Too Good To Be True? Be Wary of ERC Promoters

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While not as well-known as the Paycheck Protection Program, the Employee Retention Credit (ERC) program was another form of Covid relief provided by the federal government to businesses in 2020 and 2021. Under the ERC program, employers could claim refundable payroll tax credits (up to $10,000 per employee for 2020 and $10,000 per employee per quarter for 2021) for wages paid to employees during those years. These credits were available to employers that had been subject to a full or partial shutdown order or saw a specified reduction in gross receipts. For example, in the 2020 tax year, the requirement was that gross receipts were less than 50% of gross receipts for the comparable quarter in 2019, provided the employer was not subject to a shutdown order.

While we are now in 2023, employers can still get the benefit of ERCs for 2020 and 2021 by filing amended payroll tax returns. This has spurred an industry marketing to potential clients the possibility of large tax refunds. However, 10-25 percent of these refunds will be paid over to the ERC promoter once the refund is received. This often seems like easy money to the employer who is being told that they qualify for the ERCs, even if they were not subject to a shutdown order or saw the necessary drop in gross receipts. For example, eligibility might be based on the argument that the employer had to incur increased costs in dealing with the pandemic and that this reduction qualifies, even though this is not in the statute.

As always, when something seems too good to be true, employers should proceed with caution. While employers may believe they qualify based on the promoters' advice, the actual agreements with the promoters often provide disclaimers that no legal or tax advice is being provided to employer as to whether the employer qualifies for the credit. These disclaimers also typically limit the promoter's liability to indemnify the employer for any IRS audit to the amount paid to the promoter. This amount, even if collectible, will likely be far less than the penalties, interest and legal fees that the employer could face if audited by the IRS, not to mention that the employer has already spent the refund that they could have to pay back.

The ERC program does provide significant tax benefits for those employers that qualify, and it is not too late to act to get those credits. Employers in the senior living industry, though, should be particularly careful. They were unlikely to be subject to shutdown orders or to have undergone the necessary reduction in gross revenues, even if they did see significant reductions in their profits for 2020 and 2021. The IRS is already warning about "ERC scammers", and we can expect significant audit activity in this area in the coming years.

If considering filing an amended return to claim ERCs, employers should consult their CPA or tax advisors to make sure they qualify for the credit before proceeding.