

Employee Retention Credit Updates for 2024

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Agenda

- Short Introduction to the Employee Retention Credit (ERC)
- State of the ERC Moratorium
- How to Assess Your ERC Claim
- Three Options for Claims Already Made
 - Withdrawal Process
 - Voluntary Disclosure Program
 - Filing a Form 941-X
- Proposed Legislation to End the ERC (current as of February 9, 2024)
- Reflections

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Polling Question 1

Do you want CPE credit?

- Yes
- No

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Short Intro to the Employee Retention Credit (ERC)

- Payroll tax credit that can be claimed based upon wages paid during the period of March 13, 2020, through September 30, 2021 (a small minority may be able to claim through December 31, 2021)
- Due dates for claiming the ERC are:
 - April 15, 2024, for 2020 quarters
 - April 15, 2025, for 2021 quarters

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Short Intro to the ERC (continued)

- Throughout the final quarter of 2022 and through 2023, the IRS made several significant pronouncements regarding the ERC, encouraging employers to carefully vet their eligibility argument and to be wary of ERC promoters
- The IRS later said that nearly 15% of *all* ERC claims were filed in the second quarter of 2023
- Commissioner Werfel has also said that the IRS believes nearly all valid claims have already been made

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State of the ERC Moratorium

- On September 14, 2023, the IRS announced a **moratorium** on processing new ERC claims until **at least** December 31, 2023
 - The IRS has not yet announced the end of the moratorium
 - During an IRS webinar on February 8, 2024, the IRS representative did not indicate a date when the moratorium will be lifted
 - The purpose of the moratorium is to increase enforcement and evaluation efforts
 - Claims can still be submitted during the moratorium

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Polling Question 2

The IRS moratorium on processing new ERC claims has ended.

- Yes
- No

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How to Assess Your ERC Claim

- The IRS has provided an ERC Eligibility Checklist on [its website](#)
- The IRS is very wary of those claiming they experienced supply chain issues
- When assessing your eligibility, you should note whether you are claiming based upon a decline in gross receipts or a suspension of services

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How to Assess Your ERC Claim (continued)

- When claiming a partial suspension of services due to governmental orders, you must show:
 - a. Governmental orders that impacted your operations
 - b. Modifications that you made in response to those governmental orders
 - c. A more than nominal impact from those modifications
- All three elements must be present during the entirety of your ERC claim period

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How to Assess Your ERC Claim (continued)

From the IRS [Employee Retention Credit Eligibility Checklist](#):

Question 4

Was the operation of your business or organization fully or partially suspended by a **government** order due to the COVID-19 pandemic during 2020 or the first three calendar quarters (Jan. through Sept.) of 2021?

- The order must be a **government order**, not guidance, a recommendation or a statement.
- The government order must be **due to the COVID-19 pandemic** and must have fully or partially **suspended your operations**.
- You can only claim ERC for periods the order was in effect **and** your operations were suspended.

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How to Assess Your ERC Claim (continued)

- The IRS wants employers to home in on what a valid governmental order is
- On November 3, 2023, the IRS released a Generic Legal Advice Memorandum (GLAM) [2023-007](#), which addressed modifications made in response to OSHA guidance
- Essentially, if you were only responding to OSHA guidance when making modifications and your modifications were minimal, it will not be a winning argument for a suspension of services
- The IRS left unanswered whether compliance with the OSHA Act itself would suffice (pg. 11)

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How to Assess Your ERC Claim (continued)

- A partial suspension of services requires both:
 - a. modifications made to your operations (or a more than nominal part of your operations); and
 - b. a more than nominal impact on your operations

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How to Assess Your ERC Claim (continued)

- A “more than nominal” part of your operations can be measured by either:
 - a. more than 10% of your gross receipts comes through that portion of your operations; *or*
 - b. more than 10% of your overall staff time is dedicated to that portion of your operations

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How to Assess Your ERC Claim (continued)

- A “more than nominal” impact can be difficult to assess
- [Notice 2021-20](#) states that “the mere fact that an employer must make a modification to business operations... does not result in a partial suspension” (pg. 39)
- It is a facts and circumstances analysis

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How to Assess Your ERC Claim (continued)

- “A governmental order that results in a reduction in an employer’s ability to provide goods or services in the normal course of the employer’s business of **not less than 10 percent** will be deemed to have more than a nominal effect on the employer’s business operations” ([Notice 2021-20](#), pg. 39, emphasis added)

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How to Assess Your ERC Claim (continued)

- Questions to consider:
 - **If evaluating a claim already made** – What kind of documentation do we have that shows we were eligible? Are we able to demonstrate the three elements?
 - **If considering making a claim** – Are we able to gather documentation from 2020/2021 that we experienced a suspension?

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Polling Question 3

Has your organization claimed the Employee Retention Credit?

