# Tax Legislation—COVID-19 Relief

### Contents



To help taxpayers deal with the impact of the COVID-19 pandemic caused by the coronavirus, and to stimulate the U.S. economy, the federal government has provided a host of tax and employee benefit relief provisions. Following are highlights of these recent legislative provisions.

## Families First Coronavirus Response Act (FFCRA)—Selected Provisions

On March 18, 2020, President Trump signed into law the FFCRA (Public Law 116-127), which is intended to ease the economic consequences stemming from the coronavirus pandemic by providing, among other things, (1) family and medical leave, and sick leave, to employees and (2) tax credits to employers that pay for the leave. The FFCRA also affects employer-sponsored health plans.

### Family Leave for Employees

The FFCRA includes the Emergency Family and Medical Leave Expansion Act (EFMLEA) (Division C of the FFCRA), which requires employers with fewer than 500 employees to provide both paid and unpaid public health emergency leave to certain employees from April 1, 2020 through December 31, 2020. The emergency leave generally is available when an employee who has been employed for at least 30 calendar days (an *eligible employee*) is unable to work or telework due to a need for leave to care for a son or daughter under age 18. The need for leave must arise because an elementary or secondary school or place of care has been closed, or the son's or daughter's regularly compensated childcare provider is unavailable, due to an emergency with respect to the coronavirus that is declared by a federal, state, or local authority.

The first 10 days of leave may be unpaid, but an employee may elect to substitute vacation, personal, medical, or sick leave for the unpaid leave. After the first 10 days, the employer must provide up to an additional 10 weeks of paid expanded family and medical leave. The required paid leave is calculated based on an amount not less than two-thirds of an employee's regular rate of pay and the number of hours the employee would otherwise be normally scheduled to work, but not in excess of $200 per day and $10,000 in the aggregate. Certain special rules apply, such as when calculating required paid leave for an employee whose schedule varies from week to week. Also, if the leave is foreseeable, an employee must provide the employer with notice of leave as is practicable.

The Secretary of Labor is authorized to issue regulations that—

- Exclude certain health care providers and emergency responders from the definition of *eligible employee*, and
- Exempt small businesses with fewer than 50 employees from the leave provision mandate if it would jeopardize the viability of the business as a going concern.

Other exemptions also may apply, and there are special rules for employers and employees operating under multiemployer collective bargaining agreements.

### Sick Leave for Employees

The FFCRA also includes the Emergency Paid Sick Leave Act (EPSLA) (Division E of the FFCRA), which requires private employers with fewer than 500 employees, and public employers of any size, to provide 80 hours of paid sick leave to full-time employees who are unable to work (or telework) for specified coronavirus-related reasons. Part-time employees are entitled to paid sick leave based on their average hours worked over a two-week period. Certain special rules apply, such as when calculating compensation for an employee whose schedule varies from week to week.

The maximum required sick pay varies based on the reason for the absence. Employees must be compensated at their regular rate, up to a maximum of $511 per day and $5,110 in the aggregate if they are—

- Subject to a federal, state, or local quarantine or isolation order;
- Advised by a health care provider to self-quarantine due to coronavirus concerns; or
- Experiencing coronavirus symptoms and seeking a medical diagnosis.

Employees caring for an individual described in the first two bullet points, caring for a son or daughter whose school or place of care is closed or child care provider is unavailable, or experiencing a "substantially similar condition" specified by the government must receive two-thirds of their regular rate, up to a maximum of $200 per day and $2,000 in the aggregate.

The paid sick leave is immediately available regardless of the employee's length of employment. Employers cannot require employees to search for or find a replacement employee or use other paid leave before this paid sick time. The sick leave mandate takes effect on April 1, 2020 and expires on December 31, 2020.

The Secretary of Labor is authorized to issue regulations that—

- Exclude certain health care providers and emergency responders from the definition of *employee*, and
- Exempt small businesses with fewer than 50 employees from the sick pay mandate if it would jeopardize the viability of the business as a going concern.

Other exemptions also may apply, and there are special rules for employers and employees operating under multiemployer collective bargaining agreements.

### Payroll Tax Credits for Employers

The FFCRA provides refundable credits against an employer's Section 3111(a) tax (the 6.2% portion of the FICA tax) or Section 3221(a) railroad retirement tax to cover wages required to be paid to employees while they are taking paid leave under the EPSLA and EFMLEA (Division G of the FFCRA).

