



Fox Rothschild Podcast

The Presumption of Innocence

Episode 60: Enforcement Priorities of the Second Trump Administration: Employee Retention Tax Credit

Featuring Matt Adams, Brian Bernhardt and Jon Wasser Fox Rothschild

Matt: Welcome back to "The Presumption of Innocence," a podcast brought to you by the White-Collar Criminal Defense and Regulatory Compliance Practice at Fox Rothschild. I'm your host, Matt Adams.

And although the Employee Retention Credit Program, a dollar-for-dollar tax credit program administered by the Internal Revenue Service, was established in the early days of the COVID-19 pandemic and later expanded, it has been --and remains --a very controversial and highly contentious issue. Today we're going to explore the latest edition of a multi-part series on the evolving and shifting landscape of federal enforcement under the second iteration of the Trump administration.

And today I have the great pleasure of being joined by two of my colleagues who work exclusively in the tax controversy space and are members of our Tax Controversy and Litigation practice groups, as well as our White-Collar Criminal Defense and Regulatory Compliance Practice Groups.

First, Brian Bernhardt is a partner based in our Greensboro, North Carolina and Charlotte, North Carolina offices. Brian is a seasoned trial attorney who is skilled at both defending clients in federal tax controversies and arguing precedent-setting appeals in the courts throughout North Carolina and the broader United States.

Jonathan Wasser is an associate based in our Philadelphia office and focuses his practice exclusively on federal and state tax controversies. He provides legal counsel to businesses of all sizes on a variety of tax matters, including but not limited to the ever-controversial Employee Retention Credit.

Gentlemen, welcome to "The Presumption of Innocence." It's so great to have you both.

Brian: Thank you, Matt. It's a pleasure to be here. I appreciate the invite.

Matt: Jon, I want to start with you. Bring us up to the minute on the status of the ERC as we sit here today rounding out the first quarter of 2025. Still within the first 100 days of the second term of



President Trump, and this evolving landscape and shifting priorities that we've seen all across white-collar, criminal defense and compliance.

Bring us full circle. We've had number of guests on this program talking about ERC, really since its inception, but I found it important as we sort of sift through the new administration and what we see as the priorities to really revisit this subject. So bring us full circle on where we are at, up to the minute-- mindful that could change tomorrow.

Jonathan: Yeah, sure. My pleasure. So the ERC currently is sort of... it's in a state of flux. There, there are more than --

Matt: I'll, I'll say. I mean, we call it flux, I think that's being charitable, but...

Jonathan: Yeah. There are more than a million claims outstanding that taxpayers have filed claiming the ERC, but that have not been processed by the IRS for a variety of reasons. There was a pause in processing claims that the IRS called a moratorium. It has been partially lifted, but taxpayers that file claims after January 31, 2024, those claims are still not being processed.

There's more than a million claims outstanding and there are pretty fierce battles going on-- in litigation and IRS audits, IRS appeals-- over eligibility. A lot of that centers around whether, you know, certain government orders were applicable to businesses, whether the effect of those government orders was more than nominal on the business. They're pure eligibility questions. And right now we don't have a permanent IRS commissioner. Brian may speak a little more about the nominee, Billy Long, but he has a background in the ERC.

We're kind of, you know, at a point where the Trump administration could go continue current IRS policy towards the ERC, which has been very restrictive. A lot of taxpayers and tax advisers think that the IRS has interpreted the eligibility requirements more strictly than the statute that enacted the program. Or if this, uh, the nominee, Billy Long, gets confirmed as the new IRS commissioner, perhaps, he could take a different approach and process a lot of these returns that are waiting to be processed, pay claims that taxpayers are expecting, that they may have filed two years ago and they're still waiting. We really don't know at this point.

Matt: You know, Jon, let me jump in for just a second.

I get a call pretty much every week from prospective clients who are lamenting the fact that this claim has been made. They may be even carrying this on their books, this notion of an anticipated credit on their books, in a acceptable method pursuant to accounting principles. And all they've gotten from the government is radio silence.

So what's a taxpayer to do? On January 8 of this year, 2025, the National Taxpayer Advocate released a report to Congress that stated the IRS processing delays are, quote, "resulting in uncertainty," unquote. And I, I would say that's the understatement of the year. And quote, "harming and frustrating business owners," unquote. And I've had those calls. They're frustrated.



