

A tax periodical for the non-profit community

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Employee Retention Credit – 2021 Voluntary Disclosure Program

The Internal Revenue Service (“IRS”) has opened a limited time Voluntary Disclosure Program (the “Program”) to help businesses fix incorrect Employee Retention Credit (“ERC”) with respect to 2021. The Program will run until November 22, 2024 and allows businesses a chance to self-correct improper and/or questionable ERC claims with respect to the 2021 filing period. The Program permits businesses to return 85% of the improper ERC claim received (organization may keep 15%) and avoid future audits, penalties and interest.

The IRS has put in place an aggressive compliance program to identify and select improper ERC claims for audit. As a reminder, the ERC was available in 2021 for the first, second and third quarters of 2021; however eligibility was determined based on the specific circumstances of your organization.

The IRS has advised, “[t]he limited reopening of the Voluntary Disclosure Program provides an opportunity for those with improper claims to come in ahead of IRS compliance work and get a discount on repayments,” said IRS Commissioner Danny Werfel. “This is especially important given increasing IRS compliance actions involving bad claims, many of them are the result of aggressive marketing tactics to lure unsuspecting businesses into claiming the complex credit. This provides a final window of opportunity for those misled businesses to make adjustments and avoid future compliance action by the IRS.”

By completing the Program application and voluntarily paying back the improper and/or questionable ERC, a business can:

- Repay only 85% of the ERC received as a credit on your return or as a refund and the 15% retained is not considered taxable income.
- Does not need to repay any interest you received on your ERC refund.
- Does not have to amend income tax returns to reduce wage expense.
- The IRS will not charge penalties or interest on the claimed ERC amount if you pay it in full (claimed ERC minus 15%) by the time you return your signed closing agreement to IRS.
- The IRS won’t examine (audit) ERC on your employment tax return for tax period(s) resolved within the terms of the Program.

In addition, the IRS announced it was taking additional steps to move forward with ERC claims, including updates on the processing moratorium, compliance actions and upcoming payments. In recent weeks, the IRS separately sent out 28,000 disallowance letters to businesses whose pending claims showed a high risk of being incorrect. The IRS estimates that these disallowances will prevent up to \$5 billion in improper payments. The IRS has also identified 50,000 valid ERC claims and is quickly moving them into the pipeline for payment processing in coming weeks. These payments are part of a low-risk group of claims.

The IRS continues analyzing ERC claims, intensifying audits and pursuing promoter and criminal investigations. Current initiatives results include:

- Criminal investigations: As of July 1, 2024, IRS Criminal Investigation has initiated 460 criminal cases, with potentially fraudulent claims worth nearly \$7 billion. In all, 37 investigations have resulted in federal charges so far, with 17 investigations resulting in convictions and nine sentencing with an average sentence of 20 months.
- Promoter investigations: The IRS is gathering information about suspected abusive tax promoters and preparers improperly promoting the ability to claim the ERC. The IRS's Office of Promoter Investigations has received hundreds of referrals from internal and external sources. The IRS will continue civil and criminal enforcement efforts of these unscrupulous promoters and preparers.
- Audits: The IRS has thousands of ERC claims currently under audit.

If you are interested in exploring whether this program is favorable to your organization, please do not hesitate to contact a member of the COMD tax team.

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