



# Current Federal Tax Developments

November 13, 2023

Kaplan Financial Education



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## This Week We Look At:

Inflation adjusted numbers for 2024 issued by the IRS

Minor revisions made in final BOI FinCEN Identifier rules

The IRS issues its second ERC-related GLAM, this time taking aim at OSHA related partial shutdown theories

If a Notice isn't binding on the courts, does that mean we can just pretend it doesn't exist when advising our clients?

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## IRS Releases 2024 Inflation Adjusted Numbers

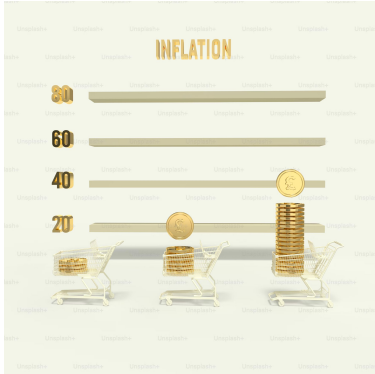


Photo by [Allison Saeng](#) from Unsplash+

- Revenue Procedure 2023-34, November 9, 2023
  - Annual inflation adjusted amounts for 2024 taxes released as a 30 page PDF
  - Section 3 contains the various entries
    - Section 3.01 2024 tax rate tables (unofficial calculations had previously been released by most tax publishers)
    - Section 3.03 has the 2024 capital gain rate tables
    - Section 3.06 has the EITC numbers for 2024

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<https://www.irs.gov/pub/irs-drop/rp-23-34.pdf>

## IRS Releases 2024 Inflation Adjusted Numbers

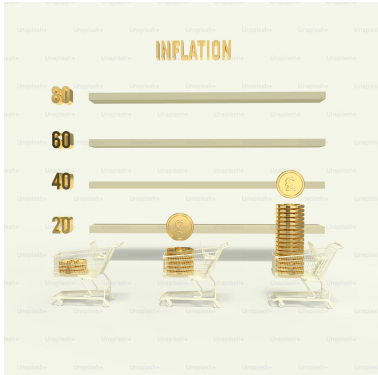


Photo by Allison Saeng from Unsplash+

- Revenue Procedure 2023-34, November 9, 2023
  - Section 3 contains the various entries
    - Section 3.11 has the exemption amounts for the AMT
    - Section 3.13 expenses for elementary and secondary school teachers will be \$300
    - Section 3.15 has the standard deductions
      - MFJ - \$29,200
      - HoH - \$21,900
      - Single and MFS - \$14,600

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## IRS Releases 2024 Inflation Adjusted Numbers

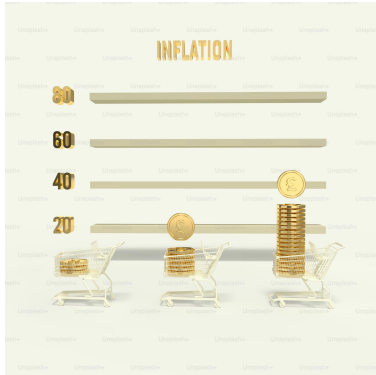


Photo by [Allison Saeng](#) from Unsplash+

- Revenue Procedure 2023-34, November 9, 2023
  - Section 3 contains the various entries
    - Section 3.25 - \$179
      - Aggregate cost \$1,220,000
      - SUV - \$30,500
      - Phase out begins at \$3,050,000
    - Section 3.27 has the QBI threshold amounts - MFJ \$383,000, others \$191,950
    - Section 3.31 limit on cash basis accounting \$30,000

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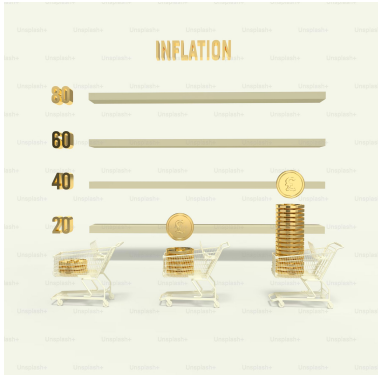


Photo by [Allison Saeng](#) from Unsplash+

- Revenue Procedure 2023-34, November 9, 2023
  - Section 3 contains the various entries
    - Section 3.32 - Threshold for excess business loss is \$305,000 (\$610,000 for MFJ returns)
    - Section 3.39 - Foreign earned income exclusion \$126,500
    - Section 3.41 - Unified credit against estate tax - \$13,610,000
    - Section 3.43 - Annual gift exclusion \$18,000