Under the EPSLA (sick leave) credit, an employer is allowed a credit equal to 100% of sick leave wages paid for the quarter, subject to limits based on the circumstance of the leave. The credit is limited to $511 per day ($5,110 in total) for sick leave paid for an employee who is unable to work because he is (1) subject to a federal, state, or local quarantine or isolation order related to COVID-19; (2) advised by a health care provider to self-quarantine due to coronavirus concerns; or (3) experiencing coronavirus symptoms and seeking a medical diagnosis. The credit is limited to $200 per day ($2,000 in total) if the sick leave is for an employee who is caring for an individual described in item 1 or 2, caring for a son or daughter whose school or place of care is closed or child care provider is unavailable, or because the employee is experiencing a "substantially similar condition" specified by the government. The aggregate number of days taken into account for any calendar quarter can't exceed the excess of 10 days over the aggregate number of days taken into account for all preceding calendar quarters.

Under the EFMLEA (family leave) credit, also referred to as the *child care leave credit*, an employer is allowed a credit equal to 100% of qualified family leave wages paid for the quarter, limited to $200 per day with a maximum of $10,000 per eligible employee. The credit can be claimed for up to 10 weeks of an employee's qualifying leave.

The amount of the EPSLA and EFMLEA credits are increased by the portion of the employer's qualified health plan expenses that are properly allocable to qualified sick leave wages or qualified family leave wages. *Qualified health plan expenses* are amounts paid or incurred by the employer to provide and maintain a group health plan [as defined in IRC Sec. 5000(b)(1)], but only to the extent that such amounts are excluded from the gross income of employees by reason of IRC Sec. 106(a).

The EPSLA and EFMLEA credits for employers also are increased by the amount of the tax imposed by IRC Sec. 3111(b) (the 1.45% hospital insurance portion of FICA) on qualified sick leave wages, or qualified family leave wages, for which an EPSLA or EFMLEA credit is allowed.

The credits are refundable to the extent they exceed the employer's Section 3111(a) or 3221(a) payroll taxes. An employer may not claim a credit under Section 45S (for certain paid family and medical leave) for any qualified sick leave wages or qualified family leave wages required to be paid under the EPSLA or EFMLEA provisions. The credits apply only to wages paid for the period beginning on April 1, 2020 and ending on December 31, 2020 (Notice 2020-21).

### Tax Credits for Self-Employed Individuals

The FFCRA also provides for similar sick leave and family leave refundable credits against the self-employment tax.

The sick leave credit provision for self-employed individuals allows an income tax credit for a qualified sick leave equivalent amount. The *qualified sick leave equivalent amount* equals the number of days (up to 10) that the self-employed individual can't perform services and would have been entitled to receive paid sick leave under the EPSLA if he were an employee, multiplied by the lesser of two amounts, based on the circumstance of the leave. The credit is limited to the lesser of 100% of average daily self-employment income, or $511 per day if the self-employed individual is (1) subject to a federal, state, or local quarantine or isolation order related to COVID-19; (2) advised by a health care provider to self-quarantine due to coronavirus concerns; or (3) experiencing coronavirus symptoms and seeking a medical diagnosis. The credit is limited to the lesser of 67% of average daily self-employment income, or $200 per day for a self-employed individual who is caring for another individual described in item 1 or 2, caring for a son or daughter whose school or place of care is closed or child care provider is unavailable, or because the self-employed individual is experiencing a "substantially similar condition" specified by the government.

The family leave credit provision for self-employed individuals allows an income tax credit for a qualified family leave equivalent amount. The *qualified family leave equivalent amount* equals the number of days (up to 50) that the self-employed individual can't perform services and would have been entitled to receive paid leave under the EFMLEA if he were an employee, multiplied by the lesser of 67% of average daily self-employment income, or $200.

The credits for self-employed individuals apply only to days occurring during the period beginning on April 1, 2020 and ending on December 31, 2020 (Notice 2020-21).

### Employer FICA Exclusion

Wages paid under the EPSLA and EFMLEA are not considered wages under IRC Sec. 3111(a) (the 6.2% portion of the FICA tax) or under IRC Sec. 3221(a) (employer's railroad retirement tax).

