

8 Warnings Signs You Might Be at Risk for an ERC Audit

WHITEPAPER



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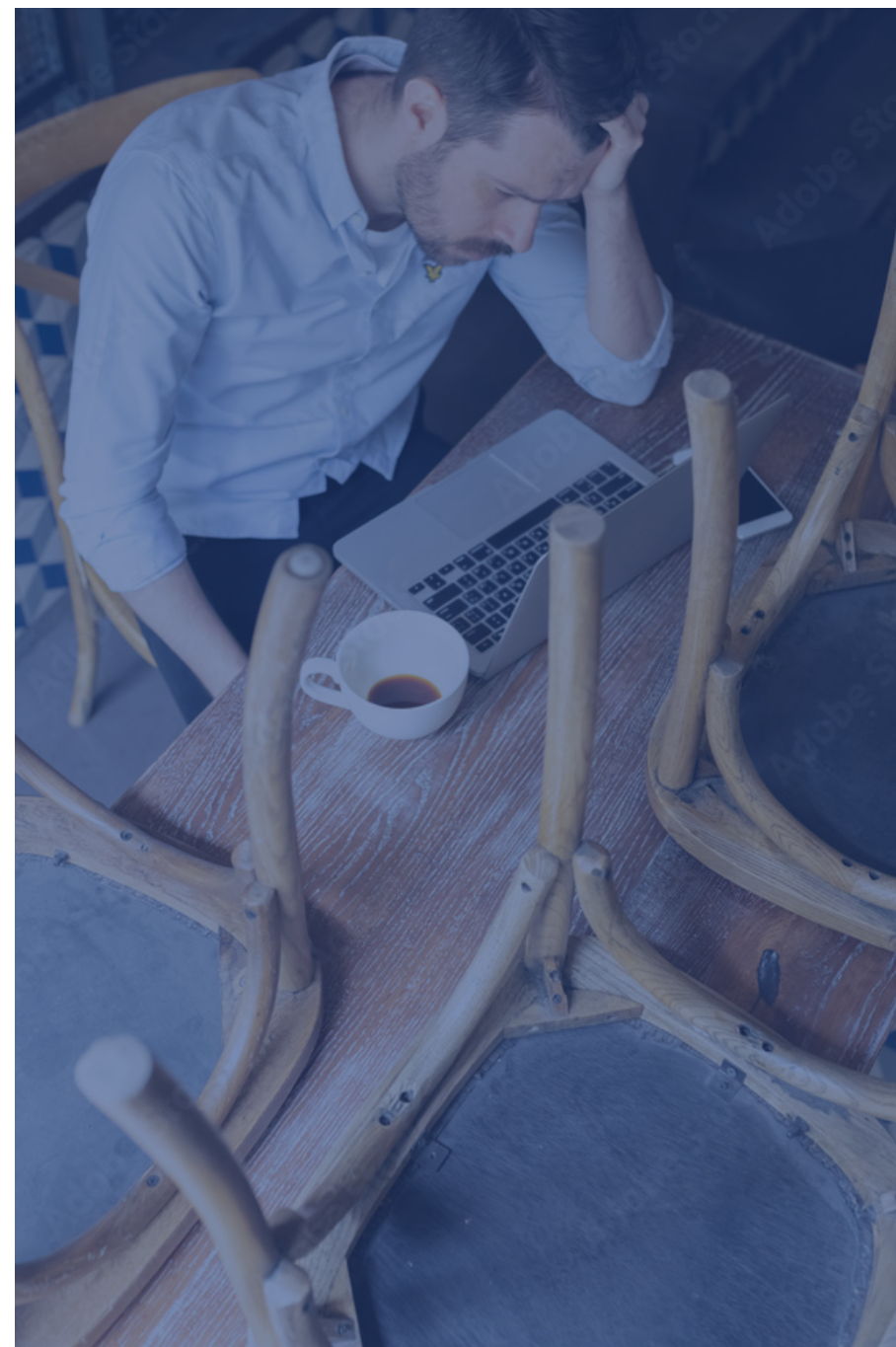
Introduction

The COVID-19 pandemic was a challenging time for nearly every business. Federal, state, and local pandemic response measures to reduce the spread of COVID-19 and save lives had unfortunate side effects that left many businesses, and especially small businesses, financially struggling.

