

OSHA Recommendations on COVID Are Not Enough to Qualify a Business for the Employee Retention Credit

December 7, 2023

The IRS recently issued guidance [1] explaining that OSHA communications regarding COVID-19 precautions alone do not allow employers to qualify for the Employee Retention Credit ("ERC").[2]

Other than some start-up businesses, there are two ways for an employer to qualify for the ERC. First, an employer could qualify if a government order required a full or partial shutdown of the operation of the business due to COVID-19. Second, an employer could qualify if its gross receipts in 2020 and 2021 took a sufficient dive compared to 2019.

Tax consultants and employers have been creative and sometimes aggressive in their ERC claims. The recent IRS guidance addresses an inquiry on whether the ERC could be claimed based on OSHA guidance which interpreted pre-existing rules in light of COVID-19 and provided nonbinding recommendations such as standards for personal protective equipment, ventilation and sanitation.

The IRS guidance denied claims that the OSHA communications qualified employers for the ERC, finding that:

- The OSHA communications were not government "orders" because they were mere recommendations, guidelines or suggestions.
- The OSHA communications were not "due to" COVID 19, because they originally related to infectious diseases existing prior to COVID-19; and
- The operation of a trade or business was not fully or partially suspended because of masks, social distancing or similar requirements.

The first IRS conclusion that the OSHA guidelines were not orders might be disputed by the fact that some companies were subject to OSHA fines due to violations of COVID rules.

The IRS guidance notes that if the implementation of OSHA recommendations become mandatory because of orders from an appropriate governmental authority (such as an executive order from the governor), an employer may be eligible to claim the ERC.

However, even if there is a government order, the other requirements still must be met (that there is a full or partial suspension of business and that the orders were due to COVID 19).

The guidance also concluded that an employer that continued operations by using remote workers was able to continue in a manner comparable to pre-COVID-19 operations, because the employer had allowed remote work prior to the pandemic and continued to allow it in the last two quarters of 2021.

As explained in **our prior alert**, the IRS has stopped processing new ERC claims and is now allowing penalty-free withdrawals of previous ERC claims. Although many false claims for the ERC have been made, employers who actually qualify should not be dissuaded from applying.

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If you need help unwinding your prior ERC claim or determining your current eligibility, Miller Canfield can help you. Please contact your Miller Canfield attorney or the authors of this alert if you wish to discuss the matter further.

[1] Office of Chief Counsel Internal Revenue Service Memorandum Number AM 2023-007 (Released October 18, 2023).
Link: **Memorandum AM 2023-007 (irs.gov)**

[2] If an employer qualifies for the ERC during quarters from March 2020 to September 2021, it could receive a refund of employment taxes up to \$5,000 or \$7,000 per quarter. Employers may file refund claims until April 15, 2024, for 2020 claims and April 15, 2025, for 2021 claims.