

PUBLICATION

IRS Launches Employee Retention Credit Voluntary Disclosure Program – Is It Time to Hold or Fold?

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January 11, 2024

As previously indicated, on December 21, 2023, the IRS launched the latest installment in a series of efforts to claw back pandemic-era tax credits erroneously received by ineligible employers.

The Employee Retention Credit Voluntary Disclosure Program (ERC-VDP) allows participating employers who need or want to repay the ERC to voluntarily pay back 80 percent of the total amount received as a credit or refund. The good news is that participating employers may keep the remaining 20 percent of the ERC amount which the IRS believes will cover the percentage fees collected by many ERC promoters at the time of payment or in advance of payment. Further, employers do not need to repay amounts received as interest on the ERC refund.

In addition, the IRS will not charge penalties and interest on the received ERC amount if paid in full (received ERC minus 20 percent) by the time the signed closing agreement is submitted to the IRS. Employers unable to pay the full amount prior to submitting the closing agreement may be eligible for an installment plan but will have to pay interest on the outstanding amount owed.

The ERC-VDP will remain open through March 22, 2024.

Is the ERC-VDP for everyone?

Employers, including businesses, tax-exempt organizations, and government entities, wishing to participate may apply for the ERC-VDP for each tax period provided that the following requirements are met:

- The ERC claimed on an employment tax return has been processed and paid as a refund, which has been cashed or deposited, or paid in the form of a credit applied to the tax period or another tax period.
- The employer, or a parent, subsidiary, or other member of the consolidated group, is not currently under or contesting the results of an employment tax audit for a tax period where the ERC was claimed.
- The IRS has not reversed or notified the employer of its intent to reverse the ERC to \$0.
- The employer has not reversed the ERC to \$0.
- The IRS does not have information from a third party or enforcement action related to the employer's ERC noncompliance.
- The employer can fully pay the ERC-VDP liability, or the IRS approves the employer for an installment agreement by the time the signed ERC-VDP closing agreement is submitted to the IRS.

Employers who used a third-party payor to file the employment tax returns or claim the ERC on behalf of the employer may participate in the ERC-VDP, but only through the third-party payor.

Participation in the ERC-VDP does require full and complete cooperation from the company including disclosure of the name of the company or individual who assisted with the ERC analysis and/or filing. In

addition, while the IRS is being "benevolent" by allowing the company to retain 20 percent of the ERC and not paying back the interest amount, this **does not** remove the possibility of criminal examination. While this may not be applicable in many situations, it is a further consideration to be factored into the analysis.

There also may be issues as to the "consolidated group" and to the extent any company included in such a group is subject to an "employment tax audit" for which the ERC claimed would not be eligible. This may create a further complexity for the company contemplating entering the ERC-VDP.

To apply to the ERC-VDP, employers must electronically submit Form 15434, Application for Employee Retention Credit Voluntary Disclosure Program, and all supporting documentation.

If your ERC-VDP includes a tax quarter in 2020, you are required to include with your application a signed ERC-VDP SS-10, Consent to Extend the Time to Assess Employment Taxes. This statute extension is a restricted consent and contains special language relating to the ERC-VDP.

For additional information regarding the terms of the Program and how to apply, please see [IRS Announcement 2024-03](#) and [ERC-VDP Q&A](#).

Baker Donelson's Tax Group has extensive experience with ERC matters, including handling a large number of IRS ERC tax audits, and is available to be consulted on these matters. For more information on this important and evolving area, please contact [Stuart M. Schabes](#) or [Seth Kossman](#) of Baker Donelson's [Tax Group](#).