

Second Employee Retention Credit Voluntary Disclosure Program Provides Relief for Some Employers

AUGUST 20, 2024

A version of this blog has been published in [Law360](#).

On August 15, 2024, the IRS announced a second Employee Retention Credit (ERC) Voluntary Disclosure Program available to certain employers who wish to self-report that they erroneously received credits for the 2021 tax year. To those that qualify, the program offers an opportunity to avoid penalties and interest by repaying a portion of the credits received.

However, the program is not entirely a selfless act of administrative grace. Participants are required to provide information about the advisors or preparers who encouraged or assisted in making the erroneous claims. In this respect, the program appears to be designed as an extension of the IRS's ongoing enforcement campaign against advisors and tax preparers that improperly promoted the ERC to ineligible employers. The IRS blames such unscrupulous promoters for a "wave of improper claims" that have beleaguered the organization. In [a prior news release](#), the IRS boasted that its Office of Promoter Investigations has already received hundreds of referrals from internal and external sources, and this program appears, in part, to be an incentive to encourage more referrals.

KEY DETAILS OF THE PROGRAM

- **Application Deadline:** Participants must apply by November 22, 2024.
- **Applicable Tax Periods:** The program is open only for claims filed for 2021 tax periods.
- **Repayment Requirement:** Accepted applications must repay 85% of the credits received.
- **Penalty and Interest Waiver:** Participants can avoid civil penalties and interest if they repay the 85% before signing the closing agreement. Those unable to do so may qualify to complete repayment in installments but will face penalties and interest under the standard policy for such installment agreements.
- **Information Disclosure:** Participants must provide information about the advisors or tax preparers who assisted with their ERC claims. This includes the name, address, and phone number of the preparers or advisors who assisted with the claim and a description of the services provided.

The full details of the program have been published in [IRS Announcement 2024-30](#).

ELIGIBILITY CRITERIA

The IRS has published [an FAQ](#) regarding the eligibility criteria that interested parties should review. Notably, persons who are currently under criminal investigation or who have been notified that the IRS intends to commence such an investigation are not eligible. The program is intended to settle erroneous, yet non-willful ERC claims and does not grant immunity from criminal prosecutions.

Generally, any participant that has claimed the ERC for tax periods in 2021 and has received a credit or refund prior to August 15, 2024, is eligible to participate in this second ERC Voluntary Disclosure Program, provided that:

1. The participant is not under criminal investigation and has not been notified that the IRS intends to commence a criminal investigation;
2. The IRS has not received information from a third party alerting the IRS to the participant's noncompliance, nor has the IRS acquired information directly related to the noncompliance from an enforcement action;
3. The participant is not under an employment tax examination by the IRS for any tax period(s) for which the taxpayer is applying for this second ERC Voluntary Disclosure Program;
4. The participant has not been notified by the IRS that the ERC they received is being recaptured for any tax period(s) for which the taxpayer is applying for this second ERC Voluntary Disclosure Program; and
5. The participant has not previously received notice and demand for repayment of all or part of the claimed ERC.

Participants that claimed the ERC through a third-party payer that filed an employment tax return under its own employee identification number are eligible under the program, but the third-party payer must submit the application on the participant's behalf.

CONTEXT AND IMPLICATIONS

Earlier this month, the IRS announced that it has recently sent out 28,000 disallowance letters to businesses whose claims showed a high risk of being incorrect. This program may serve to whittle down the number of outstanding cases wherein the IRS has already paid out claims that were substantially similar to those denied. For employers that have received such a payout, the program promises some substantial benefits, and peace of mind, but is not without its drawbacks.

Benefits

- **Financial Relief:** The program offers what will be seen as a good bargain to some by waiving interest, requiring repayment of only 85% of the credit with no penalties, and not requiring a reduction in the income tax deduction for wage expenses (for the 15% of the ERC not repaid). Additionally, participants can keep any interest previously paid by the IRS for the ERC.
- **Finality of Income Tax Returns:** Under the settlement offered by the IRS, participants are not required to reduce wage expense deductions with respect to any of the previously claimed ERC and are not required to file amended income tax returns. Further, participants are not required to report any income as a result of the settlement.

Drawbacks

- **Penalties for Non-Repayment:** Participants that are unable to repay 85% of the credits received remain subject to penalties and interest. Unfortunately, this may make the program less appealing to many employers that initially claimed the credit due to financial hardship.
- **No Criminal Protection:** The program does not protect against future criminal investigations or prosecutions. Participants that submit an application have little assurance that the IRS will accept their erroneous ERC claims were not fraudulent. As of July 1, 2024, the IRS Criminal Investigation division has initiated 460 criminal cases.
- **Disclosures Regarding Advisors/Preparers:** Some employers may have second thoughts about reporting information regarding their advisors or tax preparers to the IRS. Employers will have little information about what

actions the IRS will take against these advisors, if any, but the disclosures are likely to be used in the ongoing enforcement campaign against ERC promoters.

CONCLUSION

The second ERC Voluntary Disclosure Program represents a significant step in the IRS's efforts to address and rectify improper ERC claims while also obtaining information for use in its enforcement campaign against promoters of abusive tax practices. Employers considering the program should carefully weigh the benefits and potential risks with a knowledgeable attorney.

For more information or to discuss further, please contact the authors or your Winston relationship attorney.

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