

GOVERNMENTAL ORDERS: Full or Partial Suspension of Trade or Business Operations

(source: [Guidance on the Employee Retention Credit under Section 2301 of the Coronavirus Aid, Relief, and Economic Security Act Notice 2021-20](#))

QUESTION 1: If a governmental order requires non-essential businesses to suspend operations but allows essential businesses to continue operations, is an essential business considered to have a full or partial suspension of operations due to a governmental order?

ANSWER 1: An employer that operates an essential business is not considered to have a full or partial suspension of operations if the governmental order allows all of the employer's operations to remain open. However, an employer that operates an essential business may be considered to have a partial suspension of operations if, under the facts and circumstances, more than a nominal portion of its business operations are suspended by a governmental order. For example, an employer that maintains both essential and non-essential business operations, each of which are more than nominal portions of the business operations, may be considered to have a partial suspension of its operations if a governmental order restricts the operations of the non-essential portion of the business, even if the essential portion of the business is unaffected. In addition, an essential business that is permitted to continue its operations may, nonetheless, be considered to have a partial suspension of its operations if a governmental order requires the business to close for a period of time during normal working hours.

Solely for purposes of this employee retention credit, a portion of an employer's business operations will be deemed to constitute more than a nominal portion of its business operations if either (i) the gross receipts from that portion of the business operations is not less than 10 percent of the total gross receipts (both determined using the gross receipts of the same calendar quarter in 2019), or (ii) the hours of service performed by employees in that portion of the business is not less than 10 percent of the total number of hours of service performed by all employees in the employer's business (both determined using the number of hours of service performed by employees in the same calendar quarter in 2019).

QUESTION 2: If a governmental order causes the suppliers to a business to suspend their operations, is the business considered to have a suspension of operations due to a governmental order?

ANSWER 2: An employer may be considered to have a full or partial suspension of operations due to a governmental order if, under the facts and circumstances, the business's suppliers are unable to make deliveries of critical goods or materials due to a governmental order that causes the supplier to suspend its operations. If the facts and circumstances indicate that the business's operations are fully or partially suspended as a result of the inability to obtain critical goods or materials from its suppliers because they were required to suspend operations, then the business would be considered an eligible employer for calendar quarters during which its operations are fully or partially suspended and may be eligible to receive the employee retention credit.

Example: Employer A operates an auto parts manufacturing business. Employer A's supplier of raw materials is required to fully suspend its operations due to a governmental order. Employer A is unable to procure these raw materials from an alternate supplier. As a consequence of the suspension of Employer A's supplier, Employer A is not able to perform its operations for a period of time. Under these facts and circumstances, Employer A would be considered an eligible employer during this period because its operations have been suspended due to the governmental order that suspended operations of its supplier.

QUESTION 3: If a governmental order causes the customers of a business to stay at home, or otherwise causes a reduction in demand for its products or services, and the business responds to the lack of demand by suspending some or all of its operations, is the business considered to have a suspension of operations due to a governmental order?

ANSWER 3: No. An employer that suspends some or all of its operations because its customers are subject to a government order requiring them to stay at home or otherwise causing a reduction in demand for its products or services is not considered to have a full or partial suspension of its operations due to a governmental order. If an employer's operations are not suspended due to a governmental order but the employer experiences a reduction in demand, the employer may be considered an eligible employer if it experiences a significant decline in gross receipts.

Example: Employer B, an automobile repair service business, is an essential business and is not required to close its locations or suspend its operations. Due to a governmental order that limits travel and requires members of the community to stay at home except for certain essential travel, such as going to the grocery store, Employer B's business has declined significantly. Employer B suspends its operations due to the lack of demand. Employer B is not considered to have a full or partial suspension of operations due to a governmental order.

QUESTION 4: If an employer voluntarily suspends operation of a trade or business or voluntarily reduces hours due to COVID-19, but the suspension or reduction in hours is not due to a governmental order, may the employer qualify as an eligible employer solely on the basis of the voluntary suspension or reduction in hours?

