



IRS Employee Retention Credit (ERC) FAQs

Following the LeadingAge [webinar](#) on the IRS Employee Retention Credit, we gathered responses from frequent member questions. Below, we have organized them by topic area for quick reference. These FAQs have been written for LeadingAge by Christopher N. Moran, Esq. of Venable LLP, the legal expert for the webinar.

I. Aggregation Rule:

QUESTION: If a provider is a multi-site organization, and yet each location has its own tax ID number, do the aggregation rules still apply, or can each location apply separately for the ERC?

ANSWER: Even if each location has its own tax ID number, the aggregation rules apply. As long as there's common control, either a so-called sibling relationship or a parent organization, the parent organization would still be required to aggregate its employee count.

QUESTION: So what should an 'aggregate group' organization do if they have sites or affiliates in different states, and generally speaking, some of their sites or affiliates had a full or partial suspension of activity due to a state or federal order, and others did not?

ANSWER: IRS guidance states that if an employer operates in multiple jurisdictions and in one jurisdiction, the employer's operations are fully or partially suspended by a government order, the employer is an eligible employer. Similarly, if multiple affiliated entities would be treated as a single employer under the aggregation rules and the operations of one entity are fully or partially suspended by a government order, the operations of each entity are treated as fully or partially suspended.

QUESTION: Have you seen any multisite or affiliated organizations successfully apply for the ERC? Some of our field experts have said it's highly unlikely such organizations will qualify. How does a multisite or affiliated organization prove its eligibility?

ANSWER: Many multisite or affiliated organizations will be eligible under the government order test. However, if the organization had over 500 full-time employees in 2019, the employer can only claim the credit for wages paid to employees that were not working due to COVID-19 or were working a reduced schedule without a corresponding reduction in pay. In that scenario, a multisite provider is likely an eligible employer, but the provider's potential credit could be minimal.

QUESTION: If a provider has more than 500 full-time employees on a consolidated basis across communities, but there's only one board that oversees all the communities, is the provider limited to: just the full-time employees that have reduced schedules, and or to those couldn't work, or to those who were not paid to work or were paid to be off and not work during the pandemic?

ANSWER: *If the provider and its affiliates are treated as a single employer under the aggregation rules, and the provider and its affiliates had a total of more than 500 full-time employees in 2019, then the only wages eligible for the credit are those wages were paid to people who were not working due to COVID-19 restrictions or were working a reduced schedule without a corresponding reduction in pay.*

II. Audit/ Repayment of Funds Received:

QUESTION: *If an employer received more than \$750,000 of ERC funds in any single year, would this trigger compliance with the single audit rules?*

ANSWER: *No. The Office of Management and Budget (OMB) and the Treasury Department have jointly confirmed that the Employee Retention Credit is not subject to the single audit rules.*

QUESTION: *To what degree is there a serious risk of audit, especially a successful audit with the IRS denies eligibility and then an organization must return the funds?*

ANSWER: *The risk of the IRS auditing the organization and determining that the organization must repay some or all of the credit is higher if the organization does not have a strong legal position for eligibility. Some consulting companies have taken a 'package approach' to ERC eligibility and have advised their clients to claim the credit for each quarter in 2020 and the first three quarters in 2021 based on generic CDC and OSHA guidance. If the IRS decides to investigate any of these consultants, the IRS might open investigations into the consultants' clients.*

QUESTION: *When does the interest accrual start for any repayment amount? Does it start back in 2020 if this is when you applied, or at the time of notice of the disallowed amount?*

ANSWER: *If an employer claims the ERC on an amended payroll tax return and is later required to repay any portion of the credit, interest would be calculated as of the date the original payroll tax return was due.*

III. General Eligibility:

QUESTION: *Have you seen any precedents yet to guide us on determining eligibility? Some experts in the field describe the actual language in the legislation as highly interpretive. Has the IRS issued any guidance? Is there anything to give us some confidence that, if we pursue this credit, that we won't end up in an audit situation?*

ANSWER: *The IRS has provided examples of situations where the IRS thinks the taxpayer qualifies under the government order test. Most of those examples are geared at consumer retail or food services, so they're not too helpful aging services providers. That said, IRS guidance does establish a 'safe harbor' for eligibility under the government order test. Under the safe harbor test, an order must apply to more than a "nominal portion" of the employer's operations and have more than a "nominal effect" on the employer's operation. If the government order effects more than 10% of the employer's operations - and that could be measured by the wages paid to employees that work in that section, or to program hours spent by employees in that that program or section, or if there's other ways to measure whether the order effects more than more than 10% of the employer's operations - then the order has applied to*

more than a nominal portion of the employer's operations. If the order results in at least a 10% reduction in the employer's ability to provide goods or services in the normal course of its operations, then the order has had more a nominal effect on the employer, and the employer should be eligible.

