

Statement of Larry Gray, CPA, CGMA

Hearing on the Employee Retention Tax Credit Experience: Confusion, Delays, and Fraud

United States House of Representatives

Committee on Ways and Means

Subcommittee on Oversight

July 27, 2023

2:00 PM

1100 Longworth House Office Building

Chairman Schweikert, Ranking Member Pascrell, and members of the House Committee on Ways and Means' Subcommittee on Oversight, thank you for this opportunity to testify. I believe the reason we are all here today is to see that the right amount of the Employee Retention Credit (ERC) gets into the hands of eligible employers, as Congress intended.

My name is Larry Gray. I am a partner in a CPA firm in rural Missouri and am a small business owner. I have been the Government Liaison for the National Association of Tax Professionals, attending National Public Liaison meetings at the IRS in DC for over 20 years. Additionally, I am an instructor on tax law, speaking nationwide.

While I still did local and state tax updates to my peers during the Pandemic, including Payroll Protection Program (PPP) and ERC, because of the mandated Covid-19 shutdown, I could not go on the road doing my normal national seminars, so I turned to YouTube to get the information out. At first, it was PPP education, but approximately three years ago, it became more of a focus on ERC.

The focus of my testimony today will be on being both a small business owner as well as a tax professional, and the impact ERC fraud is having on small businesses and small tax firms in America.

Through the end of 2020 when a small business could only get a PPP loan or an ERC, the limitation on the ERC was \$5,000 per employee per year. As a small business owner, I was not bombarded with ERC specialists offering to file my ERC and get me thousands of dollars. Then the rules changed.

Today we are dealing with aggressive and misleading ERC advertising in print, on the radio, and on television. It is everywhere.

I have gone through the process of contacting a few of the solicitors and have spoken with some of them on the phone. I have used actual information from one or more of my small businesses that I know for certain does not qualify for ERC, however this is not what I am being told by the 3rd-party ERC mills I have communicated with.

In general, they do not ask the right questions, based on the eligibility requirements to qualify as an eligible employer. Specifically, they ask nothing about any government mandated shutdown in my area, and in all cases, they say my business qualifies for ERC.

The following are excerpts from Service Agreements I have received from these 3rd-party ERC specialists.

Bottom Line Concepts

“By providing the information herein and signing below, **Client acknowledges and attests that it is eligible** to claim the Employee Retention Credit...”

Client is directing Bottom Line Concepts, LLC to claim the Employee Retention Tax Credit on its behalf for qualified quarters during 2020-2021...as supplied by Client...”

ERC Specialists, LLC

“ERC Specialists, LLC **DOES NOT provide any legal or accounting** advice and users of this web site should consult with their own lawyer and C.P.A. for legal and accounting advice.”

Jefferson Duke

Service Agreement “**the client acknowledges they are a qualifying business entity** to claim the Employee Retention Credit (ERTC) according to the guidelines outlined by the United States government.”

I called Jefferson Duke. Frank C went through their qualification checklist. (See attached Exhibit). The following is their response:

**“Estimated ERTC Refund \$182,000.00
Jefferson Duke Service Agreement**

Dear Larry Gray,

...Upon our initial discussion it looks like you may be entitled to an estimated \$182,000.00 ERTC refund on the number of employees and qualifying factors we discussed over the phone...”

Notably, these 3rd-party specialists are clear in their Service Agreements that they are not determining employer eligibility. By signing the Service Agreement, **the employer is attesting they are eligible.**

However, as a practitioner who prepares income, employment, and other tax returns for clients, I have a duty of due diligence to inquire of my clients with sufficient detail to ascertain the information necessary to determine my clients’ eligibility for the ERC and to claim the proper amount of the ERC on my clients’ returns.

With the complexity of the ERC and the aggressive marketing taking place, how many small business owners are aware of the liability and potential consequences of signing these Agreements and receiving this credit?

These employers are being told by ERC specialists that this is money they are entitled to. Unfortunately, this has gone on long enough now that many small businesses, whether they are an eligible employer or not, have received a large credit. Business owners converse, and if my

neighbor got the ERC, then I should also, is the sentiment I am hearing nearly every day in my office.

The taxpayer and the tax professional both need ERC Tools, as the tax professional is also being impacted by ERC fraud.

Recently I lost a couple of clients who chose to go with a 3rd-party ERC specialist, even though I explained to them multiple times why they are not eligible for the credit.

Unfortunately, the cash influx these businesses will erroneously receive places them at a financial advantage over my clients who are not eligible for and will not receive ERC. This has impact for years down the road.

I now have multiple clients whose Reps have told them that they are the only ones in their territories who have not received the ERC. Consequently, these clients have repeatedly asked me if I am certain they are not eligible. As you can imagine, this is negatively impacting my relationship with these clients, and two of them have been clients for nearly 40 years.

In the past few weeks, I have started to hear rumbles in the small practitioner community of tax professionals just giving up and saying they are done. That if they are going to lose their clients to these 3rd-party mills, they are just going to join them, make the money off ERC, and go on down the road. If they can make enough money, they can stop preparing returns.

