



## Fox Rothschild Podcast

### The Presumption of Innocence

#### Episode 28: Under the Microscope: Examining the Future of the ERC

*Featuring Matt Adams of Fox Rothschild and Dan Mayo of Withum*

**Adams:** Hi, everyone, and welcome to "The Presumption of Innocence," a podcast brought to you by the White-Collar Criminal Defense and Regulatory Compliance Practice at Fox Rothschild.

Today I have the great fortune of being joined by Daniel Mayo. He has a J.D. and LL.M., and he is the lead of Withum's national tax services group. He's got over 20 years of tax experience in federal, international and financial products taxation, and he leads up Withum's ERC group.

And yes, we are talking about the Employee Retention Credit once again on the program because it's a hot button issue as we began the year 2024, and really beginning in the fall of 2023, rather, even. There is a whole host of activity on the ERC front, beginning with a moratorium that we've mentioned in the past, and that the firm has been heavily writing articles on over the last several months.

Dan, that's really the tip of the iceberg when it comes to the action that we're seeing on the ERC front. Let's kind of chronologically walk through some of the biggest developments that followed that announcement of a moratorium on processing new applications.

Certainly, taxpayers are free to submit amended returns seeking the ERC credit. But at the end of the day, beginning in October, we really saw what the IRS's plan is to deal with some of this aggressive marketing that we've seen from promoters, and a whole host of fraud and other issues that have developed in this particular program. Again, one of the vestiges of the COVID-19 economic stimulus. We've talked a lot about it here on the program.

But let's start really in October of 2023, Dan, on the heels of this announcement from the IRS, not only that it was going to cease processing new applications and begin a wholesale audit of then-issued and pending claims for this particular credit. The IRS went en masse and rejected something like 20,000 different ERC credit claims. And, sort of tease the notion that this was not the last we were going to hear from them on this particular issue. And then lo and behold, in October, they start announcing this withdrawal process. And what have you seen from your role on the accounting side?

**Mayo:** So first of all, thank you, Matt, for having me here. It's great to be here on the Fox Rothschild broadcast.

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Withdrawal option, as you know, is the first of a two-pronged attack by the IRS to root out what they view as improper claims. The withdrawal option allows taxpayers that have not yet received their ERC cash or checks. They either received the checks and didn't cash them, or did not receive the checks at all. And it allows taxpayers to withdraw the ERC claim in full, and in exchange, they get to avoid penalties and future compliance action.

**Adams:** And when this was first announced, I sat in on a webcast that the IRS put forth. And they're being pretty pedantic about how you have to go about this process. You know, this is just not a "click a box online" type of thing. They're pretty specific in their requirements.

Talking with clients, my advice has continued to be that this is a particular area where sound accounting and legal advice is absolutely necessary. Would you agree with me that the way that the IRS has attacked this withdrawal process is pretty mechanical and pretty hyper-technical?

**Mayo:** I do agree. And, you know, the IRS, they pulled out the fax machine for this one.

**Adams:** We're going back to the dark ages for this program. It's almost remarkable.

**Mayo:** It is. The withdrawal process they contemplate, which we've done for clients a few times already. You take the 941-X that the taxpayer filed with the IRS. On the left margin you write the word "withdrawn" and in a pen. On the right, you sign and date it. And then you fax 'em into the IRS and they'll consider accepting the withdrawal. It's not accepted, though, until the IRS notifies you that you've been accepted into the withdrawal program.

I'll also point out that the IRS indicates they received over \$130 million of withdrawals so far, as of a couple of weeks ago. And if you do the math on that, if you assume an average claim of about 500,000, you're looking at, you know, 260 taxpayers, approximately. If you assume a smaller amount, probably between 260 and 500 taxpayers availed themselves of the withdrawal option so far.

**Adams:** So, you know, I've been in a lot of discussions with clients where some real questionable actors have shown up. And we're not going to name names, but you and I know who they are. There are these promoter shops that are out there aggressively marketing the ERC program and working off of a commission. My experience has been a large number of those applications that were submitted by these promoter shops had inflated numbers. And, you know, the only way to really get at the root of that is to tick and tie the math. At what volume are you seeing at your accounting firm that type of exercise being undertaken?

