

TAXES

## Didn't Get Your Employee Retention Credit? Sue the IRS! The tax agency is plagued with backlogs in processing employee retention tax credits and the lawsuits are springing forth. [🔗](#)

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The Internal Revenue Service (IRS) headquarters in Washington, DC. Photo: Getty Images

Small businesses still vying for pandemic-era employee retention credits they haven't received could have another

course of action to nab their money sooner.

A provision in the tax code allows taxpayers who have filed refund claims to sue the Internal Revenue Service if they have not heard from the agency within six months, or their claim was denied and they believe it to be legitimate.

"A lot of small businesses are trying to decide: Should we keep waiting for the IRS or, since it's been more than six months since we filed our claim, should we go ahead and just file a refund lawsuit?" says Brian Bernhardt, a partner at Fox Rothschild who focuses on federal tax issues.

The credit, which was authorized by the sprawling coronavirus aid package known as the Cares Act, sought to motivate employers to retain staff during the pandemic as unemployment skyrocketed.

But the IRS has been unable to keep up with the tsunami of claims it received-- both from legitimate entrepreneurs trying to stay afloat along with fraudsters looking to take advantage of the agency's latest tax credit.

The agency stopped processing new ERC claims last September, citing rampant fraud. In April, the IRS clawed back hundreds of millions worth of ERCs that were erroneously claimed. Still, tax advisory firms and businesses alike have started turning to the

courts to force the IRS' hand, although they have yet to triumph as litigation tends to move slowly.

Processing times for claims before the moratorium have only ticked up: the agency increased its ERC claim processing time to 180 days, up from 90 days. That timeline could stretch even further if the agency has any questions with a claim.

As of March, the agency faced more than one million unprocessed ERC claims.

These delays aren't just hurting companies who sought them out, but also the tax advisory firms that have helped businesses fill out the necessary paperwork to obtain those credits with hopes of getting a piece of the pie as payment.

Such is the case for Jonathan Cardella, who runs Strike Tax, a tax advisory firm in Boise, Idaho. Cardella's firm—which initially focused on advising businesses on how to tap into R&D tax credits—saw interest spike from businesses wanting to pursue the employee retention tax credit. Within a year, he says, ERCs went from a small portion of the business, to a majority of it.

But Cardella claims that he's missed out on \$5 million in revenue he had banked on through uncollected fees, since businesses he advised have yet to receive their credit. As a result, Cardella says he

had to lay off 20 staff members. Cardella himself is unable to sue the IRS, since his business would not have directly received the tax credit. But that's not stopping him from exploring legal action.

"We're still hoping the IRS can do the right thing, but we're sort of in a bit of limbo as we work to develop our first handful of plaintiffs," he says. "As soon as I get my first client who has the chutzpah to do it, we're going to file our first case."

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