Proskauer

Coronavirus Tax Relief

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On March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act (H.R. 6201), and on March 27, 2020, he signed into law the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act") (H.R. 748). This alert summarizes certain tax-related provisions of these new laws and has been updated to reflect subsequent guidance from the Internal Revenue Service (the "IRS") on these provisions, and the Paycheck Protection Program Flexibility Act of 2020 (H.R. 7010).

Sick and Family Leave Credits. Beginning April 1, 2020, private employers and nonprofit organizations with fewer than 500 employees are required to pay employees (i) their full wage, (up to $511/day or $5,110 total) if the employees are unable to work because of Coronavirus-related (self-)quarantine or because they have Coronavirus symptoms and are seeking medical help, or two-thirds of their regular wage (up to $200/day or $2,000 total) if they take time off to care for a family member that is in (self-)quarantine because of Coronavirus or following a child's school closing, in each case for up to 10 days, and (ii) two-thirds of their regular wage (up to $200/day or a $10,000 maximum) if the employees are unable to work because they need to care for a child. An employer's obligation for paid sick leave ends when the employer has either paid the employee for the number of hours that the employee generally works within a two-week period (up to 80 hours), or when the employee has returned to work. To be eligible for paid leave, the employee must have worked for the employer for at least 30 days (i.e., been on payroll). An employee who is laid off on or after March 1, 2020 and rehired by the same employer before the end of the year is eligible for paid leave without having to satisfy the 30-day requirement after being rehired so long as the employee satisfied this requirement before being laid off.

A refundable payroll tax credit is available to employers through 2020 to cover wages paid to employees while they take time off under these new sick and family leave programs between April 1, 2020 and December 31, 2020, even if the wages are paid after this period. The sick leave credit is for wages up to $511/day or $200/day if the sick leave is to care for a family member or child following the child's school closing. The family leave credit is for wages up to $200/day (or a $10,000 maximum) while the employee is receiving paid family leave. The credits can be claimed each quarter. The credits are not available for employers receiving a credit for paid family and medical leave under the 2017 Tax Cut and Jobs Act (the "TCJA"). Employers may receive both these credits and the employee retention credit (see below), but not for the same wages. Employers receiving loans under the CARES Act as part of the Small Business Administration's Paycheck Protection Program (the "PPP") are eligible for the credits for paid sick and family leave.

The instructions to Form 7200, *Advance Payment of Employer Credits Due to COVID-19,* provide that employers may use the sick and family leave credits to offset all federal employment taxes (including federal withholding tax, and the employer's and the employee's share of social security and Medicare taxes), and any excess credits are refundable. The IRS has posted further guidance on its website on how to obtain the sick and family leave credit. For further information on this guidance, please see our blog post .

The sick leave credit covers 100% of a self-employed individual's qualified sick leave equivalent amount, or 67% of the individual's qualified sick leave equivalent amount if they are taking care of a sick family member, or taking care of a child following the child's school closing. A self-employed individual's qualified sick leave equivalent amount is the number of days during the taxable year that the individual cannot perform services and is entitled to sick leave (up to 10 days), multiplied by the lesser of average daily self-employment income (or 67% of that income if they are taking care of a sick family member or child following a school closing), or $511/day to care for the self-employed individual ($200/day to care for a sick family member or child following a school closing). Self-employed individuals can receive a family leave credit for as many as 50 days multiplied by the lesser of $200 or 67% of their average self-employment income, up to a maximum of $10,000.

Employee Retention Credit for Employers. An employer is eligible for a refundable payroll tax credit equal to 50% of certain "qualified wages" (including certain health plan expenses) paid to its employees beginning March 13, 2020 through December 31, 2020 if the employer is engaged in a trade or business in 2020 and the wages are paid (i) while operation of that trade or business is fully or partially suspended due to a governmental order[1] related to COVID-19 or (ii) during the period beginning in the first quarter in which gross receipts for that trade or business are less than 50% of gross receipts for the same calendar quarter of 2019 and ending at the end of the first subsequent quarter in which gross receipts are more than 80% for the same calendar quarter of 2019. The employee retention credit can be used to offset all federal payroll taxes, including federal withholding tax, and the employer's and employee's share of social security tax and Medicare, but not the federal unemployment tax ("FUTA").

