CARES Act: Business Tax Provisions

Insights
April 1, 2020

The **Coronavirus Aid, Relief and Economic Security Act** (the CARES Act) was signed into law on March 27, 2020. Included in this economic stabilization package are several business tax related provisions, including:

- A payroll tax credit for employers affected by the coronavirus (COVID-19) pandemic;
- A payroll tax deferral for all employers for the rest of 2020;
- An expansion of the use of net operating losses;
- An acceleration of refunds for unused corporate alternative minimum tax (AMT) credits;
- A temporary increase on business interest deductions; and
- Bonus deprecation status for qualified improvement property.

Employee Retention Credit for Employers Affected by the COVID-19 Crisis.

- Provides a fully-refundable payroll tax credit equal to 50% of "***qualified wages***" paid between 3/13/2020 and 12/31/2020 by "***eligible employers***."
- An eligible employer includes any employer that carries on a trade or business during 2020 and, with respect to any calendar quarter, whose:
  - Operations were fully or partially suspended, due to shut-down orders related to COVID-19; or

    - Gross receipts declined by more then 50% when compared to the same quarter in the prior year (and continuing until gross receipts for a calendar quarter are greater than 80% of the gross receipts for the same calendar quarter in the prior year).

- The definition of qualified wages depends upon the average number of full-time employees employed by such eligible employer during 2019.

    - For employers with greater than 100 full-time employees: qualified wages constitute wages paid to employees when they are **not** providing services for the period that the employer qualifies as an eligible employer.

    - For employers with 100 or fewer full-time employees: qualified wages constitute wages paid to **all** employees, whether the employee is providing services or not, for the period that the employer qualifies as an eligible employer.

- In addition, there are several limitations on wages that may be considered qualified wages, including:

    - Qualified wages do not include wages taken into account under the paid sick and family leave credit provisions of the Families First Coronavirus Response Act.

    - Qualified wages with respect to any employee cannot exceed $10,000 for all calendar quarters (essentially, this caps the credit at $5,000 per employee).

    - Qualified wages include qualified health plan expenses that are properly allocable to such qualified wages.

    - ***The retention credit is not available to employers receiving a Paycheck Protection loan.***

- The retention credit is to be applied against the employer's share of old age, survivors, and disability insurance (OASDI) taxes.

    - Although the credit is in the form of a payroll tax credit, it is not limited to OASDI taxes attributable to the qualified wages, but can be applied against all of an eligible employer's OASDI taxes.

    - Any credit in excess of such OASDI taxes will be treated as an overpayment and refunded to the employer.

    - The IRS recently released IRS Form 7200, *Advance Payment of Employer Credits Due to COVID-19* (https://www.irs.gov/pub/irs-pdf/f7200.pdf), to request an advance of the tax credit for qualified sick and family leave wages and the employee retention credit.

- *NOTES*:
  - There is no limit as to the number of employees in respect to which an eligible employer can claim the credit.
  - The Treasury Secretary is given authority to issue regulations and guidance to allow advance payment of this credit and is authorized to waive penalties for an employer's failure to make deposits in reasonable anticipation of receiving such credits and to provide for recapture of the credit if such employer subsequently receives a Paycheck Protection loan.
  - The IRS has published some preliminary guidance on the use of the retention credit in the form of an FAQ (https://www.irs.gov/newsroom/faqs-employee-retention-credit-under-the-cares-act).
  - For the purpose of this credit, entities treated as a single employer under Section 52(a) or (b) (an affiliated group of corporations or partnerships under common control) or Section 414(m) or (o) (an affiliated service group) are treated as one employer.

Delay of Payment of Employer Payroll Taxes.

- Allows all employers to defer payment of the employer's share of the OASDI tax (6.2%) on employee's wages for the period after 3/27/2020 through 12/31/2020 (the Medicare portion of an employer's payroll tax obligations are not included in this relief).
- Requires that the deferred tax be paid over the following two years:
  - 50% to be paid by 12/31/2021; and
  - Remainder to be paid by 12/31/2022.
- In addition to OASDI taxes, payment for 50% of self-employment income is also deferred and payable in the same manner as payroll taxes.
- *NOTES*:
  - This deferral effectively provides an interest free loan to employers for the amounts otherwise required to be deposited for the rest of the year.

