

Safe harbor for rental real estate

Under the safe harbor, a “rental real estate enterprise” (defined below) will be treated as a trade or business for section 199A purposes if it meets the following requirements:

1. separate books and records are maintained to reflect income and expenses for each rental real estate enterprise;
2. 250 or more hours of rental services (examples below) are performed per year for tax years beginning before Jan. 1, 2023, **and**
3. the taxpayer maintains contemporaneous records, including time reports, logs or similar documents regarding hours of all services performed, a description of all services performed, dates on which the services were performed and who performed the services.

A rental real estate enterprise is defined as an interest in real property held to produce rents and may consist of an interest in multiple properties. The individual or relevant pass-through entity must hold the interest directly or through a disregarded entity. Taxpayers can treat each rental real estate property as a stand-alone enterprise or group together similar properties and treat each group as an enterprise. Commercial and residential real estate may not be a part of the same rental real estate enterprise. Taxpayers must be consistent with this treatment unless there is a significant change in facts and circumstances.

Rental services may be performed by owners, employees, agents or independent contractors. Rental services include:

- advertising to rent or lease the real estate;
- negotiating and executing leases;
- verifying information contained in prospective tenant applications;
- collecting rent;
- daily operation, maintenance and repair of the property;
- managing the real estate;
- purchasing materials; and
- supervising employees and independent contractors.

Qualifying rental services do not include financial or investment management activities such as arranging financing, procuring property, reviewing financial statements or operations reports, planning, managing or constructing long-term capital improvements or travel to and from the real estate properties.

Real estate rented or leased under a triple net lease is not eligible for the safe harbor. Further, real estate used by the taxpayer as a residence for any part of the year is not eligible for the safe harbor.

Disclosure requirement. In order to apply the safe harbor, a taxpayer attaches a signed statement, invoking perjury penalties, to the tax return reporting the section 199A deduction.