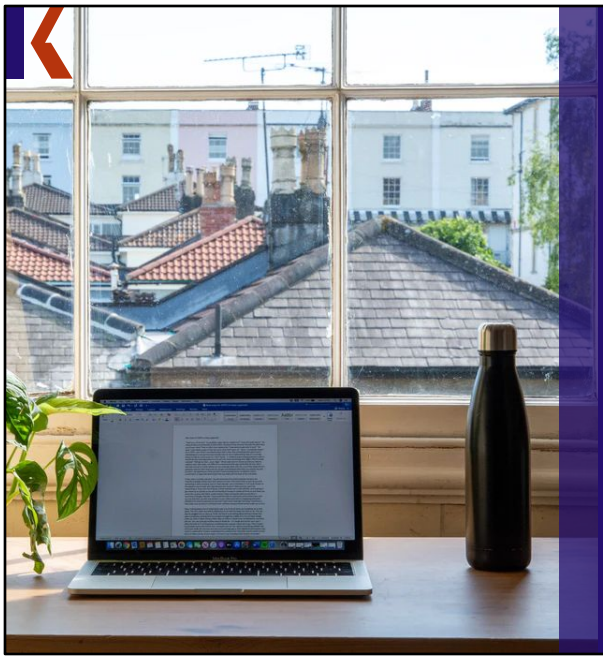

Current Federal Tax Developments

April 24, 2023

Kaplan Financial Education

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This Week We Look At:

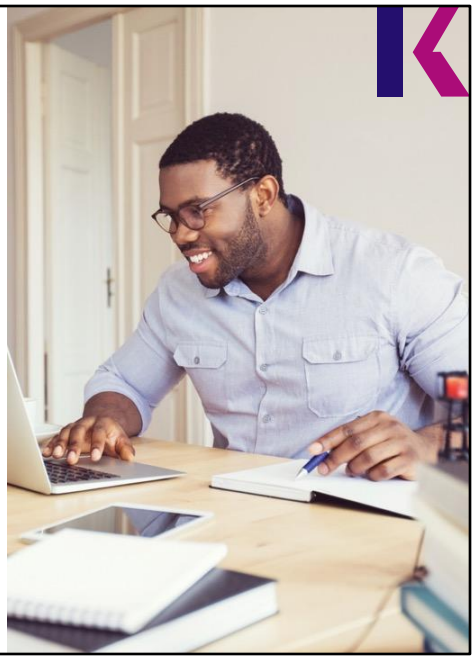
Another taxpayer fails to establish either spouse as a real estate professional

SPIFF was not a separate trade or business

IRS releases revised Form 3115

IRS letter to Senator on PEOs and ERC

FinCEN publishes FAQ on Corporate Transparency Act reporting



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Another taxpayer fails to establish either spouse as a real estate professional

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FinCEN publishes FAQ on Corporate Transparency Act reporting

Another Claim of Real Estate Professional Status Fails a Court Test

Photo by Tierra Mallorca on Unsplash

- *Drocella v. Commissioner,* TC Summary Opinion 2023-12, April 3, 2023
  - This is one of many court cases taxpayers have lost on the issue
  - A big red flag here is that both spouses had full time jobs in addition to their rentals
  - In this case the key flaw will be their inability to show the hours they worked at their jobs

https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/couple-can%27t-deduct-rental-real-estate-losses/7g9cl

Another Claim of Real Estate Professional Status Fails a Court Test

- IRC §469(c)(7)(B) gives the definition of a real estate professional

(B) Taxpayers to whom paragraph applies. This paragraph shall apply to a taxpayer for a taxable year if

(i) more than one-half of the personal services performed in trades or businesses by the taxpayer during such taxable year are performed in real property trades or businesses in which the taxpayer materially participates, **and**

(ii) such taxpayer performs more than 750 hours of services during the taxable year in real property trades or businesses in which the taxpayer materially participates.