The report went on and noted that notwithstanding the moratorium that you mentioned, the IRS has not processed many claims that were even filed before the moratorium went into place. According to this report, about 1.2 million ERC claims, as you just mentioned, remained unprocessed as of October 26, 2022. Which forces taxpayers to make difficult decisions including, whether to bring suit-- which could present other challenges and expenses to the taxpayer, and, and something that we've explored on this program with one of our colleagues, Elizabeth Blickley, before-- or, for many taxpayers, they're just left in limbo.

The report concludes that the ERC has quote, "become a source of confusion and hardship," and they recommended lifting the moratorium, expediting claim processing, enhancing communication and prioritizing economic hardship cases to remedy the IRS's shortfalls with respect to the ERC. So, a scathing rebuke from the National Taxpayer Advocate.

Brian, I wanna shift it to you. How does the ERC fit into this administration's overall shifting policy regime for a whole host of white-collar issues, including tax issues? And will the administration take heed to the National Taxpayer Advocate and respond in some way by directing the IRS in one direction or another? Or do you expect this to remain sort of in limbo where it's been for some time now?

Brian: So let me give you the, the typical lawyer answer, which is, it depends. It's certainly possible that --and, and I think it's probable that the Trump administration doesn't really care what the National Taxpayer Advocate says. And typically the Advocate comes out and, and issues a whole host of recommendations every year. And unfortunately, because many of them are very good, they go into the ether and not a whole lot happens. There is a, a bill that's percolating that would incorporate a lot of suggestions in general that the National Taxpayer Advocate has, but not necessarily for the ERC.

And as Jon mentioned, what's going to happen really depends on who the next commissioner is. You've gotta go back to 2020 to really look and see what's happening in 2025. In March and April and May of 2020, the world was falling apart. No one knew what was going on. Businesses were dying, people were unemployed. And, as opposed to the PPP loans-- which were issued really quickly and people got them, and then later on the IRS and the Department of Treasury decided to investigate-- the ERCs, the government went the opposite way. They decided to review them before they paid the money out, which is why there's over a million claims four or five years later that are still out there. There are plenty of groups that are tracking their own clients' claims and payments, and they can see from week to week and month to month whether the government's doing more or doing less.

There was a time in early October where the IRS announced they were going to issue about \$10 billion worth of ERC funds out to taxpayers who had made claims. It was about 25,000 claims. If you do the math, it turns out that it's not a whole lot of money for each claim. There were, as a result, a lot of taxpayers who just wanted to sit back. They anticipated they'd get their money. Many did. Many more did not. Then the new administration comes in. One of the first things they did was announce that Billy Long, a former congressman from Missouri, was going to be the new commissioner. That's who they were going to nominate. Uh, he has not had hearings yet. He has



provided some information to the Senate Finance Committee. We expect that he's going to have hearings maybe early May. Probably a party line vote, he'll get confirmed unless something dramatic comes out So I would expect him to be confirmed.

Given his history in the ERC world, in the last couple years, Mr. Long has been working at companies that have been promoting, marketing, selling their ERC products. And by that I mean they're engaging clients to do ERC claims and file them for the IRS. It certainly appears that he is a fan of the ERC, that he supports the ERC, that he would disagree with the prior commissioner that there is extraordinary fraud-- a claim that has been debunked by other reports. And that if he is confirmed there is, I don't wanna say an expectation, but certainly a hope that he's going to turn the spigot of money on, he is going to let money come out to all the people-- maybe not all the people, but a vast majority of the people-- who have claims. And then after the fact will try to do audits, will try to recoup money that was improperly given out.

Now, one of the problems he's going to have is a statute of limitations. Until April 15th of this year, that's for the most part the deadline for the IRS to audit 2021, money that's given out for 2021 tax periods. There is a, an extended statute of limitations for third and fourth quarter. There's some talk about in the budget reconciliation bills, they may increase the statute of limitations for the first couple quarters. There's a theory out there that the IRS could claim that they have erroneously given refunds and they can come after taxpayers.

