KS ADVISOR BLOG

The Employee Retention Credit Revisited

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Initial Process and Qualifications

The Employee Retention Credit (ERC) was part of the 2020 CARES Act, designed to assist businesses and individuals impacted by COVID-19. Initially it did not garner much enthusiasm as you were disallowed from claiming it if you had also gotten a PPP loan which was typically more advantageous for the business. That changed in December of 2020, when the rules were changed to allow businesses to claim both PPP loan money and ERC, although the same wages could not be used for both.

Simply, the credit was a 50% credit for 2020 on up to $10,000 of wages per employee from March 13, 2020, through December 31, 2020, or $5,000 per employee. In 2021, the credit was increased to 70% on up to $10,000 of wages per quarter, for the first three quarters of the year. So, for 2021, the credit could be up to $21,000 per employee.

Qualification for these credits was typically under one of two methods, a significant decline in gross receipts or a full or partial government shut down. The significant decline in gross receipts was defined as a greater than 50% drop in gross receipts in 2020 compared to the same quarter in 2019. You remained qualified until the end of the first quarter when gross receipts were less than a 20% decline from the same quarter in 2019. For 2021, the overall drop only needs to be 20% to qualify and would also qualify the subsequent quarter. The full or partial government shut down was defined as being under a mandated shut down order by a governmental agency due to COVID. Certain partial shutdowns, limiting the ability to do business on the same scale as pre-pandemic, could also qualify. The qualifying period for a full or partial shutdown was the period of time the government order was in place. A third method, with a very specific, hard to meet criteria, was the supplier shut down. If you had a supplier that was shut down by government order due to COVID and you required this supply and were unable to get a substitute product elsewhere, you could qualify during the time that supplier was shut down.

With potentially very lucrative credits out there for businesses, purveyors of these credits came out of the woodwork. Typically, these folks would take an aggressive approach on qualification, often using the supplier shut down or an aggressive or incorrect approach on one of the other qualifiers. The rules around the partial shutdown can be complicated and the current guidance doesn't always paint a clear picture, so there are ample opportunities for abuse. These providers were also very aggressive in their marketing approach, sending postcards, emails, etc. on a frequent basis. Because of the amount of abuse around these credits, on September 14, 2023, the IRS put a moratorium on processing credits at least until the end of 2023, while they reallocated resources to identifying fraud and auditing potentially fraudulent claims.

New Withdrawal Process

In an effort to assist businesses that may have inadvertently fallen prey to one of these fraudulent claim purveyors, the IRS has now implemented a withdrawal process. For businesses that have filed a claim but have not received a refund, you may withdraw the claim and eliminate the possibility of future interest and penalties resulting from an audit of the claim. The IRS has also stated that anyone who has willfully filed or assisted in filing a fraudulent claim will not be exempt from potential criminal investigation. If you think you may have filed an incorrect or fraudulent ERC claim, you should consult with your tax advisor and consider a withdrawal of the claim.

Currently, all ERC periods are still available for claims. If you have not looked into the credit yet, it might be worth discussing with your CPA or tax advisor. Be aware of the long delay in processing times and the increased scrutiny and resources being put towards new claims. The calculation of the credit and determination of qualification can be complicated. It is highly recommended that you consult a reputable and trusted professional for advice regarding the credit. If they tell you they don’t think you qualify but a pop-up credit provider is convinced you do, without knowing anything about your business, be skeptical and remember, sometimes it is too good to be true.