<https://www.irs.gov/pub/irs-drop/rp-23-34.pdf>



## FinCEN Issues Final FinCEN Identifier Rules with Minor Changes

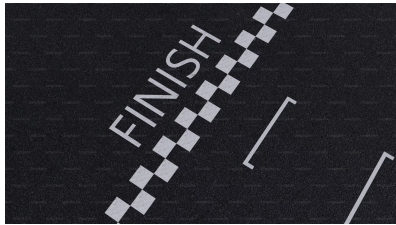


Photo by [Alexander Mijs](#) from Unsplash+

- RIN 1506-AB49, Revision to 31 CFR § 1010.380, November 8, 2023
  - Provides minor revisions to proposed FinCEN identifier rules
  - Applies to being able to use an entity FinCEN identifier to indirectly reference beneficial owners of another entity that are also beneficial owners of the filing entity
  - May simplify some filing situations for BOI reporting

<https://www.fincen.gov/news/news-releases/fincen-finalizes-rule-use-fincen-identifiers-beneficial-ownership-information>  
<https://www.govinfo.gov/content/pkg/FR-2023-11-08/pdf/2023-24559.pdf>

## IRS Issues Second ERC Related GLAM, This Time Going After OSHA Related Partial Suspension Justifications



Photo by [Levi Meir Clancy](#) from Unsplash+

- IRS Generic Legal Advice Memorandum (GLAM) AM-2023-007, November 3, 2023
  - Second GLAM issued by the IRS on ERC issues (first one was on supply chain partial suspension justifications)
  - Like the first one, this one is meant to signal the IRS's skepticism on use of this theory to justify a partial suspension ERC claim
  - Note - this is an IRS analysis of the issue, so while agents and appellate conferees are likely to follow it, a court will likely treat it as an IRS litigating position

<https://www.currentfederaltaxdevelopments.com/blog/2023/11/6/osha-guidance-is-sued-during-covid-19-pandemic-not-likely-to-justify-erc-claims-per-irs-memo>  
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- IRS Generic Legal Advice Memorandum (GLAM) AM-2023-007, November 3, 2023
  - Two scenarios
    - Employer located in state that lifted COVID related health restrictions in Q1 2021. No measures continued by employer except encouraging employees to wear masks and practice routine hygienic practices. Claims ERC based on communications from OSHA

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- IRS Generic Legal Advice Memorandum (GLAM) AM-2023-007, November 3, 2023
  - Two scenarios
    - Same as first except prior to 2020, employees teleworked 2 to 3 times a week. In 2020 allowed employees to telework full time and continued that through the end of Q3 2021.

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- IRS Generic Legal Advice Memorandum (GLAM) AM-2023-007, November 3, 2023
- OSHA guidance published on the website during period ERC was in effect
  - Instructions to field offices and certified health and safety officials (CSHOs)
  - Nonbinding guidance for employers and employees

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- IRS Generic Legal Advice Memorandum (GLAM) AM-2023-007, November 3, 2023
  - Interim response plan instructions for office and CSHOs stated it did not impose additional legal obligations on employers
  - Those obligations existed prior to the COVID-19 emergency and thus aren't orders that were directly related to COVID-19 as required by the law

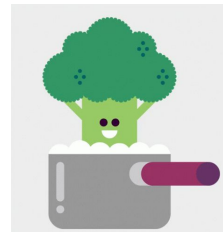
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- IRS Generic Legal Advice Memorandum (GLAM) AM-2023-007, November 3, 2023
- *Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace* contained recommendations for employers and employees (the federal government recommends you eat broccoli but that's not an order)



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- IRS Generic Legal Advice Memorandum (GLAM) AM-2023-007, November 3, 2023
- Finally, also notes guidance that OSHA does not inspect home based workspaces, so work from home spaces aren't impacted by OSHA guidance

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- IRS Generic Legal Advice Memorandum (GLAM) AM-2023-007, November 3, 2023
  - So what about OSHA “orders”
    - “Assumptions, vague statements, and news articles are insufficient to meet the definition of orders for the purposes of qualifying as an eligible employer...”
    - The statutes don’t mention recommendations, guidelines, or other informal standards, rather just *orders*

