

## IRS Expands ERC Voluntary Disclosure Program to Employers Who Already Received Their Checks

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As **previously reported** by Miller Canfield, in October 2023 the IRS launched a withdrawal program for Employee Retention Credit (ERC) claims for employers who now doubt the validity of their claim. Unfortunately, employers who already deposited their refund checks were not included in this program.

To address this discrepancy, the IRS announced a new voluntary disclosure program on December 21, 2023, allowing for the penalty-free repayment of ERC credits. Specifically, employers who have received and deposited a refund for a claimed ERC may volunteer to repay only 80 percent of the claimed credit without being assessed penalties or interest. Employers are permitted to retain 20 percent of the claimed credit to cover fees the employer may have had to pay to a promotor.

Employers participating in the voluntary disclosure program will be required to provide the names and details of any promotors or advisors who assisted them with filing the erroneous claims.

Employers who have received and deposited refund checks from erroneous ERC claims may enroll in the voluntary disclosure program by the deadline of March 22, 2024. They will not be charged penalties or interest on the claimed ERC amount if they repay 80 percent of the credit and sign the closing agreement sent by the IRS in response to the voluntary disclosure. The IRS will consider installment agreements with employers who are unable to repay the entire 80 percent amount on a case-by-case basis, but they remain at risk for penalties and interest pending IRS approval of the agreement.

Employers will be eligible to take advantage of this program so long as:

- they are not under criminal investigation by the IRS,
- the IRS has not received information from a third party about the employer's noncompliance,
- they are not under an employment tax investigation for the same period in which the ERC was claimed, and
- they have not received a prior notice or demand for repayment of the claimed ERC.

Crucially, this means that employers will not be able to avoid penalties and interest once they have received a letter denying the claimed ERC and will likely have to repay the 100 percent of the credit rather than only 80 percent.

Given that the IRS announced they have already mailed approximately 20,000 denial letters and plan on mailing additional denial letters soon, the window to utilize the voluntary disclosure program may be brief for employers not yet contacted by the IRS. Employers who have reason to believe that they erroneously claimed the ERC should consider acting quickly to minimize the financial burden associated with an IRS denial.

An employer who uses a third-party payor to pay employment taxes, and for whom the third-party payor filed a claim, should discuss with the third-party payor the advisability of applying for withdrawal of the claim pursuant to this voluntary disclosure program.

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If you want help reviewing or withdrawing your ERC claim, whether you've received your IRS refund check or not, Miller Canfield can help you. Please contact your Miller Canfield attorney or the authors of this alert if you wish to discuss the matter further.