The operation of an employer's trade or business is "partially suspended" due to a governmental order related to COVID-19 if the employer is able to "continue some, but not all of its typical operations" as a result of the governmental order.[2] If an employer's workplace is closed by a governmental order for certain purposes, but the employer's workplace remains open for other purposes or the employer is able to continue certain operations remotely, the employer's operations are considered to be partially suspended.[3] Thus, even an essential business is eligible for the credit if it can demonstrate that some portion of its operations have been suspended due to a COVID-19-related governmental order. Therefore, although a hospital provides essential services, if elective surgeries have been suspended due to a governmental order, the hospital should be eligible for the credit.[4] However, an essential business is not considered to be fully or partially suspended if a governmental order causes its customers to stay at home or the governmental order applies only to non-essential businesses, even if the governmental order may have an effect on the level of business.[5] An employer that operates a trade or business in multiple locations and is subject to state and local governmental orders limiting operations in some, but not all, jurisdictions is considered to have a partial suspension of its operations.[6] It is less clear that an employer's operations are partially suspended if it continues to provide all services to all customers, but is unable to generate the same level of new business.

For employers with more than 100 full-time employees, the CARES Act provides that the credit is available only with respect to wages paid to an employee who is “not providing services” due to the circumstances described in (i) or (ii) above. Thus, if an employee is being paid wages for a reason unrelated to the circumstances described in (i) or (ii) above (like paternity or maternity leave), the credit is unavailable. However, if an employee is unable to fully work due to one of the circumstances described in (i) or (ii) above, the credit is available for the portion of the employee’s time that the employee is not working.[7] Accordingly, if an employee is working 25% of a pay period, under the FAQ interpretation, wages eligible for the credit would appear to include the wages paid to employee for 75% of the period during which the employee is not providing services due to the circumstances described in (i) or (ii) above.

All persons treated as a single employer under section 52(a) or (b) or section 414(m) or (o) are treated as one employer for all purposes of the credit, including for purposes of determining whether they exceed the 100 full-time employee threshold. First, companies related through greater than 50% ownership (by vote or value) are treated as one employer for purposes of the 100 full-time employee threshold. Second, chains of organizations (whether or not incorporated) conducting trades or businesses may be treated as one employer if they are common control. The test for common control depends on the types of organizations in the chain of ownership, but generally requires that corporations be connected through ownership of greater than 50% of the vote or value of each corporation and partnerships be connected through ownership of more than 50% of profits or capital. In *Sun Capital Partners III, LP v. New England Teamsters & Trucking Industry Pension Fund*, 724 F.3d 129 (1st. Cir. 2013), the First District Court of Appeals held that a private equity fund would typically be treated as conducting a trade or business for purposes of a control test under section 414 that is similar to the rule in section 52(b) unless the fund can establish that its investment is truly passive, which is a high bar. Therefore, under the court's holding, two corporations more than 50% of the vote or value of each of which is owned by a private equity fund would be treated as a single employer for purposes of the 100 full-time employee rule. In *Sun Capital*, the court treated parallel funds as one entity for tax purposes where the funds were run by the same sponsor, shared a single general partner, and invested nearly identically.[8] Therefore, under *Sun Capital*, if two parallel funds each own 50% or less of two corporations, but the funds in the aggregate own more than 50% of each corporation, both corporations would be treated as a single employer. However, under a second *Sun Capital* case, where a single sponsor managed two funds that did not invest in parallel, the holdings of the two funds were not aggregated.[9] Finally, section 414(m) contains special rules for "affiliated service groups".

The credit is capped at $5,000 (50% of $10,000 qualified wages) per employee for all calendar quarters. Section 501(c) tax-exempt organizations are eligible for the credit, but governmental entities and companies receiving PPP loans under the CARES Act are not. If a company receives a PPP loan, all other persons that are treated as one employer with that company under the rules described above are ineligible for the credit.

