

The Cavalry Has Arrived - Congress Passed and President Trump Signed Into Law the CARES Act

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A Succinct Summary of the Key Tax Provisions

On March 27, 2020, President Trump signed into law the Coronavirus Aid, Relief, and Economic Security Act (colloquially, the "CARES Act" or the "Act"). The CARES Act is a historic \$2.2 trillion relief package enacted by lawmakers in the wake of the COVID-19 pandemic. The Act is more than 880 pages in length and contains a multitude of provisions, all of which are intended to support individuals and businesses during these horrific times. We have attempted to provide our readers with a broad overview of the most significant tax provisions of the Act. If a provision is potentially applicable to a given situation, please read the entire provision of the Act to affirm its application.

I. TAX ASPECTS OF FORGIVABLE SBA PAYCHECK PROTECTION LOANS AND UNREPAID EIDL GRANTS (TITLE I OF THE ACT)

Forgivable Paycheck Protection Program Loans

The Act creates the [Paycheck Protection Program \("PPP"\)](#) under which the Small Business Administration ("SBA") is authorized to make up to \$349 billion of forgivable loans to small businesses to enable them to meet payroll costs, benefits, rent and utility payments. The Act excludes from gross income the amount of any loan made and forgiven under the PPP. Consequently, this provision of the Act will be exceedingly important to business.

Under general income tax principles, borrowers have income in the amount of any debt cancelled. This often comes as a nasty surprise to borrowers in tough economic times who are faced with debt work-out situations and obtain some amount of loan forgiveness. Under the PPP, borrowers who ultimately receive

the benefit loan forgiveness will not have salt added to their economic wound.

PRACTICE ALERT: This provision does **not** appear to be tied to Internal Revenue Code ("Code") Section 108, which provides an exclusion from gross income when debt is cancelled in certain circumstances (e.g., bankruptcy, insolvency, etc.). Code Section 108 also requires taxpayers who qualify for the exclusion to reduce certain tax attributes (e.g., net operating losses, capital loss carryovers, certain tax credits, etc.) by the amount excluded from gross income. Thus, when cancelled debt qualifies for the exclusion in Code Section 108, taxpayers lose an equal amount of tax benefits (one hand giveth and the other taketh away...). Since there appears to be no tie to Code Section 108, a taxpayer taking advantage of loan forgiveness under the PPP does not appear to have to reduce other tax attributes.

EIDLDP Grants or Advances

The Act also provides for emergency grants to applicants applying for loans under the SBA's Economic Injury Disaster Loan Program ("EIDLDP"). Applicants can get an advance up to \$10,000 within two days of applying for an EIDLDP loan. The advance must be used for payroll and related expenses. The EIDLDP grant does not have to be repaid, even if the applicant is subsequently denied an EIDLDP loan. The Act does **not** appear to provide any similar income exclusion with respect to EIDLDP grants that are not repaid. Accordingly, business owners should expect to have taxable income in the amount of any EIDLDP grant that is not repaid as part of an EIDLDP loan.

II. KEY PROVISIONS IMPACTING INDIVIDUAL TAXPAYERS (CARES ACT TITLE II, SECTIONS 2201-2206)

The Act contains a number of tax provisions specifically impacting individual taxpayers.

Recovery Rebates (Section 2201 of the Act)

The Act adds a new Section to the Code (Code Section 6428) that provides tax rebates (called "Recovery Rebates") to individuals. This provision has received lots of media coverage during the legislative process. Congress tweaked the initially-proposed rebate provisions in the final legislation. Consequently, early media reports may be incorrect.

The one-time rebate will be provided as a refundable credit against an individual's federal income tax in the following amounts:

- \$1,200 for individuals (\$2,400 for a couple filing a joint return), plus
- \$500 for each qualifying child.

Qualifying Child

The definition of "qualifying child" for this purpose is based on the definitions contained in Code Sections 24(c) and 152(c). An individual means:

- The taxpayer's child or descendant, or a sibling or stepsibling, or a descendant of a sibling or stepsibling;
- Who has the same principal place of abode as the taxpayer for more than half the tax year;
- Is younger than the taxpayer and is under age 17;
- Does not provide more than one-half of his or her own financial support; and
- In the case of a married child, has not filed a joint return (other than only a refund claim) with the individual's spouse.

