

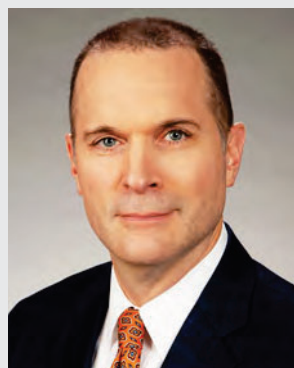
## **A Look at the Second ERC Voluntary Disclosure Program**

by Hale E. Sheppard

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## A Look at the Second ERC Voluntary Disclosure Program

by Hale E. Sheppard



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In this article, Sheppard examines the evolution of the benefits provided by the employee retention credit, the no-win situation facing the IRS initially, and some of

the steps taken by the IRS — including two rounds of a voluntary disclosure program — to reduce the number of wrongdoers it must pursue.

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### I. Introduction

Congress introduced the employee retention credit more than four years ago, but serious enforcement actions are just now getting underway. It would be a huge understatement to say that there has been lots of posturing, positioning, and prolonging by many involved, including the IRS. Things are changing, though. For example, the IRS, as one facet of its comprehensive strategy, has been methodically implementing a plan designed to persuade taxpayers to willingly return ERC payments they did not deserve in the first place. This article, the latest in a long series by the author, examines the evolution of ERC benefits by Congress, the no-win situation facing the IRS initially, and some of the steps taken by the IRS thus far to reduce the

number of wrongdoers it must pursue, including the introduction of two rounds of its voluntary disclosure program (VDP).<sup>1</sup>

### II. Evolution of ERC Benefits

Congress hoped to counteract the economic troubles created by COVID-19 by introducing just one piece of legislation. As discussed below, the scope of the problem exceeded initial expectations, and congressional action came in phases.

#### A. Phase One

Congress enacted the Coronavirus Aid, Relief, and Economic Security Act in March 2020.<sup>2</sup> That law generally provided that an eligible employer could get an ERC against certain employment taxes equal to 50 percent of the qualified wages it paid to each employee, subject to various limitations.<sup>3</sup>

An eligible employer meant one that was carrying on a trade or business and met one of the following two tests. First, the operations of the employer were partially or fully suspended during a quarter because of an order from an appropriate governmental authority that limited commerce, travel, or group meetings for commercial, social, religious, or other purposes because of COVID-19 (governmental order test).<sup>4</sup> Second, the employer suffered a significant

<sup>1</sup>For more details about ERC settlement programs, see Hale E. Sheppard, "Comparing IRS Settlements: Easements and Employee Retention Credits," *Tax Notes Federal*, Feb. 12, 2024, p. 1223; Sheppard, "ERC Enforcement Tactics: The IRS's Carrots and Sticks So Far," *Tax Notes Federal*, Feb. 5, 2024, p. 1017.

<sup>2</sup>Joint Committee on Taxation, "Description of the Tax Provisions of Public Law 116-136, the Coronavirus Aid, Relief, and Economic Security Act," JCX-12R-20 (Apr. 23, 2020); see also Notice 2021-20, 2021-11 IRB 922.

<sup>3</sup>CARES Act, section 2301(a).

<sup>4</sup>CARES Act, section 2301(c)(2)(A)(ii)(I).

decline in gross receipts during a particular quarter (reduced gross receipts test).<sup>5</sup>

Whether payments constituted qualified wages depended on the number of full-time employees working for an eligible employer. There were two categories. When an eligible employer had an average of more than 100 full-time employees (large eligible employer), qualified wages meant those paid to any employee who was not providing services.<sup>6</sup> Conversely, when an eligible employer had an average of 100 or fewer full-time employees (small eligible employer), qualified wages meant all wages paid during a quarter, regardless of whether the employees were actually working.<sup>7</sup>

Benefits under the CARES Act were capped; qualified wages for any one employee could not exceed \$10,000 for all applicable quarters in 2020 combined. This meant that the maximum ERC per employee for all of 2020 was just \$5,000.<sup>8</sup>

Under the CARES Act, coverage of the ERC originally applied to the second, third, and fourth quarters of 2020.<sup>9</sup>

