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Certified Public Accountants and Consultants

Delivering **Confidence**



The Employee Retention Credit (ERC)

Presented by: Shannon Forkin

November 9, 2023

The History of the ERC

... The History of ERC

Created with the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020

- Main goal – to Incentivize employers to retain employees on payroll
- March 13, 2020 – September 30, 2021 (except for Recovery startups)
- Refundable Tax Credit
- Filed with Payroll returns



The Credit

... The Credit – Amounts

2020

50% of
Qualified
Wages

Qtr Max: \$5k

Ann. Max:
\$5k



2021

70% of
Qualified
Wages

Qtr Max: \$7k

Ann Max:
\$21k

... The Credit – Eligibility

The IRS has received over 3.6 million ERC claims



- Large & Small Employers
- Qualified wages (QW)
- Gross receipts testing
- Government order
- Recovery startup

... The Credit – Gross Receipts Testing

March '20 – December '20

- 50% of the same quarter in 2019
- Eligibility ends after the quarter that gross receipts are > 80%

January '21 – September '21

- 80% of the same quarter in 2019; or
- Alternative quarter election – prior calendar quarter decline in gross receipts

September '21 – December '21

- Limited to recovery startups

... The Credit – Government Orders

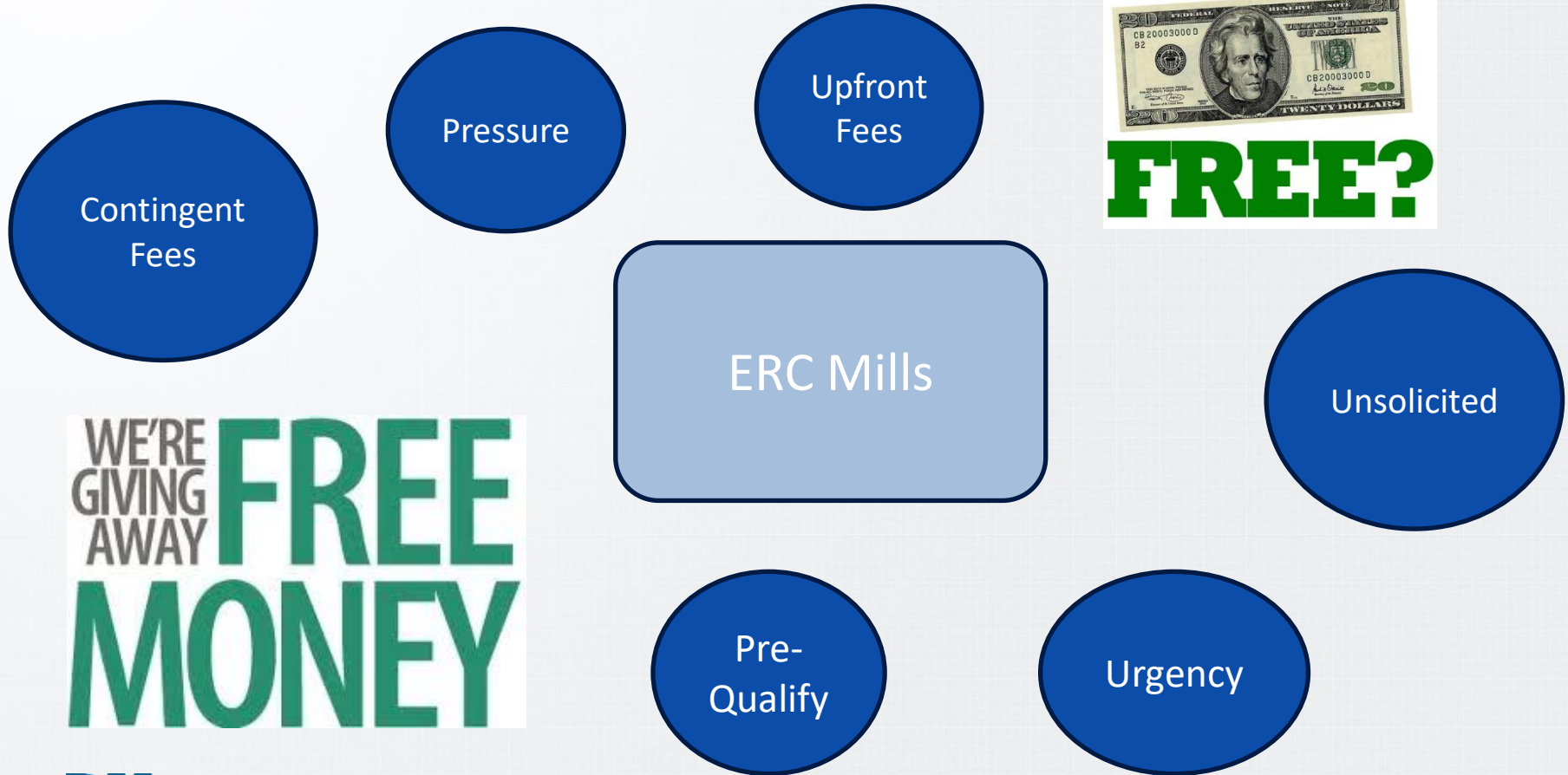
Government Orders

- Local, state or Federal orders related to Covid-19
- Direct impact
- Recommendations do not qualify
- Full or partial suspension



Fraud & the ERC

.... Fraud & the ERC: ERC Mills



WE'RE
GIVING
AWAY **FREE**
MONEY

... Fraud & the ERC: Scams

The IRS announced that hundreds of criminal cases are being worked, and thousands of ERC claims have been referred for audit

- “Self-Employed Tax Credit/Refund”
 - Fraud targets self-employed
 - Schedule C filers
 - E-mail scams

Government Refunds for Schedule C Filers

If you are self-employed and filed a Schedule C on your federal tax return you may qualify for up to \$36,220.00!

- this is not a loan
- it does not have to be paid back
- the funds are unrestricted

