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Client Alert: The Employee Retention Credit “Mill”: How to Spot the Scam, Protect Your Business, and Unwind a Bad Claim

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The Employee Retention Credit (ERC) was meant to be a lifeline for struggling small businesses facing economic hardship caused by the COVID-19 pandemic. ERC is a refundable tax credit for certain eligible businesses and tax-exempt organizations. It has also become one of the most heavily marketed tax schemes in recent history. This advisory draws on Internal Revenue Service (IRS) guidance and explains how the scam works, how to avoid it, and what to do if your business may already be affected.

How the Scam Works

ERC eligibility is narrow. To qualify, an employer must (1) had its operations fully or partially suspended by a COVID-19 government order limiting commerce, travel, or group meetings during 2020 or the first three quarters of 2021; (2) had a significant decline in gross receipts during 2020, or a decline in gross receipts during the first three quarters of 2021; or (3) qualified as a recovery startup business for the third or fourth quarter of 2021.

The IRS warns businesses that ERC scam promoters “use several different tactics to mislead people who have no chance of meeting the requirements for the Employee Retention Credit, while charging them excessive fees.” These tactics often include: (1) unsolicited calls or advertisements promising an “easy application process”; (2) large up-front or contingency fees based on a percentage of the ERC refund; and (3) claims that the business qualifies before anyone has discussed the business’s tax situation, combined with pressure to act quickly before time runs out.

Tax promoters, misrepresenting themselves as “tax specialists,” often promise potential targets that they have “nothing to lose” when, in reality, an improper ERC claim can expose the taxpayer, not the promoter, to an IRS audit, claw backs/repayment of the credit, criminal penalties, interest, and other financial penalties.

Tips for Prevention

Use a trusted, independent tax professional. The IRS urges businesses not to rely on people who solicit these credits, because those promoters have “a vested interest in making money.”

Demand the analysis prior to signing any agreement. Ask for a detailed worksheet showing how eligibility was determined and how the credit was calculated. Do not accept a generic document about a government order. Ask for a copy of the actual order and confirm that it applied to your business.

Read the engagement agreement carefully. Watch for contingent fees, personal guarantees, provisions that bar termination, and indemnification clauses, as these are all signs of a tax promotion scheme.

Remember who signs. The corporate officer who signs an ERC claim does so under penalties of perjury. Responsibility cannot be handed off to a promoter’s written “guarantee.”

Keep records. Keep the government order, the gross receipts comparisons, payroll records, and the Paycheck Protection Program (PPP) forgiveness documents that support any claim.

Resolving a Questionable Claim

As of October 2026, the IRS is still working through its ERC backlog. Approximately 13,000 ERC claims remain in various stages: 750 under review, 2,300 pending payment or disallowance, 3,000 under audit, 5,400 awaiting review of disallowance responses, and 1,500 with the Independent Office of Appeals. If your business may have filed an improper claim, it is important to act promptly.

Withdraw if you can. The IRS allows a full withdrawal if (1) the claim was made on an adjusted employment tax return, such as Form 941-X; (2) that return was filed only to claim the ERC; and (3) the IRS either has not paid the claim or has paid it by check that you have not cashed or deposited. The IRS maintains a webpage dedicated to this process, [Withdraw an Employee Retention Credit \(ERC\) claim](#), with step-by-step instructions and a sample withdrawal form. Businesses considering withdrawal should review IRS guidelines carefully.

If you have been paid, correct the claim. Anyone who incorrectly claimed the credit and received a refund must pay it back, possibly with penalties and interest. If withdrawal is unavailable, you may file a new adjusted return to reduce or correct the claim.

Report the promoter. Abusive promoters can be reported to the IRS Lead Development Center on Form 14242.

The ERC promotion industry thrives on urgency and on businesses not looking too closely. Reviewing eligibility independently, correcting a bad claim promptly, and taking a careful approach to promoter demands can protect your business from repayment liability, penalties, and litigation. If you have questions about an ERC claim or a promoter’s demand, please visit the [IRS Employee Retention Credit page](#).

The attorneys at Shumaker welcome the opportunity to discuss how these risks apply to your specific business or organization. Please do not hesitate to reach out to Erin Mason or Mark Wagoner with questions or for more information.

