

## Resources

### Tax Incentives Under the CARES Act

April 9, 2020

The Coronavirus Aid, Relief, and Economic Security Act, H.R. 748 (the “CARES Act”), signed into law by President Trump on March 27, 2020, provides considerable relief for individuals and businesses in the form of financial assistance and tax-related benefits. Below is a short description of the tax benefits available for businesses, including employers and self-employed individuals under the CARES Act.

#### Section 2301 – Employee Retention Credit

The Employee Retention Credit is a fully refundable tax credit allowed against the employer’s portion of the social security taxes or, in the case of railroad employers, the portion of taxes that corresponds to the social security taxes. The credit is available to eligible employers that carried on a trade or business during calendar year 2020 and whose operations were either fully or partially suspended pursuant to an order from an appropriate governmental authority due to COVID-19 or experienced a significant decline in gross receipts. The credit is not available for government employers or self-employed individuals with respect to their self-employed earnings.

The credit is determined based on 50 percent of an employee’s qualified wages, including applicable health benefits, which amount cannot exceed \$10,000 per employee for all calendar quarters. Eligible employers may receive a maximum credit of \$5,000 per employee for wages paid after March 12, 2020, and before January 1, 2021. The determination of available credit depends on the average number of full-time employees that an eligible employer employed during 2019. If the average number of full-time employees is 100 or less, the credit is determined based on the qualified wages of all the employees. If the average number of full-time employees exceeds 100, the credit is determined based on qualified wages of an employee that is not providing services pursuant to the reasons discussed above, in which case the qualified wages taken into account cannot exceed the amount of wages an employee would have been paid for working an equivalent duration of time during 30 days preceding the period of economic hardship.

A qualified employer may claim the credit on its Form 941, Employer’s Quarterly Federal Tax Return. If the amount of the credit is greater than the employer’s portion of the social security tax, then any excess will be treated as an overpayment and refunded to the employer. A qualified employer may also file Form 7200, Advance Payment of Employer Credits Due to COVID-19, to claim an advance refund for the full amount of the anticipated credit for which it did not have sufficient federal employment tax deposits.

Any employer that receives a loan under the Small Business Administration program pursuant to Section 7(a) of the Small Business Act is ineligible to receive the credit. In addition, the amount of qualified wages that an eligible employer claims for the credit may not include the same wages that an employer claims tax credits under the Family First Coronavirus Response Act in connection with paid sick and family leave. A qualified employer may also elect not to claim the credit.

#### Section 2302 – Deferral of Payroll Tax Payments

Section 2302 of the CARES Act allows employers and self-employed individuals to defer their share of Social Security tax on employees’ wages, which is currently 6.2 percent, from March 27, 2020, to December 31, 2020. Employers must deposit 50 percent of the deferred portion of the Social Security taxes on or before December 31, 2021, and the remaining 50 percent on or before December 31, 2022. If an employer receives a loan under the SBA 7(a) loan program, and such loan is forgiven pursuant to Section 1106 of the CARES Act, then such employer will not be eligible for this relief.

## Section 2303 – Modification for Net Operating Losses

The CARES Act temporarily modifies the net operating loss (“NOL”) limitations and carryback rules previously enacted under the Tax Cuts and Jobs Act (“TCJA”) of 2017. Under the TCJA, NOLs could be used to offset 80 percent of taxpayer’s current-year taxable income and were not available to be carried back to prior years.

The CARES Act removes the 80 percent limitation for all tax years beginning before January 1, 2021, and provides for up to five years of carryback for NOLs generated in tax years 2018, 2019, and 2020. If an NOL generated in 2018, 2019, or 2020 is carried back for any tax year in which a taxpayer incurred an inclusion event under Section 965(a) of the Internal Revenue Code (related to foreign subsidiary earnings deemed repatriated), the taxpayer can elect to skip those tax years in which such earnings were included from the calculation of the five-year carryback period. The CARES Act modifications discussed above do not apply to NOLs of Real Estate Investment Trusts.