We have all heard about the employee retention tax credit (ERC). But unfortunately, the ERC program can't help all companies or business owners. Those small business owners who file a Schedule C can try and qualify for the Self-Employed Tax Credit/Refund (SETC).

The Self-Employed Tax Credit/Refund (SETC) may provide you with up to \$36,220.00.

1-800-828-6852

[Schedule a Consultation](#)

Fraud & the ERC: Whistleblowers

- Whistleblower protection
 - Form 14242
 - Used to report all suspected fraud or abuse
 - Contact info optional

Form 14242 (October 2016)	Department of the Treasury - Internal Revenue Service Report Suspected Abusive Tax Promotions or Preparers	OMB Number 1545-2219
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Use Form 14242 to report a suspected abusive tax avoidance scheme and/or tax return preparers who promote such schemes. More information about tax avoidance schemes is available at www.irs.gov/scams. **CLAIM FOR REWARD:** To claim a reward for providing this information to the IRS, file Form 211, Application for Reward for Original Information.

Answer the following questions as accurately as possible. Fields on this form have been designed to expand as additional information is entered.

1. Describe the suspected tax scheme being promoted
2. How did you become aware of the promotion or promoter (e.g., seminar, internet, email, TV, flyer, newspaper, magazine, friend, relative, etc.)
3. When did you first learn about the tax promotion (mm/dd/yyyy)
4. Promoter/Preparer information (if more than one promoter/preparer is involved, provide information on all)
Name of Promoter(s)/Tax Preparer(s)

Social Security Number (SSN) and/or Preparer Tax Identification Number (PTIN)

Mailing address

Website

Telephone number
5. Do you have copies of any promotional material supplied by the promoter
☐ Yes ☐ No If **YES**, attach copies of the promotional material to your completed form
 Cost (if known)
 6. Is the promotion still active
☐ Yes ☐ No
 Describe how the promoter or preparer was involved in the promotion
7. What is your current relationship with the Promoter(s)/Preparer(s)? Did you purchase the promotion strategy
8. Do you have any additional information that you would like us to consider (e.g., brochures, prospectus, etc.)