**Mayo:** Yeah, so we typically do that exercise when a client is under audit. And so either we've been asked to help assist the client with an IRS audit or a lawyer like you brings us in to assist in some kind of forensic capacity. Typically the first thing we'll do is recalculate the ERC, because in the 40-plus audits we've looked at so far, every single calculation has been incorrect.



**Adams:** 40-plus, and every single one is incorrect.

**Mayo:** Every single one. It's funny because we tie out every single dollar of wages, so it is an exact science and there is a right answer here. And our methodology can show you exactly where each dollar goes, whether it goes to the PPP or to the ERC.

**Adams:** If you had to boil it down to the common threads of the people who did those calculations in the first instances. Is it the majority being, you know, just some incorrect math being undertaken, more so a good faith error by in-house accounting staff? Or is it the more sinister, which is, folks relied on a promoter and the promoter had their own self-interests ahead of the accuracy of their calculations?

**Mayo:** Now, we see a bunch of errors. So if I had to bucket them, I would say that some of them are an improper allocation between the PPP and the ERC. Some of them include wages of owners of the businesses that are not permitted to be included in the calculation. We sometimes see errors in the spreadsheet that preparers use. So there might be formula errors in the spreadsheet, which can give rise to errors. And the last one we've seen are just periods of ineligibility. Where they've claimed eligibility when they don't have government orders to support it, and/or they don't have gross receipts to support the periods of eligibility claims.

**Adams:** That, I think, was one of the ways, in my experience, that some of these promoter shops, as I call them, really started to push the envelope and tax credulity when they started to talk about these government orders. They were maybe taking liberties in that way. Would you agree or, is the predominance in another area?

**Mayo:** The areas where we've seen aggressiveness by some of the ERC providers is mostly with the partial suspension test.

**Adams:** Mm-Hmm.

**Mayo:** And mostly with the, um, you know, elongated period of eligibility that some of them find. There are some that find six quarters of eligibility, regardless of government orders, that exist to support even three periods. When I say six periods, I'm including Q2, 3 and 4 of 2020 and Q1, 2 and 3 of 2021.

**Adams:** So, we've talked a little bit about where we've been. The withdrawal process has been rolled out for Q4, I suppose, of 2023. We're well into 2024 now, and the IRS is not just sitting back and letting this play out. They're making even more aggressive and additional changes to the program, largely in the form of the Voluntary Disclosure Program, or the VDP, as it's referred to.

And this is something that the IRS, there's really historical precedence for right? Because, back in the 2012 area when foreign banks were first required to affirmatively alert the U.S. government



to U.S. taxpayers with their accounts in those banks, we saw a run on this kind of same voluntary disclosure program.

Is this revisiting that tax amnesty or is it a little bit different? Because when I read what the Voluntary Disclosure Program is going to entail as it relates to ERC, I see almost a carrot and a stick. Whereas the prior iterations of voluntary disclosure programs that the IRS has rolled out with respect to, FBARS-- foreign bank accounts-- that was really a, you know, you go into the program, if you're accepted, you get your closing letter, you pay your tax and you get your amnesty. But you didn't have a lot of certainty until you were out of the program. Do you think this is the same way? How do you view what's been announced from the IRS related to ERC voluntary disclosure?

**Mayo:** It's definitely similar connection with that prior program, as you mentioned. I guess the biggest difference is even before you get into the details of the program. And the difference is, back then with that other disclosure program, people knew when they had foreign bank accounts abroad that they weren't reporting. Most of the people had an awareness that they were doing something wrong. With the ERC, again, if you believe, you know, the language that comes out of the IRS, these people are not aware that they've been hoodwinked or that they've been fooled into thinking they're eligible for the ERC when they're not.

And so that's a big difference, I think, that will affect the amount of people that take up the IRS on the Voluntary Disclosure Program. Because you first need to know that you have risk and/or you have an improper ERC claim before you say, "Okay, let me seek out the advice of the trusted adviser who can help me determine if I want to take advantage of the VDP."

Then, when you get into the VDP itself, you're right, exactly right. There's a carrot and a stick here. The carrot says, if you are admitted into the VDP program, you get to keep 20% of the ERC that was claimed. You get to keep the interest. You don't have to pay tax on the amount that you get to keep. And you get to avoid prosecution, right, you get to avoid civil audits and penalties. And so that's the big stick. They don't make any promises for criminal prosecution, but do get to avoid penalties and further enforcement action.