But the general thought that I've seen-- and I tend to agree with this-- is that if Billy Long becomes commissioner of the IRS, it is far more likely that ERC funds are going to start flowing more freely than when the prior commissioner was in office and wasn't a fan of the ERC.

Matt: Yeah, that, that's a pretty remarkable piece of analysis there, Brian, especially in light of his involvement in what has been a very controversial industry, this promoter industry for the ERC program. We've talked on this podcast many times about some of the scrutiny that was being placed on, on those promoter shops. And I think from all of our collective experience, we've seen that they have not avoided the crosshairs of the government in being investigated themselves for being overly aggressive with some of their eligibility analysis.

And Jon, I think that segues back to you. Against all of that uncertainty, perhaps a clearer picture than we've had in a couple of years about what's going on with the ERC in light of Brian's assessment of the putative favorite to become IRS Commissioner, we've got this host of lawsuits that have now popped up. We've been talking about them on this program, Jon. We had a fairly significant development at the early part of 2025 when the government finally started to shed light in the sort of seminal case, Stenson Tamaddon, LLC litigation, where the government sort of started to take concrete positions on various issues of eligibility not the least of which was this threshold test about whether an employer has been partially suspended by government orders. And in what sort of was a surprise to some analysts and watchers of the IRS, the government seemed to concede that this partial suspension isn't an eligibility requirement. In fact, they come out and say that. And then they go on to say, even if a taxpayer cannot demonstrate at least 10% of its business has been impacted, it can still be eligible for the ERC if under the facts and circumstances the business was partially suspended.



And that really ties in with what we're talking about with some of these promoters. Because I know working alongside you on these cases, Jon, we've seen a number of instances where the government orders test and this idea of a partial suspension of business operations has been given, let's call it a wide berth by some of these promoter shops.

In light of the government's position earlier this year, in that litigation on sort of this murky area of facts and circumstances, is this basically a safe harbor for some of these promoter shops that may have been under scrutiny, perhaps under a prior administration?

Jonathan: Yeah. You know, I think that the government's position is going to provide them with some comfort. Um, you mentioned the term safe harbor. I think that's the IRS position now is that if you followed our guidance and you could meet the more the nominal tasks for a partial suspension of operations, that was like a safe harbor. It wasn't the only way to qualify for the credit--

Matt: And those aren't my words, I mean, they say in their briefs, they say, quote, " properly understood, the IRS's interpretation of the statute provides the taxpayers with the benefits of a safe harbor. It does not impose a threshold or place a limitation on receiving the credit."

Jonathan: Yes. And that is not what we were seeing from early IRS guidance. Like, guidance issued a notice, 2021-20, which established the more than nominal test. You know, it was not put forth as a safe harbor really. And a lot of tax advisers interpreted it being as more of a black or white eligibility. If you met the test, you could do it. If you didn't, you shouldn't. But now they're saying, you know, it's, it's a safe harbor and there are other ways that you can potentially be eligible for the credit.

Uh, I think this is going to give a lot of tax credit promoters and tax advisers more leverage now that the guidance they provided early on to taxpayers and their clients, um, about the ERC, that they may be able to defend them. A lot of those opinions rested on orders from OSHA and from the CDC that the IRS early on said no, these are not qualifying government orders. But now I think that that's kind of back in play. Like, if you can show that those orders at least partially suspended your business operations, based on all the facts and circumstances, even if you don't meet the more than nominal tests, you have a pretty strong argument that you do qualify for the credit. And this is, you know, this is contrary to early IRS guidance.

Matt: And, and let there be no confusion, Jon, you and I have actually looked at this issue on a number of different sets of facts with a number of different of our clients. And we are still seeing fairly significant abuses of this partial suspension test. Because we've got people that sustained virtually no disruption, or in other words, they were able to immediately pivot through the course of the pandemic into a virtual environment and therefore little to no disruption to their business operations occurred. And we're still advising them that they are likely not qualified, right?

Jonathan: Yeah, that's right. A, a lot of the opinions we've read from so-called ERC promoters, you know, there's not individualized guidance provided to that business. They really just say, you know, you were subject to this OSHA order. You were subject to this CDC order, therefore you qualify. Our feeling is that you need much more analysis about every taxpayer's individual circumstances.