ANSWER 4: No. An employer that voluntarily suspends operation of a trade or business or voluntarily reduces hours due to COVID-19 is not eligible for the employee retention credit on the basis of a full or partial suspension of its operations.

QUESTION 5: 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?

ANSWER 5: 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, including 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.

However, if the closure of the workplace causes the employer to suspend business operations for certain purposes, but not others, it may be considered to have a partial suspension of operations due to the governmental order.

Example 1: 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 therefore Employer C is required to close its office. Prior to the governmental order, all employees at the company teleworked once or twice per week, and business meetings were held at various locations. Following the governmental 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 due to the governmental order because the employer is able to continue its business operations in a comparable manner.

Example 2: Employer D operates a physical therapy facility in a city where the mayor has ordered that only essential businesses may operate. Employer D's business is not considered essential under the mayor's order, and therefore Employer D is required to close its workplace. Prior to the governmental order, none of Employer D's employees provided services through telework and all appointments, administration, and other duties were carried out at Employer D's workplace. Following the governmental order, Employer D moves to an online format and is able to serve some clients remotely, but employees cannot access specific equipment or tools that they typically use in therapy and not all clients can be served remotely. Employer D's business operations are considered to be partially suspended due to the governmental order because Employer D's workplace, including access to physical therapy equipment, is central to its operations, and the business operations cannot continue in a comparable manner.

Example 3: Employer E, a scientific research company with facilities in a state in which the governor has ordered that only essential businesses may operate, conducts research in a laboratory setting and through the use of computer modeling. Employer E's business is not essential under the governor's order, and therefore Employer E is required to close its workplace. Prior to the governmental order, Employer E's laboratory-based research operations could not be conducted remotely (other than certain related administrative tasks) and employees involved in laboratory-based research worked on-site. Employer E's computer modeling research operations could be conducted remotely, and employees who engaged in this portion of the business often teleworked. Following the governmental order, the employees engaged in the laboratory-based research cannot perform their work while the facility is closed and are limited to performing administrative tasks during the closure. In contrast, all employees engaged in computer

modeling research are directed to telework, and those business operations are able to continue in a comparable manner. Employer E's business operations are considered to be partially suspended due to the governmental order because Employer E's laboratory-based research business operations cannot continue in a comparable manner.

QUESTION 6: What factors should be considered in determining if an employer is able to continue operations comparable to its operations prior to closure such that the employer's operations are not considered to have been fully or partially suspended due to a governmental order?

ANSWER 6: The following factors should be considered in determining if an employer is able to continue comparable operations, although additional factors may be considered as well if relevant:

(1) Employer's telework capabilities. Determine whether an employer has adequate support (IT and otherwise) such that operations can continue via work from another location.

(2) Portability of employees' work. Determine the amount of portable work or work otherwise adaptable to be performed from a remote location, within an employer's trade or business operations.

(3) Need for presence in employee's physical workspace. Evaluate the role that the employer's physical workspace plays in an employer's trade or business (may be critical and necessary, beneficial but not necessary, or merely convenient). If the employer's physical workspace is so critical to its trade or business operations that tasks central to the trade or business's operations are unable to be performed remotely, then this factor alone indicates that the employer is not able to continue comparable operations. Examples of workspace that is critical include laboratories or manufacturing involving special equipment or materials that cannot be accessed or operated remotely.

(4) Transitioning to telework operations. If an employer can conduct comparable operations via telework, but the employer's operations did not previously allow for telework, or allowed for only minimal telework, then some adjustment period is expected, and, generally, the employer's operations are not considered partially suspended during that period. However, if an employer incurs a significant delay (for example, beyond 2 weeks) in moving operations to comparable telework (for example, implementing telework policies or providing employees with equipment to telework), then the employer's trade or business operations may be deemed subject to a partial suspension during that transition period.

QUESTION 7: If a governmental order requires an employer to close its workplace for certain purposes, but the workplace may remain operational for other limited purposes, is the employer considered to have a suspension of operations due to the governmental order?