## Section 2304 – Modification of Excess Business Loss Limitation

The CARES Act temporarily modifies excess business loss limitations for non-corporate taxpayers, including pass-through entities and sole proprietors. Under TCJA, noncorporate taxpayers were precluded from using net business losses to offset their income in excess of \$250,000 (\$500,000 for married taxpayers filing jointly), pursuant to which any disallowed losses were treated as net operating losses and carried over to the following year. This limitation applied to taxable years beginning after December 31, 2017, and ending before January 1, 2026. The CARES Act eliminated the excess business loss limitation for all taxable years beginning before January 1, 2021. However, the limitation will still apply to taxable years beginning after December 31, 2020.

## Section 2305 – Acceleration of Corporate AMT Credits

The TCJA repealed the corporate alternative minimum tax (“AMT”) for all tax years beginning after December 31, 2017. Any outstanding AMT credits were refundable in taxable years 2018, 2019, 2020, and 2021. In order to provide the necessary cash flow to taxpayers due to the COVID-19 pandemic, the CARES Act accelerates the refundability of the unused AMT credits for taxable years 2018 and 2019. Further, taxpayers may elect to claim their entire AMT credit in 2018, which requires taxpayers to file an election on Form 1139 prior to December 31, 2020.

## Section 2306 – Increase in Business Interest Expense Limitation

The TCJA imposed a limitation on the deductibility of business interest expense on all taxpayers other than certain exempt small businesses and excepted trades or businesses. The limitation is equal to 30 percent of adjusted taxable income (“ATI”), which is comparable to a taxpayer’s earnings before interest, taxes, depreciation and amortization (“EBITDA”), subject to modifications. In an effort to provide businesses with additional relief, the CARES Act temporarily increases the business interest expense limitation to 50 percent of ATI for taxable years beginning in 2019 and 2020. Following the 2020 taxable year, the limitation reverts back to 30 percent of ATI. Taxpayers may still elect to apply the 30 percent limitation. Taxpayers may also elect to use their 2019 ATI for purposes of computing their 2020 business interest limitation. This election may be helpful for many taxpayers who will have experienced a decline in business income in 2020 due to the COVID-19 pandemic. For partnerships, this election is available at the partnership level.

Partnerships can utilize the increase in the business interest limitation only for tax years beginning in 2020. However, if a partnership has excess business interest expense in 2019, 50 percent of such excess of each partner’s allocable share is fully deductible by such partner in 2020 taxable year. Each partner can elect for the special rule to not apply.

## Section 2307 – Bonus Depreciation for Qualified Improvement Property

Section 2307 of the CARES Act implements a technical correction to the TCJA and makes qualified improvement property (“QIP”) eligible for bonus depreciation retroactive as of January 1, 2018. QIP includes any improvement to an interior portion of a nonresidential real property. TCJA caused QIP to be depreciated over 39 years and it was not eligible for bonus depreciation. This provision would allow businesses to file amended returns and take advantage of depreciation with respect to QIP.

## Section 3606 – Advance Refunding of Credits

The Family First Coronavirus Response Act (“FFCRA”) grants employers a refundable payroll tax credit for paid sick leave and paid family and medical leave. The CARES Act amends FFCRA by allowing advances of refundable payroll tax credit and by providing for a penalty relief in the case of any failure to deposit payroll taxes in anticipation of the advanced credit.

If you have any questions about the information in this alert, please contact Michael Cumming (248-203-0740 or [MCumming@dykema.com](mailto:MCumming@dykema.com)), Asel Lindsey (210-554-5298 or [ALindsey@dykema.com](mailto:ALindsey@dykema.com)), Nardeen Dalli (248-203-0793 or [NDalli@dykema.com](mailto:NDalli@dykema.com)), or your Dykema relationship attorney.

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