QUESTION: *Just to clarify: in 2021, an employer could have 475 full time employees and 500 part time employees and still qualify?*

ANSWER: *The determination of whether an employer is a small employer or a large employer is based on the number of full-time employees in 2019. If an employer had 475 full time employees and 500 part time employees in 2019, the employer is considered a "small employer" for the 2021 version of the ERC.*

QUESTION: *Between the years of 2020 and 2021, the IRS has made several legislative changes to the ERC. How does an organization follow the criteria: within each year, or is it only the later-enacted criteria that apply that all years?*

ANSWER: *It depends. In some cases, the rules are different depending on the calendar quarter, and in other cases, the later-enacted rules apply to all quarters. The government order test is the same for all quarters. The alternative gross receipts test requires a 50% revenue decline for the 2020 version of the credit and a 20% decline for the 2021 version of the credit. The 2020 version of the credit has a 50% credit rate, with a wage limitation of \$10,000 for all quarters in 2020. The 2021 version has a 70% credit rate and a quarterly wage limitation of \$10,000. Congress retroactively eliminated the provision that prohibited an employer that obtained a PPP loan from claiming the ERC.*

IV. Government Order Test:

QUESTION: *Does the government order test apply to wages within the scope of the ordered shutdowns, or do all wages apply?*

ANSWER: *That question goes into the calculation of a large and a small employer. If the organization is a small employer (under different thresholds for the 2020 and 2021 versions of the credit), then all the wages paid during the period when the employer was eligible under the government order test would qualify. Large employers are only looking at wages that were paid to people that were that were not working because of the government order or were working a reduced schedule because of the order.*

QUESTION: *For the government order test to apply, does it have to be a federal order, or can it be a state order, or a locality order, or even something that came out from CMS in terms of restrictions or guidance?*

ANSWER: *The order must have been issued by an appropriate governmental authority, which could be a federal order, a state order, or a local order. A local order could include an order from a local government agency, such as a local health department. An "appropriate governmental authority" could be any government agency with authority to issue COVID-19-related orders. If it's CMS is ruled that restricted operation, that should fall under the basis of eligibility. However, recommendations and guidance issued by CDC or OSHA – such as maintaining six feet of social distance or providing PPE to employees likely would not be considered orders from an "appropriate governmental authority."*

QUESTION: *Let's say a provider had to close its dining room due to a government order, but they still delivered meals to resident rooms - is that considered to pass the government order test, and would that provider be eligible for the ERC?*

ANSWER: *The IRS guidance does not directly address this situation. For many Life Plan Communities or other forms of congregate senior housing, the social aspect of dining and shared mealtimes is a significant portion of their operations. There is a significant difference between enjoying community dining and eating alone in a room. So restrictions on community dining could be a basis for eligibility under the government order test.*

QUESTION: *How could multisite providers analyze eligibility under the government order test?*

ANSWER: *In that scenario, the multi-site provider should look at sites subject to government orders for the longest period. For example, a provider with operations in New York City and in other states might start by analyzing the restrictions in effect in New York City to see how many quarters these restrictions applied. If the government order in New York City resulted in the provider's operations being fully or partially suspended in a calendar quarter, all the other locations and/or affiliated entities should be eligible.*

V. Gross Receipts Test:

QUESTION: *Which months should a provider compare when doing the gross receipts test?*

ANSWER: *To determine eligibility in the second quarter of 2021, the provider could compare either the second quarter of 2021 to the second quarter of 2019 or the first quarter of 2021 to the first quarter of 2019.*

QUESTION: *If a provider were to claim eligibility under the gross receipts test because visitation was suspended, would the provider be eligible only during the time that visitation was suspended, or does it apply to the entire quarter or year of the suspension?*

ANSWER: *The provider in that example would only be eligible during the times when the visitation was suspended.*

QUESTION: *How does a provider account for a reduction in occupancy? How would that fit into the calculations of either revenue decline or gross receipts losses, where an organization had certain revenue losses from a drop in occupancy?*

ANSWER: *If the decline in revenues exceeded the thresholds under the gross receipts test, the provider would be an eligible employer. If the reduction in occupancy is tied to a government restriction, such as a restriction on admitting new residents, then the government restriction could be a basis for eligibility under the government order test.*

