



Employee Retention Tax Credit (ERTC) FAQ: Requests for Clarification

- **FAQ #28**

- Issue 1: Only eligible orders from U.S. government authorities apply. This limitation was not included in the statute, and orders of appropriate governmental authorities outside the U.S. directly affect U.S. based employees, particularly those in the transportation industry whose employers provide transportation services to and from foreign locations.
- Fix 1: Allow eligible employers to claim credit on U.S. based payroll wages paid to U.S. employees with partially suspended activities due to governmental orders of non-U.S. locations.
- Example 1: Some U.S. transportation companies are unable to operate in non-U.S. jurisdictions due to limitations of those other jurisdictions. The response to this FAQ doesn't consider an eligible employer to be one that experiences full or partial suspension of operations due to such other governmental restrictions, even though U.S. employees are being paid not to work at full capacity due to non-U.S. governmental restrictions.
- Issue 2: It is unclear if an employer's operations considered to be partially suspended for purposes of the ERTC if the employer is required to limit the number of customers in the business (based on square footage, seating capacity or occupancy) by a governmental order.
- Fix 2: Clarify that this is a partial suspension for purposes of the ERTC.
- Example 2: As long as social distancing restrictions are in place for businesses via a government mandate, operations should be considered partially suspended. For restaurants, such restrictions include limiting party size at tables to six people or less, six feet of separation between tables, or limiting number of customers based on capacity, square footage, or occupancy. The restrictions impact the ability to make payroll, and thus the ERTC should still be available to these businesses.

- **FAQ #30**

- Issue 1: Essential Business (EB) vs Non-Essential Business (NEB) Concept. The EB concept was not included in the statute. This FAQ ignores the fact that even EBs can experience partial suspension of operation of a trade or business (E.g., a division of an EB that experiences partial suspension of operations) but make business decision to keep employees on their payroll despite the financial impacts experienced by COVID-19.
- Fix 1: Allow "essential businesses" to be eligible employers if a division or portion of that trade or business experiences a partial suspension of operations due to an appropriate governmental order.
- Example 1: Mayor of City A issues a shelter-in-place order for NEB in the City. Company B is an EB that relies on in-person sales of services to

customers at their place of business. Due to shelter-in-place order, customers are unavailable to Company B. Company C is a NEB, but also sells directly to customers at their locations, but is unable to sell due to both essential restrictions and shelter-in-place. Both Companies continue to pay employees who are not working and neither get new sales to customers. It is inequitable for Company C to get a retention credit while Company B does not.

- Issue 2: FAQ #30 could be viewed as inconsistent with FAQs #36 and #37 where under the multiple locations and aggregation rules it could otherwise qualify.
- Fix 2: Make clear that any FAQ guidelines look first to the fact pattern on multiple locations and aggregation rules, and if part of the broader group is deemed an Eligible Employer due to partial locations (FAQ#36) or partial operations (FAQ#37), then the entire affiliated group will be considered an Eligible Employer.
- **FAQ #32**
 - Issue:
 - Allowing EBs to be considered eligible employers due to a full or partial suspension of operations due to supplier impacts (FAQ #31) is appropriate. This treatment should be extended to account for customer impacts (FAQ #32). For instance, some EB retailers (e.g., grocery chains) can't service the same number of customers that it normally would due to the COVID guidelines (e.g., limiting the number of people in the store at a time due to social distancing), and are thus experiencing partial suspension of operations.
 - Similarly, if NEBs are closed and can't purchase or receive deliveries of products, companies considered EBs can't make those deliveries until NEBs return to operation and deliveries can be made. This situation should also be a partial suspension.
 - Fix 1: Strike FAQ #32 and replace with a rule for customer impact that is analogous to FAQ #31. Revised FAQ #32 should provide that if the facts and circumstances indicate that the EB's operations are fully or partially suspended as a result of the inability to attract customers that were required to stay home, then the EB would be considered an Eligible Employer.
 - Fix 2: Add an FAQ that provides that if the facts and circumstances indicate that an EB's operations are full or partially suspended as a result of inability to sell or deliver to third party business customers, then the EB would be considered an eligible employer.
- **FAQ #33**
 - Issue: The FAQ provides no definition of "comparable" and has only one example, with a disqualified employer. The example cites the employees previously teleworking "once or twice per week" and the company holding

business meetings in multiple locations. These facts alone do not assure that operations are “comparable” after closure of the business’ office.

- Fix: FAQ #33 should be withdrawn, as defining “comparable” operations is inherently difficult, risking inconsistent application across different industries and scenarios. If not withdrawn, FAQ #33 should identify when operations are no longer “comparable” due to qualitative measures. FAQ #33 should acknowledge that current conditions could render teleworking materially different from operations prior to the closure, with suppliers and customers impacted and employees newly responsible for child care, home schooling, and health management.

- **FAQ #38**
 - Issue: Wages paid after a governmental order is lifted.
 - Fix: The position taken by the IRS in the FAQ is more restrictive than CARES Act §2301, which makes no reference to any period during the calendar quarter. Section 2301 defines an eligible employer and qualifying wages with respect to the calendar quarter. An employer could pay an employee for services not provided after the expiration of a stay at home order where the failure of the employee to provide services is nonetheless attributable to the stay at home order.

- **FAQ #55**
 - Issue: This FAQ could be read to require tracking of time reductions in time reports as the only reasonable method to determine the number of hours that a salaried employee is not providing services.
 - Fix: Strike the phrase “based on the time records maintained by employees,” in Example 1.

- **FAQ #56**
 - Issue: If a company implements a policy to use paid time off because of COVID-19, these wages do not appear to be eligible for the ERTC.
 - Fix: Wages related to use of paid time off due to COVID-19 should qualify for the ERTC.