

Employee Retention Credit (ERC) Moratorium and Amnesty Program: What You Need to Know

Dentons Federal Tax Controversy Insights

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KEY CONTACTS

Gregory Rhodes
Michelle Abrams Levin
Ronald Levitt
Mark A. Loyd
Logan Abernathy
Sidney W. Jackson, IV
Kristin Martin Centeno

The employee retention credit, or “ERC,” was introduced in 2020 as a part of the CARES Act to encourage businesses to keep workers on the payroll in 2020 and 2021 during the COVID-19 pandemic. For eligible businesses, the ERC provides payroll tax credits for wages and health insurance paid to employees during those difficult years. The ERC program ended with the enactment of the Infrastructure Investment and Jobs Act in November 2021, but businesses can still claim ERC credits retroactively for a period of three years.

Since the time the ERC was introduced, the IRS has issued ad hoc guidance on the program, which has not been vetted by the public or the courts. In recent weeks, the IRS decided to issue a moratorium on ERC payments and put into place a limited amnesty program for certain participants to unwind what the IRS perceives to be abusive claims. The IRS’s changing parameters for a program Congress created to help struggling businesses has put many well-intentioned taxpayers in a difficult position of either being unable to obtain their credits or left wondering whether they should withdraw the claims altogether.

The Moratorium

The ERC provided a valuable tool to businesses and employees. However, in a September 14 news release, [IR-2023-169](#), the IRS announced an immediate moratorium on retroactive ERC claims. ERC claims filed after September 14, 2023, will not be processed before the end of the year, and claims filed before then will be under “enhanced scrutiny,” with the standard processing goal of 90 days being increased to 180 days. This

moratorium comes in response to a flood of what the IRS believes to be ineligible claims resulting from aggressive marketing and promotion of the credits.

The Amnesty Program and Process

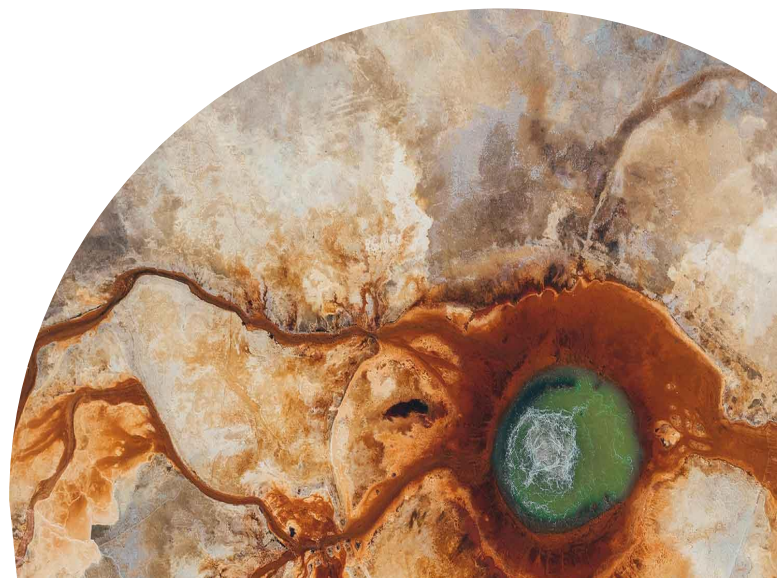
In the moratorium announcement, IRS officials stated that there would be an opportunity for taxpayers to withdraw ERC claims that have not yet been processed. In an October 19 news release, [IR-2023-193](#), the IRS provided more details on the withdrawal process and provided links to new resources to assist employers and tax professionals through the process. These resources include an [interactive eligibility checklist](#) and answers to frequently asked questions.

The new withdrawal option allows employers who filed ERC claims that have not yet been processed to withdraw their claims, avoiding possible repayment, interest, and penalties. The October 19 news release provides the four requirements for employers who wish to withdraw their ERC claims through this new process:

1. The employer made the claim on an amended employment tax return.
2. The employer filed the amended return only to claim the ERC, and no other adjustments were made.
3. The employer requests the withdrawal of the entire ERC claim.
4. The employer has not yet received a refund from their ERC claim, or the employer has not cashed or deposited the check if they were issued a refund.

Employers withdrawing an ERC claim should be careful to follow the strict procedural requirements for withdrawals. These procedures differ depending on if the employer has received a refund, if a refund check has been cashed or deposited, or if the employer has been notified that their claim is under audit. After an employer submits their withdrawal request, the IRS will respond with a letter accepting or rejecting it.

Because IRS informal notices are the only source of guidance on this Congressional authorized program, it is difficult to discern whether the limitations imposed by the IRS are overly restrictive. Employers considering withdrawal of the ERC claims should consult with their tax advisors and determine whether withdrawal is right for them. Given the ambiguities associated with ERC claims and eligibility, the analysis of whether, when, and how to file a withdrawal of an ERC claim could involve a complex analysis.



FEDERAL TAX CONTROVERSY TEAM

Alabama



Michelle Abrams Levin
Shareholder
Huntsville
michelle.levin@dentons.com



Ronald Levitt
Shareholder
Birmingham
ronald.levitt@dentons.com



Gregory Rhodes
Shareholder
Birmingham
gregory.rhodes@dentons.com



Logan Chaney Abernathy
Senior Managing Associate
Huntsville
logan.abernathy@dentons.com



Sidney W. Jackson, IV
Senior Managing Associate
Birmingham
sidney.jackson@dentons.com



Kristin Martin Centeno
Managing Associate
Birmingham
kristin.martin@dentons.com



Sarah Green
Managing Associate
Huntsville
sarah.green@dentons.com



Emily C. Ellis
Associate
Birmingham
emily.ellis@dentons.com



Sarah Myers Raben
Of Counsel
Huntsville
sarah.raben@dentons.com



Sarah Ray
Of Counsel
Huntsville
sarah.ray@dentons.com

*Licensed only in Illinois and Missouri

Indiana



Stephanie Bruns
Senior Managing Associate
Indianapolis
stephanie.bruns@dentons.com



Brett Miller
Counsel
Indianapolis
brett.miller@dentons.com

Iowa



Michael Gilmer
Special Counsel
Des Moines
michael.gilmer@dentons.com

Kentucky



Chaz Lavelle
Partner
Louisville
charles.lavelle@dentons.com



Mark A. Loyd
Partner & Co-Leader,
Tax National Practice Group
Louisville
mark.loyd@dentons.com



Bailey Roese
Partner
Louisville
bailey.roese@dentons.com

Pennsylvania



Frank Marano
Shareholder
Pittsburgh
frank.marano@dentons.com



Michael Silverman
Shareholder
Pittsburgh
michael.silverman@dentons.com

Utah



Gary Thorup
Shareholder
Salt Lake City
gary.thorup@dentons.com