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Summary of Business Tax Provisions of Families First Coronavirus Response Act (“FFCRA”) and --- Coronavirus Aid, Relief and Economic Security Act (“CARES Act”)

Outline

- Payroll Tax Credits
- Payroll Tax Deferral
- Net Operating Losses
- Excess Business Losses
- AMT Credit
- Interest Deduction Limitations
- Bonus Depreciation/Correcting the “Retail Glitch”
- Miscellaneous Individual Tax Relief

Payroll Tax Credit Summary Chart

	<u>Sick Leave Credit</u>	<u>School/Childcare Closure Leave Credit</u>	<u>Employee Retention Credit</u>
Eligible Employer	Employers with under 500 employees obligated to provide COVID-related sick leave	Employers with under 500 employees obligated to provide COVID-related FMLA leave	All employers either (a) subject to government shut-down order or (b) experiencing significant revenue decline
Eligible Wages	Sick leave required under FFCRA up to \$511/day for 10 days for COVID patients; \$200/ day for 10 days for caregivers. Credit can be increased for certain incremental health plan expenses allocable to the creditable wages	Child care leave required under FFCRA up to \$200/day for up to 10 weeks for caregivers. Credit can be increased for certain incremental health plan expenses allocable to the creditable wages	Employers under 100 employees: All wages up to \$10,000 per employee. Employers over 100 employees: All wages paid to employees not providing services up to \$10,000 per employee. For this purpose, health plan expenses constitute “wages”

Payroll Tax Credit Summary Chart

	<u>Sick Leave Credit</u>	<u>School/Childcare Closure Leave Credit</u>	<u>Employee Retention Credit</u>
Maximum Amount	100% All eligible wages	100% All eligible wages	50% of eligible wages
Refundable?	✓ Yes	✓ Yes	✓ Yes
Compatible with SBA 7(a) Paycheck Protection Program Loan?	✓ Yes	✓ Yes	✗ No

Mandatory Sick Leave and Family Leave

FFCRA (Signed March 18, 2020)

Division C: Emergency Paid Family and Medical Leave Act

- Requires paid family medical leave for up to 10 weeks if an employee is unable to work (or telework) due to a need to care for a son or daughter (generally under 18 years of age) if the school or place of care has been closed or is unavailable, due to a public health emergency

2/3 of regular rate of compensation up to \$200 per day for up to 10 weeks, capped at \$10,000

Mandatory Sick Leave and Family Leave

FFCRA (Signed March 18, 2020)

Division E: Emergency Paid Sick Leave Act

Paid Sick Leave

- Regular rate of compensation up to \$511 per day for up to 80 work hours (\$5,110 maximum) for Category 1 employees.
- 2/3 of regular rate of compensation up to \$200 per day for up to 80 work hours (\$2,000 maximum) for Category 2 employees.

Requires paid sick leave by employers with 500 or fewer employees for employees unable to work (or telework) due to a need for leave because

Category 1:

- Employee is subject to a COVID-19 quarantine or isolation order
- Employee has been advised by a healthcare provider to self-quarantine due to COVID-19
- Employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis

Category 2:

- Employee is caring for someone who is subject to an isolation or quarantine order or has been advised by a healthcare provider to self quarantine
- Employee is caring for a son or daughter of such employee if the school or daycare has been closed or the child care provider has become unavailable due to COVID-19

Sick Leave Payroll Tax Credit

- 100% credit against employer portion of OASDI payroll tax (6.2% on the first \$137,700 of wages paid to each employee) in an amount equal to 100% of required sick leave payments.
- Excess of credit over OASDI tax is applied against Hospital Insurance payroll tax (1.45%) and any excess is refundable.
- Per IRS News Release IR 2020-57 (March 20, 2020):
 - Employers will be able to retain any payroll taxes equal to the amount of the sick leave or child care leave payments made.
 - For this purpose, payroll taxes will include OASDI and HI taxes and withheld employee federal income tax.

Employee Retention Credit

CARES Act (Signed March 27, 2020)

**Employee Retention
Credit**

Eligible Employer can receive a credit against OASDI tax (remaining after any sick leave credits) for each quarter in an amount equal to 50% of qualified wages for each employee

“Eligible Employer”

=

**Carrying on Trade or
Business During CY 2020**

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During Any Calendar Quarter in Which:

- 1. Operation is fully or partially suspended due to orders from a governmental authority limiting commerce, travel or group meetings due to coronavirus; or**
- 2. The calendar quarter falls within a period of: “significant decline in gross receipts”**

Employee Retention Credit Definitions

- **Period of Significant Decline in Gross Receipts:**
 - Begins on the first day of the first calendar quarter beginning after 12/31/19 in which gross receipts are less than 50% of gross receipts for the same calendar quarter in the prior year (the “initial quarter”);
 - Ends on the last day of the first calendar quarter following the initial quarter in which gross receipts are greater than 80% of gross receipts for the same calendar quarter in the prior year.
- **Qualified Wages**
 - Employer with over 100 full time employees:
 - Wages paid to employees with respect to which the employee is not providing services due to either
 - Government shut-down order or
 - Significant decline in gross receipts.
 - Cannot exceed with respect to any employee the amount the employee would have been paid for working an equivalent duration.
 - Employer with under 100 full time employees:
 - Any wages paid during a government shut-down or a significant decline in gross receipts.
 - **Aggregation Rules (for purposes of 100 employee test):**
 - All treated as “single employer” under section 52(a) and (b) or 414(m) or (o) are treated as a single employer.
 - Most PE-backed companies will not be aggregated under this rule, but this will depend, in part, on the investor make-up of the fund itself and will need to be analyzed on a case-by-case basis.
 - Limited to \$10,000 per employee for all quarters. Health plan expenses allocable to employee compensation can be counted towards the \$10,000.

