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Congress Intended for Eligible Employers to Properly Claim ERC Relief

The IRS is fully aware that there are many unscrupulous actors tainting the Employee Retention Credit (ERC) landscape. Indeed, the IRS continues to issue warnings to urge people to "carefully review the [ERC] guidelines before trying to claim the credit as promoters continue pushing ineligible people to file." Moreover, some of those bad actors have already been audited. And as tenured tax professionals, we understand the anxiety that often accompanies even the mere vocalization of the term "audit." Knowing this, we strive to provide some crucial perspective here so that the bad actors' consequences don't negatively influence the eligible ERC employers' decision to properly seek what Congress meant for them to obtain.

First, it's important to remember that Congress created the ERC, and, from the outset, Congress intended for the credit to operate as a refundable tax credit that could offer potentially business-saving relief for those eligible employers who retained employees during the pandemic. Significantly, it's not the first time Congress has enacted "employee retention credits" against employer income tax in response to natural disasters. Perhaps, among the most familiar examples, Hurricane Katrina and California wildfires have garnered the most attention in more recent times. Indisputably, the ERC shares the nature of its statutory originations and legitimacy with these other employee retention credits.

Next, claiming the ERC is not just running the numbers; rather, it involves a comprehensive analysis of complex IRS guidance and careful application to each employer's particular set of facts and circumstances. This process, which is strictly adhered to by our team, necessarily requires compilation and review of

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various records. As clarified by the IRS, an eligible employer needs to maintain such records to ensure that the employer is able to adequately substantiate their ERC eligibility. For example, if an employer's eligibility claim rests on a partial suspension, that position and substantiating records (often compiled in a "memo") must include: (1) the relevant government order(s), and (2) a precisely tailored narrative as to how the order(s) directly impacted the business. Likewise, in the context of an employer's eligibility claim resting on gross receipts, the eligibility memo must provide the computations used for each quarter at stake. Any eligibility memo falling short of this standard is unacceptable in our practice.

Finally, claiming the ERC is analogous to claiming a tax deduction on an income tax return in that the taxpayer filing the information must sign off on it under penalty of perjury. When an employer entrusts a preparer to act as a competent professional, they expect to be able to rely on the professional's analysis of the ERC claim. Trained and trusted preparers, including all members of the Frost Law team, who sign off on these returns are cognizant of the high standard of conduct they are held to and the penalties for a violation of those standards. Indeed, one of the biggest red flags for an employer in the ERC context should be the preparer who won't sign the IRS Form 941-X used to claim the credit.

Frost Law has a sophisticated process in place which helps businesses get the maximum accurate amount of ERC, as quickly and smoothly as possible. We are a dedicated team of tax attorneys and other tax professionals who work hard so that you can remain focused on running your business—knowing that you are optimizing your relief potential while minimizing your audit risk. Contact us today at (410) 941-3945 or SCHEDULE A CONFIDENTIAL CONSULTATION.

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