Eligible Individuals

Eligible individuals do not include nonresident aliens, estates, trusts, or individuals who others can claim as dependents.

Income Limits; Phase-out

The rebates start to phase out for taxpayers with adjusted gross income ("AGI") exceeding the following thresholds:

- \$75,000 for individuals;
- \$112,500 for heads of household; and
- \$150,000 for those filing a joint return,

The phase-out is 5 percent of the amount by which AGI exceeds the thresholds. Thus, taxpayers with AGI of the following amounts or more do not qualify for any rebate:

- \$99,000 for individuals;
- \$136,500 for heads of household; and
- \$198,000 for those filing a joint return.

Each spouse filing a joint return is treated as receiving half of the total rebate.

The Recovery Rebates come in the form of 2020 income tax credits. An estimate of the allowable amount will be based on a taxpayer's 2019 income tax return (if filed), or 2018 tax income return if a 2019 return has not yet been filed. If no 2018 return was filed at the time of application for payment, the Secretary may use the individual's information provided in his or her Social Security Benefit Statement or equivalent statement.

It is important to keep in mind that the Recovery Rebates are 2020 income tax credits. However, to get the money into a taxpayer's hands as quickly as possible, the credits are applied as if taxpayer made an overpayment for 2019 which the IRS will promptly refund. (As it would for any 2019 refund.) When the taxpayer files his or her 2020 income tax return, the Recovery Credit otherwise allowable for 2020 will be

reduced by the amount previously advanced/paid to the taxpayer. Any remainder will be a credit allowed on the taxpayer's 2020 income tax return.

PRACTICE ALERT: If a taxpayer's advance was greater than the actual amount of the allowable Recovery Credit, the taxpayer will not have to repay the overpayment because the allowed 2020 tax credit cannot be reduced below zero. In other words, there is **no** claw-back for excess advance payments! Furthermore, because the Recovery Credits are treated as refundable credits, they are not includable in 2020 gross income.

Timing of Payments

Treasury is directed to make the refunds as quickly as possible.

PRACTICE ALERT: No refund or credit will be allowed after December 31, 2020.

Delivery and Notice of Payments

Most eligible taxpayers won't have to take any action to receive payment. Payments may be disbursed electronically to bank accounts previously authorized by payees on or after January 1, 2018.

Within 15 days after making a rebate payment, the IRS will send notice by mail to a taxpayer's last known address indicating the method and amount of payment.

Identification Numbers

Taxpayers must include valid social security numbers or (in the case of adopted children, adoption taxpayer identification numbers) on their returns for themselves, their spouses, and children for whom the credit is claimed.

Regulations; Public Awareness

Treasury is authorized to prescribe regulations to carry out the purposes of the new law. The Act also directs Treasury to conduct a public awareness campaign about the rebate.

United States Possessions

The Act contains provisions for possessions of the United States:

- For U.S. possessions with a mirror code tax system (e.g., Guam), Treasury is directed to pay each possession amounts equal to the loss to the possession by virtue of the rebate provisions.
- For possessions without a mirror code tax system, Treasury is directed to pay each possession an amount equal to the aggregate benefits that would have been provided to its residents by virtue of the rebate provisions if the possession had a mirror code tax system in effect.

No Reduction or Offset

The credit will not be subject to reduction or offset by the following:

- 31 USC 3716 (administrative offset);
- 31 USC 3720A (debt owed to a federal agency);
- Code Section 6402(d)-(f) (debt owed to a federal agency, state income tax obligations, and state unemployment compensation debts); or
- Other assessed federal taxes that would otherwise be subject to levy or collection.

Retirement Plan-Related Provisions (Sections 2202-2203 of the Act)

Waiver of Early Withdrawal Penalty; Expanded Plan Loans

The Act waives the 10 percent early withdrawal penalty (i.e., prior to age 59½) for COVID-19 related distributions from IRAs, 401(k) plans, and other defined contribution plans. The waiver applies to an aggregate of \$100,000 of qualifying distributions from a taxpayer's retirement plans in calendar year 2020. Employers may amend plans to allow for the distributions.

