

THE BIGGEST TAX FRAUD SCANDAL OF ALL TIME IS PROBABLY HAPPENING NOW – FRAUDULENT CLAIMS FOR THE EMPLOYEE RETENTION CREDIT (ERC)

By Mike Batts, CPA



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The Biggest Tax Fraud Scandal of All Time Is Probably Happening Now – Fraudulent Claims for The Employee Retention Credit (ERC)

By Mike Batts, CPA

I have written and spoken extensively about the Employee Retention Credit (ERC)...and about how many nonprofit organizations were not taking advantage of it for a variety of reasons...including its seeming complexity and a general lack of understanding about what it is and how it works. Our firm has produced extensive intellectual property in an attempt to disseminate quality, accurate, professional information to nonprofit leaders about the ERC and its potentially very significant financial benefits for eligible organizations.¹

Over the last several months, I have watched the ERC landscape change from one in which very few people were aware of it to one in which everyone is now flooded with television ads, radio ads, social media ads, and marketing emails and calls from providers offering to help employers get the maximum ERC benefit possible. Let me be clear and state this in no uncertain terms. Some of the providers in this space are hucksters...and many, many of the ERC claims being submitted with the help of some of these providers are invalid at best and fraudulent at worst. Many of these providers charge large percentage-based fees for helping an employer claim the credit. Our firm does not charge percentage-based fees for such work...we believe that the various laws and codes of professional conduct applicable to firms like ours prohibit us from doing so.

Many nonprofits are utilizing these providers who reach out to them in these mass marketing campaigns. And the claims being made for ERC benefits are, in many cases, massive...and invalid.

There are multiple criteria that must be met for an employer to qualify for the ERC for any particular calendar quarter during the relevant eligibility

period (which is generally most of 2020 and the first three calendar quarters of 2021). (See the article previously referenced for a detailed analysis of those criteria.) Those criteria include either a decline in “gross receipts” (a technical term with great significance addressed in our above-referenced article) or a partial suspension of operations due to specific government orders. Some providers are helping employers make huge ERC claims...with seemingly little attention to or regard for the specific elements of these essential criteria.

“Straight-Up, Unadulterated Fraud”

I was recently at a gathering of managing partners of CPA firms as part of a “managing partners’ roundtable,” of which I am a member (I know... it does sound exciting), and I heard stories from other managing partners about their clients utilizing service providers who helped them make questionable ERC claims. The term “questionable” is probably too polite. One managing partner said it more bluntly – “it’s fraud,” he exclaimed. “Straight-up, unadulterated fraud.”

Why are these claims questionable...or maybe fraudulent? Because in many cases, the provider is not probing deeply or carefully enough to determine either a) that there were specific government orders effective in the employer’s jurisdiction for the relevant time periods that affected the employer’s operations or b) that the employer actually partially suspended its operations as a result.

What’s more (or less...depending on your perspective) is that the forms for claiming the ERC do not require any explanation for how or why the employer qualifies for the ERC...nor do they require any substantiation or evidence documenting the basis for the claim...no matter how large it is!

When our firm assists a client in making an ERC claim, if the claim is going to be based on a partial suspension of activities due to government orders, we rely on guidance from legal counsel (which we can help our clients obtain) that there were

¹ Source: <https://nonprofitcpa.com/the-employee-retention-credit-a-potential-source-of-sizable-federal-aid-for-qualifying-nonprofits/>

specific government orders in effect during the relevant time periods that affected our clients and that our clients partially suspended operations in identifiable ways during the relevant time periods. And we make sure we have records supporting the basis for the claim made.

The Numbers Are Staggering

Let's talk numbers for a minute to see why I am saying that this issue may very well be the biggest tax fraud scandal of all time. For the clients we have helped make ERC claims, the minimum amount of claims we have identified for any one eligible client is well into the tens of thousands of dollars. For mid-size clients, the claims are typically in the hundreds of thousands of dollars for each organization. And for larger (but not huge) clients, the claims are in the millions of dollars for each organization. Think about that for a minute. When you realize that the ERC is available to virtually every employer (not just nonprofits...but also every business with employees) in America (assuming it is eligible)... and that the amounts are this large for **each** eligible employer, it's easy to see how the numbers for ERC claims in total are mind-numbingly staggering on a national level.

Serious Business

An ERC claim is made by filing amended federal payroll tax returns...under penalty of perjury. It is deeply concerning and saddening to see what is happening in the ERC arena, as so many improper claims are being filed for such large amounts of money. Some of the service providers who market

their services aggressively apply more professional diligence than others. Nonprofit leaders should exercise great care in selecting a service provider to assist in evaluating and making an ERC claim. It is true that many nonprofit employers validly qualify for very large benefits under this provision of the law. It is also true that many do not.

Making a claim for a very large cash benefit from the federal government under penalty of perjury is serious business...not something to be taken lightly.

Congress has authorized very substantial funding to increase the number of IRS employees, including examiners, in the near future. I expect that a large part of the IRS's job over the next several years will be to pursue improper ERC claims. The results are likely to be staggering. Employers found to have filed improper claims will be subject to requirements that include returning the ERC funds they received together with interest and, in many cases, penalties. In egregious situations, severe penalties or criminal charges could apply. Such an outcome could be severely damaging for an organization financially and reputationally. Nonprofit organizations that have submitted ERC claims and who would like assistance in evaluating the validity of their claims should consider engaging experienced independent professional assistance in doing that. If you would like to discuss with our team how we might help your organization in that regard, please let us know.

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