In the case of a joint return, the requirements of the preceding sentence are satisfied if and only if either spouse separately satisfies such requirements. For purposes of the preceding sentence, activities in which a spouse materially participates shall be determined under subsection (h).

https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/couple-can%27t-deduct-rental-real-estate-losses/7g9cl

Another Claim of Real Estate Professional Status Fails a Court Test

- IRC §469(c)(7)(A) provides additional hurdles

(A) In general. If this paragraph applies to any taxpayer for a taxable year--

(i) paragraph (2) shall not apply to any rental real estate activity of such taxpayer for such taxable year, and

(ii) this section shall be applied as if each interest of the taxpayer in rental real estate were a separate activity.

Notwithstanding clause (ii), a taxpayer may elect to treat all interests in rental real estate as one activity. Nothing in the preceding provisions of this subparagraph shall be construed as affecting the determination of whether the taxpayer materially participates with respect to any interest in a limited partnership as a limited partner.

https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/couple-can%27t-deduct-rental-real-estate-losses/7g9cl

Another Claim of Real Estate Professional Status Fails a Court Test

Photo by Tierra Mallorca on Unsplash

- *Drocella v. Commissioner,* TC Summary Opinion 2023-12, April 3, 2023
  - This case will only involve the issue of whether they were real estate professionals (the court finds neither one was)
  - But even if that hurdle is cleared, you still must material participation in each rental activity

https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/couple-can%27t-deduct-rental-real-estate-losses/7g9cl

Another Claim of Real Estate Professional Status Fails a Court Test

During 2018 petitioner husband was employed full time by Northrup Grumman Systems Corp., and petitioner wife was employed full time by the U.S. Department of Defense. Petitioners did not provide the exact number of hours they worked as employees in 2018 but rather stipulated that they worked for their respective employers full time.

https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/couple-can%27t-deduct-rental-real-estate-losses/7g9cl

Another Claim of Real Estate Professional Status Fails a Court Test

In addition to their employment petitioners owned and managed six rental real estate properties during 2018. They worked renting, renovating the properties, and handling issues with guests and tenants. The parties stipulated handwritten logs containing dates, times, and notations as to whether petitioner husband, petitioner wife, or both performed work as to a property. The parties did not stipulate as to the truth or falsity of those logs. The logs list hours attributable to petitioner husband, petitioner wife, or both from January 14 through November 13, 2018. The total listed hours equal 1,501.27. The hours listed on the logs that bear petitioner husband's first name initial exceed 750, but the total hours listed on the logs that bear petitioner wife's first name initial do not equal or exceed 750.

https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/couple-can%27t-deduct-rental-real-estate-losses/7g9cl

Another Claim of Real Estate Professional Status Fails a Court Test

Both petitioners were full-time employees. However, neither petitioner has provided the number of hours he or she performed as an employee. Assuming without finding that petitioners also performed personal services with respect to their rental real estate activities, petitioners cannot prove that more than one-half of either petitioner's total personal services performed in trades and businesses were performed on their rental real estate activities during that year. See I.R.C. §469(c)(7)(B). Consequently, petitioners have failed to sustain their burden to prove either petitioner meets the description of a real estate professional under section 469(c)(7)(B).

https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/couple-can%27t-deduct-rental-real-estate-losses/7g9cl

Another Claim of Real Estate Professional Status Fails a Court Test

Thus, failing the first prong of the section 469(c)(7)(B) test, petitioners are not entitled to deduct the rental real estate loss for 2018, and the Court need not address the reasonableness of the logs and whether either petitioner performed more than 750 hours of services during the taxable year in real property trades or businesses in which he or she materially participated.

https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/couple-can%27t-deduct-rental-real-estate-losses/7g9cl

Another Claim of Real Estate Professional Status Fails a Court Test

Photo by Tierra Mallorca on Unsplash

- *Drocella v. Commissioner,* TC Summary Opinion 2023-12, April 3, 2023
  - Remember have to have record of hours for both the rental activities *and* the jobs to meet the burden
  - One spouse has to meet the test solely on own hours
  - Very difficult to meet these tests if the taxpayer has a full time job - court won't believe absurd work levels without a lot of proof

https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/couple-can%27t-deduct-rental-real-estate-losses/7g9cl

Sales Incentive Payments to Dealership Salesman Were Not a Separate Trade or Business