ANSWER 7: If an employer's workplace is closed due to a governmental order for certain purposes, but the employer's workplace may remain open for other limited purposes, the employer's operations would be considered to be partially suspended if, under the facts and circumstances, the operations that are closed are more than a nominal portion of its business operations and cannot be performed remotely in a comparable manner. If all, or all but a nominal portion, of an employer's business operations may continue, but the operations are subject to modification due to a governmental order (for example, to satisfy distancing requirements), such a modification of operations is considered to be a partial suspension of business operations due to a governmental order if the modification required by the governmental order has more than a nominal effect on the business operations under the facts and circumstances. See Q/A 8 for a description of factors that may be used for determining if a modification required by a governmental order has more than a nominal effect on business operations.

Example 1: Employer F, a restaurant business, must close its restaurant to onsite dining due to a governmental order closing all restaurants, bars, and similar establishments for sit-down service. Employer F is allowed to continue food or beverage sales to the public on a carry-out, drive-through, or delivery basis. On-site dining is more than a nominal portion of Employer F's business operations. Employer F's business operations are considered to be partially suspended because, under the facts and circumstances, more than a nominal portion of its business operations—its indoor and outdoor dining service—is suspended due to the governmental order.

Example 2: Same facts as Example 1, except that two months later, under a subsequent governmental order, Employer F is permitted to offer sit-down service in its outdoor space, but its indoor dining service continues to be closed. During this period, Employer F is allowed to operate only its outdoor sit-down and carry-out service in accordance with the order. Indoor dining is more than a nominal portion of Employer F's business operations. Employer F's business operations are considered to be partially suspended because, under the facts and circumstances, more than a nominal portion of its business operations – its indoor dining service – is suspended due to a governmental order. The following month, under a further governmental order, Employer F is permitted to offer indoor dining service, in addition to outdoor sit-down and carry-out service, provided that all tables in the indoor dining room must be spaced at least six feet apart. This spacing constraint has more than a nominal effect on Employer F's business operations. During this period, even though Employer F resumed all categories of its business operations, Employer F's business operations continue to be partially suspended because, under the facts and circumstances, the governmental order restricting its indoor dining service has more than a nominal effect on its operations.

Example 3: Employer G, a retail business, must close its retail storefront locations due to a governmental order. The retail business also maintains a website through which it continues to fulfill online orders; the retailer's online ordering and fulfillment system is unaffected by the governmental order. The retail storefront locations are more than a nominal portion of Employer G's business operations. Employer G's business operations are considered to have been partially suspended due to the governmental order requiring it to close its retail storefront locations, which are more than a nominal portion of its business operations.

Example 4: Employer H, a hospital, is considered to be operating an essential business under a governmental order with respect to its emergency department, intensive care, and other services for conditions requiring urgent medical care. However, the governmental order treats Employer H's elective and non-urgent medical procedures as non-essential business operations and prevents Employer H from performing these services. Employer H suspends operations related to elective and non-urgent medical procedures, which are more than a nominal portion of Employer H's business operations. Although Employer H is an essential business, Employer H is considered to have a partial suspension of operations due to the governmental order that prevents Employer H from performing elective and non-urgent medical procedures, which are more than a nominal portion of its business operations under the facts and circumstances.

Example 5: Employer I, a grocery store, is considered to be operating an essential business under a governmental order. However, the governmental order requires grocery stores to discontinue their self-serve offerings, such as salad bars, though they may offer prepared or prepackaged food. Employer I modifies its operations to close its salad bar and other self-serve offerings and instead offers prepackaged salads and other items. The salad bar and other self-serve offerings are not more than a nominal portion of Employer I's business operations. Further, the governmental order requiring Employer I to discontinue its self-serve offerings does not have more than a nominal effect on Employer I's business operations under the facts and circumstances, even though Employer I was required to modify its business operations. Accordingly, Employer I's business operations are not considered to be partially suspended due to a governmental order.