## B. Phase Two

COVID-19 continued to devastate the U.S. economy after passage of the CARES Act. Congress therefore passed three additional laws focused on the ERC in less than two years. The new legislation made the ERC more accessible and was favorable to taxpayers in several ways. Here are just a few. Congress enlarged the time frame, allowing most eligible employers to claim ERCs for the second, third, and fourth quarters of 2020, as well as the first, second, and third quarters of 2021. Moreover, the percentage of qualified wages on which eligible employers could make ERC claims increased from 50 percent to 70 percent. Another modification was calculating the maximum amount of qualified wages per quarter, not per year. The effect was that the ERC cap for 2020 was \$5,000 per

employee, while the ceiling for 2021 was \$21,000 per employee (that is, \$10,000 of qualified wages, multiplied by 70 percent, multiplied by three quarters). The new laws also changed the standards for being a small eligible employer and a large eligible employer, thereby making it easier to claim ERCs for all wages paid to employees, not just to those who were not providing services. Specifically, large eligible employers became those whose average number of full-time employees during the relevant period was more than 500 (instead of more than 100), while small eligible employers were those with an average of 500 or less (instead of 100 or less). Congress also lowered the standards for meeting the reduced gross receipts test; instead of gross receipts having to fall below 50 percent of the previous mark, they only had to be less than 80 percent. Lastly, Congress created two special categories of entities that could make ERC claims, namely, recovery start-up businesses and severely financially distressed employers.<sup>10</sup>

## III. A Sophie's Choice for the IRS

The spread of COVID-19 persisted, financial challenges escalated, Congress enacted various laws making the ERC more accessible and appealing, and taxpayers filed massive numbers of ERC claims in a relatively short period. The IRS found itself overwhelmed and facing a difficult choice. One option was to give serious scrutiny to all ERC claims before paying them, which would have triggered long delays, damaging businesses, their employees, and the U.S. economy as a whole. It also would have exposed the IRS to crushing criticism by Congress and the public. The other option was to conduct a superficial review of ERC claims using the limited resources available, reject those claims that were clearly improper, swiftly pay the remainder for the overall good, and later take enforcement action to recover erroneous or excessive ERC payments. The IRS chose the latter.

<sup>5</sup> CARES Act, section 2301(c)(2)(A)(ii)(II) and (c)(2)(B).

<sup>6</sup> CARES Act, section 2301(c)(3)(A)(i).

<sup>7</sup> CARES Act, section 2301(c)(3)(A)(ii)(I) and (II). Qualified wages also included certain "qualified health plan expenses" paid by the eligible employer. See CARES Act, section 2301(c)(3)(C)(i).

<sup>8</sup> CARES Act, section 2301(b)(1); JCT, *supra* note 2, at 38.

<sup>9</sup> CARES Act, section 2301(m).

<sup>10</sup> These laws consisted of the Taxpayer Certainty and Disaster Tax Relief Act, American Rescue Plan Act, and Infrastructure Investment and Jobs Act. See Consolidated Appropriations Act, 2021, division EE, section 207; ARPA, section 9651; Infrastructure Investment and Jobs Act, section 80604.

The IRS was aware of problems immediately, but it stayed the course. The Government Accountability Office released several reports evaluating the implementation of various pandemic-related benefits, including the ERC.<sup>11</sup> The GAO acknowledged the IRS's plight, recognizing that it had to carry out laws that changed several times during 2020 and 2021, cope with its own staffing challenges, and reduce internal controls before disbursing ERCs to help struggling employers and their workers receive financial help as quickly as possible.<sup>12</sup> The GAO underscored that the IRS would have a chance at redemption; it could aggressively audit ERCs, recoup improper payments, and punish wrongdoers. The report phrased it more diplomatically, suggesting that the IRS "could use post-filing compliance or examination activities to address already-issued tax credit refunds that may have been in error or otherwise invalid."<sup>13</sup> The IRS fully agreed, consistent with its plan of attack from the outset.<sup>14</sup>

#### IV. Components of Voluntary Disclosure

Large-scale enforcement by the IRS usually involves multiple elements, one of which is offering taxpayers a chance to rectify their issues proactively, through some type of voluntary disclosure initiative, in exchange for certain inducements. The IRS has followed this playbook when it comes to ERC claims. Indeed, if readers were to take a step back, they would realize that the IRS has been implementing a classic, step-by-step approach to persuade taxpayers to freely return ERC payments.

