

WE RECEIVED OUR ERC REFUND – WHAT HAPPENS NEXT?

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NONPROFIT SPECIAL ALERT™

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The IRS Commissioner has commented recently that the IRS has made significant progress in successfully clearing the backlog of valid ERC claims.¹ As a result, many organizations that filed ERC refund claims have received refund checks from the IRS, often including significant interest. But given the multiple IRS communications about examining ERC claims, many organizations that have received ERC funds are understandably wondering whether there is still a risk that the IRS may challenge their refund.

The purpose of this article is to provide guidance regarding the period during which the IRS can initiate an examination of an ERC claim or otherwise recover an organization's ERC refund under current law, as well as to provide practical considerations during any period of uncertainty.

Statute of Limitations for IRS Examinations – A Developing Landscape

The ERC statute of limitations is a changing landscape. We expect that Congress will, in the coming months, extend the statute of limitations for the IRS to examine and challenge ERC claims.

For informational purposes, our current understanding of the potential exposure period for IRS claims related to the Employee Retention Credit under current law (which is subject to change) is as follows:

Statute of Limitations – 2020 ERC claims	Expires April 15, 2024
Statute of Limitations – Q1 and Q2 2021 ERC claims	Expires April 15, 2025
Statute of Limitations – Q3 2021 ERC claims	Expires April 15, 2027

This is the period during which the IRS can initiate an examination of an organization's Forms 941 or Forms 941-X that were filed to make an ERC claim. Currently, organizations have until April 15, 2024, to make an ERC claim for 2020 and until April 15, 2025, to make an ERC claim for 2021. Because the statute of limitations for IRS examinations expires on the same date that the period ends for making claims (for claims related to all periods other than the third quarter of 2021), and because of the well-known existence of massive fraud and impropriety in the ERC claims arena, we expect that Congress will, in the coming months, extend the statute of limitations for the IRS to examine and challenge ERC claims.

IRS Civil Lawsuits to Recover “Erroneous Refunds”

In addition to the IRS examination process, the IRS has another tool at its disposal for recovering “erroneous

¹ Source: <https://www.irs.gov/newsroom/irs-commissioner-signals-new-phase-of-employee-retention-credit-work-with-backlog-eliminated-additional-procedures-will-be-put-in-place-to-deal-with-growing-fraud-risk>

refunds” – filing a civil lawsuit against an organization. While we believe it is unlikely that the IRS would use this tool in a significant way in recovering ERC claims, it is important for employers who have received ERC refunds to be aware of this possibility.

The period by which the IRS can file a civil suit to recover an “erroneous refund” is generally as follows:

Date by which the IRS may file a civil suit to recover an “erroneous refund” other than for fraud or misrepresentation of material facts	Two years from the date of the refund
Date by which the IRS may file a civil suit to recover an “erroneous refund” due to fraud or misrepresentation of material facts	Five years from the date of the refund

Practical Considerations While the Dust Settles

Often, a determination regarding an organization’s ERC eligibility is based on the organization’s specific and unique facts and circumstances, as well as on federal guidance that is not abundantly clear in some respects. Therefore, it is possible that an organization that made a good-faith ERC claim may have some uncertainty regarding whether its claim will be upheld in the event of an IRS challenge.

If an ERC claim is determined to be improper or erroneous, organizations will be required to return the funds received together with interest and, in many cases, penalties. Therefore, an organization may wish to hold ERC refunds in high-yield, safe, liquid accounts until it concludes the risk of an IRS challenge has been substantially mitigated.

Additionally, as we have outlined in prior communications, if an organization is concerned that its ERC claim is invalid or improper, the organization should have the claim evaluated by an independent, trusted source and should re-amend its payroll tax returns if necessary – before the initiation of an IRS examination.²

What to Do If You Receive an IRS Examination Notice

We always recommend organizations obtain reputable, knowledgeable representation before the IRS in IRS examinations. As we outlined in a recent press release, our firm has formed a special team dedicated to representing nonprofits in IRS Employee Retention Credit audits.³ Nonprofit organizations that have been notified of an IRS inquiry or examination in connection with an ERC claim can reach the BMWL IRS ERC Audit Representation Team at ERCAuditTeam@NonprofitCPA.com.

² Source: <https://nonprofitcpa.com/irs-commissioner-describes-the-terrible-scenario-unfolding-involving-employee-retention-credit-fraud-irs-identifies-wildly-aggressive-suggestions-from-marketers/>

³ Source: <https://nonprofitcpa.com/bmwl-forms-new-team-to-represent-nonprofits-in-irs-employee-retention-credit-audits/>

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