

IRS Announces Voluntary Disclosure Program for Erroneously Received Employee Retention Credits

December 28, 2023

Key takeaways

- The IRS has announced a voluntary disclosure program for businesses to return money received after filing erroneous Employee Retention Credit (ERC) claims.
- The program may allow employers to avoid civil litigation, penalties and interest with respect to improper ERC claims.
- To participate in the ERC voluntary disclosure program, an employer must meet several eligibility requirements and apply by March 22, 2024.

On December 21, 2023, the [IRS announced \(IR-2023-247\)](#) a [voluntary disclosure program](#) for employers to return payments received in respect of erroneously submitted ERC claims. The IRS also provided a list of [frequently asked questions](#) to help employers understand the program.

To be eligible for the ERC voluntary disclosure program, an employer must meet all the following requirements:

- The employer is not under criminal investigation and has not been notified that the IRS intends to commence a criminal investigation.
- The IRS has not received information from a third party alerting the IRS to the employer's noncompliance, nor has the IRS acquired information directly related to the employer's noncompliance from an enforcement action.
- The employer is not under an employment tax examination by the IRS for any tax period(s) for which the employer is applying to the ERC voluntary disclosure program.
- The employer has not previously received notice and demand for repayment of any part of the erroneously received ERC.

To apply for the ERC voluntary disclosure program, an eligible employer must complete and submit [IRS Form 15434](#), under penalties of perjury, on or before March 22, 2024. If accepted into the program, the employer must, among other things, enter into a closing agreement with the IRS, repay 80% of the erroneously received ERC and, if a tax return preparer or adviser was involved in the ERC claim, disclose the name, address, and phone number of the preparer or adviser, as well as describe the services provided by such preparer or adviser. An employer that fully repays 80% of the ERC before entering into the closing agreement will not be subject to penalties or interest. Additional rules apply if the ERC was claimed through a third-party payer, such as a professional employer organization, using the third-party payer's employer identification number.

The ERC voluntary disclosure program is the latest in a series of IRS initiatives to combat improper ERC claims submitted by ineligible businesses that were misled by aggressive promoters. Previously, the IRS [imposed a moratorium](#) on processing new ERC claims, then [announced a process for withdrawing](#) pending ERC claims that have not yet been paid. The moratorium and withdrawal process are described in further detail in [our September 2023 client alert](#) and [our October 2023 client alert](#), respectively. **Note:** Acceptance into the ERC voluntary disclosure program and/or withdrawal of pending ERC claims does not shield an employer from potential criminal investigation and prosecution for willfully filed fraudulent ERC claims.

This content is provided for general informational purposes only, and your access or use of the content does not create an attorney-client relationship between you or your organization and Cooley LLP, Cooley (UK) LLP, or any other affiliated practice or entity (collectively referred to as "Cooley"). By accessing this content, you agree that the information provided does not constitute legal or other professional advice. This content is not a substitute for obtaining legal advice from a qualified attorney licensed in your jurisdiction, and you should not act or refrain from acting based on this content. This content may be changed without notice. It is not guaranteed to be complete, correct or up to date, and it may not reflect the most current legal developments. Prior results do not guarantee a similar outcome. Do not send any confidential information to Cooley, as we do not have any duty

to keep any information you provide to us confidential. When advising companies, our attorney-client relationship is with the company, not with any individual. This content may have been generated with the assistance of artificial intelligence (AI) in accordance with our AI Principles, may be considered Attorney Advertising and is subject to our [legal notices](#).

Key Contacts

Timothy Shapiro Palo Alto	tshapiro@cooley.com +1 650 843 5403
Calvin Lee New York	calvin.lee@cooley.com +1 212 479 6378

This information is a general description of the law; it is not intended to provide specific legal advice nor is it intended to create an attorney-client relationship with Cooley LLP. Before taking any action on this information you should seek professional counsel.

Copyright © 2023 Cooley LLP, 3175 Hanover Street, Palo Alto, CA 94304; Cooley (UK) LLP, 22 Bishopsgate, London, UK EC2N 4BQ. Permission is granted to make and redistribute, without charge, copies of this entire document provided that such copies are complete and unaltered and identify Cooley LLP as the author. All other rights reserved.