A qualifying distribution is in respect of an individual:

- Diagnosed with COVID-19 by a test approved by the CDC;
- Whose spouse is so diagnosed; or
- Who experiences adverse financial consequences as a result of a COVID-19 related:
 - Furlough,
 - Quarantine,
 - Layoff,
 - Reduction in work hours,
 - Inability to work due to lack of child care,
 - Closing or reduction of hours of a business, or
 - Other factors to be determined by the Treasury Secretary.

Importantly:

- The withdrawals can be recontributed to the retirement plan during the 3-year period after the withdrawal was taken and, if so, the amount recontributed is treated as a deemed trustee-to-trustee transfer, such that these amounts are not taxable income; and
- For amounts not recontributed, unless the taxpayer elects not to have this rule apply, the amount of the withdrawal is required to be included in the taxpayer's gross income ratably over 3 years.

The Act also allows qualified employer retirement plans (e.g., 401(k) plans) to make plan loans up to \$100,000 (rather than the general \$50,000 limit) during the 180-day period beginning on the date the Act was enacted (March 27, 2020). It also allows the repayment date of existing loans due prior to December 31, 2020 to be extended by one year and the payments thereunder to be re-amortized to take into account

the extension.

Temporary RMD Waiver

The Act waives the requirement for plan participants to take required minimum distributions ("RMDs") from IRAs, 401(k) plans, and other defined contribution plans in 2020, including RMDs otherwise required to be taken by April 1, 2020.

Charitable Contribution Deductions (Sections 2204-2205 of the Act)

Allowance of Limited Above-the-Line Charitable Contributions for Filers who do not Itemize

The Act allows taxpayers who do not itemize to claim up to \$300 of cash charitable contributions as an above-the-line deduction starting with the 2020 tax year. This is a small, but nice, tax benefit to persons who do not itemize, and it is designed to encourage cash contributions to public charities who need contributions more than ever before.

Above-the-line deductibility is subject to the following limitations:

- Only \$300 of charitable contributions are eligible for this treatment;
- The taxpayer must claim the standard deduction; and
- The contributions must be "qualified charitable contributions" ("QCCs").

QCCs are defined as contributions that are contributions:

- Made in cash;
- Allowable under Code Section 170 (without regard to the percentage limitations provided in Code Section 170(b)); and
- Made to organizations described in Code Section 170(b)(1)(A), but not to 509(a)(3) supporting organizations or to donor advised funds.

PRACTICE ALERT: QCCs do not include carryovers of excess contributions under Code Sections 170(b)(1)(G)(ii) or 170(d)(1).

Temporary Suspension of Limitations on Certain Cash Contributions

The Act suspends the limitations provided by Code Sections 170(b) and 170(d) that apply to certain "qualified contributions" ("QCs").

QCs are defined as charitable contributions paid in cash during calendar year 2020 to an organization described in Code Section 170(b)(1)(A) if the taxpayer elects to treat them as QCs. QCs do not include contributions to Code Section 509(a)(3) supporting organizations or donor advised funds.

Thus, the 60 percent limitation for cash contributions to public charities is increased to 100 percent of the contribution base for 2020.

Increase in Limits on Contributions of Food Inventory

The Act increases the limitation with respect to contributions of food inventory made in 2020 from 15 percent of aggregate net income (in the case of taxpayers other than C corporations) and taxable income (in the case of C corporations) to 25 percent.

Exclusion for Certain Employer Payments of Employee Student Loans (Section 2206 of the Act)

The Act expands the employer-provided educational assistance exclusion from an employee's gross income under Code Section 127(c). Under the Act, an employer's payment of an employee's student loans (whether paid directly to the lender or to the employee) may be excludable from the employee's income. To qualify:

- The loan must constitute a "qualified education loan" under Code Section 221(d)(1); and
- The employer payments must be made in 2020.

PRACTICE ALERT: The employer loan re-payments are still subject to the overall \$5,250 income exclusion for employer-provided educational payments. (There is no separately allowed amount.)

PRACTICE ALERT: To prevent employees from receiving a double benefit, the student loan interest deduction under Code Section 221 with respect to any student loan re-payments excluded from the employee's gross income under this provision is disallowed.