If you were able to pivot to working remotely and, you know, there wasn't much of a disruption to your business and your, your gross receipts increased, you're probably not going to qualify for the ERC. No matter what an ERC promoter tells you.

Brian: And what, what I see is interesting about that is that the prior commissioner, that's what he believed was happening all over the place. He believed that there was substantial fraud because of the type of thing that Jon just described. So in this litigation that's coming out and the government is now saying, well, we're going to give you more room. They're almost providing a litigation path and arguments in court that is different from what internally the IRS has been doing for the last two, two and a half years. And what these people who filed after January 31 have been waiting to have their claims processed are suffering from, you know, to the extent they've got these deficiencies, there's a spectrum of where they are on it, but in court, the IRS is giving a lot more room in these cases that, uh, marketers are bringing than they are in individual audits and in their own internal processing.

Matt: Yeah and against all that backdrop, against all this changing landscape of ERC yet again, and it makes you wonder how much of this is politically driven from the top in terms of the administration's priorities. Because it does sure seem like the Trump administration, the Trump 2.0, is in favor of getting this program fully to completion and wound up, when just a few months ago we were talking about Congress maybe passing legislation to potentially short circuit that and end the program prematurely. That legislation went nowhere, right, Jon?

Jonathan: That legislation did pass the House with bipartisan support, but it, it died a quiet death in the Senate. It never came up for a vote. As you mentioned, it would've ended the ERC program early. It would've imposed, you know, significant penalties on ERC advisers that committed certain acts. And it would've extended by years the amount of time the IRS could audit taxpayers and assess the tax are related to the ERC.

You know, as Brian mentioned, some of these provisions may appear in the reconciliation bills that are working their way through Congress now. But that bill is effectively, the whole bill is effectively dead.

Matt: So, Brian, how the heck are we advising clients on this issue when there is so much uncertainty?

Brian: Before I answer that, one of the things that interests me so much about what you and Jon just discussed is, on the one hand, for the Trump administration, giving out billions and billions of dollars in ERC claims to taxpayers would be a tremendous positive for the administration. If they suddenly turn the spigot on and distributed all the money for these ERC claims, I would have to think that in some way their polling would get better and it would make the administration a little more popular.

At the same time, they're trying to make the Tax Cut and Jobs Act either permanent or go on for a longer period of time. There's an extraordinary cost for that. They're trying to do all kinds of other, uh, issues and, and, uh, budgetary items in the reconciliation bills that are going to cost money. So giving away that ERC money, giving the claim money to the people that asked for it, is going to cost them even more money.



So they've got a rock and a hard place there. They've got, on the one hand, they can give out claim money and then worry about trying to recoup it later. That would be a popular thing to do with taxpayers and presumably half of whom would have voted for the Trump administration. But at the same time, it might negatively impact, uh, what they wanna do for the Tax Cut and Jobs Act extension that they're trying to work on.

So how do we advise clients? I've been talking to a lot of clients and saying, look, sitting still doesn't negatively impact you at all. You can file a refund, uh, lawsuit if you want to. If it's based on a decrease in gross receipts that may go quicker. Six months, seven months, uh, is something we've heard from folks who have been doing those, as far as a timeline. But, it may be that if and when the commissioner is confirmed, that a lot of claims just start going. If you sit and wait, you're not losing the ability to eventually file a refund claim because you can file a refund claim up to two years after your claim is denied. So, as long as your claim hasn't yet been denied, you haven't started that two-year period.

We talk to clients all the time about timing and pricing and how large their ERC claim is, whether it's financially efficient for them to do a refund lawsuit or not. Whether it's better to sit and wait. When did they file their claim? What was the basis for it? And for the most part, most of my clients that I've talked to are happy to sit and wait because they always believe, when the IRS says we're going to issue more money in the next two or three months, they all believe that their money is going to be in that tranche that's released.

For some of them, that's the case. I had a number of clients that did get money in December and January, a number of clients that didn't. I think right now, if I had to give general advice-- not subject to any individual facts of a specific client, so clearly don't take this as personal legal advice to anyone who's listening-- I would say, wait and see what happens with the nomination of Billy Long. Wait and see what he decides to do when he becomes commissioner. He may decide to approve claims and deliver money quickly. He may decide that he wants to wait and see. He may decide that he wants to keep on the track of the former commissioner. And once we know what he wants to do, we'll be in a position to tell clients this is the new reality we're living in in the Trump administration for the next year, two years, three years.