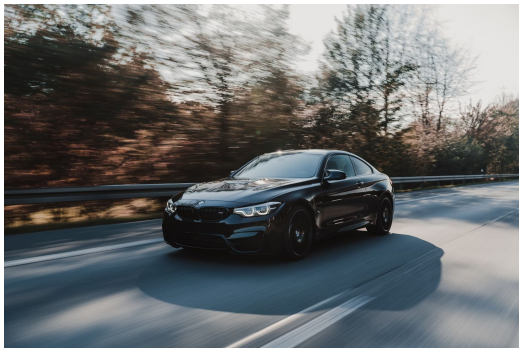

Photo by Rodan Can on Unsplash

- *Schmerling v. Commissioner*, TC Summary Opinion 2023-14, April 4, 2023
  - Looks at a "Sales Performance Incentive Fund" (referred to as a SPIFF) for an employee of a car dealership
  - Has unique tax consequences
    - Relates to work as an employee
    - But not paid by employer

https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/car-salesman-didn%e2%80%99t-have-separate-business/7g9hq

Sales Incentive Payments to Dealership Salesman Were Not a Separate Trade or Business

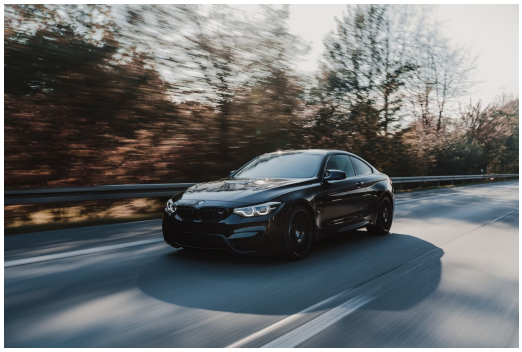

Photo by Rodan Can on Unsplash

- *Schmerling v. Commissioner*, TC Summary Opinion 2023-14, April 4, 2023
  - 2008 IRS Publication 3204 (no longer on IRS website) outlines tax treatment
    - No FICA withheld
    - But also not subject to SE tax
  - But tie to employment has another impact for expenses related to activity

https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/car-salesman-didn%e2%80%99t-have-separate-business/7g9hq

From 2008 IRS Publication 3204

Reporting Incentive Payments

Follow the filing guidelines below when reporting incentive payments you received from a manufacturer. If someone other than yourself prepares your tax return, make sure the preparer is aware of these guidelines:

- Report the income on page 1 of **Form 1040**, *U.S. Individual Income Tax Return* under **Income** on the line titled "Other Income".
- Check to see if the expenses you incur to get the incentive payments are deductible on **Schedule A**, *Itemized Deductions* (Form 1040) under **Job Expenses and Most Other Miscellaneous Deductions** on the line titled "Other Expenses". These expenses are subject to the 2% adjusted gross income limitation.
- Do not report the income on Schedule C (Form 1040), *Profit and Loss from Business*, because recipients of these payments are not engaged in an individual trade or business and are therefore not self-employed. Similarly, **no** expenses may be taken on Schedule C to offset incentive payment income.

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https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/car-salesman-didn%e2%80%99t-have-separate-business/7g9hq

Good News about the Payments

Payments reported on Form 1099-MISC, *Miscellaneous Income*, (1) are not treated as wages, (2) are not subject to federal income tax withholding, social security, medicare, or federal unemployment tax, and (3) are not considered to be self-employment income and, therefore, are not subject to self-employment tax.

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https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/car-salesman-didn%e2%80%99t-have-separate-business/7g9hq

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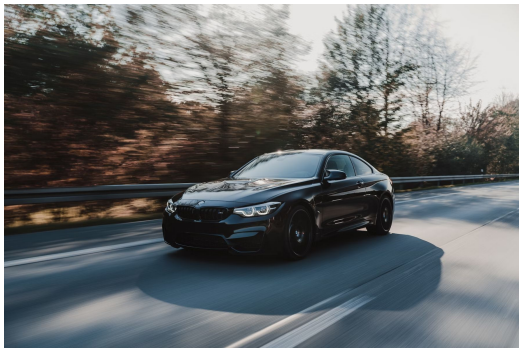