**Adams:** Yeah, I like the way you put that. Because when the IRS commissioner announced the VDP program, he directly went right at why the IRS has designed it in a way that would allow you to repay only 80% and to keep, at a discount, the 20%, notwithstanding the impropriety of the application. He said, quote, "We understand that there are many employers eager to correct their error, but who remain concerned about their ability to pay back the portion of the credit that has been lost to the promoter that brought them into this mess."

This is a fairly remarkable statement from the Internal Revenue Service. Would you agree?

**Mayo:** It really is. And, you know, we haven't seen that play out in practice. So, for the people that have approached us to discuss the Voluntary Disclosure Program, they're concerned with



the entire claim. It's never been the piece you mentioned there in that quote, it's never been that I paid 20%, I don't have the funds to repay the IRS. It's, they can't pay the 80%, right? And that's the problem that we're seeing with a lot of clients is that, you know, they received this ERC money, they've spent it on one thing or another, and they just don't have anything to pay back.

And so the focus on that element of it, I think enabled the IRS to justify it giving any benefit, right? Giving any carrot to taxpayers. And because I think they realized people did pay these fees, and when you, do the math on, you know, if you had to pay the fees and give the whole thing back, there'd, be very few taxpayers willing to take the IRS up on this process. So, I think, to make it more palatable to taxpayers, they said, all right, we'll give you a 20% off. Recognizing that that's an approximate amount of what many people paid, an adviser to help them, prepare and file an ERC claim.

**Adams:** Yeah, and it's almost as if they've learned from the voluntary disclosure programs of yesteryear. Because I had a client who entered in at an early phase of the initial Voluntary Disclosure Program, and then, lo and behold, while the voluntary disclosure was pending, Congress changed the law. And the unintentional versus volitional idea of failure to file FBARs came to light, and it was at huge savings. I remember a client that bit the bullet, so to speak, and went ahead, paid the interest, penalties and back taxes on several years of foreign bank account activity. And lo and behold, a lot of that money came back because Congress changed the law, something like 2014 rings a bell. By and large, a lot of that penalty was kind of wiped out. Certainly the tax wasn't wiped out, but the penalties were severely impacted.

And I remember that was welcome news to the taxpayer. It's almost like the IRS learned from the fact that when people want to come forward, you know, that amnesty opportunity is not the end-all, be-all to most people. They don't trust that the government is going to see it the way they do and they have to almost incentivize them to come forward. Do you agree?

**Mayo:** That's exactly right. This 20%-- again, tax-free 20% -- is an incentive to encourage taxpayers to take advantage of the VDP. Again, the difficulty they're dealing with in getting significant uptake in the program is that many of the people may not be aware that they have a claim that is specious or that they have a claim that is likely to be denied if and when it's audited. So the incentive, I think, was to bring people to open their minds to the program so they would discuss it with their what they call trusted advisers.

**Adams:** Yeah. And the voluntary disclosure program is not without its limitations. The business can't be under criminal investigation and can't have been notified that it's under criminal investigation. And ironically enough, the IRS announcement doesn't distinguish between a criminal investigation for ERC fraud and a criminal investigation for other reasons. And the first thing that comes to mind is PPP fraud, because these programs were inextricably linked.

The second requirement is that the business can't be undergoing an employment tax audit for the periods in which it will be repaying the ERC. The business also cannot have received a notice



from the IRS demanding repayment of all or part of the ERC that it received. And finally, the ERC, can't have received any information from a third party that the business is not in compliance, related to noncompliance with an enforcement action.

So, you know, the businesses here that applied for the ERC are not... it's not a carte blanche allowance to just keep 20% and go in. But you put it, I'm struck by the fact that this program is really designed in a way with a bit of an assumption or a belief that there really was a lot of people hoodwinked by these promoters. Do you agree?

**Mayo:** Yeah, that's the view they have, I absolutely agree.

**Adams:** I'm sure there are people who blatantly took advantage of this, like they did with PPP. But at the end of the day, I think it's just fairly remarkable to be able to keep 20%.

**Mayo:** Yeah, it is remarkable that they allow taxpayers. It's funny, because I was speaking on a panel about a week or two before this came out, and, you know, we were, suggesting this very thing. That if they want to encourage people, they need to give people some financial incentive. Because they're gonna have to have to repay the money, which they don't have. They've paid an amount to a promoter and/or, you know, an adviser. They might have paid to amend their tax returns to reduce the wages, right, to effectively make the ERC taxable. So there's a lot of costs. And by, you know, giving the incentive, they made it easier for people to see the benefits of the program.