III. BUSINESS PROVISIONS (SECTIONS 2301-2308 OF THE ACT)

The Act contains a number of tax provisions specifically focusing on businesses.

Employee Retention Credit for Employers Subject to Closure Due to COVID-19 (Section 2301 of the Act)

The Act creates a refundable credit against payroll taxes equal to 50 percent of qualified wages paid to employees during a calendar quarter by eligible employers. This credit is designed to assist employers who are impacted by COVID-19, but who are still paying wages to their employees. Its purpose is to share the cost of those wages paid, in order to allow employers the ability to retain and continue to pay their employees, rather than lay them off, during these horrific times.

PRACTICE ALERT: The credit is only allowed against employer Social Security taxes payable under Code Section 3111(a) until December 31, 2020.

Eligible Employers

Eligible employers are private employers (including tax-exempt organizations) for whom:

- Operations are fully or partially suspended during a calendar quarter due to orders from a government authority limiting commerce, travel, or group meetings (for commercial, social, religious or other purposes) due to COVID-19; or
- Quarterly gross receipts have declined by more than 50 percent as compared with the same quarter in the prior year.

Governmental employers and employers who receive SBA loans under the Paycheck Protection Program discussed above are not eligible for the credit.

Qualified Wages

Determination of qualified wages depends on the employer's average number of full-time employees in 2019:

- For employers with an average of more than 100 full-time employees in 2019, only wages of furloughed employees or employees with reduced hours due to the closure or reduced receipts of their employer are eligible for the credit.
- For employers with an average of 100 or fewer full-time employees in 2019, all wages of employees are eligible.

PRACTICE ALERT: The definition of "full-time employee" is the same as that used under the Affordable Care Act for purposes of the employer "pay or play" penalties under Code Section 4980H. That is, "full-time" means an employee who averages 30 hours per week! Employers are not allowed to use a different definition of "full time" (e.g., 40 hours per week).

Wages eligible for the credit are limited to \$10,000 per employee, and include compensation such as health benefits.

Wages are not eligible for the credit if they are:

- Paid to employees for whom the employer takes a Work Opportunity Credit under Code Section 51; or
- Taken into account for purposes of determining the paid family and medical leave credit under Code Section 45S.

The credit is reduced by:

- Payroll tax credits for qualified veterans and research expenditures under Code Sections 3111(e)-(f); and

- Credits for paid family leave or paid sick leave provided under the Families First Coronavirus Response Act, which we discussed in a [prior blog post](#).

Advance Payments; Penalty Waivers

Treasury may advance payments to employers. Congress directed it to waive penalties with respect to employers who do not deposit payroll taxes in reasonable anticipation of receiving the credit.

Delay of Deposit of Employer Payroll Taxes (Section 2302 of the Act)

The Act provides that taxpayers (including self-employed taxpayers) may defer the deposit of certain payroll taxes through December 31, 2020. The payroll taxes that are eligible for deferral are:

- The employer's portion of FICA taxes payable under Code Section 3111(a) (i.e., 6.2 percent of wages),
- One-half of a self-employed person's SECA tax liability under Code Section 1401(a) (i.e., 6.2 percent of self-employment income), and
- The employer's portion (i.e., 6.2 percent) of Railroad Retirement taxes.

The deferred amounts are payable over a 2-year period as follows: (1) 50 percent on December 31, 2021; and (2) the remaining 50 percent on December 31, 2022.

PRACTICE ALERT: Payroll tax deferral is unavailable for employers that have had any amount of loan forgiveness for a loan under the new PPP (discussed above).

Modifications for Net Operating Losses (Section 2303 of the Act)

The Act modifies the tax treatment of net operating loss (NOL) carrybacks as follows:

- For tax years commencing prior to 2021, taxpayers may carry back NOLs to the previous five tax years;
- Implementation of the 80 percent of taxable income limitation imposed by the TCJA is delayed until 2021 (thus, 100 percent of NOLs are available for tax years 2018, 2019, and 2020);
- NOL carrybacks are temporarily disregarded for purposes of Code Section 965 (the transition tax); and
- C corporations can elect to receive an accelerated refund with respect to NOL carrybacks.