Photo by Rodan Can on Unsplash

- *Schmerling v. Commissioner*, TC Summary Opinion 2023-14, April 4, 2023
  - Only non-employee business expenses are deductible in computing AGI (IRC §62(a)(1))
  - SE business income does not include business as an employee (§1402(a)(13))
  - FICA only applies to the employer and wages paid from same (§§3101 and 3111)

https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/car-salesman-didn%e2%80%99t-have-separate-business/7g9hq

Sales Incentive Payments to Dealership Salesman Were Not a Separate Trade or Business

Petitioner was hired as an automobile salesman in 2008 by McKenna. McKenna operated under a franchise from BMW of North America, LLC (BMW), for selling BMW automobiles. Between 2008 and the year in issue, petitioner was promoted to corporate/VIP sales manager for McKenna, and his duties expanded to include managing the used car fleet.

As the used car fleet manager, petitioner had various duties, including purchasing used cars at auctions for resale at McKenna. He personally attended used car auctions, estimated the value of a car presented for auction, and decided whether and how much to bid on it. McKenna provided the funds to purchase the used cars. The used cars purchased at auction were resold by McKenna, not petitioner, and the company profited or suffered a loss from each resale of a car purchased at auction.

https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/car-salesman-didn%e2%80%99t-have-separate-business/7g9hq

Sales Incentive Payments to Dealership Salesman Were Not a Separate Trade or Business

The Form W-2, Wage and Tax Statement, McKenna issued to petitioner for 2014 shows $206,506 in wages and commissions that petitioner earned during that year. In addition to the income reported on the Form W-2, petitioner was compensated by others in connection with his position at McKenna.

https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/car-salesman-didn%e2%80%99t-have-separate-business/7g9hq

Sales Incentive Payments to Dealership Salesman Were Not a Separate Trade or Business

BMW offered a performance bonus program (program) for sales managers. The program provided cash awards to eligible individuals who met or exceeded various goals set by BMW. Petitioner was eligible for and participated in the program. The program also provided for severe sanctions if a participant abused its benefits. According to the program rules,

> [i]f it is determined that a payment was made based on fraudulent reporting, the Center will be charged back through their parts account the entire amount awarded to all of its employees under the Performance Bonus Program. In addition, those individuals involved in the fraudulent reporting will not be eligible to participate in future Performance Bonus programs.

https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/car-salesman-didn%e2%80%99t-have-separate-business/7g9hq

Sales Incentive Payments to Dealership Salesman Were Not a Separate Trade or Business

The references to "Center" and "its" are to McKenna. Apparently, if any one participant violated the program rules, all of the bonus payments to all participants were recoverable. Petitioner received compensation through the program, and he was issued Form 1099-MISC, Miscellaneous Income, from BMW reporting $37,234 in miscellaneous other income for the year in issue. Neither party takes the position that petitioner was an employee of BMW with respect to the amounts he earned under the program.

https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/car-salesman-didn%e2%80%99t-have-separate-business/7g9hq

Sales Incentive Payments to Dealership Salesman Were Not a Separate Trade or Business

In connection with the sale of new and used automobiles, petitioner also earned commissions on the sale of extended warranty service contracts underwritten by Devex, Inc. (Devex). Those commissions, which totaled $2,560, are shown on a Form 1099-MISC that Devex issued to petitioner. Neither party takes the position that petitioner was an employee of Devex with respect to the commissions that he received from Devex.

https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/car-salesman-didn%e2%80%99t-have-separate-business/7g9hq

Sales Incentive Payments to Dealership Salesman Were Not a Separate Trade or Business

Petitioners' timely filed 2014 Form 1040, U.S. Individual Income Tax Return, was prepared by a certified public accountant (CPA). Petitioner's occupation is shown as "used car salesman." The $206,506 compensation that petitioner received from McKenna is reported as wages on the return. The return includes a Schedule C, Profit or Loss From Business, identifying petitioner as the sole proprietor of an "auto sales, used cars" business. The Schedule C shows income of $39,795 (the sum of the amounts shown on the Forms 1099-MISC issued by BMW and Devex), expenses of $27,307, and a net profit of $12,488.