Example 6: Employer J, a large retailer, is required to close its storefront location due to a governmental order but is permitted to provide customers with curbside service to pick up items ordered online or by phone. The retail storefront location is more than a nominal portion of Employer J's business operations. During this period, Employer J's business operations are considered to have been partially suspended due to the governmental order requiring it to close its storefront location. Two months later, under a subsequent governmental order, Employer J is permitted to reopen its storefront location. Under the subsequent governmental order, however, Employer J must enforce social distancing guidelines that require Employer J to admit only a specified number of customers into the store per 1,000 square feet. While the governmental order results in customers waiting in line for a short period of time to enter the store during certain busy times of the week, the size of Employer J's storefront is large enough that it is able to accommodate all of its customers after these short waits outside the store. The governmental order requiring Employer J to enforce social distancing guidelines does not have more than a nominal effect on Employer J's business operations under the facts and circumstances, even though Employer J is required to modify its business operations. During this period, Employer J's business operations are not considered to be partially suspended due to the governmental order because the governmental order requiring enforcement of social distancing guidelines does not have more than a nominal effect on its operations.

QUESTION 8: What factors should be considered in determining whether a modification required by a governmental order has more than a nominal effect on business operations for purposes of Q/A-7?

ANSWER 8: The types of modifications that are contemplated by Q/A-7 are those required by a governmental order as a condition of reopening a physical space for business or service to the public. Examples of these modifications include limiting occupancy to provide for social distancing, requiring services to be performed only on an appointment basis (for businesses that previously offered walk-in service), changing the format of service (for example, restrictions on buffet or self-serve, but not prepackaged or carry-out), or requiring employees and customers to wear face coverings.

The mere fact that an employer must make a modification to business operations due to a governmental order does not result in a partial suspension unless the modification has more than a nominal effect on the employer's business operations. Whether a modification required by a governmental order has more than a nominal effect on the business operations is based on the facts and circumstances. A governmental order that results in a reduction in an employer's ability to provide goods or services in the normal course of the employer's business of not less than 10 percent will be deemed to have more than a nominal effect on the employer's business operations. For example, occupancy restrictions at a restaurant with indoor dining service may result in an actual, and more than nominal, reduction of the restaurant's ability to service customers; however, an occupancy restriction at a retailer with sufficient physical space to accommodate its customers regardless of the restriction will likely not result in an actual, and more than nominal, reduction of the retailer's ability to provide goods to its customers.

Modifications altering customer behavior (for example, mask requirements or making store aisles one way to enforce social distancing) or that require employees to wear masks and gloves while performing their duties will not result in more than a nominal effect on the business operations.

QUESTION 9: Are an employer's operations considered to be partially suspended for purposes of the employee retention credit if the employer is required to reduce its operating hours by a governmental order?

ANSWER 9: Yes. An employer that reduces its operating hours due to a governmental order is considered to have partially suspended its operations since the employer's operations have been limited by a governmental order.

Example: Employer K operates a food processing facility that normally operates 24 hours a day. A governmental order issued by the local health department requires all food processing businesses to deep clean their workplaces once every 24 hours in order to reduce the risk of COVID-19 exposure. In order to comply with the governmental order, Employer K reduces its daily operating hours by five hours per day so that a deep cleaning may be conducted within its workplace once every 24 hours. Employer K is considered to have partially suspended its operations due to the governmental order requiring it to reduce its hours of operation.

QUESTION 10: Is an employer that operates a trade or business in multiple locations and is subject to governmental orders requiring full or partial suspension of its operations in some jurisdictions, but not in others, considered to have a partial suspension of operations?