Contact information (providing your contact information is optional, but will be helpful if we have questions, and will allow us to acknowledge receipt of the referral)

Name	Enter the date you completed this form
Mailing address	
Telephone number	Email address

Catalog Number 57652G www.irs.gov **Form 14242** (Rev. 10-2016)

... Fraud & the ERC: Moratorium

The IRS stated that 15% of total ERC claims were received within 90 days of the moratorium

Announced September 14, 2023

- **Causes**

- Increased fraud
- Scammers
- Lack of compliance
- Backlog



- **Effects**

- Slower processing times
- Investigations
- Victims
- Withdrawal process

... Fraud & the ERC: Moratorium

“The IRS is increasingly alarmed about honest small business owners being scammed by unscrupulous actors, and we could no longer tolerate growing evidence of questionable claims pouring in. The further we get from the pandemic, the further we see the good intentions of this important program abused. The continued aggressive marketing of these schemes is harming well-meaning businesses and delaying the payment of legitimate claims, which makes it harder to run the rest of the tax system. This harms all taxpayers, not just ERC applicants”

Danny Werfel, IRS Commissioner



Fraud & the ERC: The Senate & The IRS


- Letter from the Senate to the IRS
 - Sent on 10/3/2023
 - Requested response by 10/17/2023
 - Still no response from the IRS

ended, businesses are still waiting for answers. As such, we request that you provide responses to the following questions as soon as possible, but no later than 5 p.m. on October 17, 2023:

1. What steps will the IRS take to ensure legitimate ERTC claims filed before the moratorium beginning September 14, 2023 are processed in a reasonable amount of time?
2. How fast will existing ERTC claims be processed under this new moratorium?
3. What data points led you to implement the recently announced moratorium?
4. What is the most up-to-date total dollar figure of ERTC refunds that have been processed?
5. The IRS counts PEO claims as one claim, even though they may represent hundreds or thousands of claims by different small businesses. How many PEO claims are in the ERTC backlog?
6. When does the IRS expect the current backlog to be eliminated in its entirety?
7. What steps will be taken to expedite processing times of legitimate ERTC claims filed during the moratorium, which the IRS will begin processing no earlier than January 1, 2024?
8. What fraud prevention measures will the IRS take during the moratorium to be better equipped to combat fraud when processing new claims begins in 2024?
9. What legislative proposal is the IRS considering to address ERTC fraud as referenced in your July 25, 2023 remarks, and when do you plan to share this with Congress for consideration?
10. Is the IRS considering the creation of a "status check" portal for applicants to receive up-to-date information regarding their claim? Why or why not?

If you have any questions or wish to discuss the request, please contact the Majority staff of the Ways and Means Committee. Thank you in advance for your attention to this inquiry.

Sincerely,


Jason Smith
Chairman
Committee on Ways and Means


David Schweikert
Chairman
Subcommittee on Oversight

.... Fraud & the ERC: Risks

As of July 2023, the IRS' Criminal Investigation Unit has initiated 252 investigations involving over \$2.8B of potentially fraudulent ERC claims

- **Potential Risks**
 - Taxpayer has sole responsibility
 - Repayment of credit
 - Backdated interest and penalties
 - Statute of limitations
 - Employment & income tax returns



... Fraud & the ERC: Withdrawal Process

Over 800k ERC claims are awaiting processing

- **Withdrawal process**

- Announced 10/19/2023
- Designed for falsely-led taxpayers
- Immunity - DOJ
- IRS Request

- **Who can withdraw?**

- Made the claim on an adjusted employment return
- Filed the adjusted return only to claim the ERC
- Want to withdraw entire claim
- Unprocessed returns & uncashed checks

.... Fraud & the ERC: Request an ERC Withdrawal

- Claim withdrawal request
- Different Steps Depending on Situation
 - You haven't received a refund and haven't been notified your claim is under audit
 - You haven't received a refund and you've been notified your claim is under audit
 - You received a refund check but haven't cashed or deposited it

Sample claim withdrawal request

Form 941-X: Adjusted Employer's QUARTERLY Federal Tax Return or Claim for Refund
(Rev. April 2023) Department of the Treasury – Internal Revenue Service OMB No. 1545-0029

Employer identification number (EIN) 00 - X X X X X X X X

Name (not your trade name) General Taxpayer Incorporated

Trade name (if any)

