

PRATT'S GOVERNMENT CONTRACTING LAW REPORT

VOLUME 10

NUMBER 4

April 2024

Editor's Note: What to Know—and What to Beware Victoria Prussen Spears	107
The Fiscal Year 2024 National Defense Authorization Act: Key Provisions Government Contractors Should Know—Part I Adelicia R. Cliffe, Lorraine M. Campos, Maria Alejandra (Jana) del-Cerro, Olivia Lynch, Robert J. Sneckenberg, Eric Ransom and Michelle D. Coleman	109
Government Contractors Beware: New Cybersecurity Rules and False Claims Act Enforcement Actions on the Rise Michelle A. Reed, Michael J. Vernick, Elizabeth D. Scott, Angela B. Styles, Natasha G. Kohne, Rachel Claire Kurzweil and Joseph Hold	116
Navigating the Internal Revenue Service's Employee Retention Credit Voluntary Disclosure Program Scott S. Ahroni, D. Scott Lindstrom and James (Brandon) Bickerton	122
<u>The Cost Corner</u> Government Contracts Cost and Pricing: Compensation for Personal Services—Part I Keith Szeliga and Emily Theriault	126
In the Courts Steven A. Meyerowitz	137

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call or email:

Heidi A. Litman at 516-771-2169
Email: heidi.a.litman@lexisnexis.com

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at (800) 833-9844
Outside the United States and Canada, please call (518) 487-3385
Fax Number (800) 828-8341
LexisNexis® Support Center <https://supportcenter.lexisnexis.com/app/home/>

For information on other Matthew Bender publications, please call

Your account manager or (800) 223-1940
Outside the United States and Canada, please call (518) 487-3385

Library of Congress Card Number:

ISBN: 978-1-6328-2705-0 (print)
ISSN: 2688-7290

Cite this publication as:

[author name], [article title], [vol. no.] PRATT’S GOVERNMENT CONTRACTING LAW REPORT [page number] (LexisNexis A.S. Pratt).

Michelle E. Litteken, GAO Holds NASA Exceeded Its Discretion in Protest of FSS Task Order, 1 PRATT’S GOVERNMENT CONTRACTING LAW REPORT 30 (LexisNexis A.S. Pratt)

Because the section you are citing may be revised in a later release, you may wish to photocopy or print out the section for convenient future reference.

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. Matthew Bender, the Matthew Bender Flame Design, and A.S. Pratt are registered trademarks of Matthew Bender Properties Inc.

Copyright © 2024 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved. Originally published in: 2017

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

MATTHEW  BENDER

Editor-in-Chief, Editor & Board of Editors

EDITOR-IN-CHIEF

STEVEN A. MEYEROWITZ

President, Meyerowitz Communications Inc.

EDITOR

VICTORIA PRUSSEN SPEARS

Senior Vice President, Meyerowitz Communications Inc.

BOARD OF EDITORS

MARY BETH BOSCO

Partner, Holland & Knight LLP

PABLO J. DAVIS

Of Counsel, Dinsmore & Shohl LLP

MERLE M. DELANCEY JR.

Partner, Blank Rome LLP

J. ANDREW HOWARD

Partner, Alston & Bird LLP

KYLE R. JEFCOAT

Counsel, Latham & Watkins LLP

JOHN E. JENSEN

Partner, Pillsbury Winthrop Shaw Pittman LLP

DISMAS LOCARIA

Partner, Venable LLP

MARCIA G. MADSEN

Partner, Mayer Brown LLP

KEVIN P. MULLEN

Partner, Morrison & Foerster LLP

VINCENT J. NAPOLEON

Partner, Nixon Peabody LLP

KEITH SZELIGA

Partner, Sheppard, Mullin, Richter & Hampton LLP

STUART W. TURNER

Counsel, Arnold & Porter

ERIC WHYTSELL

Partner, Stinson Leonard Street LLP

Pratt's Government Contracting Law Report is published 12 times a year by Matthew Bender & Company, Inc. Copyright © 2024 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact LexisNexis Matthew Bender, 9443 Springboro Pike, Miamisburg, OH 45342 or call Customer Support at 1-800-833-9844. Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, smeyerowitz@meyerowitzcommunications.com, 631.291.5541. Material for publication is welcomed—articles, decisions, or other items of interest to lawyers and law firms, in-house counsel, government lawyers, senior business executives, and anyone interested in privacy and cybersecurity related issues and legal developments. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to *Pratt's Government Contracting Law Report*, LexisNexis Matthew Bender, 230 Park Ave. 7th Floor, New York NY 10169.

