

Top Ten Developments in Agricultural Law and Taxation in 2023-Part 4 The Employee Retention Credit

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Overview

Today's article is fourth in a series concerning the Top Ten ag law and tax developments of 2023. To recap, here's the list of the top developments so far:

- 10 - Court orders removal of wind farm.
- 9 – Reporting Rules for Foreign Bank Accounts
- 8 – New Business Information Reporting Requirements
- 7 – “Renewable” Fuel Tax Scam
- 6 – Limited Partners and Self-Employment Tax
- 5 – COE Mismanagement of Missouri River Water Levels

That brings me to the fourth most important development in ag law and tax of 2023 – it's the topic of today's post.

Employee Retention Credit (ERC)

Background. The ERC is a refundable tax credit enacted in 2020 to provide an incentive for qualified businesses to keep employees on the payroll. While 2021 legislation eliminated most employers' ability to claim the ERC for wages paid beginning with the fourth quarter of 2021, it remains possible that some business may still qualify. An eligible business that didn't claim the credit when the original employment tax return was filed can claim the ERC by filing an adjusted employment tax return. That Form, Form 941-X (943-X for farm businesses) can be filed up to three years after initially filing or two years after paying, whichever is later. Thus, claims can be filed with respect to unclaimed credits for 2020 until April 15, 2024, and until April 15, 2025, for 2021 unclaimed credits.

Note: Pending legislation (the Tax Relief for American Families and Workers Act) would bar filing any ERC claims as of January 31, 2024. If a claim is finalized and ready to mail before January 31, 2024, it should be sent via certified mail

The ERC is complex, which led to confusion and opened a door for potential fraud. One area of confusion concerned the modifications for various periods of time. For the timeframe March 13, 2020, through the end of 2020 eligible trades or businesses were those that were partially or fully suspended due to orders from a government authority, or sustained a decline in gross receipts of at least 50



percent for the same calendar quarter in 2019. Of course, farm and ranch operations were not shut down during the virus years, and the virus years tended to correspond to strong commodity price years such that many farm and ranch businesses did not experience a drop in gross receipts.

Note: The definition of “gross receipts” for ERC purposes contained complicated parent/sub rules, common ownership rules, as well as deemed ownership rules. A farmer could not determine the ERC by simply looking at the Schedule F.

Self-employed persons weren’t eligible for the 2020 ERC for their own wages, but the ERC could be claimed on wages paid to other employees. For the first three quarters of 2021, an eligible business was one that either sustained partial or full suspension of business activities by action of the government or experienced a decline of at least 20 percent of gross receipts for the same calendar quarter in 2019. For businesses that didn’t exist in 2019, 2020 could be used as a comparison. The same rule as before applied to self-employed persons.

Note: The ERC was ended as of Sept. 30, 2021, except for “startup recovery businesses” that could claim the credit on wages paid for the balance of 2021.

The credit was tied to the number of employees a business hired, and different rules applied to full-time as compared to part-time employees. Again, the rules changed on this computation for 2020 and 2021. In addition, not all wages counted for ERC purposes.

For 2020, the amount of the credit was equal to 50 percent of up to \$10,000 in qualified wages per employee (including amounts paid toward health insurance) for all eligible calendar quarters beginning March 13, 2020, and ending Dec. 31,

For 2021, the credit was equal to 70 percent of up to \$10,000 in qualified wages per employee (including amounts paid toward health insurance) for each eligible calendar quarter beginning Jan. 1, 2021, and ending Sep. 30, 2021.

Fraud. The IRS announced that it had received 3.6 million claims as of September 2023, But, on Sept. 14, 2023, the IRS announced "an immediate moratorium through at least the end of the year" on processing new ERC claims. IRS said it was taking the action because of fraud concerns, in particular involving businesses that had been "pressured and scammed by aggressive promoters and marketing" into filing questionable claims.

Note: The moratorium impacted legitimate claims by farm businesses (and other businesses) that were counting on receipt of the credit amounts.

In October, the IRS announced a "special withdrawal process" for business owners who had filed a possibly ineligible claim, but not yet received the money, allowing them to withdraw it without facing penalties or interest. IRS also made allowance for businesses that had received the ERC but later learned it shouldn’t have. By the end of 2023, the IRS reported that pending applicants had withdrawn claims amounting to more than \$100 million.



Note: The lucrative nature of the ERC combined with the complex rules attracted “mills” that perpetrated ERC fraud. For instance, many orchards and other types of labor-intensive ag business easily qualified for six-figure ERC amounts for each quarter in 2021.

Many ERC promoters claimed that supply chain issues during the virus years automatically qualified a business for the ERC. IRS issued guidance on this issue that wasn't clear, but then later stated that the supply chain issues *do not* automatically qualify a business for the ERC. Indeed, IRS stated that only wages paid during the suspension or shutdown qualify. This again caused tax preparers in many situations to consider amending payroll and income tax returns to make corrections before IRS discovered the matter and issued a notice for taxes, interest and penalties.

In late 2023, the IRS announced a voluntary disclosure program letting employers who received questionable ERCs pay them back at a discounted rate. This amnesty program was also part of the agency's efforts to combat ERC fraud. Under the program, IRS will provide amnesty if 80 percent of the improperly received ERC is paid back. Doing so removes the possibility of interest and penalties and provides a greater avenue for businesses to return the improperly received ERC having already lost some of it to a bogus ERC promoter. Businesses must apply to the voluntary disclosure program by March 22, 2024. Certain qualifications must be satisfied for a business to participate in the program.

Note: Pending legislation (the Tax Relief for American Families and Workers Act) includes substantial fines for those involved in erroneous or false claims.

Conclusion

Normally a tax credit would not make the “top ten” list. However, the magnitude of the problems associated with the ERC and the frequency with which tax preparers representing farmers and ranchers had to deal with it throughout 2023 (and continuing into 2024) pushed it to the upper half of the top ten list.

Three more developments to go. What do you think are the top three?

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