IRS Announces Voluntary Disclosure Program for Employee Retention Credit Claims

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The Internal Revenue Service has announced a voluntary disclosure program for employers that may have filed non-qualifying Employee Retention Credit (ERC) claims under the CARES Act for the wages paid during 2020 and 2021. Under the CARES Act, employers that, due to COVID-19, had either fully or partially suspended operations due to orders from a governmental authority or experienced a significant decline in gross receipts could claim the ERC for qualifying wages paid during the period from March 12, 2020, through December 31, 2021.

Many employers have filed ERC claims and received refunds or credits who may have relied largely upon third-party advisors that analyzed eligibility based upon subjective criteria and prepared ERC filings to be made on behalf of the employer. These advisors typically charge a contingent fee based upon the size of the refund or credit obtained. The Internal Revenue Service has now recognized this inherent conflict and employers' difficulties in confirming eligibility for ERC claims, and, importantly, the primary culpability of advisors promoting overstated claims based on factual inaccuracies or improper legal interpretations.

Consequently, on December 21, 2023, the Internal Revenue Service announced a voluntary disclosure program whereby employers that have already received an ERC refund or credit and now doubt their eligibility for the ERC can disclose their circumstances and repay any ERC refund or credit received with limited repercussions. As with all voluntary disclosure programs, eligibility is limited to employers who are not already under investigation or audit by the Internal Revenue Service.

If eligible and electing to participate in the program, an employer is subject to the following:

- The employer must forego ERCs for which the employer would otherwise be eligible for the entire 2020-2021 period;
- The employer must remit 80% of the claimed ERCs to the IRS;
- Interest previously received by the employer on the ERC claim amounts may be retained and no interest will be charged on the ERC amounts remitted to the IRS;
- No penalties will be imposed on the employer with respect to the erroneous ERC claims;
- If the employer had reduced its wage expense by the ERC amounts claimed for income tax purposes, the employer could now amend its income tax returns to increase its wage expense thereby lowering taxable income;
- The employer must provide identifying information regarding any advisor or return preparer assisting in filing the ERC claim and a description of services provided by the advisor or return preparer.

Employers should note the program requires forgoing all ERCs for the 2020-2021 time periods. If an employer believes its ERC claims may only be overstated, the employer would not be eligible for the voluntary disclosure program and the employer must file amended employment tax returns under normal procedures correcting the overstatement.

The process for participating in the voluntary disclosure program is as follows:

- Employers must electronically file IRS Form 15434 *Application for Employee Retention Credit Voluntary Disclosure Program* and, if 2020 periods are involved, an IRS Form SS-10 *Consent to Extend the Time to Assess Employment Taxes;*
- Repayments of ERC refunds or credits should be made separately for each tax period involved through EFTPS in connection with filing the Form 15434; if unable to repay fully, the employer may be considered for an installment agreement which will include interest;
- The employer will be required to enter a Closing Agreement with the IRS confirming the terms of the voluntary disclosure and settlement.

This voluntary disclosure program will remain open until March 22, 2024.

Employers who have received an ERC refund or credit should carefully consider the availability of this voluntary disclosure program taking into account their circumstances. Employers should review with counsel the underlying merits of their previously filed ERC claims and the desirability of making a voluntary disclosure under the program. Employers should also review with counsel the terms of any agreement with a third-party advisor retained in connection with an ERC claim in light of a possible voluntary disclosure.

We Can Help

Please feel free to contact Ansley Moses or Joe Helm if you have any questions regarding this information or need assistance with respect to your circumstances.