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IRS

Red flags for Employee Retention Credit claims; IRS reminds businesses to watch out for warning signs of aggressive promotion that can mislead people into making improper ERC claims

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WASHINGTON — The Internal Revenue Service continues to warn businesses to watch out for aggressive marketing by nefarious actors involving the Employee Retention Credit (ERC) and urged people to watch out for red flags that can signal trouble.

The credit, also called the Employee Retention Tax Credit or ERTC, is a legitimate pandemic-era tax credit but as time passes the credit has been increasingly the target of aggressive marketing to businesses that may not qualify for the credit.

Although promoters advertise that ERC submissions are "risk free," there are actually huge risks facing businesses as the IRS increases its audit and criminal investigation work. Hundreds of criminal cases are being worked, and thousands of ERC claims have been referred for audit.

The IRS reminds anyone who improperly claims the ERC that they must pay it back, possibly with penalties and interest. A business or tax-exempt group could find itself in a much worse cash position if it has to pay back the credit than if the credit was never claimed in the first place. This underscores the importance of taxpayers taking precautionary steps and avoiding being pushed by a promoter, including instances where a promoter can collect contingency fees as much as 25%.

Properly claiming the ERC

There are very specific eligibility requirements for claiming the ERC. Employers can claim the ERC on an original or amended employment tax return for qualified wages paid between March 13, 2020, and Dec. 31, 2021. However, to be eligible, employers must have:

- Sustained a full or partial suspension of operations due to orders from an appropriate governmental authority limiting commerce, travel or group meetings because of COVID-19 during 2020 or the first three quarters of 2021,
- Experienced a significant decline in gross receipts during 2020 or a decline in gross receipts during the first three quarters of 2021, or
- Qualified as a recovery startup business for the third or fourth quarters of 2021.

Warning signs of aggressive ERC marketing

The IRS sees wildly aggressive suggestions from marketers urging businesses to submit the claim because there is nothing to lose. In reality, those improperly receiving the credit could have to repay the credit – along with substantial interest and penalties.

Warning signs to avoid include:

- Unsolicited calls or advertisements mentioning an "easy application process."
- Statements that the promoter or company can determine ERC eligibility within minutes.
- Large upfront fees to claim the credit.
- Fees based on a percentage of the refund amount of Employee Retention Credit claimed. This is a similar warning sign for average taxpayers, who should always avoid a tax preparer basing their fee on the size of the refund.
- Preparers seeking anonymity by refusing to sign the ERC return being filed by the business as well as supplying their identifying information and a tax identification number. Similar to "ghost preparers," this limits the risk to just the taxpayer claiming the credit.
- Aggressive claims from the promoter that the business receiving the solicitation qualifies before any discussion of the group's tax situation. In reality, the Employee Retention Credit is a complex credit that requires careful review before applying.

Unscrupulous promoters may lie about eligibility requirements, including refusing to provide detailed documents supporting their computations of the ERC. In addition, those using these companies could be at risk of someone using the credit as a ploy to steal the taxpayer's identity or take a cut of the taxpayer's improperly claimed credit.

How the promoters lure victims

The IRS continues to see a variety of ways that promoters can lure businesses, tax-exempt groups and others into applying for the credit.

- Aggressive marketing. This can be seen in countless places, including radio, television, social media, online as well as phone calls and text messages.
- Direct mailing. Some ERC mills are sending out fake letters to taxpayers from the non-existent groups like the "Department of Employee Retention Credit." These letters can be made to look like official IRS correspondence or an official government mailing with language urging immediate action. Some solicitations even make it look like it's coming from the bank the business uses.
- Leaving out key details. Third-party promoters of the ERC often don't accurately explain eligibility requirements or how the credit is computed, and they do not share their workpapers with the businesses claiming the credit. They may make broad arguments suggesting that all employers are eligible without evaluating an employer's individual circumstances.
  - For example, only recovery startup businesses are eligible for the ERC in the fourth quarter of 2021, but promoters fail to explain this limit.
  - Also, the promoters may not inform taxpayers that they need to reduce wage deductions claimed on their business' federal income tax return by the amount of the Employee Retention Credit. This causes a domino effect of tax problems for the business.
- Paycheck Protection Program participation. In addition, many of these promoters don't tell employers that they can't claim the ERC on wages that were reported as payroll costs to obtain Paycheck Protection Program loan forgiveness.
- Mistaken supply chain arguments. Contrary to advice given by unscrupulous preparers, IRS legal guidance in July makes clear that supply chain disruptions do not qualify an employer for the credit unless they are due to a government order. Employers that experienced supply chain disruptions qualify for ERC only if they had to suspend their business operations because their suppliers were unable to provide critical goods or materials due to a government order that caused the supplier to suspend its operations.

How businesses and others can protect themselves

The IRS reminds businesses, tax-exempt groups and others being approached by these promoters that there are simple steps that can be taken to protect themselves from making an improper Employee Retention Credit.

- Work with a trusted tax professional. Eligible employers who need help claiming the credit should work with a trusted tax professional; the IRS urges people not to rely on the advice of those soliciting these credits. Promoters who are marketing this ultimately have a vested interest in making money; in many cases they are not looking out for the best interests of those applying.

- Request a detailed worksheet explaining ERC eligibility and the computations used to determine the ERC amount.

- Don't apply unless you believe you are legitimately qualified for this credit. Details about the credit are available on IRS.gov, and again a trusted tax professional – not someone promoting the credit – can provide critical professional advice on the ERC.

To report ERC abuse, submit Form 14242, Report Suspected Abusive Tax Promotions or Preparers

People should mail or fax a completed Form 14242, Report Suspected Abusive Tax Promotions or Preparers PDF, and any supporting materials to the IRS Lead Development Center in the Office of Promoter Investigations.

Mail:

Internal Revenue Service Lead Development Center
Stop MS5040
24000 Avila Road
Laguna Niguel, California 92677-3405
Fax: 877-477-9135

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