

## Key tax provisions in the CARES Act

The recently enacted Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") provides economic stimulus through various tax provisions.

### Families First Coronavirus Response Act

The Families First Coronavirus Response Act (the "FFCRA") generally provides sick leave wages and expanded family and medical leave wages for certain employees impacted by COVID-19. The CARES Act expands the employees eligible for sick leave wages and expands family and medical leave wages to generally include employees who were laid off on or after March 1, 2020, had worked for the employer for at least 30 of the last 60 calendar days prior to being laid off, and were rehired by the employer.

The CARES Act states that employers who provide sick leave wages or expanded family and medical leave wages can generally obtain an advance of tax credits (including any refundable portion of tax credits) owed pursuant to the FFCRA. The CARES Act (as discussed in more detail below) generally provides an extension for payment of certain payroll taxes. Therefore, the CARES Act provides employers with the ability to obtain prompt reimbursement of any sick leave wages or expanded family and medical leave wages paid pursuant to the FFCRA.

### Employee retention payroll tax credit

The CARES Act generally provides a payroll tax credit against employment taxes owed by certain eligible employers impacted by COVID-19. An employer is generally an "eligible employer" to the extent such employer conducts a trade or business during 2020 and such employer either (i) was required by a governmental authority to fully or partially suspend its trade or business during such calendar quarter because of COVID-19 or (ii) experienced a significant decline in gross receipts.

An employer generally experiences a significant decline in gross receipts (i) beginning with the first calendar quarter in 2020 in which such employer's gross receipts are less than 50% of such employer's gross receipts for the corresponding calendar quarter in 2019 and (ii) ending with the first calendar quarter in which such employer's gross receipts equal 80% of such employer's gross receipts for the corresponding calendar quarter for the previous year.

The amount of the employee retention payroll tax credit generally equals 50% of the "qualified wages" paid when an employer was an "eligible employer" as discussed above; however, (i) the amount of "qualified wages" taken into account for an individual employee shall not exceed \$10,000, and (ii) only wages paid after March 12, 2020 and before January 1, 2021 can qualify as "qualified wages." The CARES Act generally defines "qualified wages" as "wages" (as defined in Section 3121(a) of the Internal Revenue Code) and "compensation" (as defined in Section 3231(e) of the Internal Revenue Code). The CARES Act also notes that "qualified health plan expenses" are also generally deemed to be "wages" for purposes of computing the employee retention payroll tax credit.

Even if amounts constitute "wages" under the CARES Act, whether such wages are "qualified wages" depends on how many employees are employed by an employer. The CARES Act generally applies the pension aggregation rules for purposes of computing the employee retention payroll tax credit for related employers.

#### Not greater than 100 employees

#### Greater than 100 employees

#### Employer required to fully or partially suspend its trade or business

"Qualified wages" generally include those wages paid to all employees during the period in which the employer is required to fully or partially suspend its business (whether or not an employee is able to provide services because

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### Employer experienced a significant decline in gross receipts

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However, even if the employer satisfies all the necessary requirements, the CARES Act generally provides that (1) “wages” do not include wages taken into account under FFCRA for purposes of computing the tax credit attributable to sick leave wages and expanded family and medical leave wages (and corresponding “qualified health plan expenses”) and (2) an employer receiving a small business interruption loan is not eligible for employee retention payroll tax credit.

### Deferral of employer payroll taxes

The CARES Act generally provides for a deferral mechanism for the employer portion of any Social Security taxes due to be made during the period beginning on March 27, 2020 and ending before January 1, 2021, (the “Payroll Tax Deferral Period”). Under the CARES Act, (i) 50% of the employer portion of any Social Security taxes for the Payroll Tax Deferral Period are generally deferred until December 31, 2021, and (ii) the remaining amount of the employer portion of any Social Security taxes are generally deferred until December 31, 2022.