##### A. Step One: Setting the Tone

Taxpayers ordinarily are reluctant to take actions detrimental to themselves, like returning large sums of money to the IRS, unless they feel

compelled to do so. Fear often greases the wheel, a reality with which the IRS is quite familiar. Thus, in late 2023, the IRS disseminated lots of information about enforcement efforts during speeches, news releases, and so on. The IRS announced that it had already referred "thousands of ERC cases for audit" as of September 2023, even before starting its "enhanced compliance review" of pending and future ERC claims.<sup>15</sup> The IRS also broadcast that the Criminal Investigation division had initiated over 250 investigations of potentially fraudulent ERC claims as of July 2023.<sup>16</sup> By October of that same year, it said that the number had risen to more than 300 investigations.<sup>17</sup> The IRS, consistent with this messaging, indicated that many promoter penalty investigations under section 6700 also were underway.<sup>18</sup> Finally, the IRS stated that it had recently rebuffed more than 20,000 ERC claims that "clearly fell outside the legal requirements."<sup>19</sup> The IRS warned that the initial mass rejection was just the beginning; many more notices of disallowance were on the way.<sup>20</sup>

##### B. Step Two: Claim Withdrawal Program

With the public thus tenderized, the IRS announced in September 2023 that it would soon introduce a "special withdrawal option" for taxpayers with cold feet — that is, those who previously filed ERC claims but had not yet taken the tax benefits, and had reflected on the matter and wanted to reverse course.<sup>21</sup> According to the IRS, the option would be available to approximately 600,000 taxpayers whose ERC claims were pending review.<sup>22</sup>

<sup>15</sup> IR-2023-169.

<sup>16</sup> *Id.*

<sup>17</sup> IR-2023-201; Nathan J. Richman, "IRS Has Hundreds of Criminal ERC Cases Open," *Tax Notes Federal*, Nov. 5, 2023, p. 1102.

<sup>18</sup> Richman, "Civil Examinations of ERC Promoters Are Underway," *Tax Notes Federal*, Dec. 11, 2023, p. 2048; See also Lauren Loricchio, "Sunset for ERC Withdrawal Initiative to Be Determined," *Tax Notes Federal*, Nov. 6, 2023, p. 1093.

<sup>19</sup> IR-2023-230; Jonathan Curry, "ERC Compliance Campaign Gets Underway With First Wave of Letters," *Tax Notes Federal*, Dec. 11, 2023, p. 2046.

<sup>20</sup> IR-2023-230; Curry, *supra* note 19.

<sup>21</sup> IR-2023-169.

<sup>22</sup> *Id.*

<sup>11</sup> See, e.g., GAO, "COVID-19: Continued Attention Needed to Enhance Federal Preparedness, Response, Service Delivery, and Program Integrity," GAO-21-551 (July 10, 2021); GAO, "COVID-19: Sustained Federal Action Is Crucial as Pandemic Enters Its Second Year," GAO-21-387 (Mar. 31, 2021).

<sup>12</sup> GAO, "COVID-19: IRS Implemented Tax Relief for Employers Quickly, but Could Strengthen Compliance Efforts," GAO-22-104280, at 36 (May 17, 2022).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 66.



The IRS unveiled the program the next month, in October 2023 (withdrawal program).<sup>23</sup> Its official objective was to “help small business owners and others who were pressured or misled by ERC marketers or promoters into filing ineligible claims.”<sup>24</sup> It was also designed, says the IRS, “to help honest taxpayers” who “mistakenly claimed the ERC.”<sup>25</sup>

The withdrawal program, which remains in existence today, functions as follows. In terms of eligibility, an employer can apply if it made an ERC claim on an amended employment tax return, filed that return solely for purposes of claiming the ERC, wants to retract the entire claim, and has not yet gotten the benefits.<sup>26</sup> The IRS warned, though, that an employer that filed fraudulent ERC claims, assisted in doing so, or conspired to do so will not be exempt from criminal investigation and prosecution simply by applying for the withdrawal program.<sup>27</sup>

The withdrawal program features three different methods. The appropriate path for an employer depends on whether it (1) neither received ERC refunds nor has been notified by the IRS of an audit, (2) has not received ERC refunds but has already been contacted by the IRS, or (3) has received ERC refund checks but has not yet cashed or deposited them.<sup>28</sup>

Acceptance into the withdrawal program is not guaranteed; the IRS indicates that it will send applicants letters clarifying whether they are in or out. The IRS does not mention any specific reasons why it might reject employers from the withdrawal program, but one assumes that this might happen if the IRS has prior indications of intentional misconduct, civil fraud, or criminality.<sup>29</sup>

<sup>23</sup> IR-2023-193; Joseph DiSciullo, “Fact Sheet Explains How to Withdraw Claims for Employee Retention Credit,” *Tax Notes Federal*, Oct. 30, 2023, p. 883.

