



IRS Processing and Examination of COVID Employee Retention Credit Claims

September 21, 2023

The Employee Retention Credit (ERC) is a temporary tax credit that was available to employers during the COVID-19 pandemic. The ERC could be claimed by certain employers who experienced specific adverse effects from COVID. For most employers, the ERC expired on September 30, 2021. However, the IRS has [experienced a surge](#) in employers filing amended payroll tax returns in 2022 and 2023 to retroactively claim the credit. The IRS [warned](#) about the potential for widespread ineligible claims and fraud within the program and, on September 14, 2023, [announced](#) a moratorium on processing new ERC claims through the end of 2023.

Background on the Employee Retention Credit

The ERC was a temporary payroll tax credit available to employers during parts of 2020 and 2021 that was intended to partially offset the cost of paying workers during the COVID-19 pandemic.

Determining eligibility for the credit is a key factor for employers claiming the ERC. The ERC is not available to all employers. To be eligible, an employer needed to meet one of the four criteria:

- **Shutdown:** Be subject to a full or partial government shutdown *order* issued by the federal or a state or local government. The [IRS determined](#) that the shutdown must have been due to an official government *order*, not government guidance, recommendation, or a statement;
- **Decline in Gross Receipts:** Experience a significant decline in gross receipts during one of the quarters covered by the ERC relative to the same calendar quarter during 2019. For the 2020 ERC, eligibility required gross receipts less than 50% of the comparable quarter of 2019. For the 2021 ERC, employers were eligible for all quarters for which gross receipts were less than 80% of the comparable quarter in 2019;
- **Startup:** For the third or fourth quarter of 2021, be a recovery startup business. A recovery startup business is an employer that began operations after February 15, 2020, and has average annual gross receipts of \$1 million or less; or

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- **Supply Chains:** [Supply chain issues](#) do not qualify a business for the ERC on their own. There is *limited* supply chain-related eligibility: specifically, the employer had to temporarily close due to a crucial supplier being shut down by a government order, be unable to operate without the supplier's product, and be unable to obtain any substitute product from any other source.

The credit is calculated as a certain share of the wages paid to each qualifying worker, up to a maximum. For example, the 2020 ERC was 50% of wages up to a maximum of \$10,000, for a maximum credit of \$5,000 per employee. Smaller employers could claim the ERC for all wages paid, whether or not the employee provided services. Larger employers could only claim the ERC for wages paid when employee services were not provided. For more information, please see [prior CRS analysis](#).

IRS Processing and Examination

Businesses claimed the ERC on their employment (payroll) tax returns. Most employers file an employment tax return quarterly using IRS [Form 941](#). That form is due by the last day of the month following the end of the quarter. For example, the original Form 941 covering the third quarter of 2021 (ending September 30, 2021) was due on October 31, 2021. However, taxpayers may amend their previously filed employment tax forms to claim the ERC using IRS [Form 941-X](#), generally within three years of the date they filed the original form.

Following [lower than expected](#) uptake of the ERC in 2020, interest in the credit increased and the IRS had a [backlog](#) of tax returns to process (including employment tax forms with ERC claims) in 2021 and 2022. On July 26, 2023, the [IRS announced](#) that it had “clear[ed] the backlog of valid [ERC] claims.” At that time, the IRS shifted its focus to “increasing scrutiny on dubious submissions.” IRS Commissioner Danny Werfel said:

The further we get from the pandemic, we believe the percentage of legitimate claims coming in is declining. Instead, we continue to see more and more questionable claims coming in following the onslaught of misleading marketing from promoters pushing businesses to apply. To address this, the IRS continues to intensify our compliance work in this area.

On September 14, 2023, the [IRS announced](#) a moratorium on processing ERC claims received on and after that date until at least the end of 2023. The IRS stated this was because of “growing concerns ... that a substantial share of new claims from the aging program are ineligible and increasingly putting businesses at financial risk by being pressured and scammed by aggressive promoters and marketing.” The IRS believes the main issue is eligibility and reports anecdotally that tax professionals have seen “95 percent or more” of recent claims being ineligible. The IRS will also use the moratorium to add additional safeguards to return processing to “stop bad claims from ever coming in.”

The IRS will continue to process returns received before September 14, 2023, but is increasing its standard processing time from 90 days to 180 days due to “stricter compliance reviews.” The processing period may be longer if the return is subject to further review or audit.

What Can Employers Do?

The next steps for employers will depend on where they are in the process:

- **Employers who submitted an ERC claim for processing:** The amended return will likely take longer to process. The IRS is [currently working on](#) an option for employers with an ERC claim being processed to withdraw that claim if they no longer think they are eligible.

- **Employers who have not yet submitted an ERC claim:** The employer can file an amended return, but it will not be processed until at least the beginning of 2024.
- **Employers who have received an ERC payment, but no longer believe they are eligible:** The IRS is [currently working on](#) an ERC settlement program to repay the credit.
- **Employers who believe they are victims of an ERC-related scam:** Taxpayers may consider [reporting tax-related illegal activities to the IRS](#).

Taxpayers may also be interested in an IRS list of [ERC claim red flags](#), an [ERC eligibility checklist](#), and [Frequently Asked Questions](#).

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