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THE TAX LAWYER

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### IRS Reveals Voluntary Disclosure Program To Pay Back ERC Tax Credits



Did you claim the Employee Retention Credit (ERC) that has been in the news so much? The IRS has cracked down hard, and now even has a way for employers to step forward and pay back amounts that perhaps should not

have been awarded in the first place. As part of an ongoing initiative aimed at combating dubious Employee Retention Credit (ERC) claims, the Internal Revenue Service has a new Voluntary Disclosure Program to help businesses who want to pay back the money they received after filing ERC claims in error. The new disclosure program, which has been in the works for several months, is part of a larger effort at the IRS to stop aggressive marketing around ERC that misled some employers into filing claims. The special disclosure program runs through March 22, 2024, and the IRS added provisions allowing repayment of 80% of the claim received.

The IRS also continues to urge employers with pending ERC claims to consider a separate withdrawal program that allows them to remove a pending ERC claim with no interest or penalty. The IRS has already received more than \$100 million in withdrawals as the agency continues intensifying audits and criminal investigation work in this area.

As these special initiatives for ERC continue, the IRS will provide an update in the new year on the status of the moratorium. Additionally, the IRS mailed out 20,000 denial letters to ERC claimants earlier this month.

Interested employers must apply to the ERC Voluntary Disclosure Program by March 22, 2024. Those that the IRS accepts into the program will need to repay only 80% of the credit they received. If the IRS paid interest on the employer's ERC refund claim, the employer doesn't need to repay that interest. Employers who are unable to repay the required 80% of the credit may be considered for an installment agreement on a case-by-case basis, pending submission and review of a Form 433-B, Collection Information Statement for Businesses, available on IRS.gov, and all required supporting documentation.

The IRS will not charge program participants interest or penalties on any credits they repay. However, if the employer is unable to repay the required 80% of the credit at the time of signing their closing agreement, then the employer will be required to pay penalties and interest in connection with entering into an installment agreement.

The IRS selected an 80% repayment because many of the ERC promoters charged a percentage fee that they collected at the time of payment or in advance of the payment, and the recipients never received the full amount.

To qualify for this program, the employer must provide the IRS with the names, addresses and telephone numbers of any advisors or [tax preparers](#) who advised or assisted them with their claim and details about the services provided. Further qualifications and program details are in [Announcement 2024-3](#), posted today on IRS.gov.

As part of this expanding effort for employers that claimed an erroneous or excessive ERC, the IRS also announced today it has started sending up to 20,000 letters with proposed tax adjustments that will recapture the erroneously claimed ERC. These mailings – which are on top of the 20,000 denial letters announced earlier in December - are currently just for tax year 2020, and work continues for tax year 2021, with additional mailings planned. If the IRS identifies an employer that has received excessive or erroneous ERC, the agency will reclaim that ERC through normal tax assessment and collection procedures.

“These letters are another incentive for businesses that believe they received an erroneous Employee Retention Credit payment to come forward and participate in the disclosure program,” Werfel said. “Our compliance activities involving these payments continue to accelerate, and the disclosure program’s

80% repayment figure is much more generous than later IRS action, which includes steeper costs and greater risk. We hope these taxpayers take advantage of this window now.”

ERC Voluntary Disclosure Program: Who can apply? A variety of ERC recipients can apply. Any employer who already received the ERC for a tax period but isn’t entitled to it can apply if the following are also true:

- The employer is not under criminal investigation and has not been notified that they are under criminal investigation.
- The employer is not under an IRS employment tax examination for the tax period for which they’re applying to the Voluntary Disclosure Program.
- The employer has not received an IRS notice and demand for repayment of part or all of the ERC.
- The IRS has not received information from a third party that the taxpayer is not in compliance or has not acquired information directly related to the noncompliance from an enforcement action.

How to apply. To apply, the employer must first file [Form 15434, Application for Employee Retention Credit Voluntary Disclosure Program](#), available on IRS.gov. This form must be submitted using the IRS [Document Upload Tool](#). Employers will be expected to repay their full ERC, minus the 20% reduction allowed through the Voluntary Disclosure Program. Employers who are not able to pay the amount in full will have the option to set up an installment agreement under certain conditions.