Address 123 Main Street
Number Street Suite or room number

City Anywhere **State** US **ZIP code** 00000

Foreign country name **Foreign province/county** **Foreign postal code**

Return You're Correcting...
Check the type of return you're correcting.
☒ 941
☐ 941-SS

Check the ONE quarter you're correcting.
☐ 1: January, February, March
☒ 2: April, May, June
☐ 3: July, August, September
☐ 4: October, November, December

Enter the calendar year of the quarter you're correcting.
YYYY (YYYY)

Enter the date you discovered errors.
MM/DD/YYYY
(MM/DD/YYYY)

Write "Withdrawn" in left margin of form

Write your name, position in the company or organization, signature and date in the right margin of form

Part 1: See ONLY Form 941 or Form 941-SS for instructions.

☐ 1. A claim. Check this box if you are adjusting the claim process to ask for a refund or abatement. Don't check this box if you're correcting ANY other error.

☒ 2. Claim. Check this box if you overreported tax and the claim process to ask for a refund or abatement. Don't check this box if you're correcting ANY other error.

Part 2: Complete the certifications.

☒ 3. I certify that I've filed or will file Forms W-2 as required.

Note: If you're correcting underreported tax amounts only, go to Part 3 on page 2 and skip lines 4 and 5. If you're correcting overreported tax amounts, for purposes of the certifications on lines 4 and 5, Medicare tax doesn't include Additional Medicare Tax. Form 941-X can't be used to correct overreported amounts of Additional Medicare Tax unless the amounts weren't withheld from employee wages or an adjustment is being made for the current year.

4. If you checked line 1 because you're adjusting overreported federal income tax, social security tax, Medicare tax, or Additional Medicare Tax, check all that apply. You must check at least one box.

John Doe, President, John Doe, Date (MM/DD/YYYY)

ERC: Audit

- Response required within 10 days
- Have supporting documentation ready

The following information is necessary to determine if you are eligible for the Employee Retention Credit requested on Line 27 of the Form 941 X and if it was computed correctly:

1. Copy of all workpapers and supporting documents used to compute the employee retention credit and other amounts included on the Form 941 X.
2. A schedule of employees who were paid wages for which the Employee Retention Credit was claimed. Specifically, we need the following details itemized by employee and quarter in which it was paid:
 - Employee name
 - Date of payment
 - Amount and allocated health costs, if applicable
 - Total gross wages
 - Wages paid with the Payroll Protection Program (PPP) loans
 - Wages for the Employee Retention Credit (ERC)
3. Documentation that you were eligible to claim the Employee Retention Credit and your basis for eligibility (whichever of the following is applicable):
 - Documentation that operations were fully or partially suspended due to orders from an appropriate governmental authority limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to COVID-19. **Provide a copy of the orders.**
 - Documentation that your business experienced a significant decline in gross receipts during the calendar quarter for which the Employee Retention Credit was claimed. **Provide records to show gross receipts for each quarter in 2019, 2020 and 2021 including bank statements and general ledger.**
4. Documentation for determination of the number of full-time employees in 2019, 2020 and 2021.
5. Documentation to show how you determined the amount of qualified health plan expenses that were allocated to wages (if applicable)
6. Did you receive a Payroll Protection Program (PPP) loan? If so, please provide the following:
 - Documentation of amounts received under the PPP loan
 - If any of the loan was forgiven, provide a copy of the documentation that shows the portion of PPP loan forgiveness that included payroll costs, such as the forgiveness application.
7. Are you a member of an aggregated group? If so, please also provide the following documentation:
 - How did you determine you were a member of an aggregated group?
 - How did the aggregation affect the determination and allocation of the credit?
 - Copies of income tax returns, employment tax returns, and Forms W-2 for related entities (if you are a member of an aggregated group)

... The ERC: What's coming?

