



# Don't Fall For the Scams

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The Employee Retention Credit  
Revisited



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# OVERVIEW

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The Employee Retention Credit (ERC) was enacted as part of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) in 2020. Use of the credit was initially limited due to several factors.

First, as originally enacted, a taxpayer could take advantage of the ERC or the Paycheck Protection Program (PPP), but not both. Many taxpayers opted for the PPP loan and its 100% forgiveness opportunity.

Second, the IRS did not initially provide clear guidance in its application. The Senate Finance Committee issued the first explanation of the credit on March 31, 2020. This was followed by a conflicting report and explanation from the Joint Committee on Taxation on April 23, 2020.

The IRS then issued a series of FAQs throughout 2020 that further muddied the waters, partly because the FAQs explicitly stated that the taxpayers could not use the FAQ as guidance in a court proceeding.

Fortunately for taxpayers, the government lifted its restrictions on participation in ERC and PPP through signing the Consolidated Appropriations Act 2021 in December 2020.



# OVERVIEW

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The Consolidated Appropriations Act 2021 permitted taxpayers to take advantage of both the ERC and the PPP, provided that the same wages were not used simultaneously to qualify for both the ERC and the debt forgiveness element of the PPP. This opened the door for taxpayers who previously could not take advantage of the ERC due to their participation in the PPP.

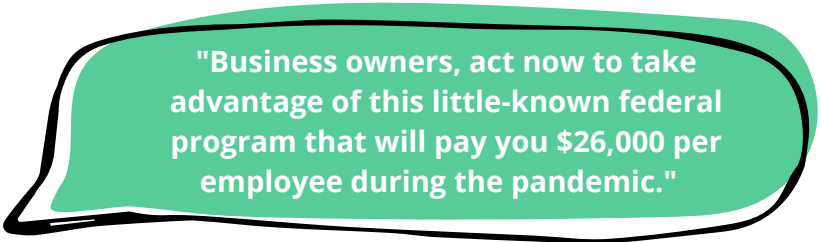
The IRS provided clearer guidance with the issuance of IRS Notice 2021-20 (addressing the ERC for 2020), IRS Notice 2021-23 (addressing the quarters ended March 31 and June 30, 2021), and IRS Notice 2021-49 (addressing the quarters ended September 30 and December 31, 2021, with the Infrastructure Investment and Jobs Act later eliminating the quarter ended December 31, 2021, except for Recovery Start-up Businesses).

Taxpayers and service providers were now able to better determine employer eligibility, yet as written, this guidance still left room for interpretation. It also opened the door for promoters to come in and capitalize on this little-known and misunderstood tax credit.

# PROMOTERS

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You may not know these promoters, but you will likely have seen or heard their advertisements. The ad goes something like this:



**"Business owners, act now to take advantage of this little-known federal program that will pay you \$26,000 per employee during the pandemic."**

Sound familiar? You may not be too far off if you hear vague echoes of "mesothelioma hotline" and "...were you injured on the job? ....".

Unfortunately, these "too good to be true" advertisements by promoters are often, well... too good to be true. These "businesses" consistently fail to adhere to the guidance issued by the IRS and will "qualify" companies for credits under the ERC for periods in which the employer does not qualify, utilizing wages that are clearly ineligible for purposes of the credit.

At best, these fly-by-night companies are negligent in the provision of their services, and, at worst, they are likely conspiring to commit fraud.

# PROMOTERS

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The IRS has caught on to these promoters and their scams. In fact, the Service has specifically identified these schemes and is combatting the issue with heightened IRS scrutiny, examination, and enforcement. Not only has the IRS said they will audit these credits, but they have also stated that they will go after these promoters.

Unfortunately, in many cases we will find that the taxpayer is left holding the bag, having to repay the IRS for the ERC claimed fraudulently or in error for which the taxpayer did not qualify.

You may find yourself asking:

**What about the fees paid to the promoter?**

Good luck.



As quickly as unqualified promoters set up shop when they spot an opportunity to take advantage of these programs, they are far quicker to close the door and disappear.

# PROMOTERS

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Unfortunately, that kind of behavior can create uncertainty about the program and breed fear among taxpayers who are perfectly within their rights to act on the opportunity the ERC provides. We frequently hear comments like this:

**We didn't take the ERC, but we are concerned by all this negative press and IRS scrutiny.**

This credit was established to help taxpayers weather the storm of the pandemic. During the most uncertain of times, this credit created a reward for taxpayers that continued to pay wages to employees. It served to bolster employment and the economy.

If you qualify for the credit based on the established criteria, then there is no reason to opt-out. You are entitled to these funds and the benefits of the program for the periods you meet the qualification requirements (discussed below). By not pursuing the ERC, you just leave your own money on the table – and for what?

