



Employee Retention Tax Credit and Shuttered Venue Operator Grant

In response to the Greater Columbus Arts Council and Ohio Citizens for the Arts' March 9, 2021 Employee Retention Tax Credit and Shuttered Venue Operator Grant webinar, this document has been compiled to address outstanding questions that could not be answered live due to time constraints and/or additional review. **In addition, the \$1.9 trillion American Rescue Plan Act, H.R. 1319 passed the House of Representatives on March 10, 2021. This legislation will become law once President Biden signs the legislation. That is predicted to be complete by March 12, 2021.** The answers below are based on issued guidance as of March 11, 2021.

Employee Retention Tax Credit (ERTC)

1. **The \$1.9 trillion American Rescue Plan Act, H.R. 1319 (ARPA) passed the House of Representatives on March 10, 2021. What changes impact ERTC?**

Please refer to the Plante Moran alert that highlights the changes to the ERTC program.

<https://www.plantemoran.com/explore-our-thinking/insight/2021/03/american-rescue-plan-act-of-2021>

2. **Is an organization that pays into the Ohio Public Employees Retirement System rather than withholding FICA eligible for the ERTC?**

The current Internal Revenue Service FAQ #58 (updated June 19, 2020) states the following: If an amount an Eligible Employer pays to an employee is exempt from social security and Medicare taxes, can the Eligible Employer still claim the Employee Retention Credit on the amount paid to that employee?

No. The Employee Retention Credit is allowed on qualified wages paid to employees; an amount must constitute wages within the meaning of section 3121(a) of the Internal Revenue Code (the "Code") (or must constitute qualified health plan expenses allocable to such wages) in order to fall within the definition of qualified wages.

However, the December 27, 2020 legislation, Consolidated Appropriations Act (CAA), expanded the ERTC for Higher Education and certain governmental entities. Unfortunately, the FAQ has not been updated to address government or governmental units.

We propose the following potential action items to address this situation: (1) Discuss with your payroll tax provider; or (2) watch for updates on the FAQs to incorporate the extensions from the CAA. We will also continue to monitor changes to the FAQ.

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

Shuttered Venue Operators Grant (SVOG)

1. **The \$1.9 trillion American Rescue Plan Act, H.R. 1319 (ARPA) passed the House of Representatives on March 10, 2021. What changes impact SVOG?**

PPP and SVOG

The ARPA amends the prior legislation. Previously, entities that received Paycheck Protection Program (PPP) funding on or after December 27, 2020 were ineligible for SVOG. With the passage of ARPA, these entities will

be eligible for SVOG; however, the SVOG funding will be reduced by the total amount of PPP loans the SVOG grantee received on or after December 27, 2020.

Additional funding

Additional funding of \$1.25 billion is provided for the SVOG program. This brings the total funding for the program to \$16.25 billion. Of those funds, \$500,000 will be allocated to technical assistance for applicants.

2. Clarification of “revenues earned” versus “gross revenues”

There has been a lot of confusion on these terms and the SBA has acknowledged the various definitions. See below for important clarifying items.

From the SBA’s FAQs:

Gross earned revenue is the total of earned revenue from various sales of goods or services, such as admission tickets, merchandise, food and beverages, advertising sales and contracted presentation income. This commonly accepted definition of earned revenue does not include other sources of funds that an organization may receive, such as donations, sponsorships, governmental assistance, or returns on investments.

Gross revenue is functionally equivalent to ‘receipts,’ which the SBA has defined under 13 C.F.R. § 121.104 as meaning “all revenue in whatever form received or accrued from whatever source.” This will include contributions, donations, and grants from any and all sources (excluding any disaster assistance funding).

The SBA will use gross revenues to determine how an entity qualifies for the priority application periods.

3. Is an entity not in business in 2019 but conducting business operations on Feb. 29, 2020, eligible to apply for an SVOG?

Yes, if an entity was not in business during 2019 but was conducting business operations on Feb. 29, 2020, including incurring costs of necessary start-up, preparatory activities in the lead time before an anticipated opening date, it is eligible to apply if it can show the required earned revenue loss. In situations like this, the SBA will use the following alternative method for demonstrating revenue loss based on the approach the Agency is using with the PPP: Firms not in operation in 2019 may qualify for an SVOG if their gross earned revenues for the second, third, or fourth quarter of 2020 demonstrate a reduction of not less than 25% from their gross earned revenue for the first quarter of 2020. For firms that had commenced start-up operations but were unable to open as anticipated due to the pandemic, they would only be eligible under this alternate method if they had earned revenue in the first quarter of 2020 from sources such as advance ticket sales, merchandising, etc. Firms which had been conducting business operations and incurring expenses in 2020 in a pre-opening capacity but which had no earned revenue for the first quarter of 2020 would not be eligible to apply.

9. How did the SBA determine what “revenue” to consider for establishing priority period eligibility?

Congress simply referenced “revenue” for the SVOG priority periods in the Economic Aid Act. General rules of statutory interpretation require an agency to give meaning to every word where possible and apply the word’s ordinary meaning. In the legislation, Congress used “revenue” in setting forth the priority periods, not “earned revenue” and specifically used the term “earned revenue” in other areas, illustrating its understanding of a distinction between the two terms and the ability to use the limitation where Congress deemed it appropriate.

