

and health laws. And why is this? Well, in construction, contracts are typically awarded to the lowest bidder. This leads to aggressive competition and razor-thin profit margins. Unfortunately, too many contractors respond to these competitive pressures using illegal means," Aguilar said.

Aguilar urged the government to implement a more robust front-end monitoring system to ensure compliance with labor standards, such as requiring taxpayers to submit notices to Treasury of their intent to claim the bonus credit before construction begins, or shortly after.

Michael Roles of Climate Jobs Rhode Island discussed how contractors and subcontractors often try to skirt labor laws in his state.

Roles noted many instances in which an out-of-state limited liability company had been set up for a specific construction project and then ceased operations once the project was done to avoid consequences for wage theft and work misclassification, which could be combated with more front-end compliance mechanisms.

### Good-Faith Exemption Clarified

To meet the requirements of the good-faith effort exception, taxpayers must have made a written request to at least one registered apprenticeship program that could reasonably have been expected to provide apprentices to the location of the facility. Denial of a request doesn't automatically qualify the taxpayer for the good-faith effort exception, however; an additional request must be made within 120 days of a denied request for the taxpayer to qualify.

Nick Panko of CFO Services requested that the government consider clarifying and amending the good-faith exemption for apprenticeship programs, particularly about changes in scope during the 120 days.

Deborah Kobes of the Urban Institute offered ways in which the exemption could be modified, including clarifying the expectations surrounding apprenticeship program requests, or limiting the use of the rule to 120 days from the date of request. ■

## IRS Moratorium Jolts Employee Retention Credit Industry

by Lauren Loricchio and Nathan J. Richman

IRS efforts to stem fraudulent and inaccurate employee retention credit claims by temporarily putting the brakes on processing new claims have shaken up the industry.

Amid concerns about a surge of erroneous claims for the credit, the IRS announced September 14 it would halt the processing of new ERC claims through at least December 31 "to protect honest small business owners from scams."

Some firms have laid off staff because of the moratorium.

The ERC was created by the Coronavirus Aid, Relief, and Economic Security Act to help struggling businesses pay their employees during the COVID-19 pandemic by establishing a refundable credit against employer taxes. The credit applied to gross receipts between March 13, 2020, and December 31, 2021.

The IRS has warned about scams related to the ERC, urging taxpayers to watch out for aggressive marketing, companies charging contingency fees based on the size of the taxpayer's refund, and promoters who suggest that businesses qualify because of supply chain disruptions even if they don't qualify on the basis of a governmental order.

Innovation Refunds LLC said in a blog post that it stopped its paid lead-generation advertising and cut back new business development. The company had laid off 155 employees as of October 25, according to its CEO, Howard Makler.

Innovation Refunds' website says it charges a 25 percent contingency fee for ERC claims. The company contracts with outside attorneys to submit claims on behalf of its clients. Makler said Innovation Refunds will continue to support the distribution of business incentives.

"We're also exploring related services and financial assistance products that can support American small and medium-sized businesses," Makler said in an email. The firm has spent over half a million dollars so far this year lobbying Congress on the ERC and other incentives.

Eric Stenson, CEO of the ERC advisory firm Stenson Tamaddon LLC, said the moratorium has

been hard on his business's cash flow. "Our revenue cycle is tied directly to these claims, so that's been painful for us," Stenson said.

Stenson Tamaddon has also been lobbying Congress on legislative and regulatory issues related to the ERC. The firm has spent \$360,000 so far this year lobbying Congress, with about \$120,000 spent in the third quarter on ERC-related issues, disclosures show.

"Congress afforded the IRS ample authority to operate and implement the ERC program — that includes through rulemaking and guidance — but statutory law does not include authority for the IRS to simply refuse to do its job and shut down the program," Stenson told *Tax Notes*.

Stenson's firm also charges contingency fees for ERC claims. He said it has submitted ERC claims for over 5,000 clients so far.

Stenson Tamaddon has also laid off staff because of the moratorium. The company has 170 employees, but before the moratorium it had over 200, according to Stenson. The firm has pulled back on its ERC marketing and has reduced the number of ERC claims it's submitting, Stenson said.

With ERC-related business slowing down, Stenson said his firm is hiring CPAs to grow its "traditional tax practice." He said he is also setting up a company that would offer an insurance product for taxpayers that get audited by the IRS.

ERC-Refunds LLC, a Cleveland-based firm, has prepared ERC claims on behalf of about 600 businesses, according to its owner, Daniel Conway, a CPA.

