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Tax Alert

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Second Employee Retention Tax Credit Voluntary Disclosure Program Announced

By Rick Cox, Tina Sciocchetti, and Morgan Nighan

The disclosure program ends on November 22, 2024, and could be the last time a tax discount is offered to participating companies.



What's the impact?

- A flurry of developments occurred in July–August 2024 relating to the Employee Retention Tax Credit (ERC) that impact pending ERC claims and businesses who are considering filing for, or returning, an ERC refund.
- The newest Voluntary Disclosure Program is available for companies who may want to return funds they received by working with an ERC “Promoter” or who otherwise are confident that they did not qualify for the ERC refunds received.
- These ERC developments should be considered in the context of M&A transactions.

Due to the tremendous amount of fraud, waste, abuse, and scams associated with the ERC program, the Internal Revenue Service created the first [ERC Voluntary Disclosure Program](#), which ended on March 22, 2024 (the “VDP-1”).

Last week the IRS announced a second VDP, set to end on November 22, 2024 (the “VDP-2”). A comparison of the two VDPs shows their close similarities:

	VDP-1	VDP-2
Start	Dec. 21, 2023	Aug. 15, 2024
End	Mar. 22, 2024 (Approx. 3 Months)	Nov. 22, 2024 (Approx. 3 Months)
Discount	20%	15%
Tax on Discount	No	Same
Years Covered	2020–2021	2021
Wage Deduction	Reversed	Same
Overpayment Interest	Taxpayer Keeps	Same
Penalties	None as long as no willful, fraudulent, or criminal circumstances	Same

The eligibility requirements for VDP-2 are essentially the same as its predecessor:

- / The taxpayer must have received the ERC refund(s) prior to the announcement of the program (for VDP-2 this is August 15, 2024, for VDP-1 it was December 21, 2023).
- / The taxpayer must *not* be eligible for any of the ERC refunds received.
- / The taxpayer must pay back 85% of the ERC refund(s) received.
- / If the taxpayer pays the full 85% prior to executing the settlement agreement with the IRS, no underpayment interest will apply. (As noted above, no overpayment interest received needs to be repaid, which can be a very large amount.)
- / The taxpayer may need to amend tax returns to reflect the wage deduction associated with the return of the ERC refund(s); the settlement will provide that the taxpayer will have no income with respect to the 15% of the ERC refund(s) retained.
- / The taxpayer will provide the name, address, and phone number of the preparer(s) or advisor(s) who assisted with the ERC claim(s).
- / The taxpayer must execute a closing agreement.

The IRS has rebooted the Form 15434, so when applying for VDP-2, make sure to reference the August 2024 version of the form (the version date is shown in the upper left corner of the form).



This version is very similar to the prior version, but now includes things such as a requirement to file an extension of the statute of limitations (Form 2750) and collection information statement (Form 433-B) if the taxpayer does not pay back the ERC amount prior to the IRS processing the VDP-2 application.

Takeaways

Given the looming end of the ERC (April 15, 2025), VDP-2 is likely to be the last chance for an employer to participate in a disclosure program that offers a discount to the taxpayer.

VDP-2 should also be considered in the context of merger and acquisition transactions between companies, one or more of whom may have obtained ERC refunds. M&A parties may determine that applying for relief under VDP-2 is advisable to avoid future ERC enforcement by the government. At a minimum, parties should address ERC funding in definitive documents in order to require, or prevent parties, from pursuing VDP-2. Applying for VDP-2 could also accomplish fixing the whipsaw effect that was created by the American Rescue Plan Act's amendment to Internal Revenue Code section 3134, that extends the statute of limitations to five-years for third and fourth quarter 2021 ERC claims, that in some circumstances could result in the taxpayer losing the ERC and losing the wage deduction associated with the ERC, since the statute of limitations on amending the 2021 federal income tax return was not concomitantly extended and would expire prior to the time when the IRS could audit the ERC for that period.

Nixon Peabody has considerable experience with the ERC and IRS civil and criminal investigations, including negotiating settlements with "Promoters." We are recommending that companies that have filed for the ERC (whether or not ERC refunds have been received) conduct a self-evaluation of their ERC situation and consider VDP-2, scheduled to expire on November 22, 2024.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

Patrick (Rick) M. Cox

212.940.3066

pcox@nixonpeabody.com

Tina Sciocchetti

518.427.2677

tsciocchetti@nixonpeabody.com

Morgan C. Nighan

617.345.1031

mnighan@nixonpeabody.com