Employers who outsource their payroll must apply through the third party. Many employers outsource their payroll obligations to a third party who reports, collects and pays employment taxes on the employer's behalf using the third party's Employer Identification Number. In this situation, the third-party, not the employer, must file Form 15434. See the form and its instructions for details.

Help options for those considering applying. As part of a larger set of information on ERC, the IRS has provided a set of [Frequently Asked Questions](#) to help employers understand the terms of the program. Once the employer has applied to the program and submitted their Form 15434, an IRS employee will contact them to go over the application and answer any questions.

Next steps after an application is approved. If the IRS approves the employer's application, they will mail the employer a closing agreement. The employer must then repay 80% of the ERC they received, either online or by phone, using the [Electronic Federal Tax Payment System \(EFTPS\)](#). EFTPS is the Treasury Department system that most businesses already use to pay various federal tax obligations.

If the taxpayer is unable to pay the amount in full, they may enter into an installment agreement with the IRS to pay over time. However, under the standard installment agreement policy, penalties and interest will apply, so the IRS encourages those who cannot pay in full to consider obtaining a loan from a financial institution to avoid the costs of an installment agreement with the IRS. Once payment has been made, the employer must return the signed closing agreement to the IRS.

Ongoing ERC initiatives. The new Voluntary Disclosure Program is just the latest step taken by the IRS in its ongoing fight against ERC fraud.

- In July, the IRS said it was shifting its focus to review ERC claims for compliance concerns, including intensifying audit work and criminal investigations on promoters and businesses filing dubious claims. The IRS has hundreds of criminal cases being worked, and thousands of ERC claims have been referred for audit.
- Following concerns about aggressive ERC marketing from tax professionals and others, the IRS announced Sept. 14 a [moratorium on processing new ERC claims](#). Enhanced compliance reviews of existing claims submitted before the moratorium is critical to protect against fraud and also to protect businesses and organizations from facing penalties or interest payments stemming from bad claims pushed by promoters.
- Then, earlier this month, the IRS began sending an initial round of more than 20,000 letters to employers disallowing their ERC claims either because their business did not exist, or they didn't have employees for the period covered by their claim.
- As mentioned earlier, the IRS also announced today it has started sending letters to up to 20,000 employers that claimed an erroneous or excessive ERC that propose tax adjustments that will remove the ERC.
- In addition to these efforts, IRS audit and Criminal Investigation work involving ERC continues to expand involving dubious claims. The IRS has more than 300 criminal cases being worked with claims worth

almost \$3 billion, and thousands of ERC claims have been referred for audit.

IRS reminder: Still time to withdraw pending ERC claims. The IRS is also continuing to accept and process requests to [withdraw an employer's full ERC claim](#) under the special withdrawal process. Employers have until at least the end of the year to request a withdrawal.

The IRS continues to see a large amount of interest in the withdrawals, with more than \$100 million from pending applicants withdrawn by early December. With the announcement of the Voluntary Disclosure Program today, the IRS continues to urge pending applicants to review their claims.

This withdrawal option allows certain employers that filed an ERC claim but have not yet received a refund to withdraw their submission and avoid future repayment, interest and penalties. Employers that submitted an ERC claim that has not yet been paid can withdraw their claim and avoid the possibility of getting a refund for which they're ineligible. They can also withdraw their claim if they've received a check but have not yet deposited or cashed it.

The IRS created the withdrawal option to help [small business](#) owners and others who were pressured or misled by ERC marketers or promoters into filing ineligible claims. Claims that are withdrawn will be treated as if they were never filed. The IRS will not impose penalties or interest.

During this period, the IRS warns taxpayers to use extreme caution before applying for the ERC as aggressive maneuvers continue by marketers and scammers. In addition, the IRS continues to urge employers who submitted claims to review the ERC requirements and talk to a trusted tax professional about their eligibility amid misleading marketing around the credit.

When properly claimed, the ERC is [a refundable tax credit](#) designed for businesses that continued paying employees during the COVID-19 pandemic while their business operations were either fully or partially suspended due to a government order, or had a decline or significant decline in gross receipts during the eligibility periods. For more information on ERC eligibility, see the ERC [frequently asked questions](#) and the ERC Eligibility Checklist, which is available as an [interactive tool](#) or as a [printable guide](#).

*Check out my [website](#).*