**We took advantage of the ERC. Will we have an issue if audited?**

That depends...

What was the basis of qualification used to qualify your company as an Eligible Employer? There are essentially two ways to qualify.

# QUALIFYING

- **Gross Receipts Test**

The first qualification criteria requires the company to meet the Gross Receipts Test. Taxpayers meet this bright-line test if the company experiences a significant decline in gross receipts in a calendar quarter in 2020 (requiring a 50% decline) or 2021 (requiring a 20% decline) compared to the same calendar quarter in 2019.



Although the test is relatively straightforward, some complexity exists around the measurement of quarterly gross receipts. Gross receipts used in the calculation must be consistent with the definition in Sec. 448(c) of the Internal Revenue Code.

The basis of accounting used in the quarterly analysis of gross receipts ***must be the same as used in the filing of the taxpayer's income tax returns.***

Additionally, aggregation rules may apply to taxpayers with common ownership, which may complicate the measurement.

If the rules for measuring quarterly gross receipts were not properly followed, then the company may have exposure.



# QUALIFYING

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- **Governmental Orders Test**

The second test is referred to as the Governmental Orders Test. To qualify under this test, the taxpayer must have been subject to orders from a qualifying governmental agency that fully or partially shut down or restricted the company's operating activities related to conducting commerce, travel, or group meetings due to COVID-19.



The period of qualification as an Eligible Employer under the Governmental Orders Test is the period in which the orders apply. There must be an order that places the restriction (starting point of qualification) and an order that lifts the restriction (ending point of qualification).

If these orders were not properly identified as a basis of qualification, it is possible that the company may not have been under qualifying governmental orders, or the period of qualification may be overstated.

# HOW DID YOU QUALIFY FOR THE ERC?

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Did the promoter you worked with specify and document the orders for which the company qualified? Many do not. In fact, the basis of qualification for these promoters are typically generic, boilerplate statements, and we consistently find that little to no effort has gone into properly qualifying taxpayers.



Did you experience any supply chain issues or problems obtaining supplies?



Did you have to take any precautions in the workplace to prevent the spread of COVID-19?



Did you close your office or were you unable to visit clients?

Unfortunately, taxpayers rarely qualify for the ERC based solely on these situations. The supply chain provision of the governmental orders test is dependent upon the supplier's business being **fully or partially suspended due to COVID**. Complying with safety precautions is merely the minimum requirement for the company to operate and does not amount to a suspension of operations. Most offices and businesses were allowed to reopen after a short period of time, and decisions to close or limit access were usually voluntary actions by the taxpayer or customers.

# OSHA REQUIREMENTS

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The promoter said we were under orders from OSHA for all quarters of the ERC.

This is a good one.

Yes, you were! **You were also under the same OSHA requirements before COVID-19.**

The OSHA requirement to provide a safe workplace for all employees is not the result of COVID-19; it was in place before COVID-19 and is not a qualifying governmental order.



**The IRS is well aware of the OSHA argument used by promoters as a basis of qualification for the Employee Retention Credit and the Service has clearly stated that it is not a valid basis for qualification.**

# BOTTOM LINE

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You can expect that the Employee Retention Credit will be heavily scrutinized by the IRS. That's perfectly reasonable and it's their job to do that. We would argue that is an important part of a system of checks and balances that allows America to continue to flourish.



**However, such scrutiny should not prevent an eligible company from taking advantage of the ERC or any other tax incentive. Instead, simply:**

- 1** Be diligent in whom you select to calculate the credit on your behalf.
- 2** Understand the basis on which you qualify and the period of qualification.
- 3** Select a reputable service provider that follows the established IRS guidance and authority and does not unnecessarily put you or your company at risk.

# TAXCREDIBLE CAN HELP

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TaxCredible has been working with CPA firms and their clients for over 20 years, helping to ensure that every client takes advantage of every incentive they qualify for.

We are here to help.

If you have not participated in the Employee Retention Credit, our trained team can assess your eligibility for the credit, documenting the basis for qualification and accurately calculating the credit – all delivered in a package supported by the qualitative and quantitative analysis required by the IRS, providing you with peace of mind.

If you have participated in the Employee Retention Credit but feel uneasy with the basis of qualification used to determine eligibility or have concerns about the quality of the firm you worked with, let TaxCredible review the credit and supporting documentation. If we find errors or unnecessary risks, we can provide the analysis to help you rectify the situation before the IRS contacts your company.

Lastly, if you have been contacted by the IRS and the promoter has disappeared, TaxCredible can work with you and your CPA to help manage and mitigate the stressful process.

To learn more about the ERC and how TaxCredible can help, reach us at:

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