Matt: Well, Jon, there's one circumstance where you can't wait and see, and that's if you get a denial letter. So, why don't you talk to our audience a little bit about that circumstance, because while wait and see if you are sort of in this pending status may very well, as Brian outlined, be a legitimate strategy, you can't do the same if you get a denial letter. And how are you advising clients when that comes to pass?

Jonathan: Yeah, I, I would say generally if you have a suspect ERC claim, you wanna look at it before you get a denial letter. Because you, you have more options available to you to correct it before the IRS sends you a letter that either denying your claim or starting an audit. Because if you do have a bad claim, you wanna withdraw it now. It tells the IRS, you know, hey, I'm not making this ERC claim anymore. And it's kind of a no harm, no foul, as long as there wasn't fraud, and there rarely is fraud in these cases.



But if you do get a denial letter, you've got a choice to make. You can fight it, or you can accept it. And if, you fight it, some of these letters have very quick turnaround times. You probably need to, reach out to a tax adviser very quickly and get your paperwork in order to prove your claim. If it's based on gross receipts, you'll need your revenue information, the number of employees you have, a whole host of information.

If the claim is based on government orders, you're going to need a lot more documentation. The government's going to ask you specifically what orders were you subject to, and send me a copy of them. And then there's probably going to be a fight over whether those are eligible government orders, how they actually impacted your business. It can be a very long, drawn out process.

So you, I would, I would recommend getting ahead of it. If you think your claim may not be good, withdraw it now, as opposed to waiting to get a denial letter. Your economic outcome would be much better by withdrawing now.

Matt: Well, this emphasis on the confirmation of Billy Long as the commissioner of the IRS seems to have captured the attention of the senators who will be tasked with confirming him. And one senator in particular Senator Elizabeth Warren of Massachusetts wrote a letter to Commissioner Designee Long on January 8, 2025 of this year. And I just wanna read a portion of that letter for our audience.

It starts, " ERTC fraud and abuse has created huge delays and harmed honest businesses trying to claim the credit. Inundated by fraudulent claims, the IRS has initiated over 250 criminal investigations and imposed a moratorium on the processing of new claims from September, 2023 to August 2024."

Senator Warren continues, "In particular, firms known as ERTC mills specializing in gaming"-- her words-- "the ERTC's eligibility criteria by offering to file claims for employers, even in instances where the company is not eligible, in return for a slice of the payout." She continues, "The result: Huge refunds from the IRS to fraudulent parties and payouts for ERTC mills and other principals who pedal fraud in exchange for compensation all paid for by taxpayers and by eligible struggling businesses who face huge delays in the IRS processing their legitimate claims."

Now, we know the composition of the Senate, as you said, Brian she's in the minority. And it's likely that his nomination could pass along strict party lines, as we've seen with a number of other of the administration's designees for various roles within the administration.

Do you envision this catching any kind of traction, this criticism of the potential incoming commissioner on the basis of his role with ERTC?

Brian: No, I don't. If we assume that everything she said is accurate, the Democrats only have 47 votes. There are 53 Republicans. If all the Republicans show up, absent something coming out, they're all going to vote for him. I don't see any reason why 53 Republicans are not going to vote for the commissioner that Donald Trump wants to be commissioner.

Matt: Allegedly, Commissioner Designee Long said in a YouTube video sometime in 2024, that quote, "everybody" unquote qualifies for the credit.



Jon, is that consistent with some of the attitudes that you've seen from some of these promoter shops as you've advised various clients who may or may not have gotten their initial advice from the promoters?

Jonathan: I think, from our perspective, it does seem like a lot of these promoter shops do think everyone qualifies for the credit. I think if you ask them, they'll tell you, oh, we've turned away lots of businesses that reached out to us to see if they were eligible for the credit.

But our understanding of eligibility is very different from a lot of these promoter shops' understanding of eligibility. Billy Long's understanding of eligibility is probably much more in line with these promoter shops than it is with ours. So if he is confirmed as the next IRS commissioner and, um, you know, he directs the IRS to start processing and paying claims, it's likely that a lot of businesses will receive ERC refunds.