### IRS Guidance

To take immediate advantage of the EPSLA and EFMLEA credits, employers can retain and access funds that they would otherwise pay to the IRS in payroll taxes. If those amounts are not sufficient to cover the cost of paid leave, employers can seek an expedited advance from the IRS by submitting Form 7200 (Advance Payment of Employer Credits Due to COVID-19) (News Release IR-2020-57).

The IRS also has provided relief from the Section 6656 penalty for failure to timely deposit employment taxes to the extent the amounts not deposited are equal to or less than the amount of refundable tax credits to which the employer is entitled under the FFCRA. This ensures that employers may pay qualified leave wages using employment taxes that would otherwise be required to be deposited without incurring a penalty. This relief applies to qualified leave wages paid April 1, 2020 through December 31, 2020 (Notice 2020-22).

## Coronavirus Aid, Relief, and Economic Security Act (CARES Act)—Individual Tax Provisions

On March 27, 2020, President Trump signed into law the CARES Act (Public Law 116-136), which is a roughly $2.2 trillion economic stimulus package intended to alleviate the devastating economic impact of the coronavirus pandemic. The CARES Act includes, among its many provisions, direct payments to individuals; enhanced unemployment aid; business loans and grants; money for states, hospitals, and education; and tax cuts. The tax cuts, which are mostly temporary provisions, range from brand new law to taxpayer-favorable changes to the 2017 Tax Cuts and Jobs Act (TCJA), including TCJA technical corrections that have been long anticipated.

### 2020 Recovery Rebates

The CARES Act adds new IRC Sec. 6428: 2020 Recovery Rebates for Individuals.

All U.S. resident individuals with adjusted gross income (AGI) up to $75,000 [$112,500 for Head of Household (HOH), $150,000 for Married Filing Jointly (MFJ)], who are not a dependent of another taxpayer and have a work eligible social security number (SSN), are eligible for the full $1,200 ($2,400 MFJ) rebate. In addition, they are eligible for an additional $500 per qualifying child [as defined under the child tax credit (CTC) rules of IRC Sec. 24(c)—generally dependent children under age 17]. While the amount of the rebate is limited by income, it is not conditioned on having income—even individuals with no income qualify, as do those whose income comes entirely from means-tested nontaxable benefit programs, such as Supplemental Security Income (SSI) benefits.

Seniors whose only income is from social security, and veterans with income only from a veterans' disability payment, qualify, as long as they are not the dependent of another taxpayer. The IRS will use tools authorized by the CARES Act to locate and provide rebates to low-income seniors who normally do not file a tax return by allowing them to base a rebate on Form SSA-1099 (Social Security Benefit Statement) or Form RRB-1099 (the equivalent of the social security statement for railroad employees).

Looking closer to the other end of the spectrum from seniors, college students are eligible for a rebate only if they are not considered a dependent of their parents. Generally, a full-time college student under the age of 24 is considered a dependent if his parent(s) provide more than half of his support. Younger children also are not eligible for the rebate if they are (or can be) claimed as dependents by their parents, even if their level of income requires filing a return. However, an individual who was not eligible for a rebate based on 2019 status may become eligible based on 2020 status, such as where the individual was a dependent for 2019 but not for 2020. The IRS will not send an advance rebate to such an individual because advance rebates are generally based on information on the 2019 return, but the individual will be able to claim the credit when filing the 2020 return.

For most Americans, no action on their part will be required to receive a rebate check as the IRS will use a taxpayer's 2019 tax return if filed, or in the alternative, his 2018 return. This includes many low-income individuals who file a tax return to take advantage of the refundable earned income credit (EIC) and CTC.

The rebate amount is reduced by $5 for each $100 that a taxpayer's income exceeds the AGI-based phase-out threshold ($75,000 for singles, $112,500 for HOH, and $150,000 for MFJ). The amount is completely phased out for single filers with incomes exceeding $99,000 ($146,500 for HOH with one child, $198,000 for MFJ with no children). For a typical family of four, the amount is completely phased out for those with AGI exceeding $218,000.

Tax filers must provide an SSN for each family member claiming a rebate (adoption taxpayer identification numbers will be accepted for adopted children). An exception to providing an SSN is made for spouses of active military members. In addition, the rebates are fully available to residents of U.S. territories, including Puerto Rico.

