



Portfolio Media. Inc. | 230 Park Avenue, 7<sup>th</sup> Floor | New York, NY 10011 | [www.law360.com](http://www.law360.com)  
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | [customerservice@law360.com](mailto:customerservice@law360.com)

## Employers Might Not Rush To Withdraw Worker Credit Claims

By **David van den Berg**

*Law360 (October 27, 2023, 6:51 PM EDT)* -- The Internal Revenue Service recently announced a program to allow employers to withdraw claims for pandemic-era employee retention credits due to rampant fraud, but uptake may be limited at first since businesses might not immediately think their submissions are invalid.

The agency released details on the credit withdrawal program Oct. 19, saying it will consider retention credit withdrawal requests for claims that the agency hasn't paid yet or for which the taxpayer hasn't cashed the refund check. The IRS said it developed the program to help small businesses and others who retention credit marketers or promoters had deceived or pressured into filing ineligible claims. The IRS also said last month it was imposing a moratorium on new claims because of the ubiquity of fraud.

There appear to be hundreds of thousands of recent pending claims for the credit. The IRS told Law360 on Friday that it currently has more than 800,000 credit claims open. In September, when the IRS announced a moratorium on processing new employee retention credit claims, IRS Commissioner Daniel Werfel told reporters he hoped the moratorium would send a message to anyone using aggressive credit claim promoters about the risk they're taking.

However, even employers that fell victim to scammers may not immediately question the advice they received. Furthermore, the requirements of the program may limit its utility for some employers.

Derek Adams, a former U.S. Department of Justice attorney now at the Potomac Law Group who represents clients under IRS audit regarding the employee retention credit, said most employers are under the impression that if a third party holding themselves out as an expert helped them with their claim it must be correct. Taxpayers generally think their claims for the credit are valid until a trusted auditor, accountant or lawyer tells them there's a problem, he said. Adams said because of that, he isn't expecting the program to spur widespread withdrawal requests.

"I don't see this program really moving the needle much," he said.

In announcing the program, the IRS said employers must meet all of a set of requirements to use the withdrawal process and must follow the steps for all periods they seek claim withdrawals. Employers must have made their claims on an adjusted employment tax return filed just for making the claim, the agency said.

Outside advice may have driven taxpayers to claim the employee retention credit for more time than

they were entitled to get it, but the withdrawal process won't help them solve the problem. That's because taxpayers seeking withdrawal have to forfeit their full claim amount.

"The withdrawal option would also not help taxpayers that fully claimed a given quarter of eligibility, but now realize they only qualified from a full or partial suspension of operations through part of that quarter," Adams said.

Some employers may have also made minor computational errors in their claims for the employee retention credit. The IRS said when announcing the program that taxpayers that aren't eligible for claim withdrawals can lower or eliminate their claims by filing amended returns. But given the length of time that could take, withdrawing claims might not make sense for employers with minimal errors, said Jeffrey M. Glassman of Meadows Collier Reed Cousins Crouch & Ungerman LLP.

"The crux of the issue is whether an employer is entitled to the ERC," Glassman said.

Lawmakers originally enacted the employee retention credit in the Coronavirus Aid, Relief and Economic Security Act in 2020 to help keep workers on the payroll while businesses dealt with coronavirus-induced closures. However, the Infrastructure Investment and Jobs Act, which President Joe Biden signed into law in 2021, moved up the planned end of the credit for wages paid from the end of 2021 to Sept. 30, 2021.

The IRS has sounded the alarm on multiple occasions about fraud regarding the credit and has announced beefed-up compliance work directed at it. In 2022, the agency said taxpayers should be careful when third parties urge them to claim it. In March, the agency added promoter claims about the credit to its "dirty dozen" list of tax scams, according to a statement.

Werfel said in July that the IRS was stepping up its scrutiny of credit claims through increased audits and criminal investigations directed at businesses filing questionable claims and promoters of them. In September, when announcing the new claim processing moratorium, the agency said it was working on hundreds of criminal cases and that thousands of credit claims had been referred for audits.

More employers could seek claim withdrawals after they learn about enforcement actions undertaken by the agency, according to S. Starling Marshall of Crowell & Moring LLP. Those who relied on the advice of promoters who are targeted by IRS investigations may decide they need to withdraw their claims to be safe, Marshall said.

The IRS said when announcing details on the program that it would treat withdrawn claims as though they hadn't been filed and no penalties or interest would be imposed in such cases. However, it said withdrawn claims wouldn't stop possible criminal investigations or prosecutions of businesses for willfully filing, conspiring to file or helping file fraudulent claims for the credit.

The agency's language about possible criminal prosecution may scare taxpayers, Adams said. However, employers who haven't received their money from their retention credit claims and admit there's a problem have no reason for concern, he said.

"As a practical matter, if you're a taxpayer that hasn't cashed the check yet, and you're raising your hand, and you're saying, 'Hey, I want to fix this because I got something wrong,' then you're not going to be charged criminally with anything," he said.

--Additional reporting by Anna Scott Farrell, Asha Glover, Stephen K. Cooper and Emlyn Cameron.  
Editing by Tim Ruel and Neil Cohen.

---

All Content © 2003-2023, Portfolio Media, Inc.