Navigating the Internal Revenue Service's Employee Retention Credit Voluntary Disclosure Program

*By Scott S. Ahroni, D. Scott Lindstrom and James (Brandon) Bickerton**

In this article, the authors discuss a voluntary disclosure program for employers that received questionable employee retention tax credits.

Several months ago, the Internal Revenue Service (IRS) announced¹ a voluntary disclosure program (VDP) for employers that received questionable employee retention tax credits (ERTC).

Specifically, this new VDP seeks to assist these employers while providing them with an opportunity to voluntarily repay only eighty percent (80%) of the ERTC received and potentially avoid both penalties and interest, while being allowed to keep twenty percent (20%) of the ERTC received.

The IRS has been clear that they are concerned about fraudulent or inaccurate ERTC claims prepared by so-called “ERTC mills” and they will be aggressively auditing these claims.

If you used one of these ERTC mills, this program may be particularly attractive to you.

One concern we have identified are claims that used a partial suspension of operations due to a government order that included all of the second quarter and/or third quarter of 2021 after many state government orders expired.

Also, claims relying solely on Occupational Safety and Health Administration (OSHA) guidance or on supply chain delays may be at a heightened risk and this VDP program should be considered.

ERTC VOLUNTARY DISCLOSURE PROGRAM OVERVIEW

At its core, the VDP represents a crucial component of the IRS's broader strategy to curb deceptive marketing practices related to ERTC claims. The program primarily functions as a safety net for employers that became entangled in the complexities of ERTC filing and/or deceptive marketing, offering them a transparent pathway to rectify their errors and contribute to a fair and compliant tax environment. The deadline to apply for entry into the VDP is March 22, 2024.

* The authors, attorneys with Polsinelli PC, may be contacted at sahroni@polsinelli.com, slindstrom@polsinelli.com and jbbickerton@polsinelli.com, respectively.

¹ IR-2023-247.

ELIGIBILITY CRITERIA AND APPLICATION PROCESS

Any employer that has received the ERTC can participate in the VDP for each tax period, so long as the employer satisfies the requirements discussed below.

Employer Received ERTC

The ERTC claim(s) must have been processed and paid, either as a refund, credit, or deposit, on specified IRS forms.

Belief of No Eligibility

Employers must believe that they are entitled to zero (\$0) ERTC for each tax period in order to be eligible for the VDP.

No Ongoing IRS Examination

The employer cannot be under an IRS employment tax examination for any period covered by the VDP submission.

No Notice and Demand for Repayment

The IRS has not reversed or notified the employer of its intent to reverse the employer's ERTC to zero (\$0).

Employer Reversal

Employers that have already reversed/withdrawn their ERTC to zero (\$0) are (generally) not eligible.

Non-Compliance Information

The IRS has not received information directly or from a third-party indicating the employer is noncompliant with its ERTC obligations.

Further, employers need to be aware that applications that include tax periods ending in 2020 must also complete and submit a Form SS-10, Consent to Extend the Time to Assess Employment Taxes, which effectively extends the statute of limitations on assessments to April 15, 2025. To initiate the process, employers must submit Form 15434, Application for Employee Retention Credit Voluntary Disclosure Program, using the dedicated portal on the IRS's website.

The employer must include, among other things, the name, address and phone number of any preparer or advisor that was involved with the ERTC. Employers outsourcing payroll obligations to a third-party must ensure that the third-party files the necessary form.