https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/car-salesman-didn%e2%80%99t-have-separate-business/7g9hq

Sales Incentive Payments to Dealership Salesman Were Not a Separate Trade or Business

Whether an activity is a trade or business is a question of fact that takes into account a taxpayer's intent and all other relevant facts and circumstances surrounding the activity. See *Commissioner v. Groetzinger*, 480 U.S. 23, 35-36 (1987). Petitioner does not claim that he earned any income from either BMW or Devex independently from his employment with McKenna. The income that petitioner earned from BMW and Devex is inextricably intertwined with and connected to his status as an employee of McKenna.

https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/car-salesman-didn%e2%80%99t-have-separate-business/7g9hq

Sales Incentive Payments to Dealership Salesman Were Not a Separate Trade or Business

Using common sense as a guide, as *Groetzinger* suggests, we are not persuaded that petitioner's relationships to BMW and Devex provided him with the opportunity to earn a living separate and apart from his status as an employee of McKenna. See *id*. Petitioner "earned his living" during 2014 as a result of his "trade or business" of being an employee of McKenna, not as the proprietor of a separate trade or business independent from his employment with McKenna. That being so, petitioners must treat petitioner's compensation from BMW and Devex as "other income," as respondent argues.

https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/car-salesman-didn%e2%80%99t-have-separate-business/7g9hq

Sales Incentive Payments to Dealership Salesman Were Not a Separate Trade or Business

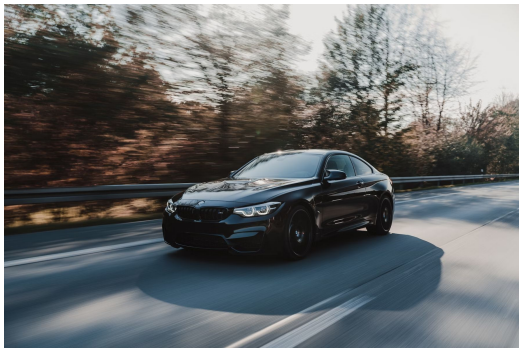

Photo by Rodan Can on Unsplash

- *Schmerling v. Commissioner*, TC Summary Opinion 2023-14, April 4, 2023
  - Note that income was reported on a Form 1099-MISC but was erroneously reported on Schedule C by the CPA
  - We see professionals get this wrong when we work from "memorized rules" but not the actual underlying law

https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/car-salesman-didn%e2%80%99t-have-separate-business/7g9hq

IRS Releases Revised Form 3115 That Must Be Used for Post-April 18 Accounting Method Change Requests

Photo by Ross Findon on Unsplash

- Announcement 2023-12, April 7, 2023
  - New December 2022 version of the form is out, replacing the prior December 2018 version
  - Still accepted December 2018 for change requests filed through April 18, 2023 (the 2022 individual filing deadline)
  - Means taxpayers must use the new form at this point

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https://www.irs.gov/pub/irs-drop/a-23-12.pdf

IRS Releases Revised Form 3115 That Must Be Used for Post-April 18 Accounting Method Change Requests

What's New

Changes related to the deferral method for advance payments, cost offset methods, and/or the applicable financial statement income inclusion rule. The instructions for Schedule B have been updated to include additional information about accounting method changes relating to the deferral method for advance payments, cost offset methods, and methods to conform to the applicable financial statement (AFS) income inclusion rule under section 451.

Research and experimental expenditures. Effective for specified research or experimental expenditures paid or incurred in tax years beginning after 2021, no deduction is allowed for such expenditures. Instead, you must capitalize and amortize these amounts over a 5-year period for amounts attributable to domestic research and over a 15-year period for amounts attributable to foreign research. See DCN 265 and Rev. Proc. 2023-11, 2023-3 I.R.B. 417.

