

Latest on Employee Retention Tax Credit: April 30, 2020

We have reported on this tax credit previously, but there have been no recent updates. Yesterday the IRS finally released an FAQ document on the program which you can access here:

<https://www.irs.gov/newsroom/faqs-employee-retention-credit-under-the-cares-act>.

Please note that, while this is an IRS document, it contains a very clear disclaimer that it may not be relied upon as legal authority: *“This FAQ is not included in the Internal Revenue Bulletin, and therefore may not be relied upon as legal authority. This means that the information cannot be used to support a legal argument in a court case.”*

It should also be noted that, not only does the answer to Question 33 on the issue of what constitutes “suspension of operations” for a nonessential company lack legal authority, it adds confusion. The IRS example in the answer is limited to a non-essential employer (software company) where “... **all** employees at the company teleworked once or twice per week.” This is obviously a limited/narrow example.

33. If a governmental order requires an employer to close its workplace, but the employer is able to continue operations comparable to its operations prior to the closure by requiring employees to telework, is the employer considered to have a suspension of operations?

No. If an employer’s workplace is closed by a governmental order, but the employer is able to continue operations comparable to its operations prior to the closure by requiring its employees to telework, the employer’s operations are not considered to have been fully or partially suspended as a consequence of a governmental order. The employer may be considered an Eligible Employer and may be eligible for the Employee Retention Credit if it experiences a significant decline in gross receipts. For more information on what constitutes a significant decline in gross receipts, see:

[*Determining When an Employer is Considered to have a Significant Decline in Gross Receipts.*](#)

Example: Employer C, a software development company maintains an office in a city where the mayor has ordered that only essential businesses may

operate. Employer C's business is not essential under the mayor's order and must close its office. Prior to the order, all employees at the company teleworked once or twice per week, and business meetings were held at various locations. Following the order, the company ordered mandatory telework for all employees and limited client meetings to telephone or video conferences. Employer C's business operations are not considered to be fully or partially suspended by the governmental order because its employees may continue to conduct its business operations by teleworking