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IRS Announces Moratorium on Processing New Claims for Employee Retention Credit

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On September 14, 2023, the IRS announced an immediate moratorium on processing new claims for the Employee Retention Credit (ERC). According to the IRS announcement (IR-2023-169), the moratorium will last through at least the end of 2023.

The ERC is set forth in Section 3134 of the Internal Revenue Code of 1986, as amended. It was created as part of the Coronavirus Aid, Relief, and Economic Security Act and modified several times under subsequent pandemic relief legislation. The ERC is a refundable employment tax credit for qualified wages paid by certain employers the operations of which were suspended due to a government shutdown order, that experienced a significant decline in gross receipts, or that qualified as a "recovery startup business" – each as determined under specific rules set forth in Department of the Treasury regulations and IRS administrative guidance. The ERC is described in further detail in this May 2020 client alert and this December 2020 client alert.

Under the IRS moratorium, ERC claims received after September 13, 2023, will not be processed until the moratorium ends. The IRS will continue to process ERC claims received before that date, but they will receive additional scrutiny before being approved. That additional scrutiny will extend the IRS's standard processing goal from 90 days to 180 days.

The IRS attributed the moratorium to concerns about a "flood of improper" ERC claims being submitted by ineligible businesses that are misled by aggressive promoters that often receive a contingency fee from any ERC refund paid. The IRS cautioned that the ERC is "an incredibly complex credit" with "very specific eligibility requirements" and urged businesses to consult with a trusted tax professional rather than relying solely on a promoter with a vested interest in obtaining ERC payments.

In a separate IRS announcement (IR-2023-170) released on the same day as the moratorium, the IRS identified red flags for ERC scams, including:

- Unsolicited calls or advertisements mentioning an "easy application process" for the ERC.
- Statements that ERC eligibility can be determined within minutes.
- Large upfront fees to claim the ERC.
- Fees based on a percentage of the refund amount of the ERC claimed.
- Preparers seeking anonymity by refusing to sign the ERC return (e.g., ghost preparers).
- Aggressive claims that a taxpayer qualifies for the ERC before any discussion of the taxpayer's tax situation.

The IRS warned that, despite promoters' claims to the contrary, receiving an improper ERC payment can leave a business in a much worse financial position if it must later repay the credit – potentially with penalties and interest – and may expose the claimant to criminal investigation. The IRS previewed that it will be implementing a settlement procedure for repayment of improper ERC claims that have already been paid, as well as a withdrawal procedure for improper ERC claims that have been submitted but not yet processed. Withdrawing an improper ERC claim may allow a business to avoid penalties, interest, and issues with repayment of the ERC and promoter contingency fees, but it will not necessarily insulate the business from criminal investigation and prosecution for willfully filed fraudulent ERC claims.

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