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https://www.irs.gov/pub/irs-drop/a-23-12.pdf

IRS Letter to Senator Cornyn on ERC and PEOs

Photo by Eric Prouzet on Unsplash

- IRS Information Letter 2023-0001, April 6, 2023
  - Inquiry from Sen. Cornyn regarding how the ERC works for employers using PEOs
  - IRS explains that only the PEO can apply for the credit
  - Up to PEO and their clients to determine if the credit gets paid to client

https://www.irs.gov/pub/irs-wd/23-0001.pdf

IRS Letter to Senator Cornyn on ERC and PEOs

There is no requirement that an employer, including the taxpayer, use a PEO to pay employment taxes and satisfy employment tax return filing obligations. mentions that many small employers choose to work with PEOs for the sake of convenience. The terms of the contract between a PEO and its clients govern their relationship. However, these clients are generally responsible for making sure that the PEO filed their tax returns and made their tax deposits and employment tax payments. This is true even if a PEO agrees to perform these acts. In many cases, both the PEO and the client remain liable if the third party fails to perform any required action.[1]

https://www.irs.gov/pub/irs-wd/23-0001.pdf

IRS Letter to Senator Cornyn on ERC and PEOs

Also, the Internal Revenue Service (IRS) has rules and regulations in place to help protect the interests of employees, employers, and PEOs. These rules help ensure the proper withholding and payment of employment taxes. As required by statute, the IRS issued guidance on the procedures PEOs use to claim the ERC on behalf of their clients. The ERC may only be claimed with respect to the qualified wages reported for clients on the Form 941 filed by the PEO, and only provided the employers are eligible for the ERC. (See Notice 2021-20, 2021-11 I.R.B. 922).

https://www.irs.gov/pub/irs-wd/23-0001.pdf

IRS Letter to Senator Cornyn on ERC and PEOs

When an employer uses a PEO to pay its employment taxes and satisfy its employment tax return filing obligations, the PEO is the taxpayer before the IRS. The PEO reports the wages, employment taxes, and credits on behalf of all its employer clients. If there is a refund owed to the PEO after applying the PEO's total credit amount for all clients to the PEO's total aggregate tax liability reported for all clients, the IRS will release the refund directly to the PEO. The IRS uses this process because the PEO deposits, pays, and reports the employment taxes under its own employer identification number (EIN) against which the PEO is claiming the ERC. How the PEO distributes the refund amounts to its clients is a contractual matter between the PEO and its clients.

https://www.irs.gov/pub/irs-wd/23-0001.pdf

IRS Letter to Senator Cornyn on ERC and PEOs

As written by Congress, the ERC hinges on the depositing, payment, and reporting of employment taxes. A PEO is obligated to collect from its client any information regarding the client's eligibility for the ERC, including whether the client filed Form 7200, Advance Payment of Employer Credits Due to COVID-19, and received advanced payments. Either the PEO or the client may maintain the records which substantiate the client's eligibility for the ERC. However, if the client maintains the records, and if the IRS requests this information, the PEO must get it from the client and provide the tax records that support the client's eligibility for the ERC. The PEO uses this information to claim the credit on its client's behalf on the PEO's employment tax return. PEOs normally use Form 941, Employer's Quarterly Federal Tax Return,[2] and attach Schedule R detailing credit amounts claimed on behalf of each client.

https://www.irs.gov/pub/irs-wd/23-0001.pdf

IRS Letter to Senator Cornyn on ERC and PEOs

Although a PEO provides client-by-client specified information concerning the ERC on the Schedule R it attaches to its employment tax return, a client can't claim the credit except through the PEO because the client doesn't deposit, pay, or report the employment taxes under its own EIN. In other words, when the client hires the PEO, the PEO becomes the taxpayer for the IRS's purposes. The IRS accepts the information concerning the qualified wages reported by the PEO for their clients on Form 941 and only the PEO can claim the ERC. After the IRS processes the ERC, the PEO is responsible for making sure each of its clients receives any credit or overpayment (including any ERC refund) owed to the client.

https://www.irs.gov/pub/irs-wd/23-0001.pdf

IRS Letter to Senator Cornyn on ERC and PEOs

In accordance with their liability under the Code and applicable regulations, the client and the PEO will each be liable for employment taxes owed because of any improper ERC claim for employment taxes reported on the federal employment tax return the PEO filed claiming the credit. This joint liability isn't solely for the claiming of the ERC. In general, the client and the PEO are both liable for paying the client's employment taxes, filing returns, and making deposits and payments for the taxes reported.

