The Incentives from the Cares Act

FAQ and Live Discussion

May 15, 2020

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With you Today

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Highlights from the CARES Act

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CARES Provisions

- **Payroll Tax Deferral**
  - 2020 payroll (employer social security) tax deferral
    - Half due December 31, 2021
    - Half due December 31, 2022
- **Employee Retention Credit**
  - Refundable employment tax credit, up to $5,000 per impacted employee
    - $5,000 = 50% on up to $10,000 in qualified wages

The Coronavirus Aid, Relief, and Economic Security (CARES) Act was signed into law on March 27, 2020.

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Payroll tax deferral

— Immediate impact on cash flow

Payment of applicable employment taxes for the payroll tax deferral period are deferred (effectively an interest-free loan from the government)

- Half due December 31, 2021
- Half due December 31, 2022

Applicable employment taxes are generally the employer share of social security taxes

- Also includes corresponding taxes imposed under the Railroad Retirement Act and on employee representatives, where applicable

Payroll tax deferral period

- The period beginning on March 27, 2020 and ending on December 31, 2020

Deferring payment of 2020 payroll taxes also defers deductibility

- The economic performance rules of section 461(h) do not permit taxpayers to deduct payroll taxes until actual payment

Note: Payroll deferral available until/if SBA Paycheck Protection Program loan forgiven under sections 1106 and 1102 of the CARES Act.

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Employee retention credit (determined quarterly)

— **Potential $5,000 credit per employee**

Eligible employers receive 50% credit for qualified wages up to $10,000 per employee ($5,000 maximum credit per employee)

- Wages paid March 13, 2020 through and including December 31, 2020 (including allocable health expenses)
- Credit against payroll taxes (including income tax withholding) with excess refunded
  - Controlled group under IRC sections 52 and 414, applying ACA definition of employee
  - Precludes double benefits under work-opportunity tax and leave credits
- Look to each organization for certain IRC section 501(c)(3) tax-exempts

Eligible Employer

- Fully or partially suspends operation during any calendar quarter in 2020 due to orders from an appropriate government authority limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to COVID-19, *or*
- Over 50% reduction in quarterly receipts measured year over year

100 or Fewer Employees

Qualified Wages =
Wages paid to each employee

More than 100 Employees

Qualified Wages =
Wages paid for time *not* providing services due to employer related eligibility

Note: Employer ineligible if receiving SBA Paycheck Protection Program loan

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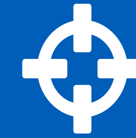
Authoritative guidance



The following guidance is currently available regarding the ERC (employee retention credit). Current technical positions may change based on impending IRS guidance:

- Section 2301: H.R. 748
- Senate Committee on Finance: FAQs (3/31/20) – *Non-binding*
- JCT Description Explanations (4/23/20) – *Non-binding*
- IRS: FAQs (two sets on 4/10/20 & 4/29/20) – *Non-binding*
- IRS: Update to FAQs (re: furloughed employees/health benefits)

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Paid leave provisions

Applies to:

—**Private employer with *fewer* than 500 employees,**

— **Public agency, and**

—**(For EPSL only) any other entity that is not private**

Note: Count number of employees on date of leave

Obligation to provide, but also receive corresponding credit

Note: An employer may receive an advanced credit prior to the expense.

Emergency Paid Sick Leave (EPSL)	Emergency Paid FMLA (FMLA +)
— Employees eligible day one — Up to 80 Hours (Basically, first 10 days) — Six Triggers — Full or 2/3rd pay depending on trigger – Full pay capped at $511 daily and $5,110 in aggregate, or – 2/3rd pay capped at $200 and $2,000 in aggregate	— Employees eligible with 30 calendar days on payroll — Up to 12 Weeks – First two weeks may be unpaid — One trigger — 2/3rd pay capped at $200 and $10,000 in aggregate

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Paid leave provision – triggers

The following reasons trigger paid leave provisions to apply to employers with fewer than 500 employees:

EPSL = Employee unable to work (or telework) because:

- Employee subject to quarantine or isolation order related to COVID-19
- Employee advised by healthcare provider to self-quarantine because of COVID-19
- Employee experiencing symptoms of COVID-19 **and** seeking a diagnosis
- The employee is caring for an individual subject to or advised to quarantine or isolate
- The employee is caring for a son or daughter whose school or place of care is closed or unavailable due to COVID-19 precautions
- The employee is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury

FMLA+ = Employee unable to work (or telework) because:

- Employee is unavailable to work or telework to care for a minor child if the child's school or place of child care has been closed or is unavailable due to a public health emergency

Blue triggers = Full pay trigger capped at $511 and 10 days ($5,110)

