

IRS Announces ERC Voluntary Disclosure Program

On December 21, 2023, the IRS announced a new [Voluntary Disclosure Program](#) (VDP) for employers that received “questionable” Employee Retention Credit (ERC) refunds. This alert provides a brief overview of the new program and the practical implications of voluntary disclosure under the VDP.

Brief Background on the ERC

The ERC is a COVID-era payroll tax credit designed to incentivize businesses to retain employees during the economic hardship experienced by many companies during the pandemic. Businesses could generally qualify by satisfying one of two tests: (1) a “decline in gross receipts” test, which required that the business experience a qualifying decline in its gross receipts as compared to the 2019 year; or (2) a “governmental order” test, which required that the business’s operations be partially or fully suspended due to a governmental order.

The ERC resulted in a number of aggressive consulting companies offering to advise on the ERC in exchange for a percentage of the credit received by the business. In many cases, these companies encouraged businesses to file ERC refund claims that were aggressive. The IRS eventually caught wind of these claims and made various efforts to warn taxpayers about the dangers of working with these consulting companies, including adding the ERC to its [2023 “Dirty Dozen” list](#).

As of September 14, 2023, the IRS Criminal Investigation Division had identified billions of dollars of [suspected ERC fraud](#).

Initial ERC Refund Claim Moratorium and Withdrawal Guidance

In September 2023, the IRS announced [an immediate stop to the processing of new ERC claims](#) until at least December 31, 2023 based upon the IRS’s “rising concerns about a flood of improper ERC claims.” That moratorium is still in place.

Additionally, in October 2023, the IRS introduced [a program](#) pursuant to which taxpayers who had applied for ERC refunds but had not received or cashed a refund check could withdraw their claim without exposing themselves to interest and penalties. According to the IRS, more than \$100 million in ERC claims have already been withdrawn using this program.

While useful for some, the vast majority of taxpayers claiming the ERC cashed

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their refund checks (and paid associated contingent fees to ERC consulting firms) long ago, making the withdrawal program of limited utility to the majority of ERC claimants.

The VDP Program

In December 2023, the IRS officially [announced the specifics of the ERC VDP](#), in which IRS Commissioner Danny Werfel noted that the VDP “provides a much-needed option for employers who were pulled into [ERC] claims and now realize they shouldn’t have applied.”

Taxpayers who participate in the VDP are **only required to repay 80 percent of the credit that they received**, and there is no requirement to repay any amount of interest that the IRS paid to the taxpayer with respect to the ERC claim. The IRS’s decision to accept less than full repayment of the refund amount is driven by the fact that many taxpayers paid contingent fees to ERC consulting firms that may no longer exist.

In addition, participating taxpayers will not be charged interest or penalties on any credits that they repay. For those taxpayers who are unable to repay the requisite 80 percent of their refund to the IRS, installment agreements may be available (but interest and penalties may apply). The IRS has also provided that participants are not required to reduce their payroll expense deduction for any ERC that is returned under the VDP, meaning that taxpayers may file an amended return to increase their previously reduced payroll expense deduction.

In order to participate in the ERC VDP, taxpayers must satisfy **all** of the following requirements (which are laid out in [IRS Announcement 2024-3](#)):

1. The taxpayer received the ERC for an eligible tax period which they were not entitled to.
2. The taxpayer is not under criminal investigation and has not been notified that they are under criminal investigation.
3. The taxpayer is not under an IRS employment tax examination (*i.e.*, audit) for the tax period(s) for which they are applying for the VDP.
4. The taxpayer has not received an IRS notice or demand for repayment of part or all of the ERC.
5. The IRS has not received information from a third party that the taxpayer is



not in compliance and has not acquired information directly related to the taxpayer's noncompliance from an enforcement action.

6. The taxpayer agrees to provide the IRS with the names, addresses, and telephone numbers of any advisors or tax preparers who advised or assisted them with their ERC claim as well as a description of the services provided by that advisor or preparer.

Taxpayers that are interested in participating in the ERC VDP must file [Form 15434](#), *Application for Employee Retention Credit Voluntary Disclosure Program*, through the [IRS Document Upload Tool](#).

Note that any taxpayers who outsource their payroll to a third party who reports, collects and pays payroll on their behalf must request that the third party (*i.e.*, not the taxpayer) file Form 15434. If the taxpayer is approved for the VDP, the IRS will mail the taxpayer a closing agreement. Receipt of that closing agreement triggers the 80 percent repayment feature of the program.

The ERC VDP runs until **11:59 pm on March 22, 2024**, meaning that eligible taxpayers must apply to the program by that date in order to participate.

Practical Insight

In December 2023, the IRS mailed 40,000 ERC-related notices to taxpayers. While half of these notices were simply denials of ERC refund claims, the other half contained proposed tax adjustments designed to recapture improperly claimed ERC refunds. These adjustment letters covered only 2020, which (because of the function of the credit) is less likely to have given rise to fraudulent claims. The IRS indicated that it continues to work on mailings for 2021 which, in most cases, will be the time period for which "questionable" claims were submitted.

For further information (in the form of FAQs) regarding the newly announced VDP, please visit the [IRS website](#).

All claimants should immediately reach out to a trusted advisor to determine the strength of their claim. For more information about the ERC, VDP or another related matter, please contact [Michael Goller](#), [Joe Rekrut](#) or your Reinhart attorney.

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