The rebates will be paid out as advance refunds (in the form of checks or direct deposits) on the basis of taxpayers' filed 2019 returns (or tax year 2018, if a 2019 return has not yet been filed). No later than 15 days after distributing a rebate payment, the IRS must mail a notice to the taxpayer's last known address indicating how the payment was made, the amount of the payment, and a phone number for reporting any failure to receive the payment to the IRS. Since the rebate is an advance on a 2020 tax return credit, a taxpayer whose income is lower in 2020 than in 2019 may be refunded, or have his tax liability reduced by, any additional credit for which he is eligible when the 2020 return is filed.

Finally, the rebate is treated like other refundable tax credits, such as the CTC and EIC, and not considered income. Moreover, if the credit amount based on 2020 income is less than the amount based on 2019 income, it does not have to be paid back (CARES Act Sec. 2201).

## Charitable Contributions Above-the-Line Deduction

A new paragraph (22) is added to IRC Sec. 62(a) to encourage taxpayers who do not itemize deductions to contribute to churches and other charitable organizations (generally public charities) in 2020. This provision permits nonitemizers to deduct up to $300 of cash contributions (CARES Act Sec. 2204).

## Charitable Contributions Limitation

The limitation on deductions for charitable contributions by individuals who itemize is increased from 60% to 100% of modified income for cash contributions, generally to public charities, made in 2020 (CARES Act Sec. 2205).

## Health Savings Account (HSA) Telehealth Services

An HDHP with an HSA may cover, for plan years beginning in 2020 and 2021, telehealth services prior to a patient reaching the deductible, thereby increasing access for patients who may have the coronavirus and protecting other patients from potential exposure (CARES Act Sec. 3701).

## Nonprescription Medical Products

Starting January 1, 2020, individuals may use funds in HSAs, Archer MSAs, health flexible spending accounts, and health reimbursement arrangements to purchase over-the-counter (nonprescription) medical products, including certain menstrual care products (CARES Act Sec. 3702).

## Required Minimum Distribution (RMD) Waiver

The RMD rules are waived for certain defined contribution plans and IRAs for calendar year 2020. This provision provides relief to individuals who would otherwise be required to withdraw funds from such retirement accounts during the economic slowdown due to COVID-19. In addition to RMDs required for the 2020 tax year, the waiver includes RMDs that are due by April 1, 2020 because the account owner turned 70½ in 2019 (CARES Act Sec. 2203).

## Retirement Plan Distributions

Consistent with previous disaster-related relief, the CARES Act waives the 10% early withdrawal penalty for distributions up to $100,000 from IRAs and defined contribution qualified retirement plans [such as 401(k) plans] made for coronavirus-related purposes on or after January 1, 2020 and before December 31, 2020. Income attributable to these distributions will be subject to tax over three years, and the taxpayer may recontribute the funds to an eligible retirement plan within three years after receipt without regard to that year's cap on contributions. Employers are permitted to amend defined contribution plans to provide for these distributions. Additionally, defined contribution plans are permitted to allow plan loans up to $100,000, and repayment of existing plan loans is extended for employees who are affected by the coronavirus.

A *coronavirus-related distribution* is any distribution made to an individual (1) who is diagnosed with COVID-19; (2) whose spouse or dependent is diagnosed with COVID-19; or (3) who experiences adverse financial consequences as a result of being quarantined, furloughed, laid off, having work hours reduced, being unable to work due to lack of child care due to COVID-19, closing or reducing hours of a business owned or operated by the individual due to COVID-19, or other factors as determined by the Secretary of the Treasury (CARES Act Sec. 2202).

### Student Loan Payments By Employers

This new provision enables employers to provide a student loan repayment benefit to employees on a tax-free basis. An employer may contribute up to $5,250 annually toward an employee's student loans, and the payment will be excluded from the employee's income. The $5,250 cap applies to both the new student loan repayment benefit as well as other educational assistance (such as tuition, fees, and books) provided by the employer under current law. (See IRC Sec. 127.) The provision applies to any student loan payments made by an employer on behalf of an employee, whether paid to a lender or to the employee, after the CARES Act's March 27, 2020 enactment date and before January 1, 2021. To prevent a double benefit, student loan repayments for which the exclusion is allowable cannot be deducted under IRC Sec. 221 (the limited deduction provision for student loan interest) (CARES Act Sec. 2206).

