IRS Establishes Withdrawal Procedures for Questionable ERC Claims

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On October 19, the Internal Revenue Service (IRS) announced the process for concerned employers to withdraw ineligible claims for the Employee Retention Credit (ERC) that were submitted to the IRS due to aggressive promoter marketing. As we noted in our previous article, on September 14, 2023, the IRS suspended processing new ERC claims through at least December 31, 2023, citing serious concerns about "aggressive promoters" that the IRS indicated were pushing employers to make questionable and even fraudulent claims to the ERC. In its prior announcement, the IRS also indicated that it was finalizing a "special withdrawal option" for employers who have submitted an ERC, but the IRS had not yet processed or paid the claim. At the time, the IRS estimated that approximately 600,000 employers may have submitted a dubious ERC claim that they now wished to withdraw.

Withdrawing an ERC Claim

If an employer chooses to participate in the ERC claim withdrawal process, the employer will be asking the IRS to **not process** the employer's previously filed adjusted employment tax return (in most cases, Form 941-X) for the tax period that included the employer's ERC claim. The IRS will treat withdrawn ERC claims as if they were never filed and will not impose any penalties or interest. If the employer made any other changes to their adjusted employment tax return that is not related to their ERC claim, or if the employer is only looking to reduce their ERC claim rather than withdraw it, the employer cannot participate in the ERC claim withdrawal process and will simply need to amend their employment tax return.

Who Can Ask to Withdraw an ERC Claim

An employer can only use the ERC claim withdrawal process if **all** of the following apply:

- The employer made the claim on an **adjusted employment tax return** (in most cases, Form 941-X).
- The employer filed the adjusted return **only** to claim the ERC and made **no other adjustments**.
- The employer wants to withdraw **the entire amount** of their ERC claim.
- The IRS **has not paid** the claim, or the IRS has paid the claim, but the employer **has not cashed or deposited** the refund check.

How to Request an ERC Claim Withdrawal

The procedures for requesting an ERC claim withdrawal can vary, depending on the employer's situation:

- The employer has not received a refund and **has not** been notified their claim is under audit.
- The employer has not received a refund and **has** been notified their claim is under audit.
- The employer has received a refund check but **has not** cashed or deposited it.

Employers should consult with counsel regarding the procedural requirements for withdrawing an ERC claim depending on their specific situation. Additionally, if the employer used a professional payroll service to file their ERC claim, the employer may need to have the payroll service submit the employer's withdrawal request, depending on how the ERC claim was filed.

IRS Response

The IRS will send a letter in response to an employer's ERC withdrawal request, indicating whether the request was accepted or rejected. An approved withdrawal request is not effective until the employer has received its acceptance letter from the IRS. Importantly, if the IRS accepts an employer's withdrawal request, the employer should consult with their tax advisor to determine if the employer's income tax return should be amended to address any impact of the ERC on the employer's tax return.

Finally, as the IRS previously noted in its announcement suspending the processing of new ERC claims, the IRS again makes it clear that an employer's withdrawal of a fraudulent ERC claim will not exempt the employer from potential criminal investigation or prosecution if the employer filed a fraudulent ERC claim or assisted or conspired in such conduct.

Next Steps

Employers should seek the advice of counsel when considering whether to participate in the IRS's ERC claim withdrawal process, or after receiving an IRS notice regarding an audit or criminal investigation regarding an ERC claim. Additionally, if an employer has a pending claim with the IRS, counsel should investigate whether the employer should consider requesting a withdrawal of the ERC claim or pursuing a reduction of the ERC claim.

For more information about these developments, please contact the authors or any attorney in Frost Brown Todd's Tax practice group. You can also visit our Tax Law Defined® Blog for more insight into the latest developments in federal, state and local tax planning and tax administration.