During the pandemic, the U.S. government took measures to render financial aid to struggling businesses, such as the Paycheck Protection Program (PPP), an SBA-backed loan designed to help businesses keep their workforce employed during the COVID-19 crisis.

Another such program was the Employee Retention Tax Credit, also known as ERC or ERTC, under the CARES act. The ERC program provided a fully refundable tax credit equal to 50 percent of qualified wages that eligible employers paid their employees over the course of 2020. The program was later modified to allow for 70 percent of qualified wages for eligible employees for 2021.

ERC has provided crucial financial help to businesses who kept their workers employed throughout the COVID-19 lockdowns. However, misinformation and disinformation regarding who is eligible to claim the credit has proliferated, putting many businesses who claimed ERC credits at risk of an IRS audit.



Why Is the IRS Auditing Many ERC Claims?



Small businesses across the U.S. are receiving Information Document Requests from the IRS in the mail regarding their ERC claims. In 2022, the IRS announced that a wide scale audit of ERC claims would commence, on the grounds that many businesses had been improperly advised into claiming employee retention tax credits they were not actually eligible for.

This is not the fault of individual businesses filing improper ERC claims or willfully and maliciously defrauding the federal government. Rather, the IRS' concerns over ERC fraud are focused on the rapid spread of predatory third-party tax credit preparers taking advantage of small businesses. Many of these third-party preparers, who sometimes claim to be "ERC experts," charge hefty contingency fees for preparing and filing ERC credits, leading to many clients being incorrectly advised to claim ERC credits they are not eligible for so these "experts" can take their cut.

These ERC providers targeted small business owners regarding their ERC eligibility and assisted them in claiming ERC credits, often in exchange for either a large upfront fee or a percentage of your tax savings — which mean they would have a vested interest in promising and delivering tax savings in excess of what their clients were eligible for, if they were even eligible at all.

The IRS is currently training teams of specialists specifically to audit ERC claims and has secured a special five-year statute of limitations, suggesting that most, if not all, ERC claims will be audited.

A business owner found to have claimed an ERC credit they are not eligible for will be obligated to pay back the tax savings they claimed, plus penalties and interest.



Are You at Risk for an ERC Audit?

“Audit” is never a pleasant word to hear. It’s a word that sets off alarm bells in your head — a word synonymous with dread, anxiety, panic, and a wide range of nasty financial consequences that could spell financial doom for you and your business.



The audit process can be stressful from start to finish. But it’s also important to keep in mind that, especially in this case, being audited doesn’t mean you’ve done anything wrong. In fact, most audits are selected based on random statistical formulas which analyze a given tax return and compare it to other similar tax returns, rather than there being some “smoking gun” that has alerted the IRS to some sort of malfeasance on your part.

Even if you have claimed an ERC credit you were not eligible for, it’s not the end of the world. The results of an audit are never the final word.

If you receive a request from the IRS for more information regarding your ERC claim, it does not necessarily mean you’ve claimed tax credits you were not eligible for, or that the IRS will force you to pay back the tax savings you claimed.

You may be audited whether or not there is anything wrong or suspicious about your ERC claim. That said, if you have been misled by a bad-faith third-party ERC provider, your risk of an audit may be much higher.



Warning Signs You May Have a Heightened Risk of an ERC Audit

If you went to an ERC provider for help claiming ERC for your small business, you are more likely to be audited by the IRS regarding your claim and more likely to face consequences that could harm you and your business.

But how do you know if the tax preparer who helped you claim ERC tax savings was legitimate, or if they were unscrupulous? It's true that the ERC program created a cottage industry of tax professionals offering ERC preparation and claim filing services, and not all of those services are fraudulent. It can be difficult to separate the real experts from the bad actors, though.

Questionable ERC providers, as opposed to legitimate tax professionals who can help you with matters related to ERC claims, often exhibit some of these telltale warning signs you might not have known to look for.



1

The Provider Assured You of Your Eligibility Before or Without Thoroughly Reviewing Your Business' Finances

The long-winded eligibility requirements for ERC tax relief are complex. To legitimately claim an ERC credit, a small business must be able to demonstrate that it met specific criteria regarding how it was adversely affected by specific pandemic response measures issued by government authorities.

To determine ERC eligibility, a thorough review of your business' finances must be undertaken before a professional preparer can tell whether or not you can claim tax savings. However, many questionable ERC providers make assurances about ERC eligibility before even reviewing their clients' finances — if they even do at all!