- Yes
- No

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Three Options for Claims Already Made

- During the period of October through December 2023, the IRS announced two new programs for withdrawing an ERC claim, or returning an ERC claim that was already paid
 - ERC Withdrawal and Voluntary Disclosure programs
- The purpose of these programs is to protect employers who may have been enticed into claiming the ERC incorrectly

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Withdrawal Process

- On October 19, 2023, the IRS announced a **withdrawal process** for ERC applicants who had yet to receive or deposit their funds
- Eligibility for withdrawal requires all of the following to be true:
 - The claim was made on an adjusted employment tax return
 - The only change made on the return was a claim for the ERC
 - The organization wants to withdraw the entire amount of the ERC claim
 - The IRS has not paid the claim, or the check has not been cashed or deposited

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Withdrawal Process (continued)

- See this [IRS webpage](#) for more details on the steps for withdrawing your ERC claim
- You can withdraw various quarters — it does not appear that you need to withdraw every quarter
- Your relevant withdrawal steps will depend on whether you have received any ERC claim checks and whether you are under an ERC audit/review

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Voluntary Disclosure Program

- The IRS is encouraging claimants of the credit to **reevaluate their eligibility** for the credit with a trusted tax advisor
- On December 21, 2023, the [IRS announced](#) a new **Voluntary Disclosure Program**
- Employers have until **March 22, 2024**, to apply to the program

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Voluntary Disclosure Program (continued)

- To be eligible, an organization:
 - Must not be under criminal investigation and have not been notified that it is under criminal investigation by the IRS;
 - Must not be under an IRS employment tax examination for any tax period(s) for which it is applying to the program;
 - Must not have previously received an IRS notice and demand for repayment of part or all of the claimed ERC; and
 - The IRS must not have received information that the organization is in noncompliance, nor acquired information directly related to the noncompliance from an enforcement action

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Voluntary Disclosure Program (continued)

- Participants in the Voluntary Disclosure Program:
 - Will only be required to repay 80% of the credit amount
 - Will not be required to repay interest paid on their credit amount
 - Will not be required to pay penalties with respect to the repaid amount
 - Are not required to reduce the wage deduction claimed on a previously filed Form 990-T or business return
 - Are required to disclose the party who assisted them with filing their ERC application

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Voluntary Disclosure Program (continued)

- Participants must comply at every stage of the process in order to be eligible for the benefits
- In a February 8, 2024, webinar, IRS representatives reiterated that this is the “best deal that you will get”
- Further, there currently are no plans to extend the Voluntary Disclosure Program beyond March 22, 2024

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Filing a Form 941-X

- If you made an error in your calculation, or if you otherwise need to reduce your claim for a particular quarter (but not to zero), the IRS encourages employers to file another Form 941-X
- You can find Form 941-X [here](#), along with instructions
- These will most likely be subject to long wait times

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Polling Question 4

The Voluntary Disclosure Program requires employers to pay back 80% of their ERC claim, among other requirements.

- Yes
- No

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Proposed Legislation to End the ERC

- On January 31, 2024, the U.S. House passed the [Tax Relief for American Families and Workers Act of 2024](#) (H.R. 7024)
- Key provisions:
 - Terminates the ERC program effective January 31, 2024
 - Extends the statute of limitations to six years
 - Includes enhanced penalties for ERC promoters

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Proposed Legislation to End the ERC (continued)

- Next steps for H.R. 7024:
 - The Senate will consider the bill with the potential for changes
 - [Continue to monitor](#) H.R. 7024 as it makes its way through the process
- Implications for employers:
 - Could the January 31 date be revised to a later date, given that it will not be enacted until after January 31?
 - How should you evaluate the ERC while it makes its way through the legislative process?

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Reflections

- If you have already claimed the ERC, you should:
 - Evaluate your original argument for eligibility
 - Ensure you have adequate documentation
 - Then, determine whether it makes sense to avail yourself of one of the three paths to address incorrect claims

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Reflections (continued)

- If you have not already claimed the ERC, you should:
 - Evaluate whether you have an argument for eligibility for the ERC, preferably with a trusted tax advisor
 - Then, determine whether you want to claim the ERC, even as Congress weighs current legislation with January 31, 2024, as the end date

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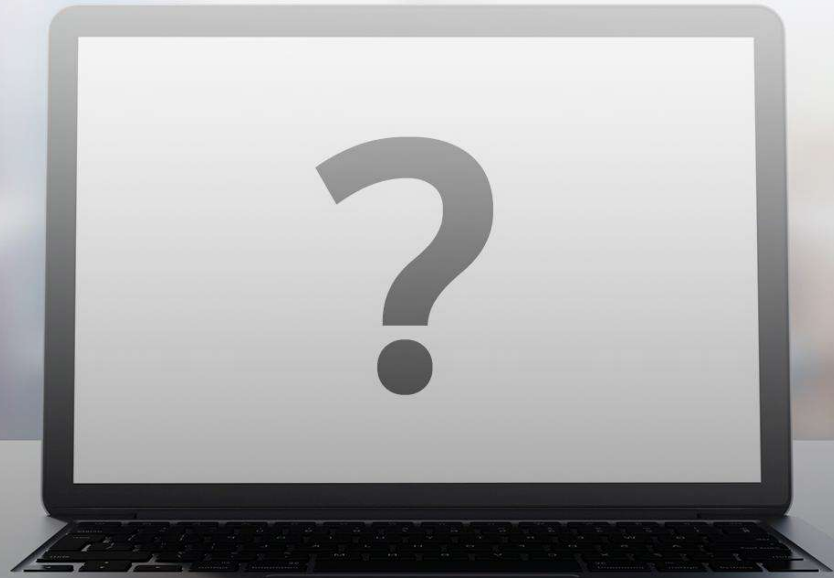
Employee Retention Resources and Services

Scan the QR code or visit capincrouse.com/erc to access helpful free resources and see how we can assist you.



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Questions?



Have a great day!

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