

# IRS Announces Second Employee Retention Credit Voluntary Disclosure Program

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The IRS has announced that it will offer a second Employee Retention Credit Voluntary Disclosure Program (ERC-VDP) to allow businesses who received the ERC to pay back the money they received after filing ERC claims in error.

Like the first ERC-VDP, this program allows businesses to resolve erroneous claims or credit or refund involving the 2021 tax year. Businesses who opt into this program will only be required to pay back 85% of the total ERC claim received for the 2021 tax year. Any associated penalties and interest will also be waived as part of the program for the full amount of the ERC claim.

The discounted 85% rate is only applicable to businesses who apply for and are accepted into the ERC-VDP by 11:59 p.m. local time on Nov. 22.

## Background

The ERC is a refundable tax credit that is an important feature of the CARES Act to provide eligible businesses and tax-exempt organizations with vital relief during the COVID-19 pandemic. The program provided businesses with credits for qualified wages paid during the 2020 and 2021 tax years provided that the businesses met certain qualifying criteria.

The IRS issued a moratorium in the fourth quarter of 2023 for any new ERC payments. It also instituted a more robust compliance regime for new ERC claims, began mailing denial letters for disallowed claims, and instituted a new voluntary withdrawal program and ERC-VDP for businesses that feel that they applied for or received the credit in error. The IRS has resumed processing ERC claims made prior to the moratorium and is slowly issuing refunds.

The IRS first offered the ERC-VDP during Q1 of 2024 as a program that would allow businesses to return erroneous ERC refunds without the need to pay any associated penalties or interest. The ERC-VDP allowed businesses to return these refunds at a discounted rate with no penalties and interest and to disclose information related to their claims.

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According to the IRS, more than 2,600 taxpayers applied to the first ERC Voluntary Disclosure Program to resolve their improper ERC claims and avoid civil penalties and unnecessary litigation. Participants included common law employers who used a third-party payer to claim the ERC on their behalf.

Based on the success of the first ERC-VDP, the IRS is once again offering a similar program to return any erroneous claims and avoid potential civil litigation, penalties and interest.

Businesses that have submitted ERC claims that are still being processed by the IRS may voluntarily withdraw these claims if they feel that upon further review, they do not qualify for the ERC program. By withdrawing their ERC claim now, businesses can avoid exposure to future penalties and interest if the IRS later audits the ERC claims and finds that the business is not eligible. Businesses that received the credit and are later found to be ineligible will be liable to repay the credit plus applicable penalties and interest.

Businesses that have received their credits can voluntarily disclose that they do not believe that they qualify and return the money to the IRS. If done timely, businesses can also avoid any liability for penalties and interest paid as part of the claims. These businesses will also avoid any risk to a future audit related to the ERC claims for 2020 and 2021. Returning ERC funds within a short time from when they are first received can be done at any time and does not need to be done as part of the ERC-VDP.

Many businesses that would like to decline any ERC claims that were submitted to the IRS prior to the moratorium will likely need to use the voluntary withdrawal program **AND** ERC-VDP. This is because the IRS does not process claims as a group. Instead, the IRS processed each claim on a quarter-by-quarter basis. It is very possible that a business may have received some of the claimed ERC credits while other credits are still in process at the IRS. A business in this situation would need to withdraw any unprocessed claims and repay any claims received in error.

#### **Who Will Qualify for This Relief?**

Any businesses that previously claimed the ERC **and** has received a credit or refund for one or more covered quarters is eligible to participate in the 85% ERC-VDP, provided that:

1. The participant is not under criminal investigation, and they have not been notified that the IRS intends to commence a criminal investigation;
2. The IRS has not received information from a third party alerting the IRS to the participant's noncompliance, nor has the IRS acquired information directly related to the noncompliance from an enforcement action;

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3. The participant is not under an employment tax examination by the IRS for any tax period(s) for which the taxpayer is applying for the ERC-VDP;
4. The participant has not been notified by the IRS that the ERC they received is being recaptured for any tax period(s) for which the taxpayer is applying for this second ERC-VDP; and
5. The participant has not previously received notice and demand for repayment of all or part of the claimed ERC.

Businesses that use a third-party payroll provider, such as a Professional Employer Organization (PEO), may still take advantage of the ERC-VDP. To do so, the third-party provider must submit the ERC-VDP application on behalf of the business.

To participate in the program, businesses will need to apply by submitting Form 15434 Application for ERC-VDP to the IRS on or before 11:59 p.m. local on Nov. 22. If approved by the IRS, program participants will be required to sign a closing agreement stating that they are not eligible to claim the ERC for the tax periods at issue and repay 85% of the claimed ERC, including both the refundable and non-refundable portions.

If the returns used to claim the ERC were prepared by a third-party preparer, the business will also need to disclose the name, address and phone number of the preparer(s) or advisor(s) who assisted with the claim for credit or refund and a description of services provided by the preparer or advisor.

#### **Additional Information**

To claim the ERC, businesses would have had to amend their 2021 annual tax return to reduce the payroll deduction claimed by the total amount of the ERC. If a business participates in the ERC-VDP, it may do the following:

1. If the 2021 tax return has **already been amended** to reduce the payroll deduction, it can be re-amended to restore the payroll deduction to the amount filed on the original return.
2. If the 2021 return **has not been amended**, businesses will not need to file an amended return.

Once a business repays 85% of the claimed ERC, signs the required closing agreement, and amends its returns as necessary, it will have met the terms of the ERC-VDP.

If your business cannot fully repay the 85% of claimed ERC due at the time that the closing agreement is executed, the IRS will consider repayment under an installment agreement. These installment agreements will be approved on a case-by-case basis by the IRS and can be established by a tax practitioner on behalf of the business.

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For more information on the second ERC-VDP and its applicability to your circumstances, see Announcement 2024-30 and IR-2024-212.