

Employee Retention Credit (ERC) – Proceed with Caution!



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August 25, 2023 | **CORPORATE**

The employee retention credit (ERC) is perhaps the most attractive – and controversial – COVID-era federal financial relief offered to the greatest number of US businesses. Congress established the ERC in the CARES Act of 2020, and the credit was modified and expanded by later legislation and IRS published guidance through today. The funds available can be substantial, with eligible employers being able to secure tax credits of up to \$26,000 per employee. This means that billions of dollars in the aggregate are available to employers throughout the country, and the program has attracted promoters who advertise across all media, soliciting employers and charging them percentages – in some instances up to 30% - of the resulting payroll tax refunds they claim on the employers' behalf.

This prolific marketing has not escaped the attention of the IRS, and the reaction has been swift and dramatic. The IRS added the ERC to its “[Dirty Dozen](#)” list in March 2023 and issued a [news release](#) in May 2023 warning taxpayers about “aggressive marketing” by promoters who misrepresent or exaggerate who qualifies for the ERC and in what amounts. The IRS encouraged employers to “work with a trusted tax professional,” who under Circular 230 and the ethical rules of their professions may not assist clients on tax matters on a contingency basis, but who can provide “critical professional advice on the ERC.” The IRS has also established a Campaign and an Issue

Management Team devoted to enforcement against abuse in this area. Considering this, and because of the expanded statute of limitations within which the IRS must audit and challenge the ERC claims, civil and criminal audits and investigations will continue over the next several years.

This aggressive promoter marketing and the IRS' equally aggressive response have placed taxpayers and return preparers in a quandary. The ERC is a legitimate, federally authorized credit available to taxpayers to help them withstand the financial impact of COVID-related business restrictions. But now, in this climate, taking advantage of the credit may place employers and practitioners under the scrutiny of the IRS. Understanding the law and the federal published guidance, along with using care and diligence in substantiating and documenting the claimed credits are key. If you are considering the ERC, if you already filed Form 941-X claiming the credit, or if you have already received the ERC credit, you can take certain prudent steps to achieve enhanced assurance that you will be able to support your credit claim upon audit and avoid civil and possibly criminal penalties. If you think you may be the victim of an abusive ERC credit promoter, it is important to explore the many options, defenses, and avenues for relief that may be available to you. And, if you are an accounting firm or an enrolled agent that requires assistance in assessing compliance in complex or unique ERC fact patterns, there is help available.

Lippes Mathias has the federal taxation experience to assist you or your clients in all areas of the ERC, including evaluating whether and to what extent you may qualify for the credit, preparing for the possibility of an IRS audit of an ERC claim, defending taxpayers under investigation by the IRS, and remedying harm caused by abusive ERC scams or promotions. Please contact [Randall Andreozzi](#), Lippes Mathias Partner and [Tax Controversy](#) Team Leader, randreozzi@lippes.com or 716.853.5100 Ext. 1832.

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