<https://www.currentfederaltaxdevelopments.com/blog/2023/11/6/osha-guidance-is-sued-during-covid-19-pandemic-not-likely-to-justify-erc-claims-per-irs-memo>  
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- IRS Generic Legal Advice Memorandum (GLAM) AM-2023-007, November 3, 2023
  - So what about OSHA “orders”
    - IRS provides justification for plain text meaning of orders for applying the law
    - Cites *Black’s Law Dictionary* definition that an order is a “command or mandate delivered by a government official.”
    - OSHA guidance cited in the GLAM fails to meet that standard

<https://www.currentfederaltaxdevelopments.com/blog/2023/11/6/osha-guidance-is-sued-during-covid-19-pandemic-not-likely-to-justify-erc-claims-per-irs-memo>  
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- IRS Generic Legal Advice Memorandum (GLAM) AM-2023-007, November 3, 2023
  - So what about OSHA “orders”
    - Rejects the employer’s use of laws or regulations that pre-date COVID-19 to be cited as COVID-19 related suspensions
    - Even if they are orders, must show full or partial suspension. IRS rejects any view that minor modifications to operations, such as requiring masks, providing sanitization supplies, and encouraging social distancing can be used.

<https://www.currentfederaltaxdevelopments.com/blog/2023/11/6/osha-guidance-is-sued-during-covid-19-pandemic-not-likely-to-justify-erc-claims-per-irs-memo>  
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- IRS Generic Legal Advice Memorandum (GLAM) AM-2023-007, November 3, 2023
- IRS does acknowledge that it's possible a state or local government could have mandated an OSHA recommendation related to COVID-19, but even if we now have an order, must connect the rest of the dots to show the items in that order led to a full or partial suspension of the employer's business

<https://www.currentfederaltaxdevelopments.com/blog/2023/11/6/osha-guidance-is-sued-during-covid-19-pandemic-not-likely-to-justify-erc-claims-per-irs-memo>  
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## IRS ERC Guidance - How Should a Tax Professional Deal with What is Out There?



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- Recently there have been many articles that deal with the ERC guidance we have and what impact that guidance would have should a case go to court
- The answer is not as simple you might expect - and too often tax pros take what is indisputably a true statement about an item but then give it more impact than it should be granted
- So, given we just got another GLAM, it's a good time to consider these issues



## IRS ERC Guidance - How Should a Tax Professional Deal with What is Out There?



Photo by [charlesdeluvio](#) on [Unsplash](#)

- Guidance we have on the ERC
  - **Statutory text** - original CARES Act, as amended at the end of 2020 and as added to the IRC in §3134 by APRA 2021, then later revised as part of IRA 2021
  - **IRS Guidance published in the Internal Revenue Bulletin** - the various notices, key being Notice 2021-20
  - **IRS Legal Memoranda** - the two GLAMs issued in 2023
  - **IRS FAQs and Website Materials**

## IRS ERC Guidance - How Should a Tax Professional Deal with What is Out There?



Photo by [charlesdeluvio](#) on [Unsplash](#)

- Statutory text
  - If the plain text language of the statute clearly provides only a single interpretation, that is how the law will be applied on that issue (*Connecticut National Bank v. Germain*, 503 U.S. 249, 1992)
    - In such a case Congressional intent isn't relevant
    - Neither is IRS guidance if it is contrary to the language of the statute

## IRS ERC Guidance - How Should a Tax Professional Deal with What is Out There?



Photo by [charlesdeluvio](#) on [Unsplash](#)

- Statutory text
  - If the statute is ambiguous, then we turn to various rules of statutory construction and (maybe) executive branch interpretation deference
    - Look to see if terms used elsewhere in the law to clarify
    - Also take a look at the context in which was used - include normal meaning
    - May look to evidence of Congressional intent to determine how to interpret



## IRS ERC Guidance - How Should a Tax Professional Deal with What is Out There?



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- IRS Guidance
  - Regulations are offered the highest deference, but we have no ERC regulations
  - IRB subregulatory guidance is the highest level of IRS guidance we have
    - The Notices are such in this case
    - The issue of how much respect a court must give them is a matter of dispute, though it seems the trend is to give less deference
    - However, the Courts will still bind the IRS to the guidance they issue this way



## IRS ERC Guidance - How Should a Tax Professional Deal with What is Out There?



Photo by [charlesdeluvio](#) on [Unsplash](#)

- IRS Guidance
  - IRB subregulatory guidance is the highest level of IRS guidance we have
  - As well, the fact that the Court may not *have* to respect the conclusions does not mean the Court won't respect them
    - The IRS Chief Counsel's office is a regular litigant in front of the courts
    - Their analysis will, at the very least, likely be viewed with at least the same respect as the taxpayer's counsel





