

IRS Enforcement News Alert: Employee Retention Credit (“ERC”) Claims

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Businesses and taxpayers should be aware that the IRS has hit the pause button on its Employee Retention Credit (“ERC”) program and is increasing its processing time of claims already received, due to mounting concerns of “unscrupulous” behavior. The moratorium on processing new claims began on September 14, 2023, and will last until December 31, 2023. Businesses that filed claims prior to the moratorium can expect to have their processing time doubled, from 90 days to 180 days, according to the Internal Revenue Service’s recent news release, IR-2023-169.

While the September 14, 2023, news release is focused on ERC claims, the IRS’s Criminal Investigation (“IRS-CI”) division is focused on a variety of COVID-19 related activities that it sees as fraudulent, according to the news release.

The ERC program set out to aid businesses struggling in the wake of the COVID-19 pandemic by providing tax credits for employers to keep employees on the payroll. But the IRS asserts that certain bad actors have put the entire program under increased scrutiny. This announcement, including the statements by IRS Commissioner Danny Werfel, draws a line between those businesses who may have “found themselves victims of aggressive promoters” and those “aggressive promoters and marketers” who are aiding businesses in filing these claims.

To that end, the IRS is offering the proverbial carrot to businesses that are willing to withdraw their claims or voluntarily re-pay their ERC funds. The exact contours of the treatment businesses might receive if they submitted claims that the IRS views as fraudulent or questionable is

unclear, as the settlement program the IRS is developing has yet to be finalized. However, the news release provides some guidance for these businesses during the interim.

Businesses who have submitted “questionable” claims that have not been processed or paid are advised to withdraw those claims—even if the claim is already being audited. The news release is silent as to whether this will completely resolve a business’s pending audit. For businesses that have already submitted claims and received payment, the news release encourages future participation in a settlement program that will “allow the businesses to avoid penalties and future compliance action.” How to deal with businesses that paid a substantial contingency fee to a promoter or marketing firm is still an open question for the IRS.

Of note to promoters of unscrupulous ERC claims, is that the news release reinforces the IRS’s current emphasis on utilizing and expanding “promoter audits” conducted under Internal Revenue Code § 6700, et seq. See e.g. *Tarpey v. United States*, No. 22-35208, 2023 WL 5282601 (9th Cir. Aug. 17, 2023) (Ninth Circuit decision stemming from an I.R.C. § 6700 related action). Future enforcement action related to the ERC program will likely place a significant focus on these so-called “promoters,” particularly with respect to investigations handled by IRS-CI.

If you have claimed an ERC benefit that you are now questioning, or if you have “promoted” such a claim, the IRS’s recent news release should be viewed as a warning to get with your advisor to consider correcting any prior potential misreporting.



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