

## Caution: Unscrupulous ERC Preparers Leave Taxpayers on the Hook

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Unfortunately, it is becoming all too common to read about bad actors who have taken advantage of federal programs meant to provide relief to those businesses impacted by the pandemic. The government is actively pursuing “those who have exploited the pandemic for personal gain and have stolen from America’s taxpayers.” One of the pandemic relief programs under such scrutiny is the Employee Retention Credit (ERC), and a recent federal grand jury’s indictment reminds us of the importance of consulting a trustworthy tax professional when claiming the ERC, or other COVID-era financial programs.

### Snapshot: What is the ERC?

Congress created the ERC through the CARES Act later amended by the American Rescue Plan Act for eligible businesses that kept their employees on payroll and/or incurred health plan expenses during the pandemic. An eligible business may receive up to \$26,000 per employee in payroll tax credit by filing the appropriate Form(s) 941/941-X.

### What Happened Here?

On February 1, 2023, a federal grand jury in Utah issued an indictment charging two individuals and their accounting and tax preparation firm as participants in a COVID-related tax fraud scheme to defraud the United States of millions of tax dollars. It is alleged that the defendants prepared and filed over one thousand IRS Forms 7200 and 941, claiming more than \$11,000,000 in ERC as well as sick and family leave wage credits for the firm’s clients.

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According to court filings, the scheme allegedly began in April 2020 and continued through at least August 2021. Of note, the Service had not issued all applicable ERC guidance at the time of the alleged fraud. The indictment outlines the “manner and means” by which the defendants and co-conspirators perpetrated the scheme. The preparers stand accused of soliciting ineligible parties such as independent contractors and sole proprietors and employing a plan to convert their “businesses” into LLCs, taxed as S-corporations. These “businesses” filed prepared forms 941/941-X claiming the ERC to the maximum allowable wage for each employee, regardless of whether the employee had been paid that amount. Some claims included spouses of business owners as employees, regardless of whether they were actual employees, despite owner and certain related individual wages being ineligible for qualified wage calculations. In some cases, the accused are alleged to have signed the IRS Forms 7200 without the clients’ knowledge.

Considering the uncertainty over the Service’s scrutiny of amounts claimed under the ERC, it is noteworthy that the majority of the firm’s clients were small businesses and that most of the claims submitted were credit amounts between \$5,000 and \$10,000.

### **Conclusion**

Unfortunately, victims of ERC schemes like the ones alleged above, remain ultimately responsible for the contents of their filed returns and face an array of unpleasant consequences, including: (1) repayment of any improper credit received; (2) payment of penalties and interest; and (3) in the case of a “ghost” preparer, an

inability to recover any contingent fee that was paid to the wrongdoer.

Remember, the determination of eligibility for COVID-related tax credits is a complex process—especially in the ERC context which requires a comprehensive analysis of complex IRS guidance, followed by careful application to each employer’s particular set of facts and circumstances.

Earlier this month, the IRS released further guidance reminding preparers and tax practitioners of their ethical duties to clients seeking professional advice on a potential ERC claim. Employers are urged to find a trusted and licensed tax practitioner to navigate them through the process. Such practitioners are cognizant of the high standard of conduct they are held to and the penalties for a violation of those standards.

In the hands of a competent and responsible tax professional, the employee retention credit is a great tool to help many small businesses who kept their employees on payroll during the COVID-19 pandemic. If you have any questions regarding filing for the Employee Retention Credit or would like a review of your filings, please click [here](#).

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