- The Secretary of the Treasury is directed to provide guidance, including rules for the administration and enforcement of this provision.
- Additional guidance is needed in order to clarify any overlap between the retention credit and payroll tax deferral.
- It is not clear as to whether the deferral applies to taxes related to wages paid after 3/27/2020, or whether it applies to all deposits otherwise scheduled to occur after that date.
- ***Although this deferral is generally available to ALL employers regardless of their size or whether they are affected by the COVID-19 crisis, deferral is not provided to employers if such employer has had indebtedness forgiven with respect to a Paycheck Protection loan.***

Changes to Net Operating Loss (NOL) Rules and Excess Business Loss Limitation.

- Under 2017 Tax Act, corporate NOLs are subject to an 80% taxable income limitation and cannot be carried back to reduce income in a prior tax year.
- The CARES Act allows an NOL from tax years beginning in 2018, 2019, or 2020 to be carried back for five years.
- Corporations may elect to file for an accelerated refund to claim the carryback benefit.
- In addition, the CARES Act temporarily removes the taxable income limitation to allow an NOL to fully offset income for taxable years beginning before 2021.
- In the case of taxable years beginning after 2020, taxpayers will be eligible for:
  - 100% deduction of NOLs arising in tax years prior to 2018; and
  - A deduction limited to 80% of taxable income for NOLs arising in tax years after 2017.
- The excess business loss limitation that otherwise limits current losses attributable to non-corporate taxpayers is temporarily suspended so they can also benefit from the NOL carryback rules.
- *NOTES*:

- NOLs carried back to taxable periods prior to the 2017 Tax Act can offset taxable income taxed at highest marginal rates of 35% (vs. current 21% rate).

Modification of Credit for Prior Year Minimum Tax Liability of Corporations.

- Accelerates the ability of companies to received refunds of AMT credits in tax years beginning in 2019.
- Alternatively, companies can elect to claim the entire refundable AMT credit in tax years beginning in 2018.

Modification of Limitation on Business Interest Deduction.

- Under current rules, the amount of business interest generally allowed as a deduction is limited to 30% of adjusted taxable income (ATI).
- This provision temporarily increases the amount of the limit to 50% of ATI for 2019 and 2020.
- It also allows businesses to elect to use 2019 ATI in calculating their 2020 limitations.

Technical Amendment Regarding Qualified Improvement Property.

- This provision makes a technical correction to the 2017 Tax Act to provide a 15-year recovery period for qualified improvement property.
- This correction enables businesses to immediately expense, through bonus depreciation, costs associated with qualified improvements to nonresidential real property (instead of having to use straight-line depreciation over the 39-year life of the building).

Related People

Mark M. Foster

PARTNER
P +1 650 463 5343

Related Services

Corporate Governance & Strategy
Data Privacy
Debt Financings & Secured Transactions
Employment & Labor
Executive Compensation
Fund Formation

Fund Investments in Companies
Fund Operations and Compliance
Mergers & Acquisitions
Private & Public Companies
Private Fund
Public Companies/Public Offerings
Seed, Venture and Growth Financings
Strategic Transactions & Licensing
Tax

Featured Insights

FIRM NEWS

Gunderson Dettmer Commemorates 2025 Asian American and Pacific Islander Heritage (AAPI) Month

CLIENT NEWS

Brazilian Carbon Capture Company Mombak Announces $30M Financing

CLIENT NEWS

Africa B2B OmniRetail Announces $20M Financing

CLIENT NEWS

Glacier Announces Series A Financing to Expand Robot Recycling Fleet

CLIENT NEWS

Dataminr Announces $100M Investment Led by Fortress Investment Group

CLIENT NEWS

Omnidian Announces $87M Series C for Renewable Energy Performance

INSIGHTS

Splitting the Pie: How Savvy Founders Divide Ownership and Navigate Other Founder Equity Decisions

CLIENT NEWS

Chainguard Announces $356 Million Series D Led by Kleiner Perkins and IVP

INSIGHTS

Client Insight: California AI Transparency Act

INSIGHTS

Client Insight: Prepare for BE-10 Benchmark Survey of US Direct Investment Abroad

INSIGHTS

Tech Brew Interviews Aaron Rubin in “Where the legal battle stands around copyright and AI training”

CLIENT NEWS

Latin America Fintech Belvo Announces $15M Funding