

Frustrations Mount Over ERC Processing Delays

by Lauren Loricchio

Businesses are growing frustrated as the IRS's moratorium on processing employee retention credit claims continues, with some wondering how to proceed with getting their refunds.

"Some businesses that are really struggling and eligible for the credit are having trouble waiting for the moratorium to lift," said Rebecca Sheppard of Frost Law.

The IRS implemented a moratorium on processing new ERC claims in September 2023 to handle an influx of claims it believed were ineligible for the credit. In April the IRS said the pause would continue but that it may decide "in late spring" when to resume processing.

The IRS said in a statement that it continues to process ERC claims submitted before the moratorium began, but "with more scrutiny and at a much slower rate than before the agency's approach changed last year," and that the moratorium is allowing it to focus on reviewing ERC inventory with "strong, new measures to protect against improper claims."

The agency said it "appreciates the patience and understanding from taxpayers as it works to protect against questionable ERC claims pushed by aggressive marketers" and that it anticipates providing an update in the next few weeks.

"It is understandable that the IRS had originally placed this moratorium on processing ERC [claims] due to the amount of claims coming in and the potential for fraud. However, this many months later, it seems like they should have already caught up to some of these and been able to start processing again," said Kathy Enstrom of Moore Tax Law Group LLC.

'Languishing While They Wait'

The National Association of Professional Employer Organizations (NAPEO) recently met with lawmakers to urge them to help alleviate the backlog of ERC claims. NAPEO has been lobbying the IRS and Congress to expedite ERC application processing for more than two years.

"Our clients are just languishing while they wait for owed credits — it's a real problem," said Casey Clark of NAPEO.

Professional employer organizations are feeling pressure from clients who want their money from the IRS and might be unaware of the slow ERC processing times, according to Sheldon J. Blumling of Fisher & Phillips LLP. In some cases, clients might blame those organizations even though the organizations are in the same position as any other taxpayer waiting for the agency to issue the credits, he said.

NAPEO isn't the only industry group seeking an end to the moratorium. The Coalition to Preserve American Jobs formed in December 2023 to urge the IRS to resume its processing of ERC claims.

In her 2023 report to Congress, National Taxpayer Advocate Erin Collins also expressed concern about how the agency is processing ERC claims.

"To provide the relief Congress intended, it is critical that the IRS develop an improved screening process to better identify legitimate claims and significantly increase the volume of ERC claims it processes," Collins wrote.

House Ways and Means Committee Chair Jason Smith, R-Mo., and Rep. David Schweikert, R-Ariz., sent an October 2023 letter to IRS Commissioner Daniel Werfel lamenting that the moratorium would exacerbate wait times and worsen the backlog of claims.

But members of Congress seem more concerned about addressing the fraudulent claims. The Tax Relief for American Families and Workers Act of 2024 (H.R. 7024) would retroactively shut down the ERC program as of January 31 and give the IRS tools to address the fraud. The bill passed the House with bipartisan support, but it has been in limbo for several months.

Ways and Means Committee ranking member Richard E. Neal, D-Mass., told *Tax Notes* that ERC claims should be assessed case by case.

Neal said businesses with legitimate claims "ought not to be caught up in this arbitrary net of being called somehow an abuser . . . but that does not mean that we should let those off the hook who have done this damage."

More Lawsuits Coming

Some taxpayers are filing refund suits to force the government to process their claims.

Tom Cullinan of Chamberlain, Hrdlicka, White, Williams & Aughtry said he's been getting more phone calls and that his colleagues at other law firms have been as well.

"Right now, there's probably . . . 10 cases that have been filed in district courts. I would predict that within a couple of weeks, maybe a couple of months, that will increase to a couple of dozen, and that'll be a couple hundred and before long, it's a couple thousand," said Cullinan, a former counselor to the IRS commissioner.

Sheppard said she filed suit on behalf of a salon that is filing for bankruptcy to push the government to process its claim so it can pay its bills and get out of bankruptcy. But for small businesses that are getting smaller credits, it doesn't always make sense to file a district court refund suit, she said.

"It's really challenging for everyone right now, trying to figure out what to do," Sheppard said.

Other taxpayers are taking out loans against their ERC claims while they wait for their refunds, according to Daniel Mayo of Withum Smith+Brown PC.

"The number one thing we're hearing from clients is frustration," Mayo said.

Cullinan said that because the Justice Department didn't receive additional funding from the Inflation Reduction Act like the IRS did, the department is "going to pretty quickly get overwhelmed" with these cases.

"It does seem kind of crazy and wasteful that we're going to assess the legitimacy of these claims . . . in court cases, but that seems to be where we're heading because taxpayers' patience is wearing thin," Cullinan said.

Stenson Tamaddon LLC filed a May 14 complaint in the U.S. District Court for the District of Arizona seeking an injunction that would require the IRS to resume the processing of ERC claims. In a motion for preliminary injunction filed May 30, the tax advisory and technology firm says that "businesses nationwide have suffered and will continue to suffer financial distress due to the IRS's unilateral decision to stop processing ERC claims."

"While the lawsuit challenges the IRS' authority to place a moratorium on processing, we are still faced with the reality that there is nothing in the Internal Revenue Code that

requires the IRS to process a refund claim within a specified timeframe," said Justin Elanjian of Stout Risius Ross LLC.

Elanjian said it seems unlikely the suit will be settled soon, but that he thinks it will raise awareness about challenges that taxpayers are experiencing and might influence members of Congress and the Taxpayer Advocate Service to place pressure on the IRS.

'The \$64,000 Question'

When the IRS ends the moratorium, Cullinan said, it's unclear what that will mean for taxpayers.

The IRS said March 22 that it is taking time during the pause to "complete the transcription of amended paper returns with the help of digitalization and deploy new risk analysis strategies to identify additional compliance work."

Cullinan said the IRS is digitizing Forms 941-X, which will allow it to better match the information it collects from that form with other forms on file. Doing so should help the IRS identify fraudulent claims, in which claims were made for fake businesses or businesses with no employees, he said.

Cullinan said the IRS may also send another round of letters to taxpayers notifying them of disallowed claims. But that would still leave the agency with a significant inventory of claims, he said.

"The \$64,000 question is what are they going to do with all those claims?" Cullinan said.

Given Werfel's rhetoric, Cullinan said he doesn't expect the IRS will just start granting claims and issuing refunds en masse.

Mayo said he'd be surprised if the agency is developing a new process for ERC claims, noting that it has been flooded by claims in other circumstances.

"What did they do then?" Mayo asked. "Probably the same thing they're trying to do now. I don't know that they need to re-create the wheel to get this done speedily." ■

Cady Stanton contributed to this article.