

Updated IRS Employee Retention Credit Voluntary Disclosure Program to Allow 80% Repayment of Claims

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The IRS has updated its newly created 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.

Businesses who opt into this program will only be required to pay back 80% of the total ERC claim received for the 2020 and 2021 tax years. Any associated penalties and interest will also be waived as part of the program for the full amount of the ERC claim.

The discounted 80% rate is only applicable to businesses who apply for and are accepted into the ERC-VDP by 11:59 p.m. local time on March 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.

As the ERC program enters its fifth year, the IRS has become increasingly concerned that new businesses claiming the credit no longer meet the complicated qualifying criteria of the program. Instead, the IRS believes that a very high number of new ERC claims are done by third parties who seek to take advantage of the program for their own monetary gain.

In response to these growing concerns, 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.

UPDATED IRS EMPLOYEE RETENTION CREDIT VOLUNTARY DISCLOSURE PROGRAM TO ALLOW 80% REPAYMENT OF CLAIMS Cont.

The IRS updated the terms of the ERC-VDP in response to direct business feedback that many are struggling to repay the money. Businesses reported that they had paid up to 20% of their ERC claims to third party promoters who retained the money as payment for their services. These businesses no longer had the full amount of the ERC and are struggling to repay the credit as part of the ERC-VDP. In response, the IRS is offering a discounted ERC-VDP to encourage businesses to take corrective action now and to disclose information related to their claims.

IRS Commissioner, Danny Werfel, said in a recent statement:

"From discussions we have had with taxpayers and tax professionals around the country, we understand that there are many employers eager to correct their error, but who remain concerned about their ability to pay back the portion of the credit that has been lost to the promoter that brought them into this mess. This new option, with an opportunity to get right with a lower financial cost, provides the relief these taxpayers requested. The new initiative will also help with our ongoing efforts to gather information on promoters who created this situation by aggressively pushing people to apply for the credit."

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. By voluntarily returning the money, 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.

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 80% 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;
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; and
4. 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 March 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 80% 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 2020 and/or 2021 annual tax returns 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 2020 and/or 2021 tax returns have **already been amended** to reduce the payroll deduction, they can be re-amended to restore the payroll deduction to the amount filed on the original return.
2. If the 2020 and/or 2021 returns **have not been amended**, businesses will not need to file amended returns.

UPDATED IRS EMPLOYEE RETENTION CREDIT VOLUNTARY DISCLOSURE PROGRAM TO ALLOW 80%
REPAYMENT OF CLAIMS Cont.

Once a business repays 80% 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 80% 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.

For more information on the ERC-VDP and its applicability to your circumstances, see IR-2023-247, Announcement 2024-3 and the IRS ERC-VDP FAQ.