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Photo by [charlesdeluvio](#) on [Unsplash](#)

- IRS Guidance
  - IRB subregulatory guidance is the highest level of IRS guidance we have
    - As well, the fact that the Court may not *have* to respect the conclusions does not mean the Court won't respect them
      - Generally the Court will look to the statutory construction methods to analyze the guidance
      - Some judges will continue to grant deference and others likely will do so simply because of experience dealing with prior Chief Counsel guidance



## IRS ERC Guidance - How Should a Tax Professional Deal with What is Out There?



Photo by [charlesdeluvio](#) on [Unsplash](#)

- IRS Guidance
  - IRB subregulatory guidance is the highest level of IRS guidance we have
  - Finally, it's fairly certain that the IRS at the administrative level is not likely to go against such guidance - at least until/unless it's clear the taxpayer is going to go to court on the matter



## IRS ERC Guidance - How Should a Tax Professional Deal with What is Out There?



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- IRS Guidance
  - IRS Legal Memoranda
    - Not considered generally binding on either the IRS or the taxpayer by the courts
    - However, it is an analysis that the taxpayer must be ready to refute and show that his/her analysis is better if challenged
    - Again, not likely that IRS agents are going to take a position contrary to the guidance if they are aware of it



## IRS ERC Guidance - How Should a Tax Professional Deal with What is Out There?



Photo by [charlesdeluvio](#) on [Unsplash](#)

- IRS Guidance
  - IRS FAQs and Website Material
    - This is the least authoritative of the items we have
    - However, it does clearly indicate the direction the IRS is indicating they plan to take on exam
    - Again, the taxpayer needs to critically analyze the positions--and not just to attempt to tear it down



## IRS ERC Guidance - How Should a Tax Professional Deal with What is Out There?



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- What do advisers do?
  - First, be sure that your position is not contrary to a plain text reading of the *statute* and took into account all relevant provisions (not just one)
  - Notice positions can be used as a safe harbor - and it's possible that the IRS is being more generous on some issues than a court might be if you attempt to go for a pure plain-text interpretation

## IRS ERC Guidance - How Should a Tax Professional Deal with What is Out There?



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- What do advisers do?
  - Positions contrary to IRS guidance
    - If not contrary to the plain text of the statute and you have a reasonable basis these can be claimed-but the client deserves to understand the relative risks for these positions
    - As there are no regulations, we don't need to worry about the extremely high hurdle that generally exists to successfully challenge a final regulation



## IRS ERC Guidance - How Should a Tax Professional Deal with What is Out There?



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- What do advisers do?
  - Positions contrary to IRS guidance
    - The Notices are the most significant existing guidance we have to deal with as we have no Court cases as of yet on the ERC
      - Taxpayer needs to understand that if their claim goes to exam, these are the least likely for the IRS to conceded at the exam level or even on appeal if it does not appear the taxpayer is willing/able to go to court

## IRS ERC Guidance - How Should a Tax Professional Deal with What is Out There?



Photo by [charlesdeluvio](#) on [Unsplash](#)

- What do advisers do?
  - Positions contrary to IRS guidance
    - The Notices are the most significant existing guidance we have to deal with as we have no Court cases as of yet on the ERC
    - The taxpayer and the adviser must have a defensible position and a persuasive argument why their analysis is at least as good (and preferably better) than that of the IRS in the Notice.



## IRS ERC Guidance - How Should a Tax Professional Deal with What is Out There?



Photo by [charlesdeluvio](#) on [Unsplash](#)

- What do advisers do?
  - Positions contrary to IRS guidance
    - The GLAMS are likely to be positions that are unlikely to be conceded at the exam level
      - But as they indirectly concede certain litigation risks, may be more room at appeals
    - Again, though, we need
      - Solid legal analysis and
      - Solid facts (and that's most often the problem)



## IRS ERC Guidance - How Should a Tax Professional Deal with What is Out There?



Photo by [charlesdeluvio](#) on [Unsplash](#)

- What do advisers do?
  - Positions contrary to IRS guidance
    - FAQs/Website guidance
      - Much like GLAMs except not written as a full blown legal memorandum
        - Exam is unlikely to concede but
        - Appeals may not be as inflexible
        - Again, if you have bad facts it probably doesn't matter if the IRS analysis is faulty

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