Matt: We're talking with Fox Rothschild's own Brian Bernhardt and Jon Wasser from our Tax Controversy Practice about the latest ERC developments. And I wanna leave you both with the same question, and I'll hear from both of you, to round out our time together today. If we're sitting here a year from today, having the same conversation, take out your crystal ball and predict for me what the landscape of the Employee Retention Credit, ERC, ERTC, as it's been called, looks like in that space and time one year from today.

Jon, go first.

Jonathan: Well, one thing we haven't really talked about today is the number of IRS employees that have been laid off and separated from the IRS and the proposed reduction in force, that is going to take place after the filing season. You know, it's been, estimated anywhere from 25% to 50% of IRS employees may leave the service within the next four to six months, let's say. If that's the case, the IRS is going to have a lot harder time paying claims, performing audits. IRS Independent Office appeals is going to be affected as well. So appeals will go slowly. You know, I would expect more... if Billy Long does get confirmed, I would expect more taxpayers to get paid. But I think we're still going to be dealing with some of this a year from now because the IRS is going to be much smaller. And it's going to have a hard time digging out from the more than one million claims that are outstanding. With a smaller workforce it's just going to take time to work through that huge backlog.

Matt: Brian, same question to you. And you can't say, I agree with Jon, because that doesn't make for interesting podcasting.

Brian: So, right. Putting aside the reduction in force that Jon talked about, which I think is a valid issue that is absolutely going to affect ERC because it's going to affect every aspect of what the IRS is doing. But put that aside. In December at a conference in Las Vegas, the then-IRS Commissioner Danny Werfel said, he laid out a plan for paying probably 75% of the outstanding claims in 2025.

So I think that in a year, under the worst-case scenario-- which is the IRS really investigating these hard, really looking closely at them-- we would still have the vast majority of the claims paid. So I think that if Commissioner Designee Long is confirmed, we're just going to go faster. So in a year we



may have a lot of claims that still aren't paid, but we're going to see a path where they have been processed and they are being paid, and somebody's gotta be the last person, right? There's always somebody who's the last person to get their check. So, I think in a year we are going to see that things have changed. Because even in a worst-case scenario, most people with outstanding claims were going to get paid. And I think it'll go a lot quicker with a Commissioner Long.

Having said that, I think there are difficulties that are going to be inherent with reduction in forces. There are less people to approve these audits. There are less people to sign off on investigations and say, yes, this is a good claim. No, that's a bad claim. There are people in the Bureau of Fiscal Services who actually press the buttons that cut the checks, and they're not there anymore because they've been reduced in force as well.

So I think that's going to have an impact. But I think if we look at that impact as separate from what's happening with the ERC, I think in a year, the ERC process is going to be in a much better place subject to implications from the reductions in forces that are happening in the IRS and throughout the entire government.

Matt: Well, you've heard of those prognostications here, folks. And I know that the business community is chomping at the bit to understand when and if their claims for this tax credit will be processed. But it sounds like the consensus is that there is some hope on the horizon, with the significant caveat that if there is a denial that has been issued, or if there is even concern, now is really the time to get your house in order. And I know that we as a firm have been very active in this particular area in advising clients about our opinions on the propriety of their eligibility. And looking, and oftentimes working with accounting firms to look at the actual math behind their claim while we've been in this bit of uncertainty to ensure that it's not advisable to potentially withdraw a claim. So I think those prognostications for the valid and the claimant, for lack of a better phrase, that has their house in order, or at least a high level of confidence that their house is in order, will be a welcome set of news from you all.

And I can't thank you both enough for being with us on this episode of "The Presumption of Innocence" as we continue our quest to unpack some of the shifting priorities as we've once again changed administrations in the United States. And had a, what I would call uncharacteristically more significant than perhaps in my lifetime, number of, of changed priorities that have flowed from that.

So thanks so much for joining us, gentlemen. It's a pleasure to have you. We'll, we'll have you again soon to round out our discussion and see if those prognostications came true but thanks for being with us on this episode of "The Presumption of Innocence." That is all the time we have for today, but until next time, I'm your host, Matt Adams.

We'll see you then. Take care.