Repercussions
for aggressive
promoters
and fraudsters

Repayment
plan guidance

IRS response
to Senate's
questionnaire



A Deeper Dive Into the Most Current Events and Hot Topics in Federal and State Taxation

Presented by: Brian J. Potter, CPA, CDA

Date: November 9, 2023

IRS Update on Grantor Trusts

... Grantor Trusts

- **Grantor Trusts – Types**
 - **Revocable trust**
 - Included in grantor's estate for estate tax purposes
 - Assets/income owned by grantor for income tax purposes
 - **Irrevocable trust**
 - Not included in grantor's estate for estate tax purposes
 - Assets/income owned by grantor for income tax purposes

... Grantor Trusts

- **Grantor Trusts – Types**
 - **Revocable trust**
 - Not a completed gift for estate/gift tax purposes (grantor retains significant control over assets)
 - For income tax purposes, trust structure is ignored and grantor is taxed on all income of the trust
 - Often structured to avoid probate and asset protection planning

... Grantor Trusts

- **Grantor Trusts – Types**

- **Irrevocable trust**

- Typically referred to as an “intentionally defective grantor trust” or “IDGT”
 - Completed gift for estate/gift tax purposes (assets excluded from grantor’s estate)
 - For income tax purposes, trust structure is ignored and grantor is taxed on all income of the trust
 - Commonly used in protecting assets (nursing homes) and government agencies (Medicaid)

... Grantor Trusts

- **Common Provisions – Intentionally Defective Grantor Trusts**
 - “Defective” for income tax, but not for estate tax
 - Grantor must retain certain administrative powers
 - Substitution of assets, or “swap power”
 - Giving a nonadverse party the power to pay trust income to the grantor’s spouse
 - Designating grantor’s spouse as trustee and granting them authority to add beneficiaries
 - Several other similar factors

... IRS Update (2023)

- **Revenue Ruling 2023-2 (March 29, 2023)**
 - **Irrevocable trusts (IDGT)**
 - Answers a long debated tax question regarding the “step-up” of basis of the trust assets on the death of the grantor
 - Ruling that upon death of grantor, no basis step-up of the trust assets is granted.
 - Ruling was careful in fact pattern
 - Did not address liabilities exceeding asset basis
 - Did not address notes between grantor and trust

... IRS Update (2023)

- **Revenue Ruling 2023-2 (March 29, 2023)**
 - **Irrevocable trusts (IDGT)**
 - When a grantor dies and the grantor trust has liabilities in excess of the basis of its assets:
 - Is there a deemed sale of the property by the decedent on death for the excess liabilities?
 - Would this require the grantor to recognize taxable income on the decedent's final income tax return?
 - Somewhat controversial, but consensus is no.

... IRS Update (2023)

- **Revenue Ruling 2023-2 (March 29, 2023)**
 - **Irrevocable trusts (IDGT)**
 - When a grantor dies and has a promissory note with the grantor trust on purchased property:
 - Does this trigger gain on the excess of the note principal over the tax basis of that asset?
 - Would this require the grantor to recognize taxable income on the decedent's final income tax return?
 - Also controversial, but most professionals agree that there is not a taxable event.

... Rev. Rul. 2023-2 (March 29, 2023)

- **Relevant Notes and Insight**

- Ruling has no “effective date”
 - As a result, ruling is retroactive
- Statute of limitations does not apply to the use of basis in any taxable year in which basis is relevant
- As a result, it appears the IRS may be able to challenge basis in any year that a step-up in basis on grantor trust property was used after the death of the grantor

... Rev. Rul. 2023-2 (March 29, 2023)

- **Potential Solution**

- Utilize the substitution of assets, or “swap power” of the trust agreement (making the trust “defective”)
 - Note: Rev. Rul. 2008-22 provided that “swap power” retention will not cause estate tax inclusion under Internal Revenue Code §2036 or §2038
- Property held in trust can be reacquired by the grantor by substituting other property of an equivalent value

... Rev. Rul. 2023-2 (March 29, 2023)

- **Substitution of Assets (Swap Power)**
 - Strategy involves substituting low-basis and high-value assets
 - Grantor will reacquire the low-basis/high-value assets in exchange for high-basis and equivalent value property
 - Upon death of the grantor, the reacquired property (low-basis) would receive a step-up in basis in the hands of the beneficiaries
 - Note: This strategy may see eventual legislation to limit or eliminate the use of the substitution of assets (swap power)

... Rev. Rul. 2023-2 (March 29, 2023)

- **Key Considerations and Questions**

- Does the grantor have (or expect to have) a taxable estate?
- Does the grantor have sufficient assets outside of the trust required to complete the swap?
- Goals of the grantor (beneficiaries)
- On a swap, does the grantor need to file a gift tax return?