ERC-Refunds normally charges a contingent fee of 10 percent of the refund, with 1 percent required upfront and the rest paid when the client gets their refund, according to Conway. Nonprofit organizations and some other groups aren't required to pay anything upfront.

With the moratorium in place, Conway said he's noticed a substantial slowdown in the payments coming in. "What we have said to people and to accountants is 'Hey, keep filing. If you qualify, file, because you will get your refund. It just might take 12 or 13 months,'" Conway said.

Conway said his business is considering other potential opportunities.

## Side Effects

Eric Pierre of the Expert Group dba the ERC Group said, "In a way, we're grateful for the IRS's moratorium." The ERC Group charges a retainer and a percentage of the refund, according to its website.

Pierre said the demand for his firm's ERC services has increased. It is even looking to add new staff.

"We had companies that we felt qualified through partial suspension. They felt it was too good to be true because of some of our competitors — the aggressive advertising tactics," said Pierre, who is also a CPA. "We want to be a solution for companies that may have used the provider that didn't sign as a paid preparer that is now playing hide and seek from the client with the moratorium."

The moratorium has addressed the IRS's concerns about overly aggressive or fraudulent claims while removing much of promoters' incentives to promote the transactions, according to James Creech of Baker Tilly US LLP. The contingency fees, especially when paid upfront, were the reason most ERC claim purveyors were in the business, and now they have to wait months or longer to collect those fees, he noted.

"The moratorium got to the people it needed to get to, namely the promoters or mills," Creech said. "They're starting to dry up because they're not going to get paid."

## Calls to Attorneys

Meanwhile, the moratorium has generated more interest in the services of tax attorneys.

Rebecca Sheppard of Frost Law said many people are seeking second opinions to ensure their eligibility. The messaging from the IRS is causing some people to worry, Sheppard said.

Taxpayers started calling as soon as promoted ERC claims hit the "Dirty Dozen" list, according to Carina C. Federico of Crowell & Moring LLP. However, the moratorium announcement has further fueled taxpayer calls to attorneys, she said.

Daniel Mayo of Withum Smith+Brown PC agreed, telling *Tax Notes* the IRS succeeded in raising the profile of its interest in ERC claims by issuing the moratorium.

However, at least at his firm, there haven't been many changes in practice because they are making meritorious claims for the credit, Mayo said. Taxpayers are still filing claims to get in the queue for when the moratorium ends, he said.

The campaign to get taxpayers to come into compliance on the ERC might not be very effective if its targets don't realize they're the ones the IRS has in mind, Mayo said. It's a small population that's both aware of the weakness of their claims and might be interested in compliance programs, he said.

That contrasts with the IRS's successes in the offshore voluntary disclosure program, in which taxpayers hiding money in offshore accounts often knew they were doing something wrong, Mayo said. The IRS should manage its expectations for taxpayer uptake of its ERC-related compliance programs, he added.

The option to withdraw an ERC claim already submitted to the IRS hasn't attracted much taxpayer interest, at least in part because the claims the IRS might want withdrawn are mostly sold to taxpayers, Creech said. "It's hard to overstate the emotional anchor that comes from somebody saying you qualify for hundreds of thousands of dollars," he said. Taxpayers want to believe they qualify, he said.

Allowing taxpayers to withdraw claims in prepayment audits could help close out a large number of those without much tax loss to the government, Creech suggested.

### Custom Suits

Creech said he has been seeing three types of responses from taxpayers: Some are getting cold feet, some are curious about still pursuing ERC claims, and some want fee refunds from the promoters who sold them claims.

S. Starling Marshall of Crowell & Moring said she hasn't seen much taxpayer interest in suing promoters, but that may change over time. Because many of the promoters wait until a refund is paid to collect their contingency fee, it could take a while for the issues to come to a head, she said. That activity may start to pick up in six to 12 months, she suggested.

Creech attributed a similar observation of low interest in taxpayers suing promoters to the IRS's enforcement stance. So far the IRS's audits have

occurred mainly before the ERC claims have been paid, meaning the taxpayers most often haven't paid contingency fees, he said.

The IRS hasn't been systematically asserting penalties in the prepayment ERC audits, again leaving little for taxpayers to want compensation for from their promoters, according to Creech. Once the IRS starts asserting penalties or demanding repayment of issued ERC refunds, taxpayers may start to have more interest in legal remedies against promoters, he said.

That said, it would be great to see a series of taxpayer lawsuits against the promoters, Creech said. ■