2

The Provider Did Not Provide Clear and Detailed Information About ERC Qualification Criteria

In order to qualify for the ERC, a small business must be able to show that their business experienced a “significant decline in gross receipts” in 2020 or 2021 or that their operations were fully or partially suspended by a government order during a calendar quarter in 2020 or 2021. For 2020, a “significant decline” in gross receipts is considered a decrease of more than 50% compared to the same quarter in 2019. For 2021, a decrease of 20% or more in gross receipts is sufficient to qualify.

Though a “significant decline” in gross receipts is the main deciding factor regarding eligibility, you can still be eligible if your business operations were fully or partially suspended due to an official government pandemic response.

The question of whether a small business’ operations were fully or partially suspended

as a direct result of the US government’s pandemic response is a much more complicated question than it may appear to be on the surface, and there is some level of subjectivity to it.

You can see that the question of what criteria a business must meet to be eligible is an intricate one. However, a legitimate third-party provider of ERC services is capable of providing you with clear and detailed information regarding ERC qualification criteria when asked.

A dubious ERC provider, however, is more likely to dance around the question or reiterate prior sweeping generalizations, promoting “too-good-to-be-true” results in order to entice their potential clients.



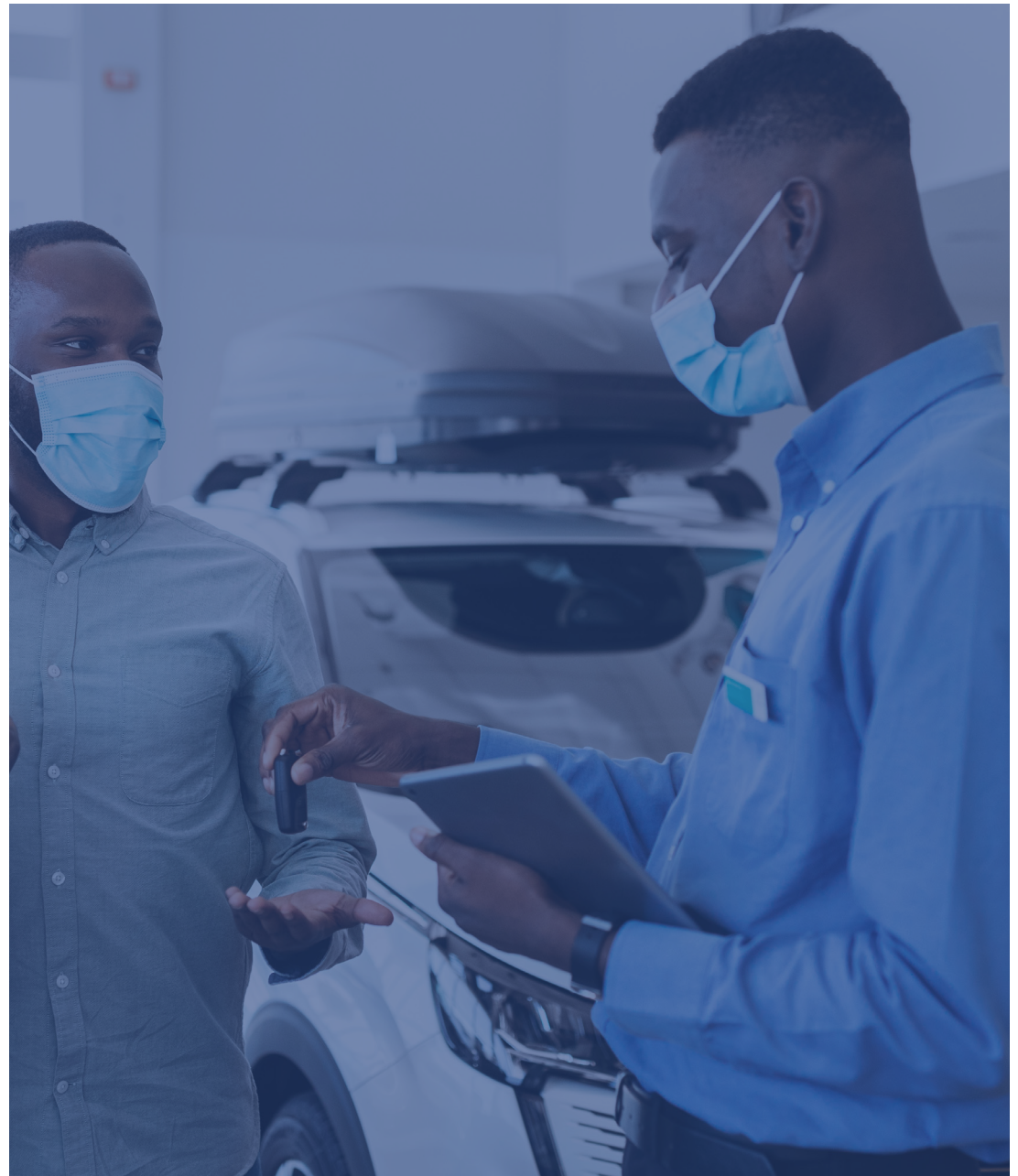
3

The Provider Made Sweeping Generalizations About Businesses' Eligibility

One of the most oft-repeated pieces of misinformation regarding ERC eligibility is that most, if not all, businesses are eligible for tax savings under the ERC program — especially businesses in specific verticals in the food service or hospitality industries.

A questionable ERC provider will often insist, for example, that ERC can be claimed by any automotive dealership, restaurant, or hospitality business.

These sweeping generalized claims are completely false. While it is true that businesses within these verticals may have been more eligible for ERC tax savings than others, that is only because they were more likely to meet the eligibility criteria due to the nature of their business — not that they were guaranteed to meet the eligibility criteria.





4

The Provider Claimed To Have Received Specialized Training From the IRS

Many ERC providers made the false claim that their tax preparers received special training directly from the IRS regarding ERC standards, eligibility, and filing practices. However, no such special training course for tax professionals exists.

In fact, some of these third-party vendors are not even CPAs at all. Any ERC preparer making claims like this is likely trying to impress you and make you believe they have some sort of “secret weapon” for getting you the best results when no such thing exists.