https://www.irs.gov/pub/irs-wd/23-0001.pdf

FinCEN Issues Guidance for Beneficial Ownership Reporting Under Corporate Transparency Act

Photo by John Schnobrich on Unsplash

- "FinCEN Issues Initial Beneficial Ownership Information Reporting Guidance," FinCEN website, March 24, 2023
  - Guidance on upcoming CTA reporting rules
    - Answers to Frequently Asked Questions about the reporting requirement.
    - One Pagers on Key Filing Dates and Key Questions.

https://www.fincen.gov/news/news-releases/fincen-issues-initial-beneficial-ownership-information-reporting-guidance

FinCEN Issues Guidance for Beneficial Ownership Reporting Under Corporate Transparency Act

Photo by John Schnobrich on Unsplash

- "FinCEN Issues Initial Beneficial Ownership Information Reporting Guidance," FinCEN website, March 24, 2023
  - Guidance on upcoming CTA reporting rules
    - An Introductory Video and more detailed Informational Video about the reporting requirement.

https://www.fincen.gov/news/news-releases/fincen-issues-initial-beneficial-ownership-information-reporting-guidance

FinCEN Issues Guidance for Beneficial Ownership Reporting Under Corporate Transparency Act

4. When do I need to report my company's beneficial ownership information to FinCEN?

A reporting company created or registered to do business before January 1, 2024, will have until January 1, 2025 to file its initial beneficial ownership information report.

A reporting company created or registered on or after January 1, 2024, will have 30 days to file its initial beneficial ownership information report. This 30-day deadline runs from the time the company receives actual notice that its creation or registration is effective, or after a secretary of state or similar office first provides public notice of its creation or registration, whichever is earlier.

[Issued March 24, 2023]

https://www.fincen.gov/news/news-releases/fincen-issues-initial-beneficial-ownership-information-reporting-guidance

FinCEN Issues Guidance for Beneficial Ownership Reporting Under Corporate Transparency Act

5. When will FinCEN accept beneficial ownership information reports?

FinCEN will begin accepting beneficial ownership information reports on January 1, 2024. Beneficial ownership information reports will not be accepted before then.

[Issued March 24, 2023]

https://www.fincen.gov/news/news-releases/fincen-issues-initial-beneficial-ownership-information-reporting-guidance

FinCEN Issues Guidance for Beneficial Ownership Reporting Under Corporate Transparency Act

7. What companies will be required to report beneficial ownership information to FinCEN?

Certain companies — referred to as "reporting companies" — will be required to report their beneficial ownership information to FinCEN. There are two types of reporting companies — domestic reporting companies and foreign reporting companies.

A *domestic reporting company* is defined as —

- a corporation,
- a limited liability company, or
- any other entity created by the filing of a document with a secretary of state or any similar office under the law of a state or Indian tribe.

https://www.fincen.gov/news/news-releases/fincen-issues-initial-beneficial-ownership-information-reporting-guidance

FinCEN Issues Guidance for Beneficial Ownership Reporting Under Corporate Transparency Act

A *foreign reporting company* is any entity that is —

- a corporation, limited liability company, or other entity formed under the law of a foreign country, AND
- registered to do business in any U.S. state or in any Tribal jurisdiction, by the filing of a document with a secretary of state or any similar office under the law of a U.S. state or Indian tribe.

If you had to file a document with a state or Indian Tribal-level office such as a secretary of state to create your company, or to register it to do business if it is a foreign company, then your company is a reporting company, unless an exemption applies.

For the definitions of both domestic and foreign reporting companies, a "state" means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, the U.S. Virgin Islands, and any other commonwealth, territory, or possession of the United States.