Deferral of Employer's Share of Social Security. Employers and self-employed individuals may delay payment of the 6.2% employer share of the social security tax (but not the employer's share of FUTA or the 1.45% employer share of the Medicare tax) through the end of 2020. The tax is payable over the following two years with half due by December 31, 2021 and the other half by December 31, 2022. These provisions are available to everyone, regardless of income. An employer that receives a PPP loan is eligible for social security tax deferral.[10]

First and Second Quarter Estimated Tax Payments; Other Extensions. The Treasury and the IRS extended the due dates for the first quarter estimated tax payments and the April 15 filing date to July 15, 2020. This extension also applies to a variety of taxpayer deadlines and due dates for other filings and time-sensitive actions that fall between April 1, 2020 and July 15, 2020. Although the due date for second quarter estimated tax payments of self-employed individuals has been extended, employers required to deposit second quarter estimated tax payments for payroll taxes are still required to do so by the normal due dates.

Extensions for Like-Kind Exchanges. If the last day of either the 45-day period to identify replacement property for a section 1031 like-kind exchange or the 180-day period to close on replacement property falls on or after April 1, 2020 and before July 15, 2020, then the applicable period is extended to at least July 15, 2020. Although the IRS guidance granting this extension references Revenue Procedure 2018-58, which extends these periods to the later of (i) 120 days or (ii) the last date of the extension period for a federally declared disaster (i.e., July 15, 2020 for the COVID-19 emergency), it is not clear that the IRS guidance extends the time period beyond July 15, 2020.

Qualified Opportunity Zone Funds. If the last day of the 180-day period for a taxpayer to invest eligible gain in a qualified opportunity zone fund falls on or after April 1, 2020 and before July 15, 2020, the taxpayer has until July 15, 2020 to make the investment. If a qualified opportunity zone business (a "QOZB") is located in a "qualified opportunity zone" within a federally declared disaster, the QOZB may receive up to an additional 24 months to consume its working capital assets as long as it otherwise satisfies the requirements of the working capital safe harbor. A federally declared disaster includes a disaster or emergency declared under the Stafford Disaster Relief and Emergency Assistance Act, Pub. L. 100-107 (the "Stafford Act"). On March 13, 2020, the President issued a letter declaring an "emergency" under the Stafford Act and has subsequently declared a disaster in every state. The Preamble to the final opportunity zone regulations provides that the extension is available only if the QOZB is delayed in using working capital assets due to the disaster, so a QOZB should keep careful records of any delays to document how the COVID-19 pandemic has impacted its ability to use working capital assets.

Partnership Audit Rules. Partnerships that are subject to the centralized audit and have already filed a Form 1065 and provided Schedules K-1 to their partners are permitted to file an amended partnership return for 2018 or 2019 so that they can benefit from the provisions in the CARES Act that provide tax relief in response to the COVID-19 pandemic. Partnerships that are eligible to amend their returns must do so and furnish corresponding Schedules K-1 to their partners by September 30, 2020.

NOLs; Excess Business Losses. A corporation may carry back its losses from 2018, 2019, and 2020 for five years, and may apply its NOLs to fully reduce taxable income (rather than only 80% of taxable income under prior law). A REIT is not permitted to carry back losses. These provisions will temporarily reverse certain changes made by the TCJA. However, NOL carrybacks may not be used to offset income includible under section 965 (the deemed repatriation provision enacted in the TCJA). Corporate taxpayers that may be able to carryback losses within a 120-day period are permitted to make certain important elections, including the election to forego the carryback. The excess business loss provision of section 461(*l*)(1) (which disallows business losses in excess of $250,000 for a single taxpayer and $500,000 for a married couple filing jointly) is also retroactively suspended for 2018 through 2020.