REPAYMENT AND INSTALLMENT AGREEMENTS

A distinctive feature of the program is the emphasis on the repayment of only eighty percent (80%) of the ERTC claim received rather than the full credit.

For example, if an employer received a total of \$100,000 in non-refundable and refundable ERTC, under the VDP terms, the employer would have to repay only \$80,000 (\$100,000 – \$20,000 reduction). This reduced repayment figure is designed to accommodate businesses that may have been deceived by promoters charging excessive fees, which were often contingent on the amount of the credit.

One of the most significant benefits of the VDP is that employers do not need to amend their income tax returns to report the twenty percent (20%) of the ERTC that they do not have to repay under the VDP. If the employer had received interest on the ERTC refund claim from the IRS, this interest does not need to be repaid or reported as income, either. In addition, the employer does not need to modify its wage expense related to the twenty percent (20%) of the ERTC that is not repaid. If accepted into the program, the employer will need to enter into a closing agreement with the IRS to finalize the VDP.

For those employers unable to make the full repayment at the time of the closing agreement, the IRS may consider installment agreements on a case-by-case basis, contingent upon the submission of Form 433-B, Collection Information Statement for Businesses, and all necessary documentation. However, under the IRS's standard installment agreement policy, penalties and interest will apply, so employers who cannot repay 80% of the ERTC amount upon signing the closing agreement may consider other options, such as obtaining a loan from a financial institution, to avoid the costs of an installment agreement with the IRS.

Further, the IRS is still actively encouraging employers with pending ERTC claims to consider the withdrawal program it announced in October 2023, which enables employers to remove their pending ERTC claims without incurring interest or penalties.

THE IRS IS AGGRESSIVELY PURSUING ERTC CLAIMS

In July 2023, the IRS heightened its scrutiny of ERTCs claims, intensified audits and launched criminal investigations targeting promoters and businesses associated with dubious claims. To address concerns about aggressive ERTC marketing, the IRS implemented a moratorium on processing new ERTC claims starting on September 14, 2023.

Emphasizing the importance of compliance, enhanced reviews of existing claims submitted before the moratorium were initiated, aiming to curb fraud and shield businesses from potential penalties or interest arising from questionable claims promoted by ERTC marketers.

In December 2023, the IRS distributed over 20,000 letters to employers, disallowing their ERTC claims based on factors such as nonexistent businesses

or a lack of eligible employees. Additionally, the IRS announced the initiation of letters proposing tax adjustments for up to 20,000 additions employers who had claimed erroneous or excessive ERTC amounts. Ongoing efforts involve the expansion of IRS audits and criminal investigation work targeting dubious ERTC claims, with over 300 criminal cases and claims valued at nearly \$3 billion under investigation as of December 2023.

In guidance released by the IRS explaining its VDP program, the IRS noted that employers who do not utilize the VDP or that are found ineligible, will be subject to a whole host of civil penalties (and interest) including:

- (1) Failure-to-pay;
- (2) Failure-to-file;
- (3) Failure-to-deposit;
- (4) Accuracy related penalties;
- (5) Civil fraud penalties;
- (6) Fraudulent failure-to-file penalties combined with the failure-to-file penalties; and
- (7) Trust fund recovery penalties.

Criminal charges related to the ERTC can include, but are not limited to:

- (1) Tax evasion;
- (2) Filing a false return;
- (3) False claims; and
- (4) False statements.

Note that employers that willfully filed an employment tax return that fraudulently claimed an ERTC will not be protected from potential criminal investigation and prosecution by pursuing the VDP.

CONCLUSION

The VDP is an opportunity for ineligible businesses to correct errors related to ERTCs. By following the prescribed procedures, businesses cannot only correct their records but also benefit from only needing to repay 80% of the ERTC received. As businesses navigate the complexities of ERTC compliance, the VDP stands as a new tool in promoting tax transparency and compliance. Employers are encouraged to reach out to counsel or tax professionals to make sure they are taking the appropriate steps in evaluating whether the VDP, or other ERTC programs, make sense in for their particular facts and circumstances.