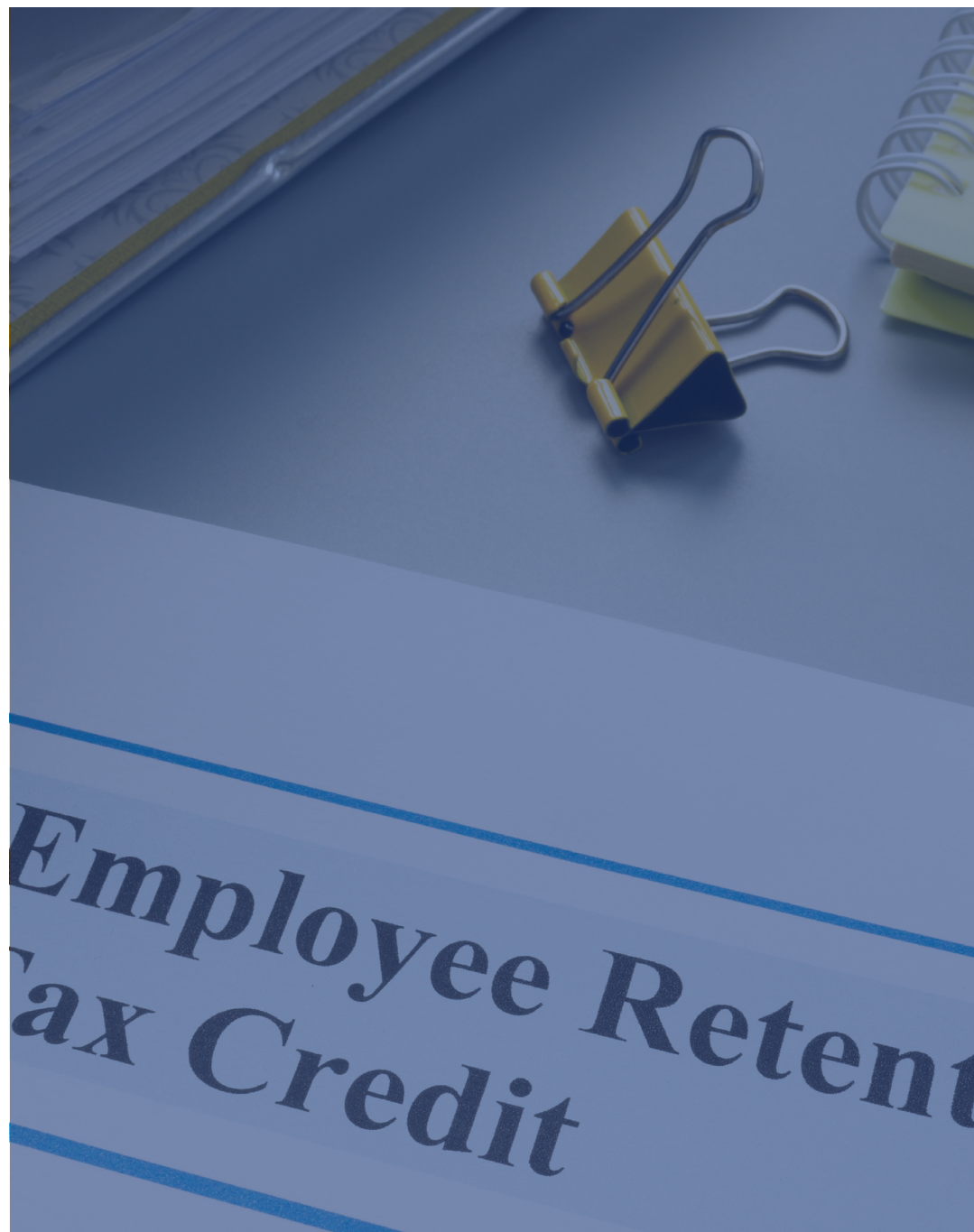


5

The Provider Claimed To Have Specialized or Proprietary Knowledge Regarding ERC

Some dubious ERC providers try to inflate their credentials and impress their clients by claiming to have specialized or even proprietary knowledge regarding the ERC program and how to effectively navigate it for maximum returns.

This claim might sound impressive to the layperson — if a tax professional has a method for navigating the IRS that's so effective that they must keep it a secret from the rest of the industry or protect it by a patent, then they must be very good at their jobs — but it's just not how tax law works. Someone who claims to have some too-good-to-be-true, patented system for getting the most out of the IRS is trying to fool you.





6

The Provider Took a Large Contingency Fee Based on the Credit They Estimated You Would Receive

One of the biggest warning signs regarding questionable ERC mills is how you pay them for their services. The reason why unscrupulous third-party entities like these pop up in any industry is because they see opportunities to make a big profit off the people they mislead while providing little to nothing of value in return.

Bad actor ERC providers will often insist on a large upfront payment for “evaluating” your eligibility for ERC and submitting your claim. Others will charge a contingency fee based on the amount of credit they estimate you would receive.

The latter is especially insidious of a practice because it gives them an incentive to overinflate how much you may be eligible to claim so that they can pocket more of your money — which means that, should the IRS audit you and determine that you weren’t eligible for the credits you claimed, you could lose most or all of the money you saved on your taxes, plus any interest and associated penalties, plus the fee you paid to your ERC provider.





