

Publications

IRS Releases FAQs with Additional Guidance on the CARES Act Employee Retention Tax Credit

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The IRS has issued [FAQs](#) providing additional guidance on several aspects of the CARES Act Employee Retention Tax Credit, which we previously [discussed here](#). The following alert summarizes a number of the key topics addressed in these FAQs.

When does a business have a “full or partial suspension of operations due to a governmental order”?

Governmental Orders. A “governmental order” is an order, proclamation or decree that limits commerce, travel or group meetings in a manner that affects an employer’s business operations in a jurisdiction in which the employer operates. General statements and comments by government officials during a press conference do not qualify as a governmental order.

Reduced Hours/Telework. If a governmental order requires reduced hours of operation, the hours of closure generally are treated as a partial suspension due to the order. However, where a government order requires a partial or complete shutdown of a workplace, but the employer can continue operations “comparable to its operations prior to the closure” by requiring its employees to telework, the employer has not experienced a full or partial suspension of operations. In other words, the FAQs take the position that, if employees are able to perform services remotely, the fact that they are not performing those services remotely will not support treatment of a full or partial suspension of operations.

Essential Businesses. An employer operating an essential business does not experience a “full or partial suspension of operations due to a governmental order” if the applicable government orders allow the employer to remain open. This remains true even if the government order requires customers of the business to stay at home. However, the FAQs provide that, when a full or partial suspension of operations of an essential business is the result of inability to obtain critical goods or materials from suppliers that were required to suspend operations

under the order, the essential business's suspension is treated as "due to a governmental order."

Employers in Multiple Jurisdictions. Where an employer operates in multiple jurisdictions, and is subject to government orders limiting operations in some, but not all, of the jurisdictions, the employer is considered to have a partial suspension of operations in all of its jurisdictions due to a government order. (This rule also applies to where multiple legal entities are treated as a single "employer" for purposes of the Employee Retention Tax Credit.)

Lifting Government Orders. Employee Retention Tax Credits are only available for wages paid while the applicable governmental order is in force. This means that no credit may be claimed after the governmental orders in all applicable jurisdictions would allow the employer to resume operations. Because many states are allowing employers to resume operations while encouraging continued social distancing, this will effectively end the credit opportunity before most employers will be willing to resume full operations.

What is a "significant decline in gross receipts" qualifying for the Employee Retention Tax Credit?

The gross receipts test is based on the receipts for all entities in the controlled group. Many companies had assumed the test would apply by entity and will be surprised that they do not have a sufficient reduction when all related entities are aggregated. There is a safe harbor rule for employers that acquired a trade or business during 2020 that allows the purchaser to consider the seller's 2019 receipts related to the acquired business.

What are "wages" qualifying for the Employee Retention Tax Credit?

Wages. The FAQs provide that a credit cannot be taken for any severance paid to a former employee. Because there is no standard definition of "furlough" or "layoff" (some employers treat them as a termination subject to reemployment while others treat them as a leave of absence), it will be important for each employer to confirm how affected employees have been classified for all other benefits to determine whether wages paid during the layoff/furlough will be eligible for the credit.

As noted in our prior alert, there is a different calculation of the amount of qualified wages depending on whether the employer has, on average, more than 100 full-time employees during 2019. This is determined based on the aggregated employees in all related companies.

For an employer group with 100 or fewer employees during 2019, the credit is based on all wages paid during the suspension of operations or period of significant gross receipts decline (limited to the period from March 13, 2020 to December 31, 2020).

In contrast, for an employer group with more than 100 employees, the credit may only be taken in connection with the wages paid to an employee who is not providing services due to the governmental order, or during a quarter in which the employer group has had a significant decline in gross receipts (also limited to the period from March 13, 2020 to December 31, 2020). The wages are capped by the rate of pay in effect before the pandemic. An employer can take a credit for a prorated portion of salary paid to an employee who continues to receive their regular salary for a reduced level of services.

Health Plan Expenses. Generally, where an employer pays wages to an employee qualifying for Employee Retention Tax Credits, the employer may claim an additional Employee Retention Tax Credit for a portion of the health care costs attributable to those wages. Under the FAQs, where an employee is not providing any services for an employer, but the employer continues to pay some wages to the employee, then the employer remains entitled to claim this additional credit related to the health care costs. However, if the employer does not pay any wages to the employee and only continues to cover their health care costs, none of those health care costs are eligible for the credit. This results in a surprising “cliff” test, where the continuing payment by an employer of a small amount of wages plus health care costs with respect to an employee may yield a materially different result from the payment of no wages plus health care costs. This may be an issue that Congress considers revisiting.

How does claiming the Employee Retention Tax Credits affect an employer’s compensation deduction?

An employer who claims the Employee Retention Tax Credit will have its compensation tax deduction reduced by the amount of the Employee Retention Tax Credit claimed by the employer.

Contact your Vorys attorney with questions about these, or any other aspects of the Employee Retention Tax Credit.

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VORYS COVID-19 TASK FORCE

Vorys attorneys and professionals are counseling our clients in the myriad issues related to the coronavirus (COVID-19) outbreak. We have also established a comprehensive Coronavirus Task Force, which includes attorneys with deep experience in the niche disciplines that we have been and expect to continue receiving questions regarding coronavirus. Learn more and see the latest updates from the task force at vorys.com/coronavirus.