



Current Federal Tax Developments

December 11, 2023

Kaplan Financial Education



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This Week We Look At:

IRS sends out a batch of 20,000 ERC rejection letters

Employer files suit claiming IRS ERC guidance violated the Administrative Procedures Act

SCOTUS hears oral arguments in the *Moore* case

Draft K-2/K-3 instructions are published with no major changes to the domestic filing exception for 2023

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IRS Sends Out 20,000 ERC Claim Rejection Letters



Photo by [Jakavla Tonev](#) on [Unsplash](#)

- “IRS expands work on aggressive Employee Retention Credit claims; 20,000 disallowance letters being mailed, more action and voluntary disclosure program coming,” IRS News Release IR-2023-230, December 6, 2023
- IRS announces the agency is sending out more than 20,000 rejection letter on ERC claims
- Rejected claims:
 - Entities that did not exist during the period of the ERC or
 - Had no employees during that period

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<https://www.irs.gov/newsroom/irs-expands-work-on-aggressive-employee-retention-credit-claims-20000-disallowance-letters-being-mailed-more-action-and-voluntary-disclosure-program-coming>

Updated Materials

One Page PDF Flyers

Beneficial Ownership Information Reporting Key Questions -

https://www.fincen.gov/sites/default/files/shared/BOI_Reporting_Key_Questions_1.23.pdf

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[1-FINAL.pdf](#)

IRS Sends Out 20,000 ERC Claim Rejection Letters



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- “IRS expands work on aggressive Employee Retention Credit claims; 20,000 disallowance letters being mailed, more action and voluntary disclosure program coming,” IRS News Release IR-2023-230, December 6, 2023
- Affected employers could still challenge the IRS denial in court
- IRS also states that they plan to release a voluntary disclosure program for those who received payments later this month

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Employer Suit Argues IRS Violated Administrative Procedures Act with ERC Guidance



Photo by [Cam Bradford](#) on [Unsplash](#)

- *Southern California Emergency Medicine, Inc. v. Werfel*, USDC Central District CA, Complaint and Exhibits, Case No. 5:23-CV-02450, December 1, 2023
 - IRS had denied ERC refund claim for all 6 quarters for the medical employer
 - IRS denial as outlined in examination report cited Notice 2021-20 along with other references
 - Complaint argues that the IRS should have been required to follow APP procedures

<https://www.taxnotes.com/research/federal/court-documents/court-petitions-and-briefs/medical-corporation-challenges-employee-retention-credit-rule/7hm5f>

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Employer Suit Argues IRS Violated Administrative Procedures Act with ERC Guidance



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- *Southern California Emergency Medicine, Inc. v. Werfel*, USDC Central District CA, Complaint and Exhibits, Case No. 5:23-CV-02450, December 1, 2023
 - Asks that IRS be
 - Enjoined from enforcing Notice 2021-20 in any administrative or judicial forum
 - Enjoined from requiring compliance with illegally imposed obligations under Notice 2021-20

<https://www.taxnotes.com/research/federal/court-documents/court-petitions-and-briefs/medical-corporation-challenges-employee-retention-credit-rule/7hm5f>

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Employer Suit Argues IRS Violated Administrative Procedures Act with ERC Guidance



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- *Southern California Emergency Medicine, Inc. v. Werfel*, USDC Central District CA, Complaint and Exhibits, Case No. 5:23-CV-02450, December 1, 2023
 - Does not ask for a refund, nor does it ask to argue for the correctness of the employer's position on the ERC
 - Not clear how quickly any ruling will come down, and we would expect any result against the government to be appealed to the Ninth Circuit

<https://www.taxnotes.com/research/federal/court-documents/court-petitions-and-briefs/medical-corporation-challenges-employee-retention-credit-rule/7hm5f>

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Employer Suit Argues IRS Violated Administrative Procedures Act with ERC Guidance



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- *Southern California Emergency Medicine, Inc. v. Werfel*, USDC Central District CA, Complaint and Exhibits, Case No. 5:23-CV-02450, December 1, 2023
 - Without a ruling on the validity of the positions used in the claim, it's also not clear how useful the case would be for filing new claims
 - Not clear what the results of even "full" relief would be (seems the IRS could raise the law text and present their positions based solely on that in court--and the burden of proof would be on the employers)

<https://www.taxnotes.com/research/federal/court-documents/court-petitions-and-briefs/medical-corporation-challenges-employee-retention-credit-rule/7hm5f>

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Supreme Court Hears Moore Case



Photo from [Unsplash+](#)

- *Moore v. United States*, US Supreme Court, Case No. 22-800, Transcript of Oral Arguments, December 5, 2023
 - Oral arguments were heard on case challenging the §965 transition tax
 - Taxpayers argued that the 16th Amendment requires that income must be realized to be taxed - and that the §965 transition tax was on income that did meet the realized test
 - Session begins with Justice Thomas almost immediately asking the taxpayers' counsel for his definition of "realized"

https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/22-800_097c.pdf

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Supreme Court Hears Moore Case



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- *Moore v. United States*, US Supreme Court, Case No. 22-800, Transcript of Oral Arguments, December 5, 2023
- Plaintiffs did concede that receipt of cash is not required for realization and, specifically, that Part F is not unconstitutional
- But justices were also concerned about impact of appearing to have not limits
- Always dangerous to speculate based on oral arguments on the results

https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/22-800_097c.pdf

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Drafts of 2023 K-2/K-3 Instructions are Out: No Major Changes for Domestic Filing Exceptions



Photo by [Anne Nygård](#) on [Unsplash](#)

- 2023 Partnership Instructions for Schedules K-2 and K-3 (Form 1065), 2023 S Corporation Instructions for Schedules K-2 and K-3 (Form 1120-S), Draft Forms, November 29 & 30, 2023
 - IRS had released draft 2023 Schedules K-2 and K-3 for both partnerships and S corporations earlier this year
 - Draft instructions now come out with few changes
 - Specifically, the rules for the Domestic Filing Exception remain the same as for 2022

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<https://www.irs.gov/pub/irs-dft/i1065s23--dft.pdf>
<https://www.irs.gov/pub/irs-dft/i1120s23--dft.pdf> ,

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