



EMPLOYEE RETENTION CREDITS: IRS EXAMINATIONS AND RECENT ACTIONS

October 12, 2023

Agenda

Topic	Duration
ERC claims background	15 min
Statute of limitations and related issues	10 min
IRS ERC examinations	25 min
New IRS pronouncement and new guidance	10 min

With you today



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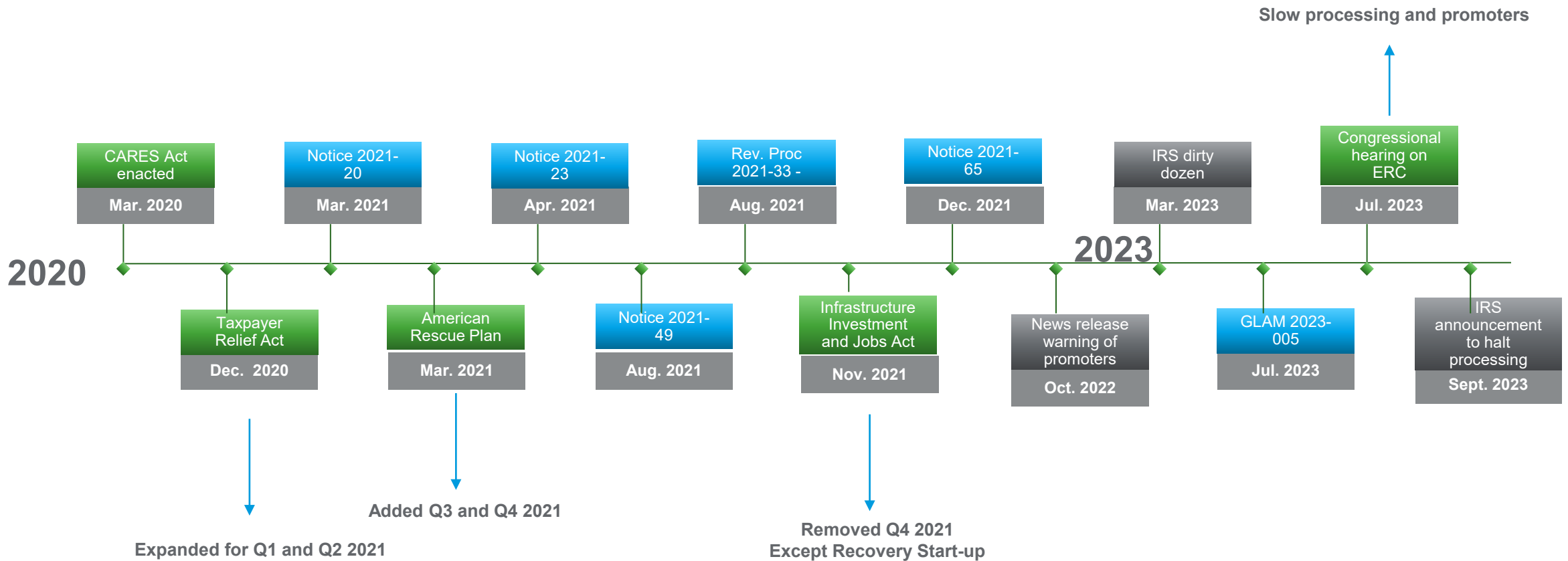
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Employee Retention Tax Credit background

ERC guidance timeline



Overview of ERC

	2020	2021
What is it?	50% payroll credit up to \$10,000 per wages per employee	70% payroll credit up to \$10,000 of wages per quarter per employee
Who is eligible?	Fully or partially impacted by a government order limiting commerce, travel or group meetings	
	OR	
	50% decline in gross receipts compared to same quarter in 2019	20% decline in gross receipts compared to same quarter in 2019
What are qualified wages?	>100 full-time employees in 2019: Wages/healthcare expenses attributable to time NOT working	>500 full-time employees in 2019: Wages/healthcare expenses attributable to time NOT working
	</ 100 full-time employees in 2019: ALL wages/healthcare expenses paid	</ 500 full-time employees in 2019: ALL wages/healthcare expenses paid

Where are issues arising?

