

# LEGAL ALERT

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## IRS LAUNCHES SECOND ERC VOLUNTARY DISCLOSURE PROGRAM

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Many well-meaning businesses have been victims of unscrupulous promoters of Employee Retention Credits (“ERC”). The promoters have facilitated the filings of ERCs to which the employers may not necessarily be entitled. The IRS has been aggressively pursuing what it considers to be ill-gotten ERC money for some time, subjecting ERC filers to audits and investigations. The IRS has also issued blatant warnings to those who may have filed false or inflated ERC claims, especially when filed in conjunction with promoters earning a commission based on the amount of the claims filed. In fact, the IRS placed the ERC at the very top of its “Dirty Dozen Tax Scams” list for 2023.

Attempting to remedy the situation, the IRS announced the first ERC voluntary withdrawal program on October 19, 2023, allowing taxpayers an opportunity to amicably resolve unwarranted ERC claims by essentially withdrawing them. This activity reflected the IRS’ overarching concern that a substantial amount of ERC claims were *patently ineligible*. The first voluntary withdrawal program closed on March 22, 2024.

Now the Service announced its Second Employee Retention Credit Voluntary Disclosure Program, available through November 22, 2024. This program constitutes a second bite at the apple for companies that, on further reflection, may have filed improper or unwarranted ERC claims. Taxpayers concerned about their ERC claims should consider consulting with a tax attorney, immediately.

As an additional inducement, the second ERC withdrawal program requires the employer to only repay 85% of the ERC claim received from the Treasury whereas the first voluntary withdrawal program required the taxpayer to repay the entire credit received. Employers who are unable to repay the required amount of the credit received may be considered for an installment agreement on a case-by-case basis. Eligible participants who timely repay, may not be charged interest or penalties on the repayment amount. Taxpayers that enter into installment agreements may not be so lucky.

To qualify for this second ERC withdrawal opportunity:

1. The participant must not have applied for first ERC withdrawal program for the same tax periods to be covered in the second program. The IRS notes it continues to process withdrawal applications on first-in, first-out basis.
2. The IRS must not have received any third-party information about the taxpayer's noncompliance.

3. The taxpayer must not be under a tax examination for any tax period(s) that are associated with the second withdrawal opportunity.
4. The participant has not been contacted by the IRS with respect to their ERC filings.
5. The participant has not filed an amended return to eliminate the ERC.
6. The participant must not be under criminal investigation or notified they will be subject to a criminal investigation.

To apply, interested employers should work with a qualified tax attorney as the applications can be very complicated. Employers that outsource payroll to a third party, such as a PEO, cannot apply for the withdrawal program. The third-party payroll provider must separately file. To participate in the second withdrawal opportunity, the application package must be submitted by 11:59 p.m. local time on Nov. 22, 2024.

If you have questions about whether this program affects you or your business, please contact [Jonathan C. Wolnik](#).

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