The NOL carryforward rules are modified as follows:

- For tax years commencing prior to 2021, taxpayers are entitled to a 100 percent of taxable income NOL deduction; and
- For tax years commencing after on or after 2021, taxpayers will be entitled to a 100 percent deduction for NOLs that arise in tax years before 2018, and an 80 percent of modified taxable income deduction for NOLs that arise in tax years after 2017.

These rules will allow taxpayers to potentially obtain the tax benefit of NOLs more quickly-i.e., via refunds for carryback tax years.

Modification of Limitation on Losses for Taxpayers Other Than Corporations (Section 2304 of the Act)

The Act temporarily amends the excess business loss limitation provisions of Code Section 461(l) added by the TCJA. As a result, non-corporate taxpayers will now be entitled to deduct excess business losses arising during 2018, 2019, and 2020. Under Code Section 461, an "excess business loss" is the excess of: the taxpayer's aggregate trade or business deductions; over the sum of the taxpayer's aggregate trade or business income plus \$250,000 (\$500,000 for joint filers).

PRACTICE ALERT: The excess business loss limitation imposed by TCJA returns in 2021.

Modification of Credit for Prior Year Minimum Tax Liability of Corporations (Section 2305 of the Act)

The Act allows corporations to accelerate corporate AMT credits with respect to tax years 2018 and 2019 arising from the TCJA's repeal of the corporate AMT. The credits are now fully refundable.

Modifications of Limitation on Business Interest (Section 2306 of the Act)

The Act temporarily and retroactively increases the business interest deduction limitation under Code Section 163(j), which was first imposed by the TCJA, from 30 percent of adjusted taxable income (ATI) to 50 percent for tax years 2019 and 2020.

This provision also includes a special rule for partnerships:

- The increase in the limitation will apply to partners only in 2020 (not 2019); and
- For partners that do not elect out, the partnership's excess business interest ("EBI") allocated to the partner for any tax year beginning in 2019 will be treated as follows:
 - 50 percent of the EBI will be treated as paid or accrued by the partner in the partner's first tax year beginning in 2020 and will not be subject to the ATI limitations in 2020; and
 - The other 50 percent of the EBI will be subject to the limitations of Code Section 163(j)(4)(B)(ii).

A taxpayer may elect **not** to have the increased limitations apply. Once an election is made, it may be revoked only with the Secretary's consent. For partnerships, such elections are made by the partnership and may only be made for tax years commencing in 2020.

A business may use its 2019 ATI to calculate its 2020 limitation. For partnerships, the election also must be made at the partnership level.

Technical Amendments Regarding Qualified Improvement Property (Section 2307 of the Act)

The Act provides a technical correction to the TCJA. It adds Code Section 168(e)(3)(E)(vii) to make qualified improvement property 15-year property eligible for 100 percent bonus depreciation.

Temporary Exception from Excise Tax for Alcohol Used to Produce Hand Sanitizer (Section 2308 of the Act)

The Act exempts alcohol producers subject to federal excise taxes from the federal excise tax on any alcohol that is used to produce hand sanitizer in 2020.

Additional Provisions

The Act also includes additional tax-related provisions. The following are highlights:

- The Act expressly provides for advance payments of tax credits to employers for paid leave pursuant to the Families First Coronavirus Response Act, which we discussed in a [prior blog post](#). The IRS had already said it would allow such advance payments, but there was no express statutory authority authorizing such advance payments.
- The Act provides that quarterly minimum required contributions (under Code Section 430(a)) for single employer pension plans may be delayed to the end of the year and allows plans to use 2019 funded status to determine funding limits for 2020.
- The Act modifies minimum funding rules for pension plans sponsored by charities that provide medical services with respect to mothers and children.
- The Act allows high deductible health plans to provide telehealth services with no deductible for the 2020 and 2021 plan years.
- The Act allows HSAs, HRAs, health FSAs, and Archer MSAs to reimburse feminine hygiene products tax-free.
- The Act suspends the collection of certain aviation excise taxes through 2020.

IV. CONCLUSION

As our broad summary should reflect, the Act is complex and broad in coverage. Lawmakers did a wonderful job in their attempt to help our country. They should be commended for this bi-partisan effort.

We will provide more detailed coverage of the key tax provisions of the Act in the near future. Stay-tuned!

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