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https://www.fincen.gov/news/news-releases/fincen-issues-initial-beneficial-ownership-information-reporting-guidance

FinCEN Issues Guidance for Beneficial Ownership Reporting Under Corporate Transparency Act

8. Are there exemptions from the reporting requirement?

Yes. The Corporate Transparency Act exempts 23 types of entities from the beneficial ownership information reporting requirement. Below is a list of the types of entities that are exempt —

(i) Certain types of securities reporting issuers.[i]

(ii) A U.S. governmental authority.[ii]

https://www.fincen.gov/news/news-releases/fincen-issues-initial-beneficial-ownership-information-reporting-guidance

FinCEN Issues Guidance for Beneficial Ownership Reporting Under Corporate Transparency Act

(iii) Certain types of banks.[iii]

(iv) Federal or state credit unions as defined in section 101 of the Federal Credit Union Act.

(v) Any bank holding company as defined in section 2 of the Bank Holding Company Act of 1956, or any savings and loan holding company as defined in section 10(a) of the Home Owners' Loan Act.

(vi) Certain types of money transmitting or money services businesses.[iv]

(vii) Any broker or dealer, as defined in section 3 of the Securities Exchange Act of 1934, that is registered under section 15 of that Act (15 U.S.C. 78o).

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(viii) Securities exchanges or clearing agencies as defined in section 3 of the Securities Exchange Act of 1934, and that is registered under sections 6 or 17A of that Act.

(ix) Certain other types of entities registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934.[v]

(x) Certain types of investment companies as defined in section 3 of the Investment Company Act of 1940, or investment advisers as defined in section 202 of the Investment Advisers Act of 1940.

(xi) Certain types of venture capital fund advisers.[vi]

(xii) Insurance companies defined in section 2 of the Investment Company Act of 1940.

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(xiii) State-licensed insurance producers with an operating presence[vii] at a physical office within the United States, and authorized by a State, and subject to supervision by a State's insurance commissioner or a similar official or agency.

(xiv) Commodity Exchange Act registered entities.[viii]

(xv) Any public accounting firm registered in accordance with section 102 of the Sarbanes-Oxley Act of 2002.

(xvi) Certain types of regulated public utilities.[ix]

(xvii) Any financial market utility designated by the Financial Stability Oversight Council under section 804 of the Payment, Clearing, and Settlement Supervision Act of 2010.

(xviii) Certain pooled investment vehicles.[x]

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(xix) Certain types of tax-exempt entities.[xi]

(xx) Entities assisting a tax-exempt entity described in (xix) above.

(xxi) Large operating companies with at least 20 full-time employees,[xii] more than $5,000,000 in gross receipts or sales, and an operating presence at a physical office within the United States.[xiii]

(xxii) The subsidiaries of certain exempt entities.[xiv]

(xxiii) Certain types of inactive entities that were in existence on or before January 1, 2020, the date the Corporate Transparency Act was enacted.[xv]

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Many of these exempt entities are already regulated by federal and/or state government, and many already disclose their beneficial ownership information to a governmental authority.

Additional information about the entities that are exempt can be found in the Beneficial Ownership Information Reporting Regulations at 31 CFR § 1010.380(c)(2). You should consult the text of the regulations, which include specific criteria for the exemptions, before concluding that an entity qualifies for an exemption.

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9. Who is a beneficial owner of a reporting company?

In general, a beneficial owner is any individual (1) who directly or indirectly exercises "substantial control" over the reporting company, *or* (2) who directly or indirectly owns or controls 25 percent or more of the "ownership interests" of the reporting company.

Whether an individual has "substantial control" over a reporting company depends on the power they may exercise over a reporting company. For example, an individual will have substantial control of a reporting company if they direct, determine, or exercise substantial influence over, important decisions the reporting company makes. In addition, any senior officer is deemed to have substantial control over a reporting company.[xvi] Other rights or responsibilities may also constitute substantial control. Additional information about the definition of substantial control and who qualifies as exercising substantial control can be found in the Beneficial Ownership Information Reporting Regulations at 31 CFR §1010.380(d)(1).

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"Ownership interests" generally refer to arrangements that establish ownership rights in the reporting company, including simple shares of stock as well as more complex instruments. Additional information about ownership interests, including indirect ownership, can be found in the Beneficial Ownership Information Reporting Regulations at 31 CFR §1010.380(d)(2).

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