

IRS Launches Voluntary Disclosure Program to Address Questionable Employee Retention Credits

By Sandra R. Brown, Robert Horwitz, and Luke Ryan

On December 21, 2023, as part of its ongoing effort to address and combat dubious claims for the Employee Retention Credit (ERC), the IRS unveiled a new Voluntary Disclosure Program aimed at helping businesses rectify errors in previously submitted ERC filings. The new initiative comes in response to growing concerns about the legitimacy of certain claims by employers and aggressive marketing tactics by ERC promoters who misled their customers about the credit. The program is intended to address a taxpayer's civil liability. Therefore, at this time, it appears that a participant still could face criminal prosecution for a fraudulent ERC claim. Applications under the Voluntary Disclosure Program are due by March 22, 2024.

I. Background

The ERC, also known as the Employee Retention Tax Credit (ERTC), was established by the CARES Act in March 2020 to provide financial assistance to eligible employers who kept their workforce employed during the COVID-19 pandemic. Despite many legitimate applications, the IRS has encountered an increasing number of questionable ERC claims that, the IRS believes, were caused by aggressive and misleading marketing by certain promoters and tax return preparers. In March 2023, the IRS added the ERC to its annual "Dirty Dozen" list of tax-related scams, signaling the Service's concern about the prevalence of ERC-related fraud. *See our firm's July 27, 2023, blog on the IRS's increased civil and criminal enforcement of the ERC -*

<https://www.taxlitigator.com/irs-steps-up-civil-and-criminal-tax-enforcement-regarding-employee-retention-credit-by-steven-toscher-and-philipp-behrendt/>

II. New ERC Voluntary Disclosure Program

On December 21, 2023, the IRS announced the ERC Voluntary Disclosure Program to give businesses a way to repay erroneously received employee retention credits. In unveiling the new program, IRS Commissioner Danny Werfel emphasized that the program also is intended to help identify promoters who encouraged the unwarranted ERC claims.

Under the new program, employers will need to repay 80% of the ERC that they received. However, if the IRS paid interest on the ERC refund, the employer will not need to repay that interest. The 80% repayment figure was chosen because many ERC promoters charged fees at the time of payment, resulting in recipients not receiving the full ERC amount. "The disclosure program's 80% repayment figure is much more generous than later IRS action," Commissioner Werfel explained, "which includes steeper costs and greater risk. We hope these taxpayers take advantage of this window now."

Employers who are unable to repay the required 80% may be considered for installment agreements on a case-by-case basis. But, while the IRS will not charge program participants interest or penalties on any credits they repay, if the employer is unable to repay the required 80% of the credit at the time of their closing agreement, the employer will be required to pay penalties and interest in connection with entering into an installment agreement. It is not yet clear if the IRS will assert negligence, fraud, or other types of penalties. Nor is it clear at this time whether the IRS will accept an offer in compromise from a taxpayer who is unable to repay due to financial hardship.

To qualify, employers must provide information about the advisors and/or tax preparers who assisted them with their ERC claim. In addition, to be eligible for the program, the following conditions also apply: (1) the employer is not under criminal investigation and has not been notified that they are under criminal investigation; (2) the employer is not under an IRS employment tax examination for the tax period for which they are applying to the program; (3) the employer has not received an IRS notice and demand for repayment of part or all of the ERC; and (4) the IRS has not received information from a third-party that the taxpayer is not in compliance, or has not acquired information directly related to such noncompliance from an enforcement action.

To apply, employers should file Form 15434, *Application for Employee Retention Credit Voluntary Disclosure Program*, using the IRS Document Upload Tool. Employers who outsource payroll to a third-party must ensure that the third-party files the Form 15434.

III. Forthcoming ERC Moratorium Update

In the December 21, 2023, announcement, the IRS also stated that it will, in the near future, provide an update on the status of the ongoing moratorium on the processing of new ERC claims. The moratorium was imposed on September 14, 2023, and extended through the end of 2023 due to concerns that a significant portion of new ERC claims are ineligible. The IRS has continued processing previously submitted claims, but the Service has implemented more detailed compliance reviews.

IV. Special Withdrawal Process for ERC Claims

Finally, in the December 21, 2023, announcement, the IRS continues to urge employers with pending ERC claims to consider a separate withdrawal program that allows taxpayers to remove a pending ERC claim with no interest or penalty. On October 19, 2023, the IRS introduced this Special Withdrawal Option to enable eligible employers to withdraw their submissions, thereby avoiding future repayment, interest, and penalties. Withdrawn claims will be treated as if they were never filed, and no penalties or interest will be imposed. The process applies to ERC claims that have not been paid by the IRS or for businesses that have received a check but have not cashed or deposited it. *See our firm's October 23, 2023, blog on the IRS's withdrawal program -*

<https://www.taxlitigator.com/increasing-fraudulent-erc-claims-and-the-irss-new-withdrawal-process-by-steven-toscher-sandra-brown-evan-davis-and-gary-markarian/>

V. Conclusion

The IRS's newly announced ERC Voluntary Disclosure Program and its ongoing ERC Special Withdrawal Option provide avenues for businesses to rectify erroneous ERC claims while avoiding penalties and interest. If you or a client of yours have concerns about having applied for an ineligible ERC claim, we strongly recommend seeking prompt guidance from experienced and trusted tax counsel.

Sandra R. Brown is a Principal at Hochman Salkin Toscher Perez P.C., and former Acting United States Attorney, First Assistant United States Attorney, and the Chief of the Tax Division of the Office of the U.S. Attorney (C.D. Cal). Ms. Brown specializes in representing individuals and organizations who are involved in criminal tax investigations, including related grand jury matters, court litigation and appeals, as well as representing and advising taxpayers involved in complex and sophisticated civil tax controversies, including representing and advising taxpayers in sensitive-issue audits and administrative appeals, as well as civil litigation in federal, state and tax court.

Robert S. Horwitz is a Principal at Hochman Salkin Toscher Perez P.C., and former Chair of the Taxation Section, California Lawyers' Association, a Fellow of the American College of Tax Counsel, a former Assistant United States Attorney and a former Trial Attorney, United States Department of Justice Tax Division. Mr. Horwitz represents clients throughout the United States and elsewhere involving federal and state administrative civil tax disputes and tax litigation as well as defending criminal tax investigations and prosecutions.

Luke Ryan is an Associate at Hochman Salkin Toscher Perez P.C., and a former clerk to the Honorable John F. Keenan, United States District Judge for the Southern District of New York. Mr. Ryan's was previously an associate in a leading tax firm in New York as well as a New York office of an international law firm that specialized in complex financial and corporate matters. Mr. Ryan served honorably as an infantry officer in the United States Army before attending law school. His practice focuses on civil and criminal tax controversies, white-collar criminal defense, and internal investigations.

Additional information on the firm is available at <http://www.taxlitigator.com>.