

BUSINESS

Pandemic fraud: IRS sets March 22 deadline for firms to apply to repay undeserved Employee Retention Tax Credits



David A. Shuster, a tax partner at Marcum LLP, urged recipients to take advantage of the amnesty program if they are unsure of their eligibility. Credit: Olivia Falcigno

By James T. Madore

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March 4, 2024 5:00 am

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Employers, many of them small businesses, that were duped into applying for pandemic tax credits they didn't deserve now have the chance to pay back the money without facing penalties — but the application window closes in three weeks.

The Internal Revenue Service launched an amnesty program for the Employee Retention Credit in December amid mounting evidence that businesses and nonprofits were misled by unscrupulous promoters into seeking the credit. The ERC was designed to reward those employers who — despite lost revenue — continued paying employees at the height of COVID-19 in 2020-21 when the economy was shut down.

The March 22 amnesty deadline comes as the IRS finds itself inundated with ERC claims, with as many as 95% of them being fraudulent, based on testimony to Congress from an anonymous whistleblower. The IRS stopped processing new claims in September.

As with other pandemic relief, the fraudulent ERC payouts total in the billions of dollars.

WHAT TO KNOW

- **Employers that believe** they fraudulently received the Employee Retention Credit have until March 22 to apply to repay 80% of the funds, according to the Internal Revenue Service.
- **Small businesses and** other employers were duped by unscrupulous marketing firms that erroneously told them they were eligible and collected millions of dollars in advisement fees.
- **The ongoing program** was designed to aid employers that continued to pay employee salaries in 2020-21 at the coronavirus' height and when the economy was shut down.

That's led members of Congress to call for an early end to the ERC, also called the Employee Retention Tax Credit. Legislation to expand the federal child tax credit would also close the ERC to new claims as of two months ago, instead of mid-April 2025.

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Nationwide, more than 3.6 million ERC claims have been filed, spurred in part by radio and internet advertisements from marketing firms looking to collect commission fees. The IRS has paid out \$230 billion to date, far above the \$55 billion anticipated by leaders in Washington, based on a recent Congressional Budget Office report.

The number of ERC claims from Long Island employers is not known.

Firms saw opportunity for profit

The tax credit was meant to help employers that paid workers' wages even as their revenue plummeted during the pandemic shutdowns ordered by state and local governments. The credit can be as much as \$26,000 per employee — claimed against wages paid.

But some marketing and financial services firms saw an opportunity to profit by collecting fees for helping employers with their ERC claims, pushing some to apply even though they didn't qualify.

The IRS hopes duped employers will help the agency go after those firms, according to government officials and accountants.

"There have been a lot of problems with dubious claims," said David A. Shuster, a tax partner at Marcum accountants in Manhattan and leader of its tax controversy services. "The IRS has sent out 20,000 letters disallowing claims for companies that did not exist during the relevant time periods or they didn't have employees during the relevant time periods."

He and others urged recipients of the credits to consider the amnesty program if they are worried that they received the COVID-19 aid in error.

"There's a lot of incentives. ... You only have to pay back 80% [of the tax credit], and the other 20% is for you to keep and doesn't have to be included as income. ... You also don't have to adjust your [tax] returns," said Shuster, who leads a 24-member committee at Marcum that is helping employers determine the validity of their ERC claims.

He said the rationale behind the 20% forgiveness is that it roughly equals the commission fee of unscrupulous ERC promoters.

No civil penalties or interest will be charged unless the repayment is made in installments, according to the experts. However, they said employers aren't exempt from possible criminal prosecution.

"You do have to provide information to the IRS about those who assisted you with making your claim. From that, the IRS will build a database and start connecting the dots to go after the bad [ERC] promoters," Shuster said.

Promoters being investigated

The IRS is investigating nine promoters and reviewing another 123 as of mid-January, according to agency head Danny Werfel.

IRS Criminal Investigation has brought 18 cases that resulted in federal charges, with 11 convictions and four prison sentences averaging 21 months. The cases are among 352 involving more than \$2.9 billion in potentially fraudulent claims for the 2020-23 tax years.

“There’s been so much fraud related to the pandemic,” said Scott C. D’Alessandro, assistant special agent-in-charge of the IRS-CI local office. “This started with price gouging and hoarding of PPE, then the different loan programs and unemployment insurance claims. Now, we’re seeing an uptick in fraud in the Employee Retention Tax Credit.”

For example, a tax preparer in New Jersey was arrested in July and accused of seeking more than \$124 million from the IRS by filing more than 1,000 tax returns that falsely claimed ERC eligibility.



Neil Seiden, president of Asset Enhancement Solutions LLC in Uniondale, said the program was "like the Wild West." Credit: Judy Walker

It was like the 'Wild West'

For more than two years, Prime Auditors, a Mineola firm that helps businesses get money back on their energy and telephone bills, has recruited potential ERC clients for the consumer credit reporting firm Experian, which charges a fee for assisting ERC applicants.

"There are so many charlatans out there using 15-second radio and TV ads to get clients," said John E. Appelt, managing director at Prime Auditors.

Neil Seiden, a financial consultant based in Uniondale, said the IRS should have required employers to supply the documents that support the claims in their ERC application. His firm, Asset Enhancement Solutions LLC, arranges financing for businesses that face challenges.

"You had these so-called ERC mills that collected millions of dollars in fees to advise people about the ERC. ...They did no due diligence," Seiden said. "It was like the Wild West."

FRAUD FLAGS

- 1) Employer claims the ERC for all the quarters that are available.
- 2) Claim is based on government orders shutting down the economy in 2020-21 that don't qualify for the ERC program.
- 3) Too many employees are claimed, and the calculation of their wages is wrong.
- 4) Employer claims the ERC based on supply chain disruptions.
- 5) Employer seeks the ERC for every day in a quarter.
- 6) Employer didn't pay wages or didn't exist during the eligibility period of 2020-21.
- 7) Promoter told the employer they had nothing to lose by applying for the ERC.

SOURCE: Internal Revenue Service

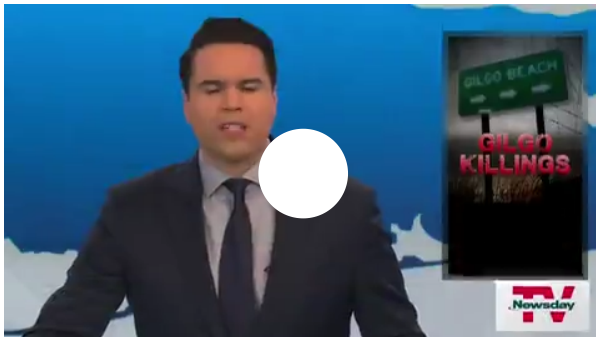


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James T. Madore writes about Long Island business news including the economy, development, and the relationship between government and business. He previously served as Albany bureau chief.

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