Navigating the Latest IRS Updates on Employee Retention Credit Claims

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The IRS continues to alert taxpayers of misinformation regarding the Employee Retention Credit (the "ERC") and the serious consequences of filing improper ERC claims. On July 25, the IRS hosted a Webinar for Tax Practitioners, which covered an overview of the ERC program, key areas of compliance, how to spot and report ERC fraud, and tips on how to steer your clients away from it. The IRS also included ERC scams as part of its "dirty dozen" list of fraudulent tax schemes for 2023.

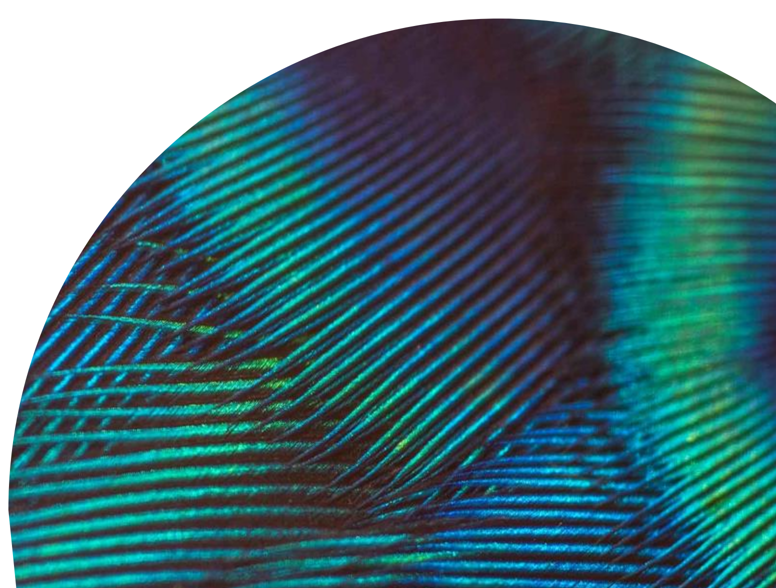
The ERC is a legitimate tax credit designed to help businesses and tax-exempt organizations that continued to pay their employees while being shut down by government order during the COVID-19 pandemic. No sooner had the ERC program begun, however, than third-party promoters started advertising "risk-free" applications for the credit. Some of these promoters are legitimate and carefully analyze and document their analysis. However, certain promoters do not evaluate the taxpayer's overall tax situation or qualification for the credit.

To qualify for the ERC, businesses had to meet certain criteria, including being shut down by government order, experiencing significant declines in gross receipts, or qualifying as a "recovery startup." Each of these options had to fit within certain quarters of 2020-2021. There are also factors excluding participation in the ERC. For instance, taxpayers are not allowed to claim the ERC for wages reported as payroll costs if the taxpayer obtained loan forgiveness under the Payroll Protection Program. Taxpayers are also required to reduce wage deductions claimed on their business' federal income tax returns by the amount of the ERC.

The pandemic may be over, but these schemes are still being advertised. According to IRS Commissioner Danny Werfel, "The aggressive marketing of the Employee Retention Credit continues preying on innocent businesses and others." Werfel further warned that "Aggressive promoters present wildly misleading claims about this credit. They can pocket handsome fees while leaving those claiming the credit at risk of having the claims denied or facing scenarios where they need to repay the credit."

These types of announcements from the IRS are a sure sign enforcement action is coming. Even unwary taxpayers who file invalid claims can nonetheless be on the hook for repaying the credit, as well as interest and significant penalties. And, of course, willfully false filings risk criminal prosecution. Businesses and non-profit entities should beware of ERC solicitors promising an "easy application process," guaranteed eligibility or a determination "within minutes," and "risk-free" filings. To avoid these pitfalls, the IRS suggests working with a trusted tax professional, and to not apply for the ERC unless you believe you are legitimately qualified for the credit.

If you have filed an ERC claim and are now having second thoughts about whether you qualified, there are steps you can take to limit your exposure. Similarly, if you are experiencing an audit of an ERC claim, you should contact an experienced IRS tax controversy attorney.



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