**Adams:** At the same time as they announced the VDP, there was an update from the IRS, and this one's stark. As of, I guess, the early part of January 2024, the IRS announced that there had been more than \$100 million in ERC withdrawal requests. And that's only since announcing the beginning of that program in early October. How deep do you think this is going to go?

**Mayo:** Yeah, so that's what I was mentioning earlier. I don't think that number is quite significant. And so, as an objective number, 100, I think it was \$130 million was the amount they announced.

**Adams:** Yeah, chump change, right? In the grand scheme.

**Mayo:** Right. It's an objectively large number, but it's chump change in the grand scheme. And if they paid out over \$230 billion on this program, and to say they recovered \$130 million from, you know, yeah, 500 at best, 700 taxpayers is not a significant victory.

But look, they're talking to the public and they're also talking to legislators. And so if they can show some quick wins and big hits they can justify, you know the VDP, giving some money back, justify legislative action and their other lobbying efforts to help stem that tide of these improper claims.



**Adams:** One of the things that I'm really struck by, Dan, is exactly how many people have come to me and said, "I'm sitting on an ERC check, but I haven't cashed it." Have you had any people like that come to you?

**Mayo:** Yes, we have. It's a tough call, because if they don't cash the check, they can take advantage of the withdrawal option. And if they do cash the check, they can take advantage of the VDP and get 20% off.

**Adams:** Exactly.

**Mayo:** Right. So that's the choice people have. And obviously most people would prefer to take the 20% off.

You know, there's a few people, a few clients, who got caught in between the programs and returned the checks before the VDP came out and knew there was an incentive to cash it and then return it. We've also heard that the IRS has slowed almost to a halt the processing of new claims. Because what they don't want to have happen is to pay out a new claim only to have that person go back and enter the VDP and keep 20%, you know, a couple of weeks later.

**Adams:** And we still remain under this moratorium. So, when do you think, if ever, that gets lifted?

**Mayo:** It's not clear. I have a pet peeve with use of the word moratorium myself. So, the IRS said that they're not going to process any new claims until they get through the old claims. And that's what they call a moratorium. To which I say, you didn't get to 'em anyway. How can you stop something you never even got to?

**Adams:** Only IRS could come up with some logic like that.

Right,

**Mayo:** right. So, they called it a moratorium. They haven't actually stopped anything. Again, if you believe the IRS-- and I have no reason not to-- they're continuing to process old claims. So, they haven't stopped anything. They've stopped something they haven't yet gotten to. So, that's what they've announced. So, that's the moratorium.

When will they get to the new claims? It's hard to say. I think I sort of heard a recent estimate. They must have over a million claims in the backlog. I mean, they're taking a long time to process claims, and the claims keep coming in. And the claims are really going to jump --as to what you're going to get to in a few minutes, I assume, the proposed legislation that's really going to probably double the backlog of claims that they have to process.



**Adams:** I've got sort of this weird visual in my head when I think about this idea of a moratorium. And, you know, the moratorium doesn't stop the new claims coming in. It's just created this two buckets: One of the new claims that is a stack of applications that are growing by the day, and then the backlog. Nobody's looking at that either. I mean, --

**Mayo:** Right.

**Adams:** It's like, what are we doing? And it really puts us into the area where I want to go next, is where are we going with this program? And it's, almost like the IRS is saying to Congress, "Hey, uh, legislatures, please wake up because we need some guidance on this." And a little bit of a preview of that guidance really hit with the announcement of a proposed package of legislation that goes --and attempts to go-- head on. So, why don't we talk about that for a little bit?

And then I want to get your take on whether you think that'll be effective in eliminating this visual that I've laid out, which is this IRS office with a growing stack of new applications and a pretty sizable stack of existing application and nobody's doing anything with any of it!

