

Should You Take Advantage of the IRS's Employee Retention Credit Voluntary Disclosure Program?

January 16, 2024

Taxpayers and tax professionals wishing to learn more about the IRS's Employee Retention Credit Voluntary Disclosure Program are invited to attend the Dentons In-House Counsel CLE Webinar Series presentation titled “**Employee Retention Credit: Should We Keep It or Give It to the IRS?**,” from 1:00-2:00 pm EST on January 17, 2024 presented by **Mark Loyd**, **Greg Rhodes**, and **Helen Cooper**. They will provide a comprehensive overview of the ERC, detailed tips for preparing for an IRS Audit, and insights for in-house counsel considering whether to keep ERC funds or return them, including navigating the VDP. To register for this free event please [click here](#).

The Employee Retention Credit is a legitimate pandemic-era credit designed to encourage businesses affected by the pandemic to avoid laying off employees. Since its inception, the ERC has surpassed expectations in its overwhelming popularity. Levels of ERC claims have remained high years after the ERC ended as employers have continued to file amended employment tax return claims to seize on the ERC opportunity before the statute of limitations for filing a claim expires.

The ERC has also been a hot-button topic with the IRS. Following the unexpected popularity of the credit, the IRS has engaged in a public relations campaign to warn the unwary of ERC scams. Beginning on September 14, 2023, the IRS announced a moratorium on retroactive ERC claims. The moratorium was followed by the announcement of a withdrawal process allowing “victims of aggressive promoters” to withdraw pending claims and repay improper refunds.

Most recently, on December 21, 2023, the IRS launched the Voluntary Disclosure Program to give eligible taxpayers the opportunity to address potentially erroneous ERC claims by repaying only 80 percent of the credit amount received. **The VDP will only be available until March 22, 2024.**

The VDP is designed to encourage taxpayers not entitled to the credit to self-identify and repay ERC funds. To participate, a taxpayer must cooperate with any requests from the IRS for information and sign a closing agreement.

The advantage of the VDP is that, provided the settlement funds are paid before the signing of the closing agreement, taxpayers will be able to retain 20 percent of the claimed credit, which will not be taxed as income; not be charged interest or penalties on the ERC repaid; not be required to amend federal income tax returns to reduce wage expense deductions; and, not have their ERC claims audited by the IRS.

Repayment of 80 percent of the credit must be made before signing the Closing Agreement. If the taxpayer cannot pay the 80 percent, they can apply for an installment plan with the IRS. However, taxpayers paying pursuant to an installment plan will pay interest and penalties.

Eligibility:

To be eligible for the VDP, the taxpayer must meet all the following criteria:

- have claimed and received an ERC in the form of a credit applied to payroll taxes, or refund;
- no longer believe in its entitlement to the claim;
- not be currently under, or notified of, a pending criminal investigation;
- not be the subject of third-party information or an enforcement action relating to ERC noncompliance;
- not be under an employment tax examination for the applicable tax period(s); and
- not have received a prior notice and demand from the IRS for the claimed ERC's repayment.

We find that our clients often need help with determining whether they are entitled to their claims.

The IRS sent 20,000 letters denying the ERC and will send a second round of letters for the 2020 and 2021 tax years. If the letter is received prior to opting into the VDP, the 80 percent repayment plan will not be available. However, pending ERC claims may be withdrawn. Additionally, taxpayers that are ineligible for the withdrawal program and the VDP may amend returns claiming the ERC.

Applying for the VDP:

If eligible, taxpayers opting into the VDP need to file Form 15434, Application for Employee Retention Credit Voluntary Disclosure Program and, if the ERC was claimed in 2020, Form SS-10. To be considered for an installment plan, include a Form 433-B, Collection Information Statement for Business, with the application.

The application must be signed by an authorized person and uploaded using the IRS Document Upload tool by 11:59 PM on March 22, 2024. If a third-party filed the employment tax returns, then that third-party will need to apply for the VDP.

After submission, the IRS will mail a letter accepting or rejecting the application. If rejected, a specific reason for the rejection will be included. If accepted, the IRS will mail a Closing Agreement that must be signed and returned, with payment, within 10 business days.

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