7

The Provider Made Oral Promises That Were Not Reflected in the Text of Their Retainer Agreement

One hallmark of third-party ERC advisors providing questionable services is if they made assurances about your eligibility or downplay risks in person but did not include them in their retainer agreement. If a tax professional can't put a claim into a legally binding document, then they shouldn't be saying it either.



8

The Provider Did Not Offer a Contract to Sign To Prove Their Credibility and the Accuracy of Their Results

This is probably one of the biggest red flags of a questionable ERC provider. As mentioned above, written documentation is crucial. If an ERC provider cannot provide a legally binding contract that attests to their credibility and how accurate they expect the results of their review of your situation to be, it means they can't actually attest to those things — in other words, they're stringing you along with promises they have no intention of keeping.

If you feel you have any reason to be suspicious, review your contract, retainer agreement, or any other legally binding documentation your ERC provider may have given you carefully.



What Are the Consequences of an ERC Audit?

With so many ERC claims being investigated, it's important to keep a level head and a sense of perspective.

An ERC audit may result in stiff fines but will not result in jail time unless you are willfully trying to defraud the government — and it's likely safe to say that the vast majority of people who could be audited over their ERC claims have not done that.

If the audit turns up nothing, the consequences are the headaches and anxiety you've endured throughout the process. At worst, though, you could be required to pay back the tax savings you claimed, plus accrued interest or penalties, which could prove to be a crippling financial consequence for most small businesses.