Other triggers are 2/3rd pay capped at $200 per day for the paid benefit period

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Income tax considerations

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Net operating losses: The CARES Act

NOLs generated in Tax Year:	Carryback Period	Carryforward Period	Limitation on Utilization	
Beginning on or prior to 12/31/2016	2 tax years	20 tax years	100% of taxable income	Pre-TCJA
Beginning in 2017	2 tax years	20 tax years	100% of taxable income	
Beginning in 2018	5 tax years	Indefinite	100% of taxable income (prior to 2021) 80% of taxable income (after 2020)*	The CARES Act provisions
Beginning in 2019	5 tax years	Indefinite	100% of taxable income (prior to 2021) 80% of taxable income (after 2020)*	
Beginning in 2020	5 tax years	Indefinite	100% of taxable income (prior to 2021) 80% of taxable income (after 2020)*	
Beginning in 2021	No carryback	Indefinite	80% of taxable income	Reverts back to TCJA rules
Beginning on or after 1/1/2022	No carryback	Indefinite	80% of taxable income	

* NOLs generated in tax years beginning after 2017 and before 2021 can be used up to 100% of taxable income.
The 80% limitation applies to the extent 2018-2020 NOLs are carried beyond 2020.

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Sec. 163(j) - The CARES Act modifications

Temporary modifications to interest limitation rules

For tax years beginning in 2019 and 2020, the 30% adjusted taxable income (ATI) limitation is increased to 50%.

Electing out of the 50% of ATI limitation rule: Taxpayers can elect not to have the 50% rule apply to any tax year.

For any tax years beginning in 2020, taxpayers can elect to use their ATI from their last tax year beginning in 2019 for their ATI in the 2020 tax year.

The ability to use 2019 ATI for 2020 is welcome news for taxpayers that may face reduced earnings in 2020.

For taxpayers that generate an NOL in 2019 or 2020, the ability to deduct additional business interest expense would increase the NOL that can potentially be carried back to a 35% tax year.

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Qualified Improvement Property (QIP)

Generally includes improvements to the interior of non-residential real property that are placed in service after the building was first placed in service (Sec. 168(e)(6)(A)).

Excludes improvements attributable to building enlargements, elevators, escalators, or the internal structural framework (Sec. 168(e)(6)(B).

The CARES Act provides for a technical correction

Due to a drafting error in the TCJA, QIP placed in service after 2017 has been depreciated as non-residential real property (over 39 years).

Accordingly, QIP has not been eligible for bonus depreciation.

The CARES Act corrects this oversight and QIP will now have a recovery period of 15 years, retroactive to 1/1/2018, making it eligible for 100% bonus depreciation.

Allowance of bonus depreciation can potentially increase the amount of NOLs that can be carried back.

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The CARES Act NOL Carryback and Similar Opportunities

For NOLs arising in tax years beginning after 12/31/2017 and before 1/1/2021, opportunity to use NOLs generated in 21% tax rate years to offset income generated in 35% tax rate years through carryback.

Opportunity can be maximized through various tax planning strategies:

Tax accounting method changes

— Accelerate deductions or defer income recognition

Section 165(i) election

— Allows certain losses from 2020 to be recognized in 2019

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Minimum Tax Credits (MTC)

The TCJA repealed the corporate alternative minimum tax, effective for tax years beginning after 12/31/2017. Additionally, the TCJA enacted transition rules that allowed taxpayers to utilize their remaining MTCs before 2022.

Under the transition rules, in tax years 2018-2020, corporations could receive a refund equal to 50% of the unused MTC carryforward balance. In 2021, the remaining balance would be refundable.

The CARES Act accelerates the ability to claim unused MTCs as refunds. Instead of allowing 50% credit for tax years beginning in 2018 through 2020, with a 100% credit allowed in 2021, the legislation now allows a 50% credit for 2018 and a 100% credit for 2019.

Alternatively, a taxpayer may elect to recover 100% of any of its remaining MTCs in its 2018 tax year and to claim that MTC using the expedited refund procedures on Form 1139 or the Form 1045, as applicable.

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Transfer pricing considerations

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Transfer pricing considerations

- Supply Chain Disruptions
- Intercompany Pricing Policies
  - Remuneration of Routine Functions in a Downturn
  - Considerations for Distributors
  - Considerations for Service Providers
  - Intercompany loans
  - Advance Pricing Agreements
  - Feedback from the Internal Revenue Service
- Intercompany Contracts
- Implications of Transfer Pricing decisions for FY2020
  - Trade and Customs
  - Estimated Tax Payments
  - Income tax implications

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Thank you

Please do not hesitate to contact us for any questions or comments:

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