

TAX LAW

INFORMATION MEMO

SEPTEMBER 15, 2023

Employee Retention Tax Credit Consultants and Eligibility: Traps for the Unwary

Update: Late on September 14, the Internal Revenue Service (IRS) announced an immediate moratorium on the processing of new Employee Retention Tax Credit (ERTC) claims amid a surge of questionable claims. The moratorium will run through at least the end of 2023 and will provide the IRS with the opportunity to add safeguards intended to prevent future abuse of the ERTC and protect businesses from predatory ERTC consultants. The IRS will continue to process and pay out claims received prior to the enactment of the moratorium, but given increased fraud concerns the standard processing time is expected to rise from 90 days to 180 days.

The ERTC is a refundable payroll tax credit available to certain eligible employers that kept paying employees despite shutdowns imposed during the COVID-19 pandemic or that faced steep declines in gross receipts during the period between March 13, 2020 and Sept. 30, 2021. Our prior [information memorandum](#), details the eligibility factors for the ERTC. While the pandemic is long past, eligible employers may still claim the credit by amending quarterly payroll tax returns for eligible quarters in both 2020 and 2021.

Over the past year, there has been an uptick in self-proclaimed “ERTC experts” offering ERTC eligibility review and tax preparation services. The IRS issued a [warning](#) in October 2022, which it renewed in March 2023, to employers to beware of third parties that may be offering inaccurate or false tax advice regarding the ERTC and added ERTC scams to their “[Dirty Dozen](#)” list of the most prevalent tax scams.

These ERTC consultants aggressively market their services through a barrage of advertisements. They charge a substantial fee – oftentimes based on a percentage of the potential credit (as calculated by the consultant). The fee may be due before the credit has been received, or even if the employer decides not to claim the credit.

In late July, the IRS continued its outreach to taxpayers and practitioners with a newly released set of [FAQs](#) which provide guidance on the ERTC to help combat ERTC scams. The guidance addresses key areas of the ERTC such as eligibility, how to claim the credit, scams and recordkeeping requirements. The FAQs provide the following warning signs of ERTC scams:

- unsolicited calls or advertisements mentioning an “easy application process,” or offering a short eligibility checklist;
- statements that the promoter or company can determine ERTC eligibility within minutes;
- large upfront fees to claim the credit;
- fees based on a percentage of the refund amount of ERTC claimed;
- preparers refusing to sign the ERTC return being filed by the business, exposing just the taxpayer

claiming the credit to risk;

- aggressive claims from the promoter that the business receiving the solicitation qualifies before any discussion of the group's tax situation. In reality, the ERTC is a complex credit that requires careful review before applying; and
- that the IRS also sees wildly aggressive suggestions from marketers urging businesses to submit the claim because there is nothing to lose. In fact, those improperly receiving the credit could have to repay the credit – along with substantial interest and penalties.

Determining eligibility for the ERTC can be a complex legal and accounting issue. It is important to be certain whether your entity is eligible for the ERTC before applying for the credit, given the risk of an IRS audit or an investigation into pandemic-related relief fraud. Generally, eligible employers may apply for the credit if they satisfy one of two eligibility factors: (1) if the entity fully or partially suspended operations during any calendar quarter due to orders from an appropriate government authority limiting commerce, travel or group meetings due to COVID-19 and it more than nominally affected the business; or (2) if the entity experienced a significant decline in gross receipts during the calendar quarter (in 2020, this meant a 50% decrease in gross receipts compared to the same calendar quarter in 2019; for 2021 this was changed to a 20% decrease in gross receipts compared to the same calendar quarter in 2019). In the case of an entity that suspended operations due to a government order, if, under the facts and circumstances, more than a nominal portion (not less than 10% of total gross receipts or not less than 10% of the total number of hours of service performed by all employees) of its business operations were impacted, the entity may be considered to have a partial suspension of operations.

Over the past several months, we have had the opportunity to review a number of reports from these “ERTC experts” which have relied on, in our opinion, a questionable analysis of the ERTC eligibility criteria as they should be applied to certain businesses. By way of example:

1. To be considered an “order” from an appropriate government authority, it must be an order, proclamation or decree from the federal government or any state or local government and must limit commerce, travel or group meetings. The IRS has specifically asserted that statements from a governmental official, including comments made during press conferences or in interviews with the media, do not rise to the level of a governmental order for purposes of the ERTC. Further, guidance issued by the Occupational Safety and Health Administration (OSHA) or the Centers for Disease Control and Prevention that reference the safety and wellbeing of workplaces (but do not have the authority to mandate a shutdown) likely do not constitute shutdown orders, unless the IRS issues a directive to the contrary. Certain reports we have reviewed have relied on statements in press releases and general OSHA guidelines. Neither of these constitute “orders” to support ERTC eligibility at this time.
2. Another common error we have seen is either a miscalculation of what may constitute a “more than nominal portion” of a business when meeting the effect of a shutdown order, or even a complete disregard of this prong of the analysis. If the entity is relying on the government shutdown test, it must show that the impacted portion of its operations is more than a nominal

portion of its business operations by evaluating either gross receipts or hours of service performed by employees. In some cases, this element has not even been mentioned in their eligibility analysis.

In a recent news [release](#), the IRS signaled a new phase of ERTC work, indicating that the backlog of ERTC claims has been eliminated and additional procedures are being put into place to deal with the growing fraud risk in the program. The IRS has increased audit and criminal investigation work on ERTC claims, both on the promoters as well as those businesses filing dubious claims.

If your business currently has a contract with an ERTC consultant, or is contemplating entering into one, you should contact your attorney to review the contract and/or ERTC eligibility in general. If you have claimed the ERTC through a third party, please contact us so that we can assist you with resolving any possible underpayment or erroneous refund that may have occurred.

If you need assistance, please contact [Frank C. Mayer](#), [Jared A. Joyce](#), or any of the attorneys in our [tax law practice](#) or the attorney in the firm with whom you are regularly in contact.