ANSWER 10: Yes. Employers that operate a trade or business in multiple locations and are subject to State and local governmental orders requiring full or partial suspension of operations in some, but not all, jurisdictions are considered to have a partial suspension of operations. Employers that operate a trade or business on a national or regional basis may be subject to governmental orders requiring closure of their locations in certain jurisdictions but may not be subject to a governmental order in other jurisdictions. To operate in a consistent manner in all jurisdictions, these employers may establish a policy that complies with the local governmental orders, as well as the Center for Disease Control and Prevention (CDC) recommendations and the Department of Homeland Security (DHS) guidance; in this case, even though the employer may not be subject to a governmental order to suspend operations of its trade or business in certain jurisdictions, and may merely be following CDC or DHS guidelines in those jurisdictions, the employer would still be considered to have partially suspended operations due to the governmental orders requiring closure of its business operations in certain jurisdictions. Therefore, the employer would be an eligible employer with respect to all of its operations in all locations for calendar quarters during which the employer's operations are

partially suspended whether or not the employer voluntarily adopts consistent measures for its business operations in other jurisdictions.

Example: Employer L is a national retail store chain with operations in every state in the United States. In some jurisdictions, Employer L is subject to a governmental order to close its stores to customers but is permitted to provide customers with curbside service to pick up items ordered online or by phone. In these jurisdictions, Employer L determines that it is not continuing comparable operations and that the stores that are closed to customers are more than a nominal portion of its business operations. In other jurisdictions, Employer L is not subject to any governmental order to close its stores to customers or is considered an essential business permitting its stores to fully remain open. Employer L establishes a company-wide policy, in compliance with the local governmental orders and consistent with the CDC and DHS recommendations and guidance, requiring the closure of all stores and operating with curbside pick-up only, even in those jurisdictions where the business was not subject to a governmental order. As a result of the governmental orders requiring closure of Employer L's stores to customers in certain jurisdictions, Employer L has a partial suspension of operations of its trade or business whether or not Employer L chooses to take consistent measures for stores in other jurisdictions. The partial suspension results in Employer L being an eligible employer nationwide for calendar quarters during which the employer's operations are partially suspended.

QUESTION 11: If the operations of a trade or business of one member of an aggregated group are fully or partially suspended due to a governmental order, are the operations of the trade or business of the other members of the aggregated group considered to be fully or partially suspended for purposes of the employee retention credit?

ANSWER 11: Yes. All members of an aggregated group that are treated as a single employer under the aggregation rules are treated as a single employer for purposes of the employee retention credit. If a trade or business is operated by multiple members of an aggregated group, and if the operations of one member of the aggregated group are suspended due to a governmental order, then all members of the aggregated group are considered to have their operations partially suspended, even if another member of the group is in a jurisdiction that is not subject to a governmental order.

Example: Employer Group M is a restaurant chain that operates a single trade or business through multiple subsidiary corporations located in various jurisdictions. Employer Group M is treated as a single employer under the aggregation rules for purposes of the employee retention credit. Certain members of Employer Group M's operations are fully suspended due to a governmental order, while other members of Employer Group M's operations are not subject to a governmental order and remain open. Because Employer Group M is treated as a single employer for purposes of the employee retention credit, the operations of all members of Employer Group M are treated as fully or partially suspended due to governmental orders suspending the operations of certain of Employer Group M members.

QUESTION 12: If an employer is subject to a governmental order to fully or partially suspend its business operations and the order is subsequently lifted in the middle of a calendar quarter, is the employer an eligible employer for the entire calendar quarter?

ANSWER 12: Yes. An employer with business operations that are fully or partially suspended due to a governmental order during a portion of a calendar quarter is an eligible employer for the entire calendar quarter. However, only wages paid with respect to the period during which the employer is fully or partially suspended due to a governmental order may be considered qualified wages.

Example: State Y issued a governmental order for all non-essential businesses to close from March 10, 2020, through April 30, 2020, and the governmental order was not extended. Pursuant to the order, Employer N, which operates a non-essential business in State Y, closes from March 10 through April 30. Employer N is a large eligible employer in the first quarter and second quarter of 2020 but may claim the credit only for qualified wages paid from March 13, 2020, the effective date of section 2301 of the CARES Act, through April 30, 2020, with respect to employees who were not providing services during this period because of the suspension of operations due to State Y's governmental order.