## CARES Act—Business Tax Provisions

### Business Interest Expense Limitation

The amount of interest expense businesses are allowed to deduct on their tax returns under IRC Sec. 163(j) is temporarily and retroactively increased, by raising the deduction limitation from 30% to 50% of adjusted taxable income (ATI) for 2019 and 2020. Businesses also may elect to use 2019 ATI in calculating their 2020 limitation (since 2019 ATI will likely be higher than 2020 for many businesses). As businesses look to weather the storm of the current crisis, these provisions will allow them to increase liquidity with a reduced cost of capital, so that they are able to continue operations and keep employees on the payroll.

Unless the taxpayer elects out, a special rule for partnerships allows 50% of any excess business interest allocated to a partner in 2019 to be deductible in 2020 and not subject to the ATI limitation. The remaining 50% of excess business interest from 2019 is subject to the ATI limitation. The 2019 limitation remains at 30% of partnership ATI rather than 50% of ATI. The limitation for 2020 is 50% of partnership ATI, and partnerships may elect to use 2019 partnership ATI in calculating their 2020 limitation (CARES Act Sec. 2306).

### Charitable Contributions Limitation

The limitations on deductions for charitable contributions by C corporations are increased. The 10% limitation is increased to 25% of taxable income. In addition, the limitation on deductions for contributions of food inventory is increased from 15% to 25% for both C corporations and other business taxpayers (CARES Act Sec. 2205).

### Distilled Spirits Excise Tax

This provision waives the federal excise tax on any distilled spirits used for or contained in hand sanitizer that is produced and distributed in a manner consistent with guidance issued by the Food and Drug Administration, and is effective for calendar year 2020 (CARES Act Sec. 2308).

### Employee Retention Credit

A refundable payroll tax credit is available for 50% of wages paid by eligible employers to certain employees during the COVID-19 crisis. The credit is available to (1) employers, including nonprofits, whose operations were fully or partially suspended due to a COVID-19-related shut-down order and (2) employers whose gross receipts declined by more than 50% when compared to the same quarter in the prior year.

The credit is based on qualified wages paid to employees. For employers with an average number of full-time employees during 2019 greater than 100, *qualified wages* are wages paid to employees when they are not providing services due to the COVID-19-related circumstances described earlier. For eligible employers with an average number of full-time employees during 2019 of 100 or less, all employee wages qualify for the credit, whether the employer is open for business or subject to a shut-down order. However, wages do not include those taken into account for purposes of the (1) payroll credits for required paid sick leave or required paid family leave under the FFCRA (see *Payroll Tax Credits for Employers* on Page 1) or (2) employer credit for paid family and medical leave (IRC Sec. 45S). In addition, no credit is available with respect to an employee for any period for which the employer is allowed a work opportunity credit under IRC Sec. 51 with respect to that employee. The credit applies to the first $10,000 of compensation, including health benefits, paid to an eligible employee after March 12, 2020 and before January 1, 2021.

The Secretary of the Treasury is granted authority to advance payments to eligible employers and to waive applicable penalties for employers that do not deposit applicable payroll taxes in anticipation of receiving the credit. The credit is not available to employers receiving Small Business Interruption Loans (CARES Act Sec. 2301).

**Note:** In Notice 2020-22, the IRS provided relief from the Section 6656 penalty for failure to timely deposit employment taxes to the extent the amounts not deposited are equal to or less than the amount of the employee retention credit. This relief applies to qualified retention wages paid March 13, 2020 through December 31, 2020.

### Excess Business Loss Limitation

The CARES Act retroactively turns off the Section 461(l) excess business loss limitation rule implemented by the TCJA by amending the provision to apply to tax years beginning after December 31, 2020 (rather than December 31, 2017). It also turns off active farming loss rules for tax years beginning after December 31, 2017 and before December 1, 2021.

An *excess business loss* is defined as deductions in excess of income and gain attributable to a trade or business in which the taxpayer actively participates plus $250,000 ($500,000 for joint filers), as adjusted for inflation [that is, active business losses in excess of $250,000 ($500,000 for joint filers), as adjusted for inflation, were disallowed by the TCJA and treated as NOL carryforwards in the following tax year].