Increased Section 163(j) Limitation on Business Interest Expense Deduction From 30% to 50%. The section 163(j) limitation on business interest expense deductions is increased from 30% to 50% for 2019 and 2020. Taxpayers may elect to use their 2019 adjusted taxable income for purposes of calculating their section 163(j) limitation for 2020. Taxpayers may also elect out of the increase (for example, to defer the deduction and avoid generating or increasing a net operating loss which will again be usable only to the extent of 80% of taxable income beginning in 2021; or to minimize the amount of interest subject to the base erosion and anti-abuse tax or the "BEAT"). The increase in the limitation applies to partners in partnerships only in 2020 (and not in 2019) but, for partners that do not elect out of the provision, 50% of the excess business interest of a partner that is accrued in 2019 is deemed to accrue in 2020 and is not subject to any limitation in 2020.

Small Business Loan Forgiveness Does Not Give Rise To Cancellation of Indebtedness Income. The CARES Act includes a loan forgiveness program under the PPP. Any cancellation of debt income under the PPP is tax-free (i.e., excluded from income), and does not result in a loss of tax attributes. However, the IRS has held that a borrower whose loan is forgiven may not deduct the expenses that relate to the forgiven amount (i.e., the eight weeks of wages, employee benefits, interest, rent, and utilities that determined the forgiven amount).[11] Senator Chuck Grassley (R., Iowa), the Chair of the Senate Finance Committee, has said that the IRS misconstrued Congressional intent, and Representative Richard Neal (D., Mass), the Chair of the House Ways and Means Committee, has indicated that he intends to reverse the IRS guidance and allow the deductions. An employer that receives a PPP loan is eligible for social security tax deferral.[12]

Tax Treatment of Economic Stabilization Investments. The Treasury is authorized to make or guarantee up to $500 billion in debt and equity investments in businesses, states, and municipalities affected by COVID-19. The IRS has been directed to issue guidance providing that the acquisition of warrants, stock options, common or preferred stock or other equity under the program does not result in an ownership change for purposes of section 382. While the new law does not by its terms prevent investments from contributing to a section 382 ownership change, it appears consistent with the intent of the legislation for the IRS to entirely disregard investments for purposes of determining whether a taxpayer has experienced a section 382 ownership change. Any loans made or guaranteed by the Treasury under the program are treated for tax purposes as debt issued at par, and stated interest on these loans are treated as qualified stated interest. As a result, loans issued or guaranteed under the program are not treated as issued with original issue discount for tax purposes, and cash basis taxpayers are not permitted to deduct interest on the loans until that interest is paid.

No Repeal of Downward Attribution. The CARES Act does not include a provision from a prior version of the law that would have restored section 958(b)(4). (Before its removal as part of the TCJA, section 958(b)(4) prevented a United States person from being treated as owning the stock owned by its foreign owner.)

Immediate Expensing of Costs Associated With Improving Qualified Improvement Property. The CARES Act corrects an error in the TCJA that prevented businesses from expensing certain costs for improvements to “qualified improvement property”, and required the costs to be depreciated over the 39-year life of the building. Qualified improvement property is any improvement to the interior of a nonresidential building that is placed in service after the building is first placed in service. Qualified improvement property does not include improvements that are attributable to the enlargement of the building, elevators or escalators, or the internal structural framework of the building. The change is retroactive to the date of enactment of the TCJA.

Acceleration of Alternative Minimum Tax (AMT) Credits. The TCJA repealed the corporate AMT and allowed corporations to claim corporate AMT credits over several years until 2021. Under the CARES Act, corporations with outstanding AMT credits are allowed to claim their credits immediately.

