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Congressional Tax Writers Propose Accelerated Jan. 31 Deadline to Claim Employee Retention Credit, and Other Changes

On Jan. 16, 2024, the Senate Finance Committee and House Ways and Means Committee chairs announced their bipartisan agreement to a tax package that would include several new tax provisions (including an expansion of the childcare tax credit, an extension of 100% bonus depreciation, and several others). However, to offset the costs of these provisions and to address fraud, the bill would also shorten the deadline to claim the pandemic-era Employee Retention Credit (ERC) and impose penalties on ERC accountants and promoters of erroneous claims.

Abuse in the ERC program from aggressive marketing and fraud has been a longstanding Internal Revenue Service (IRS) focus. To combat this abuse, the IRS included aggressive ERC promotions and illegitimate ERC claims in its annual list of “Dirty Dozen” tax schemes, announced a mortarium on the processing of ERC claims, and introduced programs including allowing ERC claimants to withdraw their pending claims or to voluntarily disclose improper ERC claims without incurring significant penalties and having to pay back only a percentage of the awarded ERC claims. The Jan. 16 announcement of the proposed legislation would assist the IRS in further combating ERC program abuse.

The ERC allowed a refundable credit for wages paid after March 12, 2020, and before Oct. 1, 2021, if the business’s operations were disrupted due to a COVID-related governmental order that partially suspended its business operations, or if the business suffered a substantial reduction in gross receipts.

There are several additional requirements that also must be satisfied to claim the ERC. The theoretical maximum credit allowed was $26,000.00 per employee.

Although the ERC program ended for wages paid after Sept. 30, 2021, if a business was eligible to claim the credit, it could do so for wages paid between March 13 and Dec. 31, 2020, until April 15, 2024. For wages paid between Jan. 1, 2021, and Sept. 30, 2021, the existing deadline is April 15, 2025.

The tax package proposal would shorten the deadline to file all claims for the ERC to Jan. 31, 2024, for eligible wages paid during 2020 and 2021. Although this deadline change may not become law, any business considering filing a valid ERC claim should assume the deadline to file will be Jan. 31, 2024, presenting an aggressive timeframe to file the claim. The ERC is claimed on an amended quarterly payroll tax return (Form 941-X) for the applicable quarter for which eligible wages were paid. Businesses should contact their accountant for advice on whether they are eligible to claim the credit and for assistance in preparing the Form 941-X for each quarter of eligibility.

The IRS has been on an enforcement initiative to weed out erroneous ERC claims, and it should be assumed the IRS will require proper documentation to demonstrate entitlement to the credit. It should also be noted that the proposed bill would extend the statute of limitations allowing the IRS to claw back an erroneous credit for six years, establishing a six-year statute of limitations for all quarters. (The current statute of limitations is three years for wages paid between March 13, 2020, and June 30, 2021, and five years for wages paid between July 1 and Sept. 30, 2021.

In addition, the proposed bill would impose a hefty penalty against tax advisors and consultants who aided and abetted a business in filing an erroneous claim for the ERC. The penalty would be the greater of $200,000.00 or 75% of the revenue received from providing the advice and assistance. In addition, the proposed legislation provides an increased due diligence requirement for tax preparers regarding an ERC claim and extends certain recordkeeping requirements applicable to material advisors of abusive tax transactions to ERC promoters, including the maintenance of a customer list that would need to be provided to the IRS upon request.

The bill's proposed changes to the ERC rules may represent a congressional endorsement of the IRS's aggressive approach against ERC consulting firms who, according to the IRS, have been assisting taxpayers in claiming the ERC for businesses that do not qualify under IRS guidance. The IRS has established a short-term voluntary disclosure program for businesses that received an ERC refund to which they might not have been entitled. This program allows a business to keep 20% of the questionable ERC refund and waives interest and penalties so that the business only needs to repay 80% of the refund. It also requires the business to identify the advisors who assisted them with filing the erroneous ERC claim. Should the promoter penalties become law, the IRS would be able to recover some of the revenue lost from allowing the business to keep 20% of the refund under the voluntary disclosure program.

Authors

This GT Alert was prepared by:

- Scott E. Fink | +1 212.801.6955 | finks@gtlaw.com
- Barbara T. Kaplan | +1 212.801.9250 | kaplanb@gtlaw.com
- Marvin A. Kirsner | +1 954.768.8224 | kirsnerm@gtlaw.com

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