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IRS set to reopen popular ERC voluntary disclosure program

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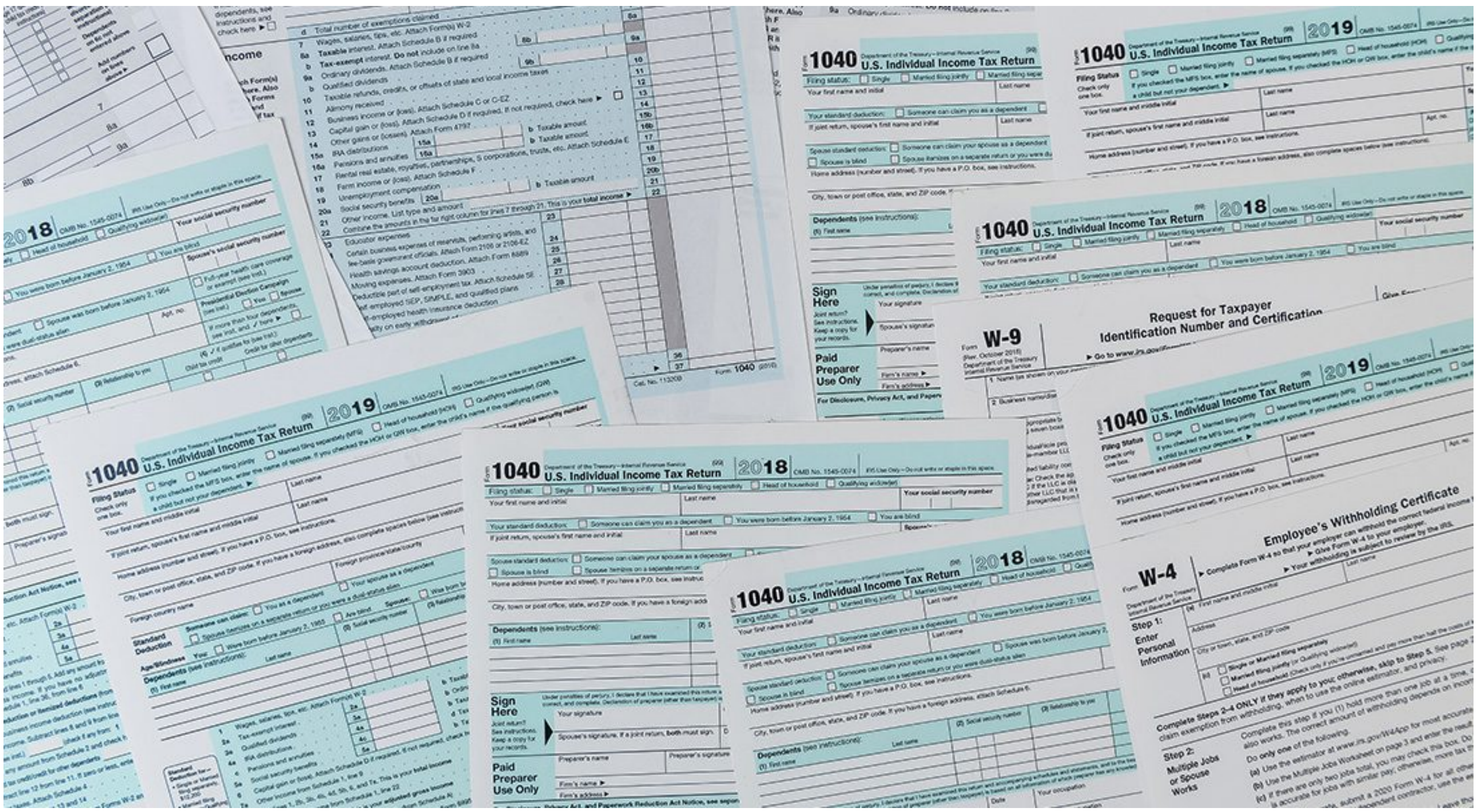

The IRS recently announced that it is in the final stages of reopening the special ERC Voluntary Disclosure Program for a brief period. To date, no additional details have been provided.

The IRS first made this Program available on December 21, 2023, and it was open for only 92 days. The Program was wildly popular among employers who received ERC refunds they erroneously claimed because the terms of the Program were so generous. When the Program closed on March 22, 2024, the IRS had already recovered more than $225M from over 500 employers, with more than 800 submissions still being processed. To date, the IRS is still working through many of those submissions.

What is the ERC voluntary disclosure program?

In general, the Program required employers to voluntarily repay 80% of the erroneous ERC refund amount, agree to provide additional information as requested by the IRS, and enter into a closing agreement with the IRS. Employers accepted into the Program were allowed to keep 20% of the ERC refund amount tax-free, protected from an IRS audit, and avoided significant penalties and interest. To further incentivize employers' participation in the Program, the Program also allowed employers to:

- Keep the interest they received on the erroneous ERC refund amount, and,
- Avoid amending their income tax returns to reduce wage expenses, likely increasing their tax liability.

To apply for the Program, employers were required to prepare Form 15434, Application for ERC Voluntary Disclosure Program, and Form SS-10, Consent to Extend the Time to Assess Employment Taxes, and submit those forms online using the IRS Document Upload Tool.

Tax practitioners expect the IRS will operate the reopened ERC Voluntary Disclosure Program in much the same way as the original program. The application window is expected to be relatively short. Applicants should be prepared to provide detailed information and calculations for each tax period.

Should employers wait for the program to reopen?

Employers looking to return some, or all, ERC refund amounts erroneously claimed may be tempted to wait for the Program to reopen, since the terms of the Program are so generous; however, waiting has its risks. Earlier this year the IRS announced that it was expanding ERC claim recapture efforts and intensifying ERC tax audits. At that time, the IRS had already sent out more than 12,000 letters aimed at recapturing the ERC claims for tax year 2020. Since then, the IRS has issued more letters addressing tax year 2021. Once an employer is under an employment tax audit or a criminal investigation by the IRS, it is no longer eligible for the ERC Voluntary Disclosure Program.

While waiting for the Program to reopen, employers may consider other ways to correct erroneous ERC claims. First, employers may withdraw their ERC claim requests, which would allow them to avoid future repayment, interest, and penalties. However, this withdrawal option is only available if employers have not received refund checks from the IRS or have received but not deposited their refund checks from the IRS. This withdrawal option is an all-or-nothing proposition for each tax period because it does not allow employers to claim partial ERC. So long as the ERC claims were not fraudulent, the claims that are withdrawn by employers will be treated by the IRS as if those ERC claims were never filed. For these cases, the IRS has agreed not to impose penalties or interests on the employers.

For employers who have already received and deposited ERC refund checks from the IRS, they may correct the amount of ERC by preparing and filing amended employment tax returns (Form 941-X, Form 943-X, Form 944-X, Form CT-1X) with the correct amount of ERC for each tax period. These amended returns are required to be mailed to the IRS and cannot be submitted through the dedicated ERC claim withdrawal fax line. Once the IRS processes the amended returns, the employers will likely receive a payment notice from the IRS for the amount due. Unlike the ERC Voluntary Disclosure Program and the withdrawal option, the IRS has not indicated that it will not impose penalties or interests on the tax resulting from the amendment of the employment tax returns.

In comparison to the ERC Voluntary Disclosure Program, these other correction options are less generous. Still, they may reduce the risk of audit and significant penalties and should not be overlooked.

If you are questioning your ERC claims, considering a correction program, or responding to an ERC audit notice, please contact me or any member of the Saxton & Stump Tax and Tax Controversy Group.

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