New York 'State of Tax'

Presented by: Joseph A. Hardick, CPA, CCIFP

November 9, 2023

... Quick Review of New York State Taxation of Individuals

- **For 2023 and 2024, rates range from 4% to 10.9 %**
 - However, New York has a recapture tax, and “incremental benefit addback” to eliminate some of the low rates
 - The top rate for most filers, which is 6.85%, kicks in at \$323,200, as the next bracket is at \$2.1 million, with the highest bracket of 10.9% starting at \$25.0 million
 - **HOWEVER**, it used to be a lot more generous. The brackets, which the tax is calculated on, usually increase by inflation every year. This is to keep the tax burden equal based on a consistence income

... Quick Review of New York State Taxation of Individuals

- That ceased in early 2016 – the brackets have not increased in over 8 years! The effect on the taxpayer is a hidden increase in taxes paid, as their incomes do increase, every year, hopefully near inflation
- If the brackets did increase for those years, they would be 42% higher and your taxes would be a lot lower
 - This is a stealth tax
 - They raise taxes without seeming to

- **New York Collected – Individual**

2020	\$53.0 Billion
2021	\$67.0 Billion
2022 (est)	\$72.0 Billion

- **Number of Individuals Filing**

2020	11.0 Million
2021	10.8 Million
2022 (est)	10.6 Million

- **Population**

2020	20.2 Million
2021	19.8 Million
2022	19.6 Million

New York Tax Climate Index

State Tax Climate Index

2024 Tax Foundation Study

The 10 best states in the prior year (2023) Index:

- | | |
|-----------------|------------------|
| 1. Wyoming | 6. New Hampshire |
| 2. South Dakota | 7. Nevada |
| 3. Alaska | 8. Utah |
| 4. Florida | 9. Indiana |
| 5. Montana | 10. N. Carolina |

The 10 worst states in the prior year (2023) Index :

- | | |
|------------------|-----------------|
| 41. Alabama | 46. Maryland |
| 42. Rhode Island | 47. Connecticut |
| 43. Hawaii | 48. California |
| 44. Vermont | 49. New York |
| 45. Minnesota | 50. New Jersey |

State Tax Climate Index

2024 Tax Foundation Study

The 10 overall best states in the 2024 Index Study:

- | | |
|---------------------|----------------------|
| 1. Wyoming (0) | 6. New Hampshire (0) |
| 2. South Dakota (0) | 7. Nevada (0) |
| 3. Alaska (0) | 8. Utah (0) |
| 4. Florida (0) | 9. N. Carolina (+1) |
| 5. Montana (0) | 10. Indiana (-1) |

The 10 overall worst states in the 2024 Index Study:

- | | |
|-----------------------|-------------------------|
| 41. Rhode Island (+1) | 46. Massachusetts (-12) |
| 42. Hawaii (+1) | 47. Connecticut (0) |
| 43. Vermont (+1) | 48. California (0) |
| 44. Minnesota (+1) | 49. New York (0) |
| 45. Maryland (+1) | 50. New Jersey (0) |

State Tax Climate Index

2024 Tax Foundation Study

New York's Specific Index Ranks

	Overall	Corporate Tax	Individual Tax	Sales Tax	Property Tax	Unemploy. Insurance
2024 Index Study	49	24	50	42	49	39
2023 Index Study	49	24	50	43	49	40
Increase (Decrease)	0	0	0	1	0	1

Top Marginal 2023 New York Tax Rates

		<u>New York</u>	<u>New York & New York City</u>
Federal Tax Rate		37.00%	37.00%
Medicare Surtax	¹	3.80%	3.80%
New York Tax Rate		10.90%	10.90%
New York City Tax Rate			3.876%
Top Marginal Rate		<u>51.70%</u>	<u>55.576%</u>

¹ Applies to the net investment income of Taxpayers with modified adjusted gross income exceeding \$250,000 (MFJ)