<sup>24</sup> IR-2023-193.

<sup>25</sup> FS-2023-24.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

### C. Step Three: First Voluntary Disclosure Program

About two months after debuting the withdrawal program, the IRS announced the initial VDP (first VDP) in December 2023.<sup>30</sup> The rationale for the first VDP was the IRS’s “concerns about scams and potential fraud regarding ERC claims given false and misleading public advertisements and scams taking advantage of taxpayers.”<sup>31</sup>

Not all employers were eligible for the first VDP, of course. The IRS explained that an employer could apply for the first VDP only if it met all the following criteria: The employer was not under IRS criminal investigation; the employer had not been notified that the IRS intends to start a criminal investigation; the IRS had not received information from a third party about the employer’s noncompliance; the IRS had not acquired information directly of noncompliance as the result of an enforcement action; the employer was not presently under an employment tax audit by the IRS for any relevant tax period; and the employer had not received a notice and demand from the IRS for repayment for all or a portion of an ERC claim.<sup>32</sup>

The IRS clarified that an employer that uses a third-party payer, like a professional employer organization, could apply for the first VDP. However, the third-party payer had to submit the application on its behalf.<sup>33</sup>

The main terms of the first VDP required an employer to: (1) complete, sign, and electronically file Form 15434, “Application for Employee Retention Credit Voluntary Disclosure Program,” by March 22, 2024; (2) return 80 percent of the ERCs it previously received to the IRS; (3) execute a closing agreement; (4) make full payment electronically before signing the closing agreement, or apply for an installment agreement; (5) if entering into an installment agreement, pay the taxes, applicable penalties, and interest charges; (6) if the ERC claims involved any

<sup>30</sup> Announcement 2024-3, 2024-2 IRB 364; Loricchio, “IRS Launches ERC Voluntary Disclosure Program,” *Tax Notes Federal*, Jan. 1, 2024, p. 188.

<sup>31</sup> Announcement 2024-3, section 1.

<sup>32</sup> *Id.* at section 2.

<sup>33</sup> *Id.*

quarters in 2020, give the IRS an extension of the assessment period; and (7) supply detailed information to the IRS about any individual, business, or organization that assisted in making ERC claims.<sup>34</sup>

What did employers get in exchange for applying for the first VDP? Well, if the employer repaid the 80 percent in full, then the IRS would waive all penalties and interest on the amount returned. The IRS also would not characterize as income the 20 percent that the employer retained. Lastly, the employer could claim a wages-paid deduction for income tax purposes for 100 percent of the relevant wages, even though it was paying only 80 percent (not 100 percent) thanks to the first VDP.<sup>35</sup>

The IRS clarified that it was the sole decision-maker when it came to eligibility for the first VDP. It said that denial of an application was “not subject to judicial review or administrative appeal.”<sup>36</sup> The IRS further warned that even if it permitted an employer to participate in the first VDP, this does not necessarily mean that all matters were concluded. On the contrary, the IRS explicitly said that executing a closing agreement did “not preclude the IRS from investigating any associated criminal conduct or recommending prosecution for violation of any criminal statute, and does not provide immunity from prosecution.”<sup>37</sup>

The IRS posted FAQs dealing with the VDP.<sup>38</sup> Here are just a few of the more interesting ones<sup>39</sup>:

- If an employer previously filed Forms 941-X, “Adjusted Employer’s Quarterly Federal Tax Return or Claim for Refund,” to eliminate the ERC claims, or if the IRS already disallowed those claims, before the IRS announced the VDP, can the employer still obtain the 20 percent reduction? The FAQs say that an employer in either of these two positions generally is not eligible for the benefits of the VDP. However, in the case of

the former, “the IRS will review your application on a case-by-case basis for eligibility” for the VDP.