Technical corrections to the TCJA also are provided, clarifying that excess business losses do not include any deduction under IRC Sec. 172 or 199A, or any deductions related to performing services as an employee. Another clarification provides that, because capital losses cannot offset ordinary income under the NOL rules, capital loss deductions are not taken into account in computing the Section 461(l) limitation, and that the amount of capital gain taken into account in calculating the Section 461(l) limitation cannot exceed the lesser of capital gain net income from a trade or business or capital gain net income (CARES Act Sec. 2304).

## Minimum Tax Credit For Corporations

The corporate alternative minimum tax (AMT) was repealed as part of the TCJA, but outstanding AMT credits could be claimed, subject to certain limits for tax years prior to 2021, at which time any remaining AMT credit could be claimed as fully refundable. The CARES Act allows corporations to claim 100% of AMT credits in 2019 as fully refundable and provides an election to accelerate claims to 2018, with eligibility for accelerated refunds. Thus, corporations can claim a refund now and obtain additional cash flow during the COVID-19 emergency (CARES Act Sec. 2305).

## Net Operating Loss (NOL) Limitation and Carryback

The TCJA generally limited NOLs arising after 2017 to 80% of taxable income and generally eliminated the ability to carry NOLs back to prior tax years.

The CARES Act modifies the TCJA's treatment of NOL carrybacks. For losses arising in a tax year beginning in 2018, 2019, or 2020, taxpayers may carry back NOLs to the prior five tax years. Effectively, this delays the 80% of taxable income limitation until 2021 and temporarily extends the carryback period from zero to five years. C corporations may elect to file for an accelerated refund to claim the carryback benefit.

The CARES Act also modifies the treatment of NOL carryforwards. In tax years beginning before 2021, taxpayers will be allowed an NOL deduction equal to 100% (as opposed to 80%) of taxable income. In tax years beginning after 2020, taxpayers will be allowed (1) a 100% deduction for NOLs arising in tax years beginning before 2018 and (2) a deduction limited to 80% of modified taxable income for NOLs arising in tax years beginning after 2017.

The provision also includes a technical correction to the TCJA relating to the effective date of the NOL carryback repeal (CARES Act Sec. 2303).

## Payroll Tax Payment Delay

Employers and self-employed individuals may defer paying the employer portion of certain payroll taxes. The deferral applies starting on the CARES Act's March 27, 2020 enactment date and extends through December 31, 2020. Payroll taxes that can be deferred include the 6.2% employer portion of FICA taxes [IRC Sec. 3111(a)], the employer and employee representative portion of railroad retirement taxes that are attributable to the 6.2% employer FICA rate [IRC Secs. 3211(a) and 3221(a)], and half of the 12.4% self-employment tax (SECA) liability [IRC Sec. 1401(a)].

The deferred employment tax must be paid over the following two years, with half of the amount required to be paid by December 31, 2021 and the other half by December 31, 2022. Employers that had debt forgiven with respect to an SBA 7(a) loan are not eligible for the deferral (CARES Act Sec. 2302).

## Pension Plan Funding

The CARES Act provides single-employer pension plan companies more time to meet their funding obligations by delaying the due date for any contribution otherwise due during 2020 to January 1, 2021. At that time, contributions due earlier will be due with interest (CARES Act Sec. 3608).

## Qualified Improvement Property

The TCJA amended IRC Sec. 168 to allow 100% bonus depreciation for certain qualified property. The TCJA eliminated preexisting definitions for (1) qualified leasehold improvement property, (2) qualified restaurant property, and (3) qualified retail improvement property. It replaced those definitions with one category called *qualified improvement property* (QIP). A general 15-year recovery period was intended to have been provided for QIP. However, that specific recovery period failed to be reflected in the statutory text of the TCJA. Thus, under the TCJA, QIP fell into the 39-year recovery period for nonresidential real property, which makes QIP ineligible for 100% bonus depreciation.

In a technical correction to the TCJA, effective for property placed in service after 2017, the CARES Act specifically designates QIP as 15-year property for General Depreciation System (GDS) purposes, which makes QIP eligible for 100% bonus depreciation. QIP also is specifically assigned a 20-year class life for the Alternative Depreciation System (ADS) (CARES Act Sec. 2307).

## Notes