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Tax Alert

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ERC update: OBBB Act and the final phase for the tax credit

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Learn about the latest changes to the Employee Retention Credit, including new deadlines, penalties, and legal options for unresolved claims.



What's the impact?

- The One Big Beautiful Bill Act has a limited impact on the Employee Retention Credit, but where it applies the effect is significant.
- ERC refund recipients must consider amending or adjusting tax returns.
- ERC claimants still awaiting refunds should consider litigation.

The Employee Retention Credit (ERC) is a refundable tax credit introduced by the US government designed to encourage businesses to keep employees on their payroll during the COVID-19 pandemic and to help offset the cost of retaining staff. However, ambiguity regarding statutes of limitations and additional confusion created by the One Big Beautiful Bill Act (OBBB Act) may create new challenges for businesses.

The OBBB Act and ERC

The OBBB Act imposes a retroactive ban on ERC claims filed after January 31, 2024, more than a year prior to the original end date of April 15, 2025. This retroactive ban only applies to ERC claims filed after January 31, 2024, which relate to the third and fourth quarters of 2021. A prior version of the OBBB bill would have applied to additional quarters, but this broader application was removed by the Senate.

This retroactive ban on certain ERC claims is a noteworthy aspect of the OBBB Act, but since fourth-quarter 2021 ERC claims only apply to “startup recovery businesses,” a very limited type of taxpayer, this retroactive aspect of the OBBB Act is essentially limited to third-quarter claims filed between February 1, 2024, and April 16, 2025. This part of the OBBB Act will likely be challenged on the basis that such a retroactive provision is unconstitutional.

The OBBB Act also extends the statute of limitations from five years to six years for assessments of ERC claims relating to the third and fourth quarters of 2021, regardless of when such claims were filed. This means that taxpayers with such claims will face the possibility for assessment until April 15, 2028.

The OBBB Act also enhances penalty provisions, especially those for ERC promoters and taxpayers working with them.

Amending or adjusting tax returns

Many ERC claimants have continued to face extensive delays in receiving ERC refunds, and these delays continue to extend beyond deadlines for amending income tax returns to reflect required reductions in wage deductions. The IRS issued [FAQs for taxpayers](#) in March 2025 providing a web of “rules” that purported to allow taxpayers to essentially file income tax returns in subsequent years to reflect ERC refunds or denials that arose after the statute of limitations (SOLs) passed relating to such income tax returns. However, since FAQs are neither law nor categorized as official IRS guidance (such as Revenue Ruling), taxpayers covered by the FAQs now face the choice of following the FAQs or relying on tax law and official IRS guidance when filing income tax returns. Hundreds of thousands of taxpayers are affected and the impact could be significant. Taxpayers should consult with their tax lawyers and accountants to determine the correct approach.

ERC litigation

The IRS has an obligation to process taxpayer refund claims. If they do not do so within six months, taxpayers have the right to file a federal lawsuit to force consideration of the refund

claim. This statutory right (Internal Revenue Code Section 7422)¹ was rarely used prior to the ERC, but in the wake of the IRS moratorium on processing ERC claims (effective September 14, 2023), the number of these filings—referred to as 7422 Complaints—has increased significantly.

While the IRS has made progress in processing the millions of outstanding ERC claims, there are still hundreds of thousands of ERC claims that have waited more than six months for processing, with some delays lasting over three years. While unprocessed ERC claims accrue interest in favor of the taxpayer, some taxpayers need the funds to continue rebuilding after COVID-era disruptions and to navigate inflation and higher interest rates that followed. Those taxpayers are more frequently turning to 7422 Complaints as a solution, especially when the SOLs run out on other ERC refunds they may have already received.

Two SOLs are relevant. First, the IRS generally has two years from the date on any ERC refund check to claw back the refund.² Historically, this claw back has been used in very limited cases, for example, where the IRS issued a check to the wrong taxpayer or for the wrong tax period or for some other clerical error. Over the past five decades the number of these federal cases numbers in the low hundreds. It remains a tool in the IRS toolbox, but its use would be unusual in most cases.

Second, the IRS generally has three years from the date of the return to make an assessment for the tax year relating to the ERC claim. For example, the assessment deadline for 2020 ERC claims was April 15, 2024, and for ERC claims in the first two quarters of 2021 it was April 15, 2025. It is possible that the SOL could be six years if the result would be a substantial unpaid tax (25%). The SOL would not apply at all in the event of fraud. Setting these two circumstances aside, ERC claimants for 2020 and the first two quarters of 2021 should strongly consider this SOL defensive posture when deciding whether to file a 7422 Complaint.³

As noted above, the SOL for the third and fourth quarters of 2021 was extended by the OBBB Act from five years to six years. This means that for those quarters the IRS has until April 15, 2028, to make an assessment. As a result, the IRS could issue a refund and still file an assessment with respect to those quarters. However, even taxpayers falling into this group may be interested in filing a 7422 Complaint, which would provide finality by forcing the IRS to the table to resolve the applicable tax period.

Taxpayers contemplating a 7422 Complaint should also consider the recent federal district court decision from *JPM Restaurant LLC v. United States*, No. 1:24-cv-357 (E.D. TN, July 31, 2025). In this

¹ All references to “Code” or “Section” are to the Internal Revenue Code of 1986, as amended.

² Section 7405. The SOL can be five years if the refund was induced by fraud or misrepresentation of a material fact, but that exception has been narrowly interpreted by courts. See, e.g., *United States v. Northern Trust Co.*, 372 F.3d 886 (7th Cir. 2004).

³ There are other circumstances that might keep the SOL alive for these quarters, such as ongoing assessments or tolling agreements with the IRS. We are ignoring those specific circumstances.

case, the taxpayer filed for summary judgment on the basis that the IRS was willing to settle some of its ERC claims favorably. In denying summary judgment, the court ruled that the taxpayer lost its ability to settle its ERC claim with the IRS when it filed the 7422 Complaint, finding that Section 7122 gives the Department of Justice the exclusive right to settle tax claims once a 7422 Complaint is filed. This decision was issued despite the fact that the Code says “may” and not “shall.” This ruling further complicates decisions relating to 7422 Complaints and is another reason to consult with a tax lawyer or accountant when considering your options.

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