- What unique procedures apply if an employer must repay the ERC amounts through an installment agreement? The FAQs explain that the IRS will assert penalties and interest charges; the employer must submit a complete Form 433-B, “Collection Information Statement for Business,” with all supporting documentation; the employer is required to grant the IRS an extension of the assessment period for trust fund recovery penalties; “all potentially responsible persons for the business entity” must submit the VDP application; and the IRS will file a notice of federal tax lien against the employer.
- What happens if an employer that wants to apply for the VDP is unable to pay in full, and the IRS rejects its installment agreement application? The FAQs indicate that “no other IRS payment plans are an option” and recommend that the employer “consider financing the amount due from other sources” to receive the benefits of the VDP.
- If the parent, subsidiary, or a member of an employer’s consolidated group is under employment tax audit, can the employer still participate in the VDP? The FAQs explain that any such employment tax audit renders the employer ineligible, but the situation would be different if an income, excise, or some other type of tax audit were underway.
- Can an employer apply for the VDP if it is challenging the results of an earlier employment tax audit with the Appeals Office or in the Tax Court? The FAQs clarify that an employer is considered under audit for VDP purposes during any administrative or judicial appeal that involves the relevant tax periods.
- What happens if an employer does not cooperate with the IRS after filing the VDP application? The FAQs explain that the concept of cooperation includes “responding timely and accurately to any requests” by the IRS. They further warn that lack of cooperation will deprive an

<sup>34</sup> *Id.* at section 3.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at section 4.

<sup>37</sup> *Id.*

<sup>38</sup> IRS, “Frequently Asked Questions About the Employee Retention Credit Voluntary Disclosure Program” (last updated Sept. 11, 2024).

<sup>39</sup> The author has abbreviated or restated certain FAQs to make them easier for readers to understand.

employer of all VDP benefits and might lead to “civil and criminal interest and penalties.”

- If an employer does not agree to the terms of the closing agreement after applying to the VDP, can it engage in mediation with the IRS? The FAQs emphasize that participation in the VDP requires the execution of a closing agreement, the terms of which cannot be appealed.
- How long does it take to complete the VDP process? The FAQs are noncommittal, stating that “because every case is different, there is no way to estimate how long the process will take for you.”

#### D. Step Four: Further Setting the Tone

Interest by employers in the first VDP was, in a word, underwhelming. The IRS acknowledged that only 2,600 employers applied.<sup>40</sup> In light of this lackluster statistic, the IRS needed to make additional efforts to create an appropriate environment — that is, one in which employers were anxious enough to return their ERC money voluntarily.

The IRS took several steps, among them sharing the “warning signs” of improper ERC claims derived from its experience in reviewing them. It began by rehashing the initial seven signs of problematic claims: (1) filing ERC claims for absolutely all quarters in 2020 and 2021, (2) relying on restrictions that do not meet the definition of governmental order or do not cause a business to fully or partially suspend its operations, (3) seeking ERCs for all wages paid to all workers, (4) basing claims on disruptions to a supply chain, (5) requesting benefits for an entire quarter when the business was suspended during only part of it, (6) professing eligibility when the employer did not exist or pay wages during the relevant quarters, and (7) working with a “promoter” that urges employers to make aggressive ERC claims because “there is nothing to lose.” To those original seven, the IRS added five more signs: (1) claiming the ERC when the employers were “essential businesses” that continued to operate, (2) failing to supply

<sup>40</sup> IR-2024-203.

adequate proof that a governmental order had “more than a nominal effect” on a business, (3) including amounts paid to family members as qualified wages, (4) using the same wages for purposes of ERC claims and Paycheck Protection Program loans, and (5) counting wages paid to employees who were providing services when the employer was a large eligible employer.<sup>41</sup>

The IRS next underscored the large number of notices of disallowance that it had sent in recent weeks. It touted 28,000 of those communications in early 2024 and warned that this was merely the start of a trend.<sup>42</sup> The IRS alluded to the dissemination of about 30,000 more letters in fall 2024, “reversing or recapturing improperly paid ERC claims.” The IRS called the next batch of letters clawback notices.<sup>43</sup>

The IRS also updated its general enforcement numbers, explaining that it had initiated 460 criminal actions related to ERC claims, secured 17 convictions, received “hundreds of referrals from internal and external sources” leading to promoter penalty investigations, and started thousands of civil audits of employers making questionable ERC claims.<sup>44</sup>

#### E. Step Five: Second Voluntary Disclosure Program

By August the IRS was ready to give it another go, announcing the next round of the earlier initiative (second VDP).<sup>45</sup> The IRS got right to the tough talk. It boldly predicted, despite the limited number of judicial decisions yet in the ERC realm, that it would prevail in litigation to recover improper ERC payments and assert penalties. Despite this supposed confidence level, the IRS indicated that it wants to give employers, particularly those falling victim to “false and misleading public advertisements and scams,” another chance to resolve their issues under the second VDP.<sup>46</sup>

<sup>41</sup> IR-2024-198; IRS Tax Tip 2024-72.