10. For determining applicant eligibility for priority periods, how is “revenue” being defined?

The SBA will use gross revenues to determine how an entity qualifies for one of the priority periods.

3. Does a performing arts organization/theater that rents its performance space/theater from another entity qualify?

We would need some clarification here to get a more specific answer. You should review the eligibility section below for performing arts organizations.

	Live Venue Operator or Promoter, Theatrical Producer, or Live Performing Arts Organization Operator
Business Requirements:	<ul style="list-style-type: none"> One of its principal business activities is operating or using venues for Eligible Live Events for which (i) a cover charge through ticketing or front door entrance fee is applied, and (ii) performers are paid in an amount that is based on a percentage of sales, a guarantee (in writing or standard contract) or another mutually beneficial formal agreement. <p>Either:</p> <ul style="list-style-type: none"> not less than 70% of the earned revenue of the business is generated through, to the extent related to a live event described immediately above, cover charges or ticket sales, production fees or production reimbursements, nonprofit educational initiatives, or the sale of event beverages, food, or merchandise; or one its principle business activities is making available for purchaser by the public an average of not less 60 days before the date of the event tickets to live events described immediately above.
Operational Requirements	Has resumed or intends to resume organizing, promoting, producing, managing, or hosting future Eligible Live Events.
Facility Requirements	<ul style="list-style-type: none"> Has a defined performance and audience space. Has mixing equipment, a public address system, and a lighting rig. Engages one or more individuals to carry out not less than two of the following roles: a sound engineer; a booker; a promoter; a stage manager; security personnel; or a box office manager. Requires a paid ticket or cover charge to attend most performances and artists are paid fairly (rather than performing for free or for tips, except for fundraisers or similar charitable events). If owned or operated by a nonprofit entity that produces free events, the Eligible Live Events are produced and managed primarily by paid employees, not by volunteers. Markets performances in printed or electronic publications, on websites, by mass email, or on social media.

The SBA's FAQs are also helpful. See below questions for further considerations in renting performance space.

9. How is “performing arts organization operator” being defined?

A performing arts organization operator is any entity (including a theatrical management business) which meets the criteria established under the Economic Aid Act and whose principal business activity is to create, produce, perform, and/or present live performances for audiences in qualifying venues, including amphitheatres, concert halls, auditoriums, theatres, clubs, festivals, and schools.

10. How are “cover charges” being defined as a requirement for live venue operator or promoter?

The SBA defines “cover charges” to encompass front door entrance fees, food or beverage minimums, or other similar charges required to gain admission to a venue, whether collected via ticket sales, addition to a tab, or direct payment.

11. How is “defined performance space” being defined for live venue operator or promoter?

A defined performance space is the distinct physical space reserved solely for the presentation of a performance, such as drama, music, dance, comedy, or other live performing arts activity.

12. How is “defined audience space” being defined as a requirement for live venue operator or promoter?

The defined audience space is the distinct physical area in which the audience experiences the performance for qualifying venues that host live performing arts events (not including museums and movie theatres).

4. What if you are paying rent to a venue-are you still eligible for SVOG?

This question would require clarification on what type of business type your entity is. Talent representatives do not have to own the venues that they use for live events. The application checklist does specify that floor

plans must be included for all entities except talent representatives. Thus far, the SBA has not specifically addressed whether venues are rented or owned.

- 5. The application checklist states that applicants must include a "Copy of most recent Audited Financial Statement (2019) or Single Audit (if applicable) or link to website where the report can be located". We are a tiny organization that has not been able to afford an audit. Do you think we would be able to submit an alternative to an audit, like a financial compilation? Or would we simply be disqualified because we don't have an audited financial statement?**

The SBA has not clarified which documents are absolutely necessary elements of the application. However, in addition to audited financial statements, the checklist does request quarterly income statements for 2019 and 2020 (does not specify that those need to be audited) as well as the 2019 and 2020 tax return.

On March 9, 2021, the Journal of Accountancy reported (see below for link) that SBA spokesperson Matt Colemans tried to clarify this concern of smaller venues and stated that only SVOG recipients that expend \$750,000 or more in federal funds in a fiscal year will be required to submit a single audit or audited financial statements. However, this issue is not yet addressed in the FAQs or published guidance.

<https://www.journalofaccountancy.com/news/2021/mar/sba-loan-shuttered-venue-operators-grant-program.html>

It is important to be aware that receipt of SVOG funding may trigger financial statement audit and single audit requirements. The Governmental Audit Quality Center has indicated that SVOG funding will be subject to single audit requirements. Entities that spend more than \$750,000 in federal funding (including SVOG) in any fiscal year are subject to single audit requirements.

- 6. The checklist states that applicants must include "payroll statements covering 2/29/2020." As mentioned, we are tiny and have not implemented a payroll system. Would this disqualify us (in other words, if we don't include this, would our application be considered incomplete, and therefore be denied?**

As described in question #5 above, the SBA has not indicated which documents will be mandatory. The checklist indicates that it is "not an all-inclusive list..." There are no current indications stated by the SBA that the omission of any one of the documents will result in disqualification.

Additional Resources

<https://www.plantemoran.com/explore-our-thinking/areas-of-focus/take-advantage-of-the-employee-retention-credit>

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

<https://www.plantemoran.com/explore-our-thinking/areas-of-focus/cares-act-resource-center>

<https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/shuttered-venue-operators-grant>

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