

# Now & Next

## Tax Alert

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### What's ahead for ERC claims?

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IRS suspends ERC processing to limit scams—businesses that worked with promoters should assess their claims.



#### What's the impact?

- Companies that have engaged promoters should immediately review their contracts to determine any next steps and/or possible actions.
- Time is of the essence to evaluate options a business may have to bring a claim against a promoter for return of the fee or other damages under various state laws, including fraud.

The IRS released [IR-2023-169](#) on September 14, 2023, announcing that the IRS is suspending the processing of employee retention tax credit (ERC) claims (the Moratorium). As a result of this release, taxpayers need to evaluate what to do based on their particular circumstances, including whether they have engaged with "promoters" of the ERC (i.e., companies that charge a contingent fee relating to the ERC and thus are not law firms or accounting firms). Here is a summary:

## **No contract with a promoter**

The Moratorium does not prevent taxpayers from submitting ERC claims, so taxpayers are still able to file for the tax credit, but the announcement is consistent with prior IRS advice stating that taxpayers should not rely on promoters when seeking the tax credit, but rather should engage tax professionals to evaluate whether they meet the qualification requirements for the ERC.

## **Contract with promoter, but no ERC filing**

We recommend reviewing the contract to determine your options, including but not limited to terminating or seeking rescission of the contract, and seeking damages from the promoter.

## **Contract with promoter, ERC filing, but no refund**

In addition to the steps above, consideration should be given to withdrawing the Form 941-Xs and then reapplying for the ERC, if appropriate. The IRS announcement suggests that filings under these circumstances should be able to avoid penalties and interest.

## **Contract with promoter, ERC filing, and receipt of ERC refund**

In most cases this will mean that the promoter has been paid its contingent fee or is seeking to collect it. Companies should review any contract they have with the promoter with counsel to determine how to terminate or rescind the contract and seek damages under various state laws, including fraud. The IRS announcement says that it is in the process of establishing a “settlement program” in fall 2023 that will allow taxpayers to repay the ERC claims. When these types of “voluntary disclosure” programs are established by the IRS it is usually a good idea to wait to hear the details before acting, but in the meantime these taxpayers should complete a thorough review of the facts and circumstances that may or may not support their qualification for the ERC to better prepare for a response to this “settlement program.”

Some promoter contracts provide that the taxpayer will get its contingent fee returned if the IRS successfully challenges the ERC claim and/or that the promoter will represent them during any audit. However, most, if not all of the promoters are not qualified to represent taxpayers. Moreover, the taxpayer remains exposed to civil or criminal fines and penalties, even if the contingent fee is returned. As the IRS advised in the Moratorium, “[a] business or tax-exempt group could find itself in a much worse financial position if it has to pay back the credit than if the credit was never claimed in the first place.”

Promoters are feeling the heat after the recent IRS announcement. In most cases they have collected an enormous amount of contingency fees and are evaluating their options. Undoubtedly many are considering “leaving town.” Consequently, those taxpayers who have paid a contingency fee to the promoter need to be very concerned about the credit risk associated with the promoter. Time is of the essence to evaluate options a business may have to bring a claim against a promoter for the return of contingency fees or other damages.

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