

## Tracking the ERC: Voluntary Disclosure Program Deadline Approaching and Other ERC Updates

By Sandra R. Brown and Hunter Keaster

The Employee Retention Credit (ERC) is a refundable tax credit created by the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) in 2020 to help businesses negatively impacted by the COVID-19 pandemic maintain their payroll. The credit has very specific eligibility requirements including full or partial suspension of business operations because of government orders and significant declines in gross receipts during 2020 or the first three quarters of 2021. Despite, or perhaps because of, these complex eligibility requirements, the IRS received a deluge of dubious claims caused by aggressive third-party promoters encouraging (oftentimes ineligible) employers to claim the ERC – receiving a percentage of the (oftentimes illegitimate) refund as payment for their “service.” For employers who have determined their claim is incorrect but have already received the ERC, the IRS created the Employee Retention Credit Voluntary Disclosure Program (ERC-VDP). The program allows employers to repay 80% of the credit to avoid paying interest or penalties, with an approaching deadline of March 22, 2024.

### I. Background

In response to an influx ERC claims, the IRS placed a moratorium on processing claims filed on and after September 14, 2023, while they attempted to sort through the fraud-filled claims filed in the months prior. Along with increased scrutiny of claims and opening criminal investigations, the agency announced the [ERC-VDP](#) to assist in more efficiently sorting through the backlog of claims. The program is available to taxpayers who claimed and received the ERC but are, in fact, ineligible and need to repay the ERC. The program requires volunteers to pay back 80% of the ERC received (no interest payment necessary), cooperate with any information requests from the IRS, and sign an agreement. In exchange, the taxpayer may keep the remaining 20% and it is not taxed as income, the IRS will not charge penalties or interest on the claimed ERC, and the ERC will not be examined on the taxpayer’s employment tax return for the applicable ERC periods.

### II. Common signs of an ineligible ERC claim

The ERC-VDP is open until March 22, 2024, and, with the deadline approaching, the IRS is urging businesses who have claimed the ERC to review their eligibility. The agency shared seven common signs that an ERC claim may be incorrect:

- 1. Too many quarters claimed.** Because eligible businesses must meet strict requirements regarding government orders that caused full or partial suspension of business operations, it is rare for businesses to qualify for all quarters that the credit was available. Third-party promoters may dubiously encourage employers to apply for quarters which they are not eligible for.
- 2. Government orders that do not qualify.** To claim the ERC, government orders must have fully or partially suspended businesses operations for the relevant ERC period, the orders must be caused by the COVID-19 pandemic, and the orders must be in the form of an official government order – guidance, recommendations, and statements do not qualify. Unscrupulous promoters may incorrectly advise employers that they can claim the ERC if government orders did not affect their businesses, but they decided to suspend operations voluntarily.

**3. Incorrect calculations and too many employees.** With the law changing throughout 2020 and 2021, employers should be cautious about claiming the ERC for every employee on their payroll at their full wage. ERC requirements stipulate varying limits and credit amounts and employers must meet certain wage rules to be considered qualified wages. For more details on how to avoid overclaiming the ERC, see [how the credit has changed throughout 2020 and 2021](#).

**4. Citing supply chain issues.** While businesses can qualify for the ERC based on supply chain issues, it is very rare. The ERC includes a very narrow exception for employers whose operations were not fully or partially suspended but their supplier was. But this only applies when the affected employer was unable to operate, and the supplier was fully or partially suspended. Employers who claimed the ERC based on supply chain issues should review eligibility rules before the March 22, 2024, ERC-VDP deadline.

**5. Claiming ERC for too much of a tax period.** It is uncommon for a business to qualify for ERC for an entire calendar quarter if their operations were only suspended for a portion of a calendar quarter. Employers should review their claim to ensure there is no overclaiming of the credit.

**6. Business did not exist or did not pay wages during eligibility period.** To qualify for the ERC, employers must have been paying wages during the applicable tax period. The IRS has begun disallowing claims from taxpayers who have no record of payments to employees or who did not have an employer identification number during the tax period for which they claimed the ERC.