IRS examinations

Financial statement audits

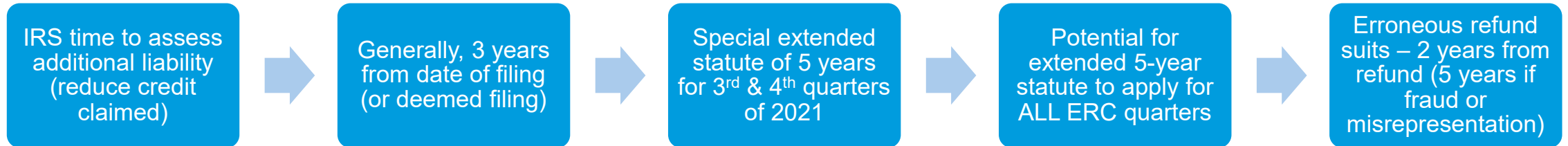
Due diligence in mergers & acquisitions

Statute of limitations and related issues

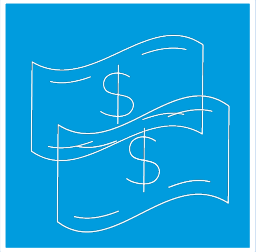
Statute of limitations (SOL) for claiming ERC



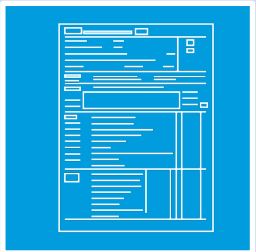
SOL on assessment



Requirement to reduce claimed wage deduction



Cannot claim ERC on wages deducted for income tax purposes



Amended Income Tax Return may be necessary



Example: Company A claimed \$50,000 in ERC wages for all 2020 periods on amended returns filed in 2022. Company A claimed a wage deduction on their original Form 1120 for 2020 which included the \$50,000 in qualified wages. Company A must file a Form 1120-X for 2020, reducing their wage deduction by \$50,000.

Potential conflict between statutes of limitation

If employer loses ERC credit and has already amended corresponding income tax return, entitled to reclaim reduced wage deduction

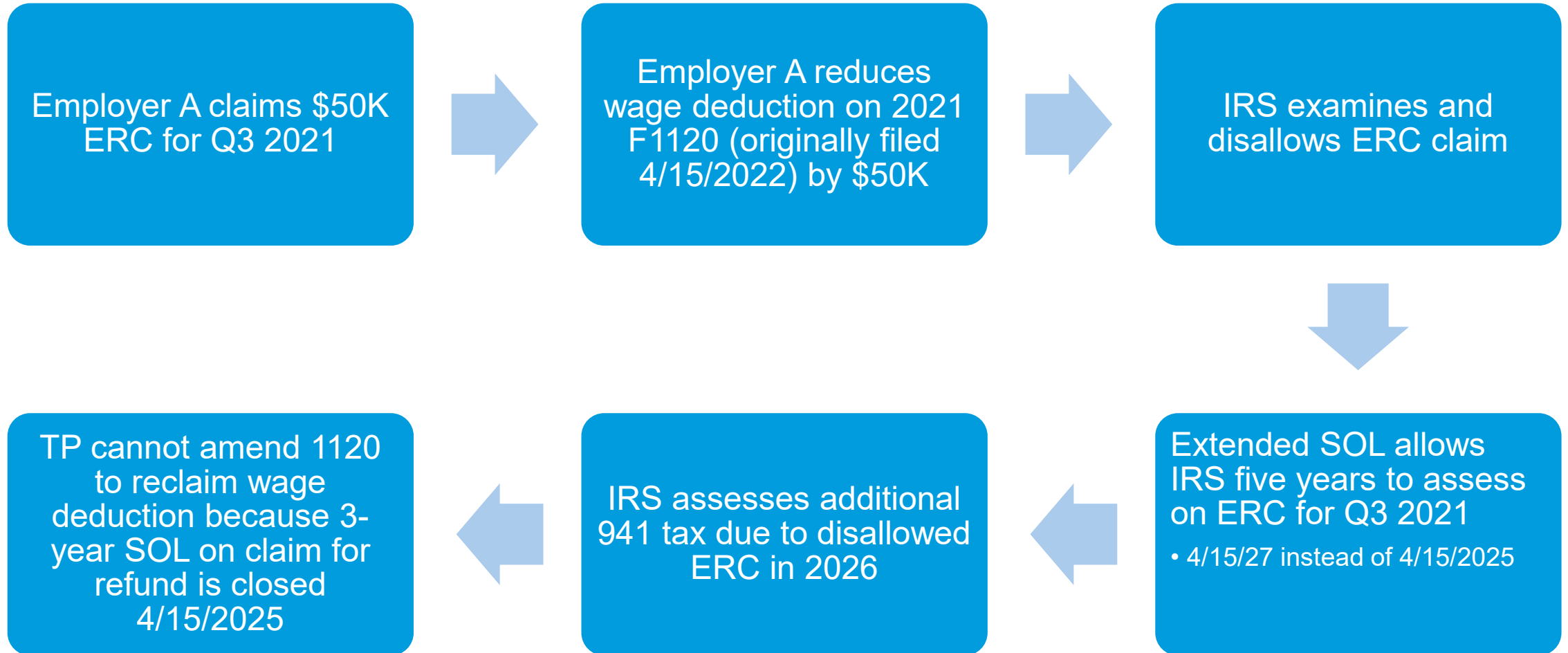
Claim for refund statute: Typically, three years from date of filing

