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The IRS's New Voluntary Disclosure Program: Bringing Cheer to Taxpayers This Holiday Season Rather Than Placing Coal in Their Stockings

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The Internal Revenue Service ("IRS") announced in IR News Release 2023-247 (December 21, 2023) its new Voluntary Disclosure Program ("ERC VDP") that allows employers who may have received questionable Employee Retention Credits ("ERCs") to pay them back at a discount. The ERC VDP is a part of the government's ongoing fight against questionable ERC claims.

IRS Warning

As you may recall, on November 7, 2022, the IRS issued COVID Tax Tip 2022-170. It warned employers to be wary of third-party vendors offering assistance in applying for ERCs. In fact, the IRS stated in that notice:

"Employers should be wary of third parties advising them to claim the employee retention credit when they may not qualify. Some third parties are taking improper positions related to taxpayer eligibility for and computation of the credit.

These third parties often charge large upfront fees or a fee that is contingent on the amount of the refund. They may also fail to inform taxpayers that wage deductions claimed on the business' federal income tax return must be reduced by the amount of the credit.

If the business filed an income tax return deducting qualified wages before it filed an employment tax return claiming the credit, the business should file an amended income tax return to correct any overstated wage deduction.

Businesses should be cautious of schemes and direct solicitations promising tax savings that are too good to true. Taxpayers are always responsible for the information reported on their tax returns. Improperly claiming the ERC could result in taxpayers being required to repay the credit along with penalties and

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interest."

ERC VDP

The government's stated goal of the ERC VDP is twofold:

- To provide a solution for employers who were enticed by third-party providers to file dubious ERC claims that they now realize were not supported by the law and/or the facts; and
- To assist the government in identifying the promoters who are facilitating the filing of unsupportable ERC claims.

For employers that qualify for the ERC VDP, they will only be required to repay 80 percent of the credit received. Additionally, if the IRS paid the employer interest on the ERC claim, the interest does not have to be repaid. Lastly, if the employer is unable to repay 80 percent of the credit received, it may qualify for an installment agreement.

A prerequisite of participation in the ERC VDP is that the employer provide the IRS with the names, addresses and telephone numbers of any advisers or tax preparers who aided or assisted with the ERC claim.

ERC VDP Qualifications

The ERC VDP qualifications are:

- The employer must apply by March 22, 2024;
- The employer may not have received a disallowance letter from the IRS;
- The employer may not be under criminal investigation;
- The employer may not have received a notice and demand from the IRS for repayment (in whole or part) of the ERC;
- The employer may not be under an IRS employment tax examination for the tax period for which it is applying to the ERC VDP; and
- The IRS may not have received information from a third party or as the result of an enforcement action that the employer is not in compliance (presumably related to the ERC).

Application

Applying for the ERC VDP appears to be fairly simple. The employer must file Form 15434 (Application for Employee Retention Credit Voluntary Disclosure Program) with the IRS on or before March 22, 2024. The submission must be made by using the IRS Document Upload Tool found at www.IRS.gov. For employers that outsource payroll functions to a third party who reports, collects and pays employment taxes on the employer's behalf using the third

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party's EIN, the third party, not the employer, files Form 15434.

If the IRS approves the ERC VDP application, it will forward a closing agreement to the employer. At that time, the employer must repay 80 percent of the ERC it received. As stated above, employers that are unable to pay the amount owing in full may apply for an installment agreement.

IRS Holiday Note/Warning

The IRS issued this holiday note:

"[T]axpayers [need] to use extreme caution before applying for the ERC as aggressive maneuvers continue by marketers and scammers. In addition, the IRS continues to urge employers who submitted claims to review the ERC requirements and talk to a trusted tax professional about their eligibility amid misleading marketing around the credit."

Conclusion

Arguably, Santa visited early this year, leaving a present for those employers who may have fallen prey to a dubious third-party vendor selling unwarranted claims of obtaining an ERC for the employer. Employers should confer with a qualified tax practitioner and check once or even twice to determine whether their ERC claim is supportable under the applicable law and facts. If their ERC claim is not thus supported, filing an application under the ERC VDP may be appropriate.

Posted in Internal Revenue Service, IRS, Tax Planning

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