

# IRS CRACKS DOWN ON ERC FILINGS – REEXAMINE YOUR CLAIMS NOW

The Employee Retention Credit (ERC) is a federal payroll tax credit designed to help business that continued to pay employees while they were partially or completely shut down due to the COVID-19 pandemic or that experienced a significant decline in gross receipts in 2020 and 2021. While this was intended to help businesses survive the COVID-19 pandemic by encouraging companies to keep their employees on their payroll, ERC fraud has become a major issue for the IRS, as various promoters have encouraged businesses that do not qualify for the credit to file improper ERC claims.

In September 2023, the IRS took the first step in trying to address this issue by establishing a moratorium on new ERC claims to protect businesses from aggressive promoters. While the IRS stated that they would still process claims filed before the moratorium, processing times became much slower as the IRS analyzed the claims with increased scrutiny. In January 2024, the IRS Commissioner stated that the IRS has “no definite timetable” for ending the moratorium.

On Dec. 21, 2023, the IRS highlighted the penalties taxpayers could face for filing ERC claims they are not entitled to. This included penalties up to 75% and possible criminal charges with convictions resulting in prison terms up to five years and fines up to \$250,000. However, to prevent civil penalties, the IRS also introduced the Employee Retention Credit Voluntary Discourse Program (ERC-VDP). This program was developed by the IRS to allow certain taxpayers who received but were not entitled to ERCs to self-identify and repay the ERC. This program will relieve taxpayers from potential ERC audits if resolved through this manner. The deadline to apply to ERC-VDP is March 22, 2024.

Additionally, the latest tax bill, Tax Relief for American Families and Workers Act of 2024, was passed with bipartisan support in the House and is currently awaiting a vote in the Senate. This bill would bring ERC to an end by sunseting the applicable time period for filing an ERC as of Jan. 31, 2024, ending the program much earlier than initially anticipated. Currently, 2020 ERC claims are due by April 15, 2024, and 2021 ERC claims are due by April 15, 2025. The bill also cracks down on ERC promoters while increasing the statute of limitations for ERC assessments to six years.

## PEOPLE

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While ERC could be going away sooner than expected, the IRS urges those who have not filed yet to carefully review the ERC guidelines during the processing moratorium period. The IRS also strongly urges companies to talk to a trusted legal or tax professional – not a tax promoter or marketing firm for assistance with ERC filings.

If your organization previously filed and received ERC refund claims from the IRS, you should assume that you may be hearing from the IRS about your prior ERC claims. We are aware of many organizations which used third-party promoters to process their claims and in many cases the promoters did not adequately support the basis of that claim. As noted above, the IRS has at least five years to audit an ERC claim. You should carefully review your ERC claim filing to determine whether the documents provided by your third-party promoter can withstand an IRS audit, especially those claims relying on governmental orders which caused a partial suspension in your business activities.

If you believe that you have filed an ERC claim improperly or have concerns whether your prior ERC filing could withstand an IRS audit, Armstrong Teasdale's team is well versed in assisting clients through the various ERC challenges outlined. There is still time to participate in the ERC-VDP. If you have any questions relating to these matters or if you need further guidance on any pending or potential ERC claims, please contact Scott Hunt, Crystal Howard or your regular AT lawyer.