- 4/15/2025 for 2021 Forms 1120 filed 4/15/2022

Mismatch with extended 5-year statute to assess ERC for 2021 Q3 and Q4

- 4/15/2027

SOL mismatch example



IRS ERC examinations

Employee retention credit examinations

Increased IRS eyes on ERC claims

Extra levels of review

IRS viewing additional sources of information

- Form 5500 filings
- Gross receipts from income tax returns
- Form 941 information
- Websites

IRS making field visits to ensure company is “real”

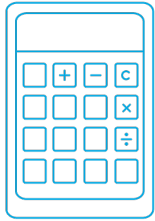
Technical issues raised on ERC examinations

Aggregation

- Used for
 - Gross receipts
 - Full time employee headcount

- Section 52
 - Generally, more than 50% ownership
 - Also pulls in the section 414 controlled group testing rules, including “management services” and affiliated service group rules

Technical issues raised on ERC examinations (cont.)



Qualified wage calculations

“Medicare wage”

PPP loan forgiveness amounts

FFCRA sick and family COVID leave

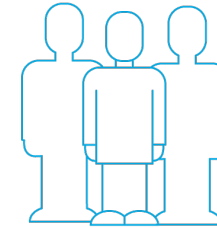
Other COVID credits such as the Shuttered Venue, Restaurant Revitalization Fund, WOTC (Work Opportunity Tax Credit)

Owner’s/relatives’ wages

Large employer – PTO, severance, Health Savings Account contributions



Proper use of \$10,000 cap on qualified wages



FTE headcount for small employer qualification

Significant decline in gross receipts testing

Quarterly gross receipts should tie to gross receipts reported on corresponding annual tax return (1120, 1065, 990, etc.)

Gross receipts include investment earnings

Gross receipts may include amounts earned by subs, even if foreign

IRS requesting proof of decline in quarterly profit and loss statements

Transactions between aggregated entities should be excluded

Technical issues raised on ERC examinations

Governmental orders forcing a partial or full shutdown of business

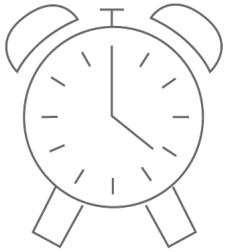
- Generally actual orders, not governmental recommendations
- “Reduced productivity” due to economy does not count
 - “Stay at home” orders permitting work at home insufficient
 - Supply chain arguments
- Need to provide explanation of specific effects of the orders on company
- IRS has asked employers to send in additional information and support beyond pointing to an order

Technical issues raised in IRS examinations

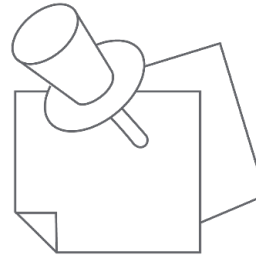
“Idle time” determinations

- Small employer – use as support with governmental orders to show “partial shut-down”
- Large employer – can only use wages paid while employees are “not providing services”:
 - Reasonable method requirement
 - Explanation of why employees were not busy, tied to the governmental orders – NOT tied to economy (people were not buying)
 - Watching for changes in hours as government orders eased over the quarters

Potential consequences of ERTC failures



Repay credit (or IRS reduces credit not yet refunded)



