

Employee Retention Credit Updates and Considerations

By Chris Purnell, Partner and Tax Counsel

The Employee Retention Credit (ERC) has recently been receiving negative attention, as the IRS continues to increase its scrutiny of the claims filed and its enforcement efforts to uncover errors, potential scams, and fraud. On September 14, 2023, [the IRS announced](#) that it had stopped processing new ERC claims through at least the end of 2023 as it works to perform enhanced reviews of current claims and add safeguards against future abuse of the credit.

However, the ERC continues to be a significant potential benefit for qualifying organizations that properly determine their eligibility and maintain the critical supporting documentation. If your organization is considering applying for the ERC or you have already filed a claim and are questioning in hindsight if you are eligible, this article provides updates and insights to help you through the next steps.

Employee Retention Credit Overview

As we explain in our [ERC FAQs](#), the ERC is a fully refundable payroll tax credit. Nonprofit organizations, including churches and higher education institutions, can claim the credit if they meet the eligibility criteria. Funds are still available and can be claimed based on qualified wages paid after March 13, 2020, through September 30, 2021.

How much can an organization receive from the ERC? The credit, which can be substantial, is calculated by using a percentage of the qualified wages paid during the eligibility timeframe:

- If you claim the credit for qualified wages paid in 2020 quarters, the amount is 50% of the maximum amount of qualified wages. The maximum amount of qualified wages for 2020 is \$10,000 per employee for the entire year.

- For 2021 quarters, the credit is 70% of the maximum amount of qualified wages. The maximum amount of qualified wages for 2021 is \$10,000 per employee per quarter.

To be eligible, employers must have experienced at least one of these two situations:

- A significant decline in gross receipts between quarters in 2020 or 2021, or both, compared to the same quarter in 2019. For 2020 quarters, the decline must be 50% or greater. For 2021 quarters, the decline must be 20% or greater.
- A full or partial suspension of its trade or business due to governmental orders that limited commerce, travel, or group meetings because of COVID-19. This requires assessing the modifications the employer made to its operations because of the governmental order, and then measuring whether those modifications had a more than nominal effect on its trade or business.

Organizations can claim the ERC by filing [Form 941-X, Adjusted Employer's Quarterly Federal Tax Return or Claim for Refund](#), which is an amendment to prior-quarter payroll tax filings. The deadline to file those amendments is April 15, 2024 (when claiming the ERC based upon 2020 qualified wages) and April 15, 2025 (when claiming the ERC based upon 2021 qualified wages).

You can learn more about eligibility and qualified wages in our [ERC FAQs](#).

Choosing Credible Employee Retention Credit Assistance

Establishing eligibility and navigating the nuances of applying for the ERC can be challenging, and many organizations turn to a third party for help. However, the

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potential size of the credit has led some unscrupulous third parties to charge a fee for ERC “assistance” and then fail to properly assess an organization’s eligibility. Many of these organizations also refuse to file Forms 941-X and leave the organization to file the amended payroll filings.

The organization making the claim, not the third party, is responsible for the information reported on Form 941-X. **And if the IRS deems a claim to be illegitimate, the organization must pay back the entire credit, along with interest and possibly penalties.** By law, the IRS has up to five years to audit a claim.

[The IRS has said](#) it enacted the ERC processing moratorium due to increased concern that a “substantial share of new claims... are ineligible and increasingly putting businesses at financial risk by being pressured and scammed by aggressive promoters and marketing.”

The IRS is advising taxpayers to work with trusted tax professionals and has provided taxpayers with a general list of the [warning signs](#) that may indicate an aggressive ERC promoter that might lead to improper claims. These include:

- Unsolicited calls or ads mentioning an “easy application process.”
- Statements that the promoter or company can determine ERC eligibility within minutes.
- Large upfront fees to claim the credit.
- Fees based on a percentage of the refund amount of credit claimed.
- Preparers who refuse to sign the ERC return or supply their identifying information and a tax identification number. This limits the ERC promoter’s risk and shifts the total risk to the taxpayer claiming the credit.
- Aggressive claims that the organization qualifies for the ERC before any discussion of the organization’s tax situation.

This is an important time for taxpayers who may be uncertain about their claim to gain certainty before being questioned by the IRS. The agency said that it is developing initiatives to help organizations that were victims of aggressive promoters, including a settlement program for repayment. In a process announced in October 2023, certain organizations that now believe their claims were submitted improperly can withdraw a claim if it has not been paid by the IRS, or if they have received a refund but not deposited or cashed it. You can learn more about the requirements and the withdrawal process [here](#).

Additionally, in December 2023 the IRS announced an ERC Voluntary Disclosure Program for organizations that want to pay back the funds they received after filing ERC claims in error, thereby avoiding potential interest, penalties, and litigation. You can learn more about this program and how to apply [here](#). Applications are due by March 22, 2024.

As the IRS noted, “the ERC is a complex credit that requires careful review before applying.” The examinations of these ERC credit filings have been happening with very short timelines and taxpayers should be prepared with their supporting documentation.

CapinCrouse can help. Our experienced nonprofit tax professionals understand the complexities of ERC claims and can carefully assess your organization’s specific facts and circumstances.

We have been assisting nonprofit clients with ERC analysis and claims since 2021 and can help no matter what stage of the ERC process you are in. This includes assisting organizations that:

- Are considering or making a new ERC claim
- Have already made an ERC claim and need to document their eligibility
- Have already made an ERC claim and need an objective assessment of their eligibility
- Are facing an ERC audit

You can learn more about our ERC services [here](#).

We also offer a variety of informative resources about the ERC:

[Employee Retention Credit Frequently Asked Questions Assistance with the Employee Retention Credit](#)
[Next Steps as IRS Halts Processing of New ERC Claims Through End of Year](#)

[IRS Launches Process for Withdrawing Employee Retention Credit Claims](#)

[IRS Launches New Employee Retention Credit Voluntary Disclosure Program](#)

[Accounting and Reporting for the Employee Retention Credit](#)

[Tax Implications of the Employee Retention Credit](#)

We will continue to provide updates as more information becomes available. **Please contact us with questions or to learn more about how we can assist you.**

This article has been updated.

About the Author

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A licensed attorney, Chris advises exempt organizations of all sizes on a wide range of issues, including tax and employee benefit related matters, representation before state and federal tax authorities, and assistance with firm audit or advisory engagements to formulate advice and counsel on important operating and tax issues. Chris also assists clients with general tax issues, unrelated business income, charitable solicitation, and missionary employment structures. Prior to joining CapinCrouse in 2019, Chris served as the Executive Director of the Neighborhood Christian Legal Clinic, one of the nation's largest Christian legal aid organizations.

Note: Although licensed to practice law in Indiana, Chris's services through CapinCrouse do not involve the practice of law and consequently do not result in the creation of an attorney-client relationship.

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