

EMPLOYEE RETENTION CREDIT UPDATE

The Latest News on Fast-moving Developments

1. IRS Panicking over bogus ERC claims

a. About \$85 billion appropriated to ERC

b. About 3.8 million refunds issued

2. Progression of news releases reveals concern

a. July 2023 – IR-2023-135, claims national marketing firms guaranteeing refunds for all businesses leads to “businesses filing dubious claims”

b. September 2023 – IR-2023-169, IRS announced a moratorium on processing ERC claims through at least the end of 2023

1. Werfel: “The IRS is increasingly alarmed about honest small business owners being scammed by unscrupulous actors, and we could no longer tolerate growing evidence of questionable claims pouring in.”

2: Werfel: “Businesses should seek out a trusted tax professional who actually understands the complex ERC rules, not a promoter or marketer hustling to get a hefty contingency fee.”

3. Processing time will at least double 180 days

c. October 19, 2023 – IR-2023-193, IRS announced ERC “withdrawal procedures”

1. Werfel: “The IRS is committed to helping small businesses and others caught up in this onslaught of Employee Retention Credit marketing. The aggressive marketing of these schemes has harmed well-meaning businesses and organizations, and some are having second thoughts about their claims. We want to give these taxpayers a way out.”

d. December 6, 2023 – IR-2023-230, initial round of 20,000 letters mailed to businesses announcing disallowed ERC claims

1. Notice focuses on just two problem areas
 - A. Entity not in existence during eligible claim periods
 - B. No paid employees during eligible claim periods
2. Decision subject to admin appeal
3. Werfel: “Audit and criminal investigative work” is extensive and continues
3. Concern over “supply chain” arguments – Chief Counsel Advice Memo AM 2023-005 (July 2023)
 - a. Presents five scenarios of supply chain interruptions
 - b. Just one qualifies as a “governmental shut-down” that prevents operation
4. Withdrawal procedures per IR-2023-193
 - a. Business seeking to withdraw ERC claim must meet all of the following criteria:
 1. Claim filed on an **adjusted employment return** (Forms 941-X, 943-X, 944-X, CT-1X),
 2. Adjusted return was filed only to claim ERC, with **no other adjustments**,
 3. Business wants to withdraw **the entire amount** of the claim, and
 4. Either the IRS **has not paid** the claim, or the IRS has paid the claim but the business hasn’t cashed or deposited the refund check. See: IR-2023-193, pg 2.
 - b. Manner of requesting withdrawal depends on one of three potential scenarios:

1. Business hasn't received a refund, and was not notified of audit,
 2. Business hasn't received a refund but has been notified of audit, or
 3. Business received a refund check but hasn't cashed or deposited it.
- See: <https://www.irs.gov/newsroom/withdraw-an-employee-retention-credit-erc-claim>

c. Procedures in detail

1. No refund and no audit notice

A. Fax withdrawal request to IRS

- i. Request is a copy of the adjusted return

B. In the **left** margin write the word "Withdrawn"

C. In the **right** margin, authorized person signs/dates, prints name and title

- i. "Authorized person" is one who can bind the company as to financial or other legal decisions

D. Fax withdrawal to 855-738-7609

- i. Include a cover letter with name and EIN of business, and authorized person's contact information

E. Follow this procedure for each separate tax period

2. No refund but received audit notice

A. Prepare withdrawal as explained above

B. If an examiner has been assigned, communicate with examiner on how to submit withdrawal

C. If no examiner is assigned, send withdrawal per instructions in the notice

3. Refund check received but not negotiated

A. Prepare the withdrawal request as outlined above

B. Write “VOID” in check’s endorsement space

C. Mail the check, cover letter, and withdrawal form to the IRS

Cincinnati Refund Inquiry Unit

PO Box 145500

Mail Stop 536G

Cincinnati, OH 45250

5. Notification of withdrawal

a. IRS provides written notification whether withdrawal is accepted

1. Withdrawal is not effective until accepted in writing

b. Income tax returns likely need amending if withdrawal is accepted

c. Businesses that “willfully filed fraudulent claims or conspired to do so should be aware, however, that withdrawing a fraudulent claim will not exempt them from potential criminal investigation and prosecution.” IR-2023-193

1. IRS working thousand of ERC audits

2. IRS working with DOR on egregious ERC claims and promoters “who have been ignoring the rules and pushing businesses to apply.” IR-2023-169.

6. The moratorium and the statute of limitations

a. The September 14 decision to suspend ERC processing is purely administrative

b. Decision in no way affects any statutory provision of the code

1. SOL on amended returns and refund claims are controlled by statute

c. Withdrawal procedures not affected by processing moratorium

7. IRS announced “voluntary disclosure program” – IR-2023-230 (December 6, 2023); IR-2023-247 (December 21, 2023); Announcement 2024-3

a. Re-payment of 80% of ERC

1. 20% retained to offset income tax adjustments

b. Participant eligibility

1. No criminal investigation

2. No third-party notice to IRS of non-compliance, nor has IRS otherwise acquired info on non-compliance

3. No employment tax audit pending for periods covered by application

4. No prior notice/demand for repayment of ERC

5. Participants can include third-party payers, professional payroll service, etc.

c. Terms of the program – Participant must:

1. Concede non-eligibility for ERC

2. Payback 80% of ERC received

3. Not be required to repay interest on the ERC; no interest on the 80% if paid in full before signing a closing agreement; interest applies if an installment agreement is set up

4. Not required to amend income tax returns to adjustment payroll tax deductions

5. Provide name/contact info of any person who advised/assisted in making the claim

6. Sign a closing agreement

7. IRS will not assess civil penalties related to the ERC claim if the 80% is full-paid prior to signing a closing agreement

d. Procedures

1. Application to be submitted on Form 15434, Application for ERC Voluntary Disclosure Program

A. Signed under penalty of perjury

B. Submitted by 11:59PM local time on March 22, 2024

2. EFTPS must be used to submit online payment of 80% settlement

A. Each tax period paid separately

B. Installment agreement available if full payment is not possible

3. IRS will prepare a closing agreement under IRC § 7121

A. Agreement must be signed/returned within 10 days

4. Other matters

A. Denial of request to participate is not appealable

B. Executing a closing agreement does not provide immunity from prosecution