The CARES Act states that the deferral of the employer portion of Social Security taxes generally does not apply if the employer had any loan authorized by the Small Business Act forgiven under the CARES Act.

### Deferral of self-employment taxes

The CARES Act generally provides for a deferral mechanism for the employer portion of any self-employment taxes attributable to Social Security due to be made during the period beginning on March 27, 2020 and ending before January 1, 2021 (the “Self-Employment Tax Deferral Period”). Under the CARES Act, (i) 50% of the employer portion of any self-employment taxes attributable to Social Security for the Self-Employment Tax Deferral Period are generally deferred until December 31, 2021 and (ii) the remaining amount of the employer portion of any self-employment taxes attributable to Social Security are generally deferred until December 31, 2022.

### NOL carryback limitation

The Tax Cuts and Jobs Act of 2017 (the “TCJA”) generally eliminated the ability of taxpayers to carryback any net operating loss (“NOL”). The CARES Act (i) generally removes the TCJA carryback limitation with respect to NOLs arising in a taxable year beginning after December 31, 2017 and before January 1, 2021 (i.e., 2018, 2019, and 2020 for calendar year taxpayers), and (ii) generally provides that such NOLs can be carried back to each of the five taxable years preceding the taxable year of such loss. With respect to NOLs arising in a taxable year beginning on or after January 1, 2021, the TCJA carryback limitation is reinstituted and such NOLs are generally not eligible to be carried back to prior taxable years.

### NOL 80% limitation

The TCJA also generally limited the ability of taxpayers to carryforward any NOLs; specifically, the TCJA provided that a taxpayer could generally only use NOLs to offset 80% of the taxpayer’s taxable income. The CARES Act generally suspends the 80% limitation with respect to any taxable year beginning before January 1, 2021 and, thus, such NOLs (whether from being carried forward or carried back) can generally be used to fully offset taxable income with respect to any taxable year beginning before January 1, 2021. The 80% limitation enacted by the TCJA would generally continue to apply to taxable years beginning on or after January 1, 2021.

### Business interest deduction

Under the TCJA, business interest expense deductions are generally limited to 30% of a company’s adjusted taxable income. The CARES Act provides that (i) the 30% limitation on business interest expense deductions is generally increased to 50% for any taxable year beginning in 2019 or 2020, and (ii) a company can generally elect to use their 2019 adjusted taxable income (which is likely higher than their 2020 adjusted taxable income) for purposes of computing the business interest expense deduction for the 2020 taxable year.

The increase of the business interest expense deduction from 30% to 50% does not apply to partnerships (though it does generally apply to S corporations). Instead, the CARES Act provides that, unless a partner elects out, (i) 50% of any excess business interest of the partnership for any taxable year beginning in 2019 is generally fully deductible and (ii) the remaining 50% of any excess business interest of the partnership would continue to be generally subject to the applicable limitations enacted under the TCJA.

### Excess business losses

The TCJA generally disallowed “excess business losses” of noncorporate taxpayers generated in taxable years beginning after December 31, 2017 and before January 1, 2026. The CARES Act modifies the relevant taxable years to generally apply to “excess business losses” of noncorporate taxpayers generated in taxable years beginning after December 31, 2020 and before January 1, 2026. The CARES Act notes that this amendment to the



limitation on “excess business losses” is effective for taxable years beginning after December 31, 2017 (i.e., retroactive).

### Qualified improvement property

The CARES Act corrects a “glitch” in the TCJA and provides that “qualified improvement property” is generally eligible for bonus depreciation. The CARES Act notes that this correction should be treated as if were included in the TCJA (i.e., retroactive).

### Amending tax returns

Taxpayers should discuss with their tax advisors whether its possible or beneficial to amend any previously filed tax return.

*If you have any questions on these various programs, please feel free to call or e-mail your regular contact at Thompson Coburn LLP. For more information from Thompson Coburn LLP related to COVID-19, please [visit our resource page](#).*

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