To make matters worse, word is out that the IRS cannot audit their way out of this one and that if the taxpayer's income is under the \$400,000 threshold, there is little or no chance of audit. Once ethical practitioners and small business are weighing the odds of being audited vs the benefits of the influx of cash. It is coming down to them making a business decision, not a tax compliance decision.

This stands to jeopardize our voluntary tax system as we have known it.

As practitioners, we need guidance.

We need guidance to be able to show our clients clearly why they do or do not qualify.

In that effort, this is what an ERC search on IRS.gov provides today:

Beware of ERC Scam Promotions

- Warning signs of aggressive ERC marketing

Eligibility

- Shut down by a government order, or
- Decline in gross receipts during eligibility periods, or
- A recovery startup business

“For more information see the *Employee Retention Credit – 2020 vs 2021 Comparison Chart*.” This Notice refers to outdated Notices.

Limitations

One paragraph on limitations relating to ERC and PPP.

Definitions of eligibility terms

Notice 2021-20 is a very long Notice, last reviewed or updated March 12, 2021

Notice 2021-23 was last reviewed or updated April 16, 2021

Notice 2021-49 was last reviewed or updated August 20, 2021

Need Help?

“If you need help claiming the credit or correcting your tax return, see [tips for choosing a tax professional](#).”

How to Claim

File Form 941X.

“If you file Form 941X to claim the Employee Retention Credit...You may need to amend your income tax return...to reflect that reduced deduction.”

I believe this is where there is a disconnect. Claiming the credit and correcting the tax return are likely not done by the same people. You are referring taxpayers to a tax professional who is under the Return Preparers Office (RPO) for income tax returns. ERC is reported on a 941X, a payroll tax return. Many, if not most, tax professionals do not do payroll tax returns.

There is a disconnect between payroll tax returns and income tax returns. The ERC specialists assist employers with filing the 941X but do not assist with filing the amended income tax returns as a result of the ERC credit, leaving our clients looking to us to bring them compliant, yet we are ethically unable to if we know they are not eligible.

Another source for guidance is the Frequently Asked Questions. However, ERC FAQ's fall under **Historical Information**.

“These FAQs do not reflect the current status of the credit.”

So, there is no current guidance with FAQs.

After the tax professional community asked for specific guidance on an amended 1040X when the practitioner had not assisted or prepared the amended 941X, on March 7, 2023, Office of Professional Responsibility (OPR) released Issue Number: 2023-02, *Professional Responsibility and the Employee Retention Credit* which does clarify a tax professional's Diligence as to Accuracy by stating, “...Practitioners who prepare income, employment, and other tax returns

for clients have a duty of due diligence to inquire of their clients with sufficient detail to ascertain the information necessary to determine clients' eligibility for the ERC and to claim the proper amount of the ERC on the clients' returns...*If the practitioner cannot reasonably conclude (consistent with the standards discussed in this guidance) that the client is or was eligible to claim the ERC, then the practitioner should not prepare an original or amended return that claims or perpetuates a potentially improper credit...*"

So, while I and my fellow tax practitioners are bound by our professional responsibilities under Circular 230, the 3rd-party ERC specialists are accountable to whom?

These 3rd-party mills are creating an unfair playing field in the tax community as they are playing the odds of not being caught.

And this does not even address the questionably unconscionable fees they are charging for doing many times nothing more than the clerical work of submitting an ERC claim.

What I see happening in the future, if these 3rd-party mills are not stopped and there are no consequences for their actions, those of us compliant tax professionals are going to be facing the backlash. Word will quickly spread from those businesses who erroneously got the ERC and were able to keep the funds without ramifications that the compliant preparers did not know what they were talking about. This has the potential to put compliant tax preparers out of business, or at best negatively impact our bottom line.

Again, this stands to jeopardize our voluntary tax system.

Because the bad players are always moving the bar, I am concerned the example below is what is coming next. Last week I received this email:

"Hi Larry, came across your company searching for the top Accountants on LinkedIn and your reputation stood out.

We help businesses secure Federal tax credits, particularly the Employee Retention Credit. We charge a 20% fee, and with an average credit of \$250,000, **you could earn \$12,500 per referral. One Accountant in our network made \$127K in just two months referring clients he knew would qualify!**

Open to a 13m call this week or next to discuss?

Thank you,
Tim Parrish
Owner, Founder
Resolute Tax Credits"

In conclusion, going forward, we need a coordinated effort by all starting at the top. Education, communication, guidance, maybe even legislation, specifically addressing the unscrupulous that are taking advantage of the small business community and the tax system. Where will these 3rd

party mills be when small business owners are audited down the road? It will be left to the tax professionals to represent their clients, because the mills will likely not be here. Yet that is when small business needs specialists the most.

In the past few weeks, we are beginning to see a movement in the right direction by Treasury and the IRS. We have a new Commissioner, but we also need an IRS Chief Counsel appointment to move this forward.