Economic Impact Payments. Individual filers with adjusted gross incomes of $75,000 or less (or $112,500 or less for a head of household) are eligible for a refundable tax credit for 2020 of $1,200, and married couples filing jointly with adjusted gross incomes of $150,000 or less are eligible for a refundable tax credit for 2020 of $2,400. For individuals, heads of households, and married couples with adjusted gross income of $75,000/$112,500/$150,000 or less, there is an additional $500 refundable credit for each of their "qualifying children". Although the credit is for 2020, a taxpayer is treated as if he or she had overpaid an amount equal to the credit in 2019 (or if the taxpayer has not yet filed a 2019 tax return, 2018) so that the taxpayer is eligible to receive his or her refund immediately. No minimum income is necessary to receive the credit. For taxpayers with incomes over the $75,000/$112,500/$150,000 threshold, the credit is reduced by 5% of the taxpayer's adjusted gross income over $75,000/$112,500/$150,000. This results in a complete phase out for taxpayers who in 2019 made more than $99,000 (individuals), $146,500 (heads of households), and $198,000 (joint filers). Taxpayers who have not filed a 2018 or 2019 tax return because they were not required to do so, but who are otherwise eligible to receive an economic impact payment (i.e., U.S. citizens or residents with a valid social security number who satisfy the requirements above and have not been claimed as a dependent of another taxpayer), may provide the necessary information on the IRS website to receive their payment.

$300 Above the Line Charitable Contribution Deduction; Relaxation of the Charitable Contribution Limitation. A permanent "above the line" charitable contribution deduction is allowed for up to $300 of cash contributions to certain section 501(c)(3) public charities beginning in 2020, even if the individual takes the standard deduction. The 50% adjusted gross income limitation is suspended for charitable contributions by individuals in 2020 (so that individuals can receive a charitable contribution deduction for up to 100% of their 2020 adjusted gross income), and the 10% taxable income limitation on charitable contribution deductions for corporations is increased to 25%. Finally, the cap on deductions for charitable contributions of food inventory in 2020 is temporarily increased from 15% to 25% of taxable income (in the case of a C corporation) or aggregate net income for all relevant trades or businesses (in the case of an individual).

Employee Benefits. For changes that affect employee benefits, please see our ERISA Practice Center blog post.

[1] Governmental orders include orders, proclamations, or decrees from the federal government, or any state or local government that limit commerce, travel, or group meetings due to COVID-19 in a manner that affects an employer's operation of its trade or business (including orders that limit hours of operation) and, if they are from a state or local government, are from a state or local government that has jurisdiction over the employer's operations. IRS, "28. What 'orders from an appropriate governmental authority' may be taken into account for purposes of the Employee Retention Credit?", COVID-19-Related Employee Retention Credits: General Information FAQs (April 29, 2020) (the "FAQs").

[2] "3. When is the operation of a trade or business partially suspended for the purposes of the Employee Retention Credit?", FAQs. The Joint Committee on Taxation (the "JCT") has indicated that a restaurant in a state under a statewide order that restaurants offer only take-out services or a concert venue in a state under a statewide order limiting gatherings to no more than 10 people would meet the governmental order test. An accounting firm that is subject to a countywide directive from public health authorities to cease all activities other than minimum basic operations and that closes its offices and does not require employees who cannot work from home (*e.g.*, custodial employees, mail room employees) to work also meets this test. Joint. Comm. Tax'n, Description of the Tax Provisions of Public Law 116-136, The Coronavirus Aid, Relief, and Economic Security ("CARES") Act at 38 (Apr. 22, 2020), https://www.jct.gov/publications.html?func=startdown&id=5256 (the "JCT Report").

[3] For example, a restaurant business is considered to be partially suspended if it must close its restaurant locations to in-room dining due to a governmental order closing all restaurants for sit-down service, but is allowed to continue food or beverage sales to the public on a carry-out, drive-through, or delivery basis. "34. If a governmental order requires an employer to close its workplace for certain purposes, but the workplace may remain operational for limited purposes, is the employer considered to have a suspension of operations?", FAQs. However, a software company is not considered to be partially suspended if it closes its office in accordance with a citywide order closing all non-essential businesses, but is able to continue operations comparable to its operations prior to the closure by having its employees work remotely. "33. 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?", FAQs.

[4] An essential business may be considered to be partially suspended if 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. "31. If a governmental order causes the suppliers to an essential business to suspend their operations, is the essential business considered to have a suspension of operations?", FAQs.