<sup>42</sup> IR-2024-203.

<sup>43</sup> IR-2024-212.

<sup>44</sup> *Id.*

<sup>45</sup> Announcement 2024-30, 2024-36 IRB 1.

<sup>46</sup> *Id.*



The first VDP and second VDP have many similarities, as well as a few key differences. Three major distinctions stick out. First, the deadline for applying for the first VDP was March 22, while the deadline for the second VDP is November 22. Second, the employer had to repay 80 percent of the ERC amount under the first VDP, while this figure rose to 85 percent under the second VDP. Third, the employer could rectify ERC claims for any quarter in 2020 or 2021 under the first VDP, but the second VDP is limited to claims for 2021.<sup>47</sup>

Various factors, some I've mentioned in a prior article, applied to the first VDP and persist with the second VDP. Savvy employers and others are surely considering these when deciding whether to participate:

- the need to repay 85 percent of ERC claims, particularly when many employers long ago invested all the money in their business operations;
- the obligation for employers to make full payment immediately, or in the short term under an installment agreement;
- the imposition of late-payment penalties and interest charges if an employer needs to repay ERC amounts via an installment agreement;
- the lack of a “pre-clearance mechanism,” meaning that an employer must admit to the IRS, under penalties of perjury, that its earlier ERC claims were invalid, without any assurance that it will get the benefits and protections of the VDP;
- the sole discretion of the IRS to initially determine whether an employer is eligible, and its authority to later banish an employer from the VDP if, in its opinion, the employer has not adequately cooperated with the process;
- the fact that litigation is pending to determine whether Notice 2021-20, 2021-11 IRB 922 (and, by extension, other IRS guidance about ERC issues in the form of notices, advisories, memoranda, and FAQs) is invalid because it was issued in violation of the Administrative Procedure Act;
- the likelihood that employers will challenge in court the recent IRS regulations authorizing it to administratively recapture “erroneous refunds” and related overpayment interest;
- the fact that repayment of ERCs to the IRS might not trigger for the employer a refund of contingency fees paid to professionals that assisted it in procuring the ERCs;
- the fact that participation in the VDP does not ensure an exemption from criminal charges;
- the obligation of an employer to continue interacting with the IRS even after participating in the VDP, such as providing data or testimony in future IRS examinations, investigations, or litigation focused on other parties;
- the limited time, resources, and money available to the IRS and Department of Justice for ERC enforcement activities; and
- the serious challenges facing the IRS in penalizing any employer who relied in good faith on third parties (for example, sponsors, accountants, attorneys, and others) given its repeated public announcements to the effect that many employers were “victims of aggressive promoters” and the ERC is “a complex claim with precise requirements,” “an incredibly complex claim,” “a very technical area of the law,” and “one of the most complex tax provisions ever administered by the IRS.”<sup>48</sup>

## V. Conclusion

So this is how the IRS found itself in the current ERC quagmire and some of the measures it is taking to get out. These include classics, such as carrying out certain enforcement actions, threatening to effectuate many more, and then offering taxpayers a remedy featuring a certain degree of financial benefit and risk alleviation. The participation level in the first VDP was low. It will be interesting to see if the IRS fares better with the second VDP, particularly when the terms are less favorable than those of the first

<sup>47</sup> *Id.*; IR-2024-213; IR-2024-212; Benjamin Valdez, “ERC Voluntary Disclosure Program Reopens,” *Tax Notes Federal*, Aug. 16, 2024, p. 1576.

<sup>48</sup> See, e.g., IR-2023-169; IR-2024-203; Sheppard, “Comparing IRS Settlements: Easements and Employee Retention Credits,” *supra* note 1.



VDP, a long list of considerations remains, and the courts have yet to issue decisions regarding key ERC issues. ■

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