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Tax Alert

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The Employee Retention Credit comes with rewards — and risks

By Patrick (Rick) Cox, John Ruskusky and Morgan Nighan

The Employee Retention Credit offers businesses significant financial relief, but should be approached with discretion to minimize risk.



What's the Impact

- / Eligible employers can get up to \$26,000 per employee, resulting in billions of dollars of credits being claimed by US taxpayers.
- / The IRS added the ERC to its Dirty Dozen list in March 2023.
- / If you believe you may have fallen victim to an ERC fraud, there may be a variety of legal defenses that can be asserted.

Perhaps the most significant financial relief available to the largest number of US businesses arising from the COVID-era (2020–2021) is the employee retention credit (ERC). The ERC was established in the CARES Act of 2020, and modified by subsequent acts of Congress through 2021. The dollars involved are astronomical, as eligible employers can get up to \$26,000 per employee, resulting in billions of dollars of credits being claimed by US taxpayers. As a result, the ERC attracted non-lawyer and non-accounting promoters, who advertised (and continue to advertise) in all forms of media, seeking employers who might qualify for the ERC, and charging

those employers 10%, 20%, or even 30% or more of the amount of the ERC for their services, which typically do not include legal or accounting advice.

The Internal Revenue Service (IRS) reacted to these developments in several ways. The IRS added the ERC to its “[Dirty Dozen](#)” list in March 2023¹ and issued a [news release](#)² in late May warning taxpayers about “aggressive marketing” by promoters who “wildly misrepresent[] and exaggerat[e]” who qualifies for the ERC. The IRS recommends that taxpayers should “[w]ork with a trusted tax professional,” who is not allowed, under ethics rules³, to assist clients on tax matters on a contingency basis, but who can provide “critical professional advice on the ERC.” The IRS has created a task force to review the ERC, and we expect enforcement actions to occur over the next several years. The ERC rules relating to the limits on the IRS’s time to audit a taxpayer’s refund makes it likely that ERC matters will be ongoing until 2027 and possibly beyond.

What are businesses to do at this point? Whether you are thinking about filing for the ERC in the future, have already filed Form 941-X amended returns claiming the credit, or even if you have already received ERC monies from the U.S. Treasury, there are certain things that you should do to better ensure that you will avoid penalties (civil, and possibly criminal). To the extent that you believe you may have fallen victim to an ERC scam, there may be a variety of legal defenses that can be asserted. There are also steps that advisory firms can take to comply with the standards set forth in IRS guidance.

NP has the relevant experience to assist with all aspects of the ERC, including evaluating qualification for ERC, asserting defenses to improper contracts, or defending businesses who are being investigated by the IRS.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

[Patrick \(Rick\) M. Cox](#)

212.940.3066

pcox@nixonpeabody.com

[John Ruskusky](#)

312.977.4460

jruskusky@nixonpeabody.com

[Morgan C. Nighan](#)

617.345.1031

mnighan@nixonpeabody.com

[Robert Fisher](#)

617.345.13351

rfisher@nixonpeabody.com

¹ [IR-2023-49, March 20, 2023.](#)

² [IR-2023-105, May 25, 2023.](#)

³ [Treas Dept Circ No. 230 § 10.27\(b\)\(1\)](#)