Pay interest from date refund was received



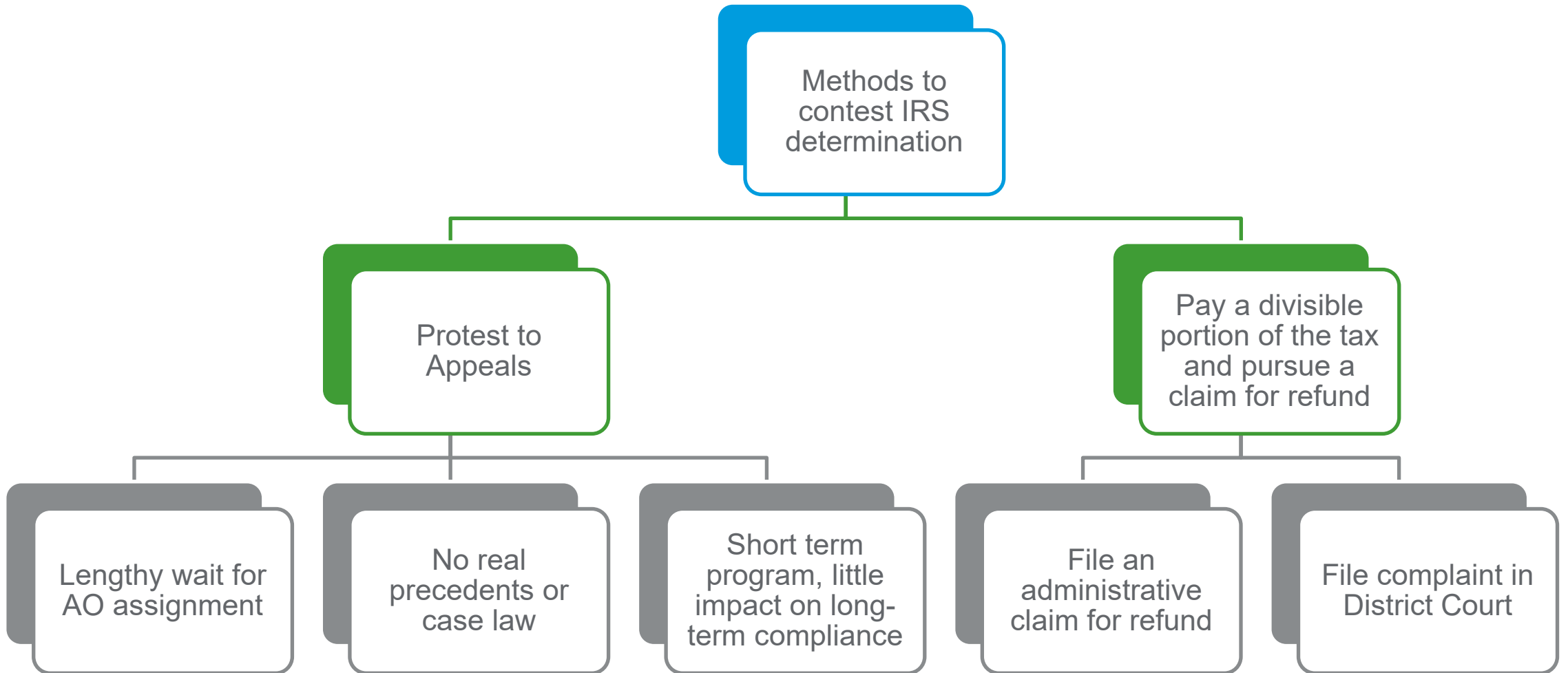
Face potential penalties

- 20% negligence penalty
- Failure to pay penalty (up to 25%)



CARES Act 2301(k) provides for nonassertion of penalties where failure to deposit (10% penalty) was in reasonable anticipation of credit

Contesting IRS ERC determinations



IRS moratorium on processing ERC claims

IRS announcement: Sept. 14, 2023

IRS announces halt to processing new cases until 2024

- IRS did not prohibit sending new cases, they just will not work them yet
 - IRS will continue working already-accepted cases
- IRS will provide more scrutiny on new cases going forward
- IRS taxpayer advocate service does not accept new cases to facilitate processing of already filed ERC claims

ERC invalid claims withdrawal procedures

IRS will provide steps to repay claims that companies later decide are invalid

- Some companies have already repaid claims or amended Forms 941 X for cases not yet worked to “revoke” request for refund

Issues arising from

- Financial audits
- Due diligence as part of company purchase

Additional ERC resources

- [What to do if you filed an employee retention credit claim with the IRS](#)
- [IRS clarifies employee retention credit guidance](#)
- [Employment tax: Actions to take and documents for an IRS audit](#)
- [Game-changing updates to the Employee retention credit](#)
- [Employee retention credit: Answers to frequently asked questions](#)

Before we conclude

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Follow-up

We will respond to questions following today's event

The presentation slides and a link to recording will be made available a few days following the event



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