**7. Promoter says there is nothing to lose.** Employers should review their ERC claim if they filed it based on the advice of a promoter told them they had “nothing to lose.” Severe consequences could result from incorrectly claiming the ERC including repayment requirements, penalties, interest, and audit.

Employers who determine that they are, in fact, ineligible for the ERC but have already received it may have the option to participate in the ERC-VDP before March 22, 2024, to avoid future repayment, interest, and penalties in return for the repayment of 80% of the credit received. Employers should speak to a tax professional if they determine that their claim was ineligible and [read more about the seven common signs of ineligibility created by the IRS](#).

### **III. ERC Withdrawal Program**

As noted, the ERC-VDP is only available to employers who have already received and cashed their ERC check. However, if an employer believes their ERC claim to be incorrect and they have either not received the credit or have not yet cashed the check for the credit which they received they may be eligible for the [ERC Withdrawal Program](#). An employer who has filed an incorrect claim which the IRS has not yet paid can withdraw their claim to avoid penalties and interest. Unlike the ERC-VDP, the withdrawal program will continue after March 22, 2024, and employers must return the entire ERC (only 80% is returned in the ERC-VDP).

By participating in the ERC Withdrawal Program, the taxpayer is asking the IRS not to process their entire adjusted employment tax return (Form 941-X, 943-X, 944-X or CT-1X) for the relevant ERC tax

period. As such, employers can only withdraw their claim if it was made on an adjusted employment tax return, if no other adjustments were made on the return, if they are willing to withdraw the entire ERC claim, and if the IRS has not yet paid the claim (if the claim has already been paid, the ERC-VDP may be an option). If other changes were made on the adjusted employment tax return, employers cannot utilize the withdrawal process and must amend the return instead.

#### **IV. Liability of Third-Party Payers**

On February 15, 2024, the IRS released a [General Legal Advice Memorandum](#) stating that certain third-party payers (TPP) are liable for underpayments because of improper ERC claims. TPPs like certified professional organizations, professional employer organizations, and section 3504 agents could be liable if they improperly filed an ERC claim for clients under their own employer identification numbers (EIN). While the CARES Act did not directly assign liability for ineligible claims, [Notice 2021-20](#) applies existing TPP rules which state that “[t]he employer client and the [TPP] will each be liable for employment taxes that are due as a result of any improper claim of the employee retention credit”. Given the increased scrutiny of ERC claims by the IRS, TPP who filed claims under their own EIN should review documentation to ensure eligibility.

#### **V. Tax Relief for American Families and Workers Act of 2024**

Under current law, employers can file an ERC claim any time before April 15, 2025, but Congress is pushing to end the program almost five months earlier with a new tax bill before the Senate. The [Tax Relief for American Families and Workers Act of 2024](#) passed with bipartisan support in the House and is awaiting a vote in the Senate. The bill includes sunseting the ERC by creating a final filing deadline of January 31, 2024. Additionally, the bill seeks to strengthen the agency’s ERC enforcement options. Included in \$78 billion legislation is a provision that would increase the statute of limitations on ERC assessment from five years to six years from the date of filing. The bill would also increase penalties for ERC promoters (as newly defined in the legislation) who aided and abetted in the understatement of a tax liability in a return or ERC claim.

Whether or not January 31, 2024, ends up being the final date for the ERC, Congress is sending a clear message in the bill: crack down on ERC abuse/scams and end the credit earlier than expected. Employers who believe they are eligible for the ERC should not delay in speaking to a tax professional about filing a claim before the credit ends.

#### **VI. Conclusion**

With the IRS’s ERC-VDP ending on March 22, 2024, employers who received the ERC should review documentation to ensure eligibility. Congress is signaling support to the IRS in enforcing ERC fraud and is seeking to put an end to the credit sooner than expected. As such, employers who have concerns about a filed claim or employers who believe they have an eligible claim but have yet to file should act promptly. If you or a client of yours have concerns about having applied for an ineligible ERC claim, we strongly recommend seeking guidance from experienced and trusted tax counsel.

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