While receiving an ERC audit can seem like endgame for you and your business, keep in mind that that IRS notice is not a final decision. You can defend yourself in an audit, make your case, and come out victorious — or at least reduce the severity of whatever penalties you might face — if you meet the IRS honestly and in good faith, and enlist the help of tax professionals to guide you through the process and zealously come to your defense.

In addition to claimants, credit providers who helped businesses claim ERC credit may also be at risk of an audit by the IRS. For ERC providers, their risk of an IRS audit — should their clients be found ineligible — include preparer penalties, which allow the IRS to claw back the fees preparers received for their work.



How To Prepare for an ERC Audit



Rest assured that should you find yourself being audited over your ERC claim, it is not the end of the world — but you need to be well prepared for it.

If you are subject to an ERC audit, you will be notified in advance of the date of your audit — giving you time to prepare. The very first thing you should do is consult with a tax professional, ideally an attorney who is qualified and authorized to represent you before the IRS.

Having a tax attorney on hand will not only help you prepare your case, but help you make it as well. A great tax expert will diligently come to your defense and do everything in their power to help you and your business arrive at the best resolution possible.

A seasoned tax attorney is also essential for helping you with documentation. The heart of getting through any audit is having all the documentation you need to make your case. In the case of an audit, poor record-keeping can be your downfall, whether or not you've done anything wrong. Getting your records in order, including documentation of employee payroll, gross receipts, and detailed ERC credit calculations quarter is essential.

Organized documentation regarding your business is especially essential with ERC audits, since the primary focus of the audit is determining whether you were truly eligible for the tax credit you claimed. Even if you are eligible, you might have trouble proving it if you can't produce sufficient documentation or satisfactorily argue your case.

Having well-organized documents is beneficial to the IRS as well, and it should go without saying that your goal is not to make their job more difficult.

With the right preparation, and a qualified professional advocating on your behalf, an ERC audit can be a minimal disruption to your life, rather than an overwhelming ordeal.



Conducting an ERC Risk Assessment

The best time to start preparing for an ERC audit is before you receive any notification from the IRS. If you suspect that you may have been misled by a bad actor ERC provider into claiming credits you were not eligible for, the best thing you can do is seek a second opinion from a professional regarding your eligibility and have an ERC risk assessment conducted.

An ERC risk assessment involves taking a look at all of the work your previous ERC provider did, comparing it with your business' documents, and determining whether or not their initial determination of your eligibility was accurate. The results inform you of how likely you are to be audited by the IRS over your ERC claim and give you a clear picture of what the potential consequences might be in plain terms. By having an ERC risk assessment conducted for your business, you might find out that you claimed credit you weren't qualified for and can receive guidance on how to prepare for a potential audit. Tax professionals performing the risk assessment can also review your case and see if there are any legitimate avenues toward bolstering your qualification for the credit.

Getting an ERC risk assessment is the first step toward preparing for an ERC audit. If you do find out that you will be audited, an ERC risk assessment means you are already aware of how severe the consequences could be and are ready to take further steps to prepare.

At Wiggam Law, our ERC risk assessment services include:

- Reviewing the work of your previous ERC provider
- Evaluating the ERC provider's analysis under the applicable rules from an IRS audit perspective
- Provide recommendations to bolster existing or prospective ERC claims
- Assist in any counsel or document review should you be notified of an ERC audit of your business
- Negotiate with the IRS and defend you throughout the audit process to mitigate the consequences of an audit



About Wiggam Law

Wiggam Law is here to tackle the tough tax law cases no one else wants to take. At Wiggam Law, you'll find a team of expert tax attorneys dedicated to treating our clients like family and helping them sleep better at night knowing that their problems are our problems and that we will do everything in our power to help them.

We know that tax issues can happen to anyone and that is why at Wiggam Law, tax law is all we do. Our team of experienced tax attorneys knows the IRS backwards and forwards, and we're happy to negotiate directly with state and federal tax agencies so that you don't have to.

We do everything we can to put an end to the hassle and stress of your tax woes and help protect what is precious to you – be it your business, your home, or financial security for your family.

If you need help related to your ERC claim, or any other tax related issues, contact us at [\(470\) 347-1842](tel:4703471842) or via our website to schedule your case consultation.

Schedule Your Case Consultation Today!





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