

## Tax Credits & Incentives

Employment Retention Credit | January 2023

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The Employee Retention Credit (the “ERC” or “the credit”) was initially enacted as part of the CARES Act, signed into law on March 27, 2020, to provide a refundable tax credit against certain employment and payroll taxes for eligible employers to claim against qualified wages and certain healthcare benefit costs that were paid to or for the benefit of its employees while the employer’s business was impacted by the COVID-19 pandemic.

One of the primary policy rationales outlined by Congress prior to establishing the ERC opportunity was to provide critical relief to small and mid-sized businesses by allowing those businesses to obtain recompense for the negative impact that the COVID-19 pandemic had on their business. In fact, Congress doubled-back to make an even greater effort to increase taxpayer participation and capture more eligible taxpayers within the affected demographic by easing the thresholds for employer eligibility during tax year 2021.

Since the inception of the ERC, an increasing number of credit and incentive mills and third-party organizations have entered the marketplace seeking to prey on unsuspecting business owners who do not understand the complexity involved under the ERC framework related to filing a refund claim in accordance with the established IRS guidelines. The IRS has issued direct guidance cautioning employers against advertised schemes and direct solicitations promising tax savings that seem too good to be true. Some third parties are taking improper positions related to taxpayer eligibility for and computation of the credit, and employers should be wary of third parties who are advising them to claim the ERC when they may not qualify. These third parties often charge a large upfront fee, or a contingency fee based on the amount of the refund claimed filed, without properly advising the client of other potential tax obligations that arise as a result of their claiming the credit. This places a significant risk on the employer, as taxpayers are always responsible for the information reported on their tax returns. Improperly claiming the ERC could result in taxpayers being required to repay the credit along with substantial penalties and interest assessed by the IRS, which can amount to an increased cashflow burden placed on businesses that were already in an undesirable liquidity position.

As fiduciaries, we have an obligation to our clients to bring these developments to their attention and protect them from any potential harm resulting from their engagements with predatory consulting practices that can ultimately amount to fraudulent tax filings. The IRS has projected that the fraud related to incorrect third-party filings claiming a refund based on the ERC is estimated to be in the

trillions thus far. With the proper documentation, businesses may receive up to \$25,000 per employee across tax years 2020 and 2021, depending on a litany of qualifying factors. Due to the complexity of the ERC analysis and refund claim calculation, it's essential that we make clients aware of these scams, and inform them on the correct procedures, processes, and qualifying criteria to receive a refund when claiming the ERC to avoid filing potentially fraudulent tax claims with the IRS.

Taxpayers still have an ample amount of time to file their ERC refund claims within the statute of limitations, but as taxpayers push to file their ERC refund claims with the IRS throughout calendar year 2024, they should be cautious of third-party callers, sweeping claims about large refund amounts, and any outside contact made by a salesperson who is not a qualified tax professional.

Due to the dynamic nature of the underlying ERC legislation and IRS guidance, some clients may self-disqualify themselves for availability to claim the ERC, but the best practices advice in that situation is to consult with the attorneys at Howard & Howard to obtain a thorough analysis as to their eligibility to claim the ERC. Howard & Howard has the appropriate attorney infrastructure in place to properly analyze a client's ability to claim the credit and accurately calculate the amount that the client may be due.

For more information about filing ERC refund claims, and to begin your refund claim process, please contact tax attorney Jake Kacynski of Howard & Howard Attorneys PLLC.



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