

FBA ERC Panel: 2026 Tax Conference Update

March 5, 2026

Federal Bar Association Virtual Tax Law Conference

Moderator:

Maryna Sticksel, McMahon & Tivnan, PC

Speakers:

Morgan C. Nighan, Nixon Peabody LLP

Patrick M. Cox, Nixon Peabody LLP

Katherine Chace, Miller & Chevalier, Chartered

Summary:

This panel addressed the evolving landscape of the Employee Retention Tax Credit (“ERC”), focusing on administrative challenges, litigation trends, and transactional implications. Panelists discussed the statutory evolution of the ERC, the impact of the One Big Beautiful Bill Act (“OBBBA”), the Internal Revenue Service’s (“IRS”) enforcement posture, and emerging risks for taxpayers and practitioners navigating ERC-related disputes.

ERC Administrative Challenges and IRS Enforcement

Patrick Cox emphasized that the ERC program has been significantly affected by widespread improper claims and aggressive marketing by third-party promoters. As a result, the IRS has adopted a more restrictive and enforcement-focused posture, including increased use of disallowance letters, correspondence examinations, and refund clawback mechanisms.

Cox noted that the IRS’s administrative tools, such as Letters 105C and 106C, have become central to resolving ERC claims, but they impose strict procedural requirements on taxpayers. He highlighted that delays in processing, coupled with inconsistent IRS communication, have created substantial uncertainty. While administrative remedies such as contacting the IRS or the Taxpayer Advocate Service remain available, these avenues have proven challenging in practice.

Litigation Trends and APA Challenges

Morgan Nighan explained that litigation has emerged as an alternative mechanism for resolving ERC disputes, growing in popularity given the IRS's backlog and delays in processing claims. She discussed the growing number of refund suits brought under Internal Revenue Code ("IRC") § 7422, as well as Administrative Procedure Act ("APA") challenges targeting IRS guidance, including Notice 2021-20.

Nighan noted that APA claims have faced significant hurdles, particularly with respect to standing and the availability of alternative remedies through refund litigation. Courts have been reluctant to grant broad relief, and early decisions suggest a judicial preference for resolving disputes through traditional refund actions rather than systemic challenges to IRS procedures. She also highlighted increasing litigation between taxpayers and ERC promoters, including fraud and contract disputes.

Refund Litigation and Procedural Considerations

Katherine Chace focused on the procedural framework governing ERC refund litigation. She explained that taxpayers must carefully evaluate forum selection when bringing refund claims, particularly the choice between U.S. district courts and the Court of Federal Claims. Factors such as the availability of jury trials, applicable precedent, and judicial expertise play a critical role in this decision.

Chace also emphasized the importance of complying with statutory requirements under § 7422, including exhaustion of administrative remedies and adherence to strict timing rules. She highlighted additional complexities for taxpayers that used Professional Employer Organizations ("PEOs"), noting that such arrangements may affect standing and the ability to pursue refund claims directly against the government.

M&A Due Diligence and Strategic Considerations

Cox addressed the implications of ERC-related risks in mergers and acquisitions. He explained that extended statutes of limitation, particularly for 2021 ERC claims, have made ERC diligence a critical component of transactional practice. Buyers are increasingly scrutinizing ERC claims, particularly where third-party promoters were involved or where substantiation is limited.

Cox noted that unresolved ERC issues can materially impact deal structure, including the negotiation of representations, warranties, and indemnification provisions. He also highlighted

the importance of addressing amended income tax returns and protective claims, which may create additional exposure if ERC claims are later disallowed.

Looking Ahead: Enforcement, Backlog, and Systemic Concerns

Panelists agreed that the ERC system remains under significant strain, with a substantial backlog of claims and ongoing uncertainty regarding IRS enforcement priorities. While recent data suggests some improvement in processing times, skepticism remains regarding the accuracy of reported reductions in the backlog.

The panel also identified several emerging issues likely to shape the future of ERC litigation, including constitutional challenges to retroactive legislative changes, continued APA litigation, and the potential for increased civil and criminal enforcement. Panelists emphasized that practitioners must remain attentive to procedural deadlines, documentation requirements, and evolving IRS guidance as the ERC landscape continues to develop.