Corporate Tax Rates

- **Background:**
 - Two years ago, the 2022 budget increased the top corporate franchise tax rate to 7.25% from 6.5% for tax years beginning on or after January 1, 2021 and before January 1, 2024, for taxpayers with a business income base greater than \$5 million
 - Scheduled phase-out of the capital base tax was delayed. The rate of the capital base was to have been 0% starting in 2021. the fiscal year 2022 budget imposed the tax at the rate of 0.1875% for tax years beginning on or after January 1, 2021 and before January 1, 2024, with the 0% rate to take effect in 2024

Corporate Tax Rates/Estate Taxes

- Under the legislation, the 7.25% rate is extended for another three years to tax years ending before January 1, 2027. Additionally, the legislation extends the current 0.1875% capital base tax rate for three years, through tax years ending before January 1, 2027 (with capital base tax rate decreasing to 0% starting in 2027)
- The New York State estate tax exemption has been adjusted for inflation
- Please note, New York is not tied into the Federal amount, nor does it allow the transfer of unused exemption to the spouse. Additionally, the New York State estate tax exemption amount for 2023 is only \$6,580,000, not the \$13,600,000 the Federal amount is in 2024, an increase from last year in the amount of \$470,000

... Estate Tax

- Individuals close to this amount should be cautious, as they could be at risk of falling off the “New York State Estate Tax Cliff”
- This rule states that if an individual’s assets total more than 105% of the New York State estate tax exemption upon his or her death, his or her estate “falls off the cliff” at \$6,909,000, at which point, his or her entire estate will be subject to New York State estate tax
- Planning for the cliff is important and there are estate planning techniques that can be utilized in this regard
- Because New York State does not have a gift tax, proper planning is imperative

State Tax Climate Index

- New York is 24th on corporate – mostly due to low manufacturing rate
- New York corporate tax structure was pro-business as recent as 2018 when they were 7th, but have since slid to 24th

Personal Taxes	50 th	Real Estate Taxes	49 th
Sales Tax	42 nd	Overall	49 th

- Only 1 worse – New Jersey
- But I am sure we are moving in the right direction
- New York has been 49 or 50 each of the past 10 years, save one – when they were 48th
- New Jersey has been last the past 5 years

... New York Individual Tax Ranking is Last – 50/50

- Behind California by a lot and they have a 13.3% top rate
- Have not been lower than 48th in over a decade
- **Lower Tax States:**
 - People move for a variety of reasons:
 - New job, family, better weather, retirement
 - Increasingly 'Taxes' have become one of those reasons
 - For the years 2020-2022
 - 9 of the top 10 percentage gains were to states with low or no taxes

... New York Individual Tax Ranking is Last – 50/50

- 80% of positive (more in than out) changes were to below average tax states
- 73% of the negative changes, were from above average tax states
- Correlation does not equal causation, however, numerous surveys indicated that taxes played an important role in where to go

... What Happens to States' Tax Revenue When Those People Leave?

- When people move out of a state, they take their earning power with them. IRS data from 2019 and 2020 shows that most states that lost people to interstate migration also lost adjusted gross income (AGI). Conversely, most states that gained people also gained AGI
- Example, in 2021, California and New York lost \$29 billion and \$25 billion in AGI, respectively, while Florida gained \$39 billion
- Less income in the state means less tax revenue. In 2021, California lost \$343 million, while New York lost \$300 million

... What Happens to States' Tax Revenue When Those People Leave?

- The losses in 2022 have not been measured yet, but out-flow of existing residents has increased from 2021 for both states
- New Jersey recorded a record diminishment in 2022. Many of those who left were high earners, which means they were probably wealthy and have now also removed their estates
- Remember the earlier slide – increasing tax-imposed decreasing tax base
- Shifting the cost of Government to a smaller base, increases the cost per person, which in turn, increases the likelihood that those remaining will also flee the state

... What Happens to States' Tax Revenue When Those People Leave?

- Please note that lawmakers only have so many tools at their disposal to attract people
- They need to highlight the assets that the region has, as was done with Micron
- But they *can* control their taxes
- Prioritizing structurally sound tax policies with low rates will not only lower people's tax burdens – which clearly attracts people, but also produces economic growth, increasing job opportunities and wages that will further attract them
- Many of our political leaders understand this



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Questions



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