[5] “30. If a governmental order requires non-essential businesses to suspend operations but allows essential businesses to continue operations, is the essential business considered to have a full or partial suspension of operations?” and “32. If a governmental order causes the customers of an essential business to stay at home is the essential business considered to have a suspension of operations?”, FAQs. The JCT report includes an example of a grocery store in a state that generally imposes limitations on food service, gathering size, and travel outside the home but exempts grocery stores (and travel to and from grocery stores) from any COVID-19 related restrictions because they are “essential businesses” that are excepted from restrictions, and provides that the grocery store would not meet the governmental order test. However, slight variations in the example might lead to different conclusions. For example, if the grocery store in the example also were to normally operate a sit-down restaurant (without delivery service), it appears that the restaurant’s closure as a result of a governmental order would qualify as a partial suspension of the operation of the store’s trade or business, and therefore the store would be eligible for the credit, and if the store had more than 100 employees, would be eligible for the credit only with respect to wages paid to the restaurant employees who were unable to work because of the order.

[6] “33. 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?”, FAQs.

[7] *See* "48. What is the definition of 'qualified wages'?" and "52. May an Eligible Employer that averaged more than 100 full-time employees during 2019 treat all wages paid to employees as qualified wages?", FAQs (providing an example in which an employer with more than 100 full-time employees that is forced to suspend its operations at the end of the first calendar quarter of 2020 is eligible for the credit with respect to wages paid to employees who stopped working during the portion of the quarter when the business is suspended); JCT Report, *supra* note 1 at 39-40 (providing two examples that make clear that an employer is entitled to credits for wages paid to employees for the portion of their time that they were unable to work); "CARES Act: Employee Retention Credit FAQ", United States Senate Committee on Finance (Mar. 31, 2020), https://www.finance.senate.gov/chairmans-news/cares-act-employee-retention-credit-faq. ("[i]f an employee is performing services on a reduced schedule, wages paid to the employee are only treated as qualified wages if they exceed what the employee would have otherwise been paid for the services performed. In that case, employers will receive a credit for the difference between the total wages paid to the employee and the amount the employer would have paid for the reduced hours or services actually provided by the employee."). Policy reasons support this interpretation. If the statute imposed a cliff effect, employers would be discouraged from having employees perform any services so as to benefit from tax credits. This interpretation enables an employer to use employees as necessary for its business operations (and relieves the government of providing tax credits with respect to that use), without penalizing the employer by denying credits for qualified wages paid to the employee during the period he or she was not providing services.

[8] One of the funds at issue in the *Sun Capital* case was actually comprised of two parallel funds, which the court treated as a single entity. *See* footnote 3 of *Sun Capital Partners III*, 724 F.3d at 133 n.3; *Sun Capital Partners III, LP v. New England Teamsters & Trucking Industry Pension Fund*, 943 F.3d 49, 52 n.1 (1st. Cir. 2019).

[9] *Sun Capital Partners III, LP v. New England Teamsters & Trucking Industry Pension Fund*, 943 F.3d 49 (1st. Cir. 2019).

[10] Under the CARES Act, an employer that received a PPP loan was not eligible for the social security tax deferral for taxes due after it received notice from a lender that the loan was forgiven. *See* IRS News Release, "Deferral of employment tax deposits and payments through December 31, 2020," (Apr. 16, 2020). However, on June 5, 2020, President Trump signed into law the Paycheck Protection Program Flexibility Act of 2020 (H.R. 7010), which eliminates this restriction and permits an employer to defer social security tax deposits even after its PPP loan is forgiven.

[11] Notice 2020-32.

[12] Under the CARES Act, an employer that received a PPP loan was not eligible for the social security tax deferral for taxes due after it received notice from a lender that the loan was forgiven. *See* IRS News Release, "Deferral of employment tax deposits and payments through December 31, 2020," (Apr. 16, 2020). However, on June 5, 2020, President Trump signed into law the Paycheck Protection Program Flexibility Act of 2020 (H.R. 7010), which eliminates this restriction and permits an employer to defer social security tax deposits even after its PPP loan is forgiven.

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