VI. Nominal Impact/ Safe Harbor:

QUESTION: *How is the nominal impact that's a result of a full or partial shutdown defined for the government order test? Is there a threshold that defines 'more than nominal impact' in terms of the degree of disruption, for eligibility?*

ANSWER: *IRS guidance establishes a safe harbor whereby a portion of an employer's operations is considered more than a "nominal portion" if (1) the revenues from that portion are not less than 10% of the employer's overall revenues, or (2) the employee hours in that portion are at least 10% of the employer's total employee hours.*

QUESTION: *If a provider was not able to allow tours to prospective residents, and it resulted in less than 50% of typical annual moves into the independent living sections, does that meet the nominal impact and the government order test?*

ANSWER: *In this example, if independent living is more than a nominal portion of the provider's operations, the restriction on tours to prospective residents should be a basis for eligibility under the government order test.*

VII. Provider Relief Fund/ Paycheck Protection Program:

QUESTION: *Are providers who have already received Provider Relief Funds (PRF) during the pandemic eligible for the ERC, and to what degree must there be documentation of full or partial revenue loss, where PRF funds have helped to offset those losses?*

ANSWER: *If an employer received the PRF, the employer could still potentially claim the ERC. The programs aren't mutually exclusive. The PRF would be treated as gross receipts for purposes of the gross receipts test. If a provider received a PRF distribution in a calendar quarter, the provider likely would not be eligible for the ERC in that quarter under the gross receipts test, but the provider could still be eligible under the government order test. So that provider could potentially be eligible under the government order test regardless of whether the provider received a distribution for the PRF.*

QUESTION: *Should the PRF and Paycheck Protection Program (PPP) monies be included in the calculation of the gross receipts test?*

ANSWER: *The PRF should be included in the calculation of gross receipts test; the PPP funds would not. For example, if an employer had \$10,000 of gross receipts in the second quarter of 2019 and in the second quarter of 2021 had \$7,900 of gross receipts, and received \$1500 from the PRF, for a total of \$9400 in gross receipts, that employer would not be eligible under the gross receipts test based on the decline from the second quarter of 2021. However, the employer still could be eligible under the government order test.*

QUESTION: *Let's say a provider applied PRF payments to ERC wage costs, can they also claim the ERC for the same purposes, or does this constitute "double dipping?"*

ANSWER: *The employee retention credit statutes do not prohibit a provider from claiming the ERC for wages that were funded by a PRF distribution. Congress said that wages that are used for PPP*

forgiveness can't be claimed for the employee retention credit, but there's no similar rule with PRF. That said, a provider receiving a PRF distribution must stipulate that the distribution is not being used to pay for expenses that were reimbursed by another source. This stipulation should not prevent providers from filing amended payroll tax returns to claim the ERC for wages that were paid with PRF funds in 2020 or 2021.

VIII. Receipt of ERC Funds:

QUESTION: *How long should organizations expect to wait to receive ERC funds?*

ANSWER: *The IRS could take at least six to nine months to process an ERC refund claim.*

QUESTION: *If an organization does receive the ERC funds, how can they be used? Are there any requirements, or are they restricted in any way? Let's say that organization then spends its ERC funds before the end of the look back period – how should that be accounted for?*

ANSWER: *There are no restrictions on using the funds. If the IRS audited in an organization and the organization went through an audit appeals and subsequently some or all of the credit was disallowed, the organization would have to repay the disallowed amount, with interest. The interest rate for underpayments of tax is based on a rate the IRS publishes quarterly.*

QUESTION: *What should a provider do if they have submitted their Form 941x and it's been over a year since they have done so? How can they find out the status of their submission?*

IX. Wage Calculations:

QUESTION: *What is the definition of "full time" employees? Specifically what number of hours qualifies as "full time" versus "part time?"*

ANSWER: *The "full time" employee definition for the ERC is the same as that in the Affordable Care Act, typically 30 hours a week or 130 hours per month.*

QUESTION: *If a provider is self-funded for their health insurance, how would this be factored into 'qualified wages?'*

ANSWER: *The IRS guidance states that if an employer sponsors a self-insured group health plan, the employer may use any reasonable method to determine and allocate health plan expenses, including the COBRA applicable premium for employees, or any reasonable actuarial method to determine the annual estimated expenses of the plan.*

QUESTION: *When including the health insurance in the calculation of the quarterly maximum, do you deduct the employee contribution or use the gross value of the health insurance paid?*

ANSWER: *There are several ways to calculate the qualified health expenses paid by the employer. Oftentimes, the simplest way to include the health expenses is to use the gross wages paid to the employee without taking into account any pre-tax salary reductions, then adding the employer's share of health insurance costs for the employee.*