Employee Retention Credit Limitations

Credit in any quarter cannot exceed applicable employment taxes for the quarter reduced by any credit for sick leave pay under Families First Coronavirus Response Act

If the credit exceeds the limitation, the excess credit is an overpayment that is refundable

Not available for borrowers with SBA PPP small business interruption loan

Payroll Tax Deferral Summary Chart

Applicable Employer	All
Deferral Amount	OASDI Deposits (6.2% of the first \$137,700 paid to each employee).
Deferral Period	Period beginning 3/27/2020 and ending before January 1, 2021.
Repayments	50% on 12/31/21 and 50% on 12/31/22.
Compatibility with SBA 7(a) Payroll Protection Program Loan	Does not apply if debt is forgiven with respect to SBA 7(a) PPP Loan under CARES Act.
Interplay with Payroll Credits	Deferral applies to any OSDI Deposits due in excess of applicable credits (if any).

Payroll Tax Deferral

- Payment of OASDI for the payroll tax deferral period not due until the applicable date.
 - Payroll tax deferral period:
 - 3/27/2020 until 12/31/2020
 - Applicable Date:
 - 12/31/2021 for 50% of the amount deferred; and
 - 12/31/2022 for the other 50%.
- Limitation: Does not apply if taxpayer has indebtedness forgiven with respect to an SBA 7(a) loan.
 - Although not spelled out, it would appear that a taxpayer who takes advantage of the OASDI deferral and subsequently is relieved of debt for an SBA 7(a) loan would be required to pay past due OASDI deposits with interest and penalties.

Payroll Tax Credit Summary Chart

Prior Law Under TCJA

CARES Act Change

Carryback of NOL

No carry-back for
NOLs generated in
2018 and thereafter

No carry-back for
NOLs generated in
2018 and thereafter

Carryforward of NOL

For NOLs generated in
2018 and thereafter,
carryforward can only
shelter **80%**
of taxable income

80% limitation
does not apply for
taxable years
beginning before
1/1/2021

NOL Practice Notes:

Carryback is default rule. An election to waive a carryback for 2018 or 2019 can be filed up until the due date for the 2020 tax return

Check acquisition agreements to determine contractual economic benefit (or detriment) of loss carryback or waiver

Excess Business Losses

	<u>Prior Law under TCJA</u>	<u>CARES Act</u>
Excess Business Loss limitation	Limits deduction of business losses of non-corporate taxpayers against non-business income for taxable years beginning after 12/31/17 and ending before 1/1/26.	Suspends limitation until taxable years beginning after 12/31/2020.
Trade or business loss taken into account for purposes of the limitation	All losses from a trade or business.	Exempts capital losses (as might be recognized by an investor engaged in a securities or commodities “trading” trade or business).

Corporate AMT Credit

	<u>Prior law under TCJA</u>	<u>CARES Act Changes</u>
Corporate AMT Credit	Corporate AMT was repealed. Carryforward refundable AMT credits usable over 4 year period 2018, 2019, 2020 and 2021.	AMT credit carryforwards are recoverable over 2 year period in 2018 and 2019, and election can be made to take the entire refundable credit amount in 2018.

Interest Deductibility

	<u>Prior Law under TCJA</u>	<u>CARES Act Changes</u>
Business interest limitation for corporations	Deduction limited to 30% of EBITDA for taxable years 2018-2021; 30% of EBIT for taxable year 2022 and thereafter.	<ul style="list-style-type: none"> • 2019 and 2020 limitation increased to 50% of EBITDA • Elective use of 2019 EBITDA in 2020 for purposes of determining limitation.
Business interest limitation for partnerships	Partnership level deduction limited to 30% of EBITDA for 2018-2021, 30% of EBIT thereafter. Excess interest allocated to partners as a carryforward against “excess taxable income” of partnership in subsequent years.	<p>30% limitation remains in place for 2019-2020; Excess interest for 2019 allocated to partners and carried forward to 2020:</p> <ul style="list-style-type: none"> • 50% is deductible as business interest of partner in 2020 without limitation; and • Other 50% is deductible against “excess taxable income”.

“Retail Glitch”

	<u>Prior Law under TCJA</u>	<u>CARES Act Changes</u>
Depreciation of interior improvements to nonresidential real property.	39-year property—depreciated on a straight line basis.	Qualified improvement property is 15 year property eligible for first year expensing.

Miscellaneous Individual Tax Relief in CARES Act

- **Refundable credits**
 - Up to \$1200 per taxpayer and \$500 per dependent child for individual taxpayers.
 - Phases out after \$150,000 of adjusted gross income.
 - Received by automatic rebate from Treasury based on 2019 AGI.
- **Waiver of excise tax and deferral of income tax**
 - Applies to coronavirus-related distributions of up to \$100,000 from qualified retirement plans (with ability to repay over three years free of contribution limitations).
- **Increase in limits on qualified plan loans**
 - Increase to \$100,000 and 100% of account balance.
- **Qualified plans and IRA's**
 - Temporary waiver of required minimum distributions
- **Charitable contributions**
 - Partial above-the-line deductions for charitable contributions made by taxpayers who do not itemize deductions
 - Increase in income limitations for certain charitable contributions.