualifying wages” (\$10,000 in 2020 and in \$10,000 in each of the first three quarters of 2021) to “eligible employees” in 2020 and 2021. For example, a “qualified employer” with 100 “eligible employees” in both 2020 and 2021 would be able to claim an ERC refundable credit of \$2,600,000, i.e., 2020: 50% of \$10,000 in qualifying annual wages = \$5,000 x 100 employees = \$500,000; 2021: 70% of \$10,000 in three quarters qualifying quarterly wages = \$21,000 x 100 employees = \$2,100,000; total refundable ERC credit amount: \$2,600,000.

The lure of such large refunds has brought out a virtual army of scammers including both unscrupulous business owners willing to submit falsified data to the IRS on their own in order to get “free money” as well as equally unscrupulous ERC promoters or “consultants” who mislead innocent business owners into applying for ERC benefits that they did not qualify for (and pay a percentage of the refunds received to these consultants).

Through September 2023, the IRS was flooded with over 3.6 million ERC claims. It has identified a significant number of them as either erroneous or outright fraudulent. The IRS and the Department of Justice have created a task force to investigate and prosecute COVID-19 relief scams involving PPP and ERC claims, but the flood of claims has kept coming.



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This led the IRS to place bogus Employee Retention Credit claims as No. 1 on its 2023 Dirty Dozen list of abusive tax schemes and warning that:

“Promoters ... have been blasting ads on radio and on the internet touting refunds involving Employee Retention Credits. Those promotions can be based on inaccurate information related to eligibility for and computation of the credit.”

Innocent employers who are tricked into applying for ERC and receive erroneous refunds as a result may not be criminally culpable but still are liable to repay the IRS the money they received with interest and possibly will be subject to penalties as well.

By September 2023, the IRS had over 600,000 pending ERC claims in its inventory and was overwhelmed in trying to sort the wheat from the chaff.

The situation was so bad that the IRS publicly declared a moratorium on the processing of any new ERC claims received after Sept. 14, 2023. The moratorium will extend “at least through Dec. 31, 2023.” The IRS has also warned that any pending ERC claims received before the moratorium will be subjected to enhanced review and may be audited and the processing time could extend beyond 180 days.

The IRS’ issuance of Notice IR-2023-193 on Oct. 19, 2023 presented “concerned” employers with a unique opportunity to simply withdraw a previously submitted ERC claim that was made prior to the Sept. 14, 2023 moratorium but not yet paid or subjected to audit.

This is an extraordinary step for the IRS. There are typically no formalized mechanisms for “unringing the bell” in tax cases except by filing a new amended return (also under penalties of perjury) and there is no way to prevent the IRS from auditing an already filed return.

The withdrawal process is simple: It can be done by writing “withdrawn” on the previously filed Form 941-X claiming the credit and having an authorized corporate officer or partner sign and date the withdrawal and faxing it to a designated IRS ERC withdrawal hotline. However, not everyone is eligible to withdraw a claim. Only claims that have not been paid or noticed for audit qualify for withdrawal and even then, the decision on whether to withdraw the claim is not a simple one.

If the employer is actually eligible, but the amount claimed is incorrect, he or she cannot use the IR-2023-193 withdrawal process to correct the claim. A new claim is needed but should first be subjected to rigorous testing by a qualified independent accounting firm with expertise in ERC claim matters. The employer should have this review done in conjunction with and under the supervision of legal counsel both to preserve potential privileges and to have counsel determine whether the employer or its management might be perceived by the IRS as also culpable (“reckless” even if not “willful”) in making an original ERC claim which the IRS may view as fraudulent. Withdrawing the bogus claim is essentially an admission that the original submission, signed under penalty of perjury, was inaccurate and possibly “false.”

Independent advice is critical to deciding whether to withdraw an already filed ERC claim. Most employers who filed ERC claims likely thought or were told by a “consultant” that they qualified for ERC refunds, and they submitted their claims without a real independent review of whether they actually qualified. However, the IRS may view the employer’s conduct as “reckless” for not exercising their own due diligence. Contrary to the promoters’ ads, not everyone qualified for ERC and determining whether a business qualified and, if so, for what ERC benefits requires a detailed review of payroll and operational records as well as an analysis of whether the particular business was sufficiently impacted by COVID-19.

An employer considering withdrawal of an ERC claim should also consider whether the advisor or other “consultant” who helped submit the claim was truly an independent or disinterested party. This is a key factor in seeking relief from civil penalties because a taxpayer can only rely on advice received from independent advisers. The IRS has identified a number of factors which may indicate that an advisor or “consultant” is really a “promoter” whose “advice” will not be considered “independent” in the IRS decision to impose penalties on an employer:

- Unsolicited ads, calls or emails from someone the employer doesn't know or hasn't sought advice from offering consulting services about ERC.
- Statements that the consultant can determine the employer's ERC eligibility quickly on the phone and without any detailed analysis of the employer's business.
- Statements touting ERC as “free money” or that there is nothing to lose by applying for ERC.
- Large upfront fees (typically 10% or more of the ERC amount claimed) and/or offers of refund anticipation loans for the credit amount less the fee.
- A contingent fee based on the amount of the ERC credit claimed (this likely also violates IRS Circular 230 Section 10.27, which provides rules followed by reputable tax practitioners in matters before the IRS and limits contingent fee arrangements to a narrow set of circumstances).

Since September 2023, the tax services have contained almost daily IRS pronouncements about ERC eligibility (in contrast to the original limited guidance issued before 2023 which may have inadvertently created opportunities for unscrupulous promoters to exploit). This is an evolving, high priority issue for the IRS both civilly and criminally, and concerned employers should proceed with caution and with competent, independent counsel.