**Mayo:** Exactly. Yep.

**Adams:** So, what did Congress tell us?

**Mayo:** So, the bill that passed, it passed the two committees. Passed the House Ways and Means and the Senate Finance Committee. And well, I should say the chairs of both committees agreed to this, and it hasn't yet cleared the house vote after it clears the house to go to the Senate. But the purpose of the legislation is, they're enacting a bunch of the child tax credit and a bunch of business-friendly tax positions, like the 174 R&E deduction, 163 J interest deduction and the bonus depreciation. So a very friendly, helpful business tax provisions. And they would fund it by this limits on the ERC. And the joint committee attack scored it to be around 778 billion, was the number I heard, by limiting the ERC. And so they're proposing to sort of attack the ERC on the front end, the back end and in the middle.

And so on the front end, the legislation would limit any claim for the ERC that is not filed before January 31 of this year. To give you a sense, 2020 claims otherwise would have until April 15 of this year to be filed and 2021 ERC claims would have until April 15 of 2025. So pretty early shut off of the program if the bill were to be enacted in its present form.

The next thing it does extend, on the back end, extends the statute of limitations pretty substantially. And so, the statute of limitations would be six years after the later of original filing date, of the 941-X or the amended 941-X, basically when you claim the ERC. So a very long extension to the statute of limitations.



Again, many people were expecting-- if you file the 2020 claim-- they were expecting that statute to expire this year on April 15. So, significant change on the back end of the program.

On the middle end, they would impose significant penalties on promoters as they define the term. They would make the ERC a listed transaction, which would trigger reporting obligations, and enhance penalties for promoters and material advisers. There would be loosening of the penalties for due diligence in filing these returns and evaluating them. And, you know, other kind of penalties, increasing the dollar amount of the penalties, mostly on promoters, what they define as an ERTC promoter.

**Adams:** And with all of that, and all of that uncertainty that is injected into the taxpayer side of this, the quote, unquote moratorium-- I know you don't like that word, but let's, go with what the IRS is calling it --the moratorium doesn't move and those piles keep growing.

**Mayo:** That's right. The room is split between pre September 14, 2023 claims and post September 14, 2023 claims. And that's going to keep getting bigger. And, you know, I can't think of an adviser that I know... if you have an ERC claim of meritorious ERC claim to be filed, I can't think of anyone who's not going to file it by that January 31 deadline. Because even if Congress does not get to this legislation until February and March of this year, it's possible they keep that January 31 date.

So, it would almost be negligence not to file a claim --if you have all the information in your possession --to not file it by January 31. So you know, we have a backlog of claims at Withum nowhere near the IRS's backlog, but we are, going full speed ahead 24/7 in order to file every claim we have by January 31 of this year. And we're aware that other law firms and accounting firms are doing the same thing. You just don't want to take a chance of the legislation is passed, it retains this January 31 date and that you didn't meet that deadline.

**Adams:** Yeah, and once again, we're talking with Dan Mayo. He's the lead of national tax services at Withum. He's also an adjunct tax professor at Georgetown University Law Center and a frequent contributor to Forbes, writing on all things tax and sharing best practices for minimizing tax for businesses and high net worth individuals. Dan, have you ever seen anything like this?

**Mayo:** No, except for the PPP.

**Adams:** So all the COVID era stuff that's kept us busy collaborating over the last few years. Our respective firms have been working hand in glove with one another in that space and time that--

**Mayo:** Right, go figure. When the government offers free money. There are people who take advantage.



**Adams:** Yeah, no doubt. I've said it once if I've said it a million times, and that's I think that this whole economic stimulus program resulting from the pandemic will turn out to be one of the largest white-collar criminal investigations, if not the largest, in the history of the United States.

And we're no stranger to economic stimulus. We've been only doing this since World War I.

You know, we're getting short on time. I think the takeaway that I'm getting from our conversation here today, Dan, is that the need for trusted advisers on the accounting and the legal side is paramount. These are confusing processes. The arcane way that the IRS has prescribed for taxpayers to withdraw their ERC claims is really just the tip of the iceberg at the complexity of this process. And it really screams out for solid accounting and legal advice.

I can't thank you enough for joining us today. I get the sense that this is not gonna be the last time we chat on ERC we're gonna have some more developments before this thing ends. would you agree?

**Mayo:** I would, and I look forward to chatting with you, Matt, about these topics. I know we've had many shared clients on the PPP and the ERC. And, you know, there really is a need for both separate professions to come in at various stages of these investigations and audits.

**Adams:** Well, that's all the time we have for today's episode of "The Presumption of Innocence."

And until next time, I'm Matt Adams, your host. We'll see you.

**Mayo:** Thanks Matt.