

CARES Act: Tax Relief for Businesses

April 1, 2020

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The CARES Act signed into law on March 27, 2020 contains numerous provisions to deliver tax relief to businesses amidst the financial crisis caused by the COVID-19 pandemic.

Charitable Contributions

The deduction limit on corporate charitable contributions for 2020 increased from 10% to 25% and the limit on the deduction of food inventory increased from 15% to 25%. These limits **do not** apply to contributions to private foundations and donor-advised funds.

Employee Retention Credit

For employers carrying on a trade or business during 2020, the CARES Act allows a credit against the employer portion of Social Security taxes equal to 50% of “qualified wages” paid to each employee. The credit is available on a quarterly basis only for those quarters during which the trade or business:

- was fully or partially suspended due to government orders limiting commerce, travel, or group meeting due to COVID-19; or
- experienced a “significant decline in gross receipts.”

The period for which an employer will be considered to have a significant decline in gross receipts begins with the first day of a calendar quarter in 2020 in which the employer had gross receipts less than 50% of the gross receipts for the same calendar quarter in 2019 (a “50% quarter”) and ends with the last day of the first calendar quarter following a “50% quarter” during which the employer has gross receipts that exceed 80% of gross receipts for that same calendar quarter in 2019.

Qualified Wages

The term “qualified wages” differs depending on the average number of full-time employees the employer has. For employers with an average number of full-time employees greater than 100 during 2019, “qualified wages” means any wages paid by an employer to an employee *who is not providing services* due to:

- a full or partial suspension of the business
- circumstances under which the business is experiencing a “significant decline in gross receipts”

“Qualified wages” is further limited to the amount an employee would have been paid for working an equivalent

duration during the 30 days immediately preceding such period.

For employers with an average number of full-time employees of 100 or less during 2019, “qualified wages” means any wages paid by the employer to any employee:

- during a full or partial suspension
- during a period during which the business is experiencing a “significant decline in gross receipts”

There is no equivalent 30-day limit for employers with 100 or less full-time employees in 2019.

For all employers, “qualified wages” also includes the employer’s qualified health plan expenses that are allocable to otherwise “qualified wages.” These include employer expenses to provide and maintain a group health plan. However, “qualified wages” does not include Qualified Sick Leave wages or Qualified Family Leave wages whose payment is mandated by the Families First Coronavirus Response Act (“FFCRA”).

The wages that may be considered to determine the credit is limited to \$10,000 annually for an individual employee. The credit itself is limited to the total amount of the employer portion of Social Security taxes paid for all employees (reduced by credits allowed for Qualified Sick Leave payments and Qualified Family Leave payments under the FFCRA), determined on a quarterly basis. Any excess credit is refundable. The law also provides certain rules to prevent employers from taking a double benefit for wages considered in determining this credit. Further, an employer who receives a small business interruption loan is not eligible for this credit.

Delay of Payroll Tax Payments

Businesses can delay payment of the employer portion of Social Security taxes for wages paid between March 27, 2020 and December 31, 2020. 50% of these taxes are now due by December 31, 2021, with the remainder due December 31, 2022. If these taxes are paid by those dates, there will be no penalty applied for failure to timely deposit.

A similar rule applies to self-employed individuals, which allows half of self-employment tax incurred for wages paid between March 27, 2020 and December 31, 2020 to be paid by December 31, 2021, with the rest due by December 31, 2022. No estimated tax penalty will be applied to half of self-employment tax incurred during this time period, if paid by the extended deadlines.

The law also contains provisions protecting third parties who withhold taxes on behalf of employers from liability where the third party is directed to defer payment of taxes under the delayed payment provisions of this new law.

Delayed payroll tax provisions do not apply to any taxpayers that have had debt forgiven through a small business loan.

Net Operating Loss (NOL) Modifications

Under Section 172(a) of the Internal Revenue Code, the amount of a net operating loss deduction is equal to the lesser of:

1. The aggregate of the NOL carryovers to such year and NOL carrybacks to such year, or
2. 80% of taxable income computed without regard to the NOL deduction allowable.

Thus, Section 172(a) limited the use of NOLs based on taxable income.

The new law temporarily removes this taxable income limitation to allow an NOL to fully offset income. These amendments apply to tax years beginning after December 31, 2017, and to tax years beginning on or before

December 31, 2017, to which NOLs arising in tax years beginning after December 31, 2017, are carried.

In addition, IRS Section 172(b)(1) provided that except for farming losses and losses of property and casualty insurance companies, an NOL for any tax year is carried forward to each tax year following the tax year of the loss but isn't carried back to any tax year preceding the tax year of the loss. The CARES Act provides that NOLs arising in a tax year beginning after December 31, 2018, and before January 1, 2021, can now be carried back to each of the five tax years preceding the tax year of such loss. These amendments apply to NOLs arising in tax years beginning after December 31, 2017, and to tax years beginning before, on, or after such date to which such NOLs are carried.

Limitation on Loss Modifications for Non-Corporate Taxpayers

IRS Section 461(l)(1) disallows the deduction of excess business losses by noncorporate taxpayers for tax years beginning after December 31, 2017 and ending before January 1, 2026. An "excess business loss" is the excess of the (1) taxpayer's aggregate trade or business deductions for the tax year over (2) the sum of the taxpayer's aggregate trade or business income or gain plus \$250,000 (adjusted for inflation). The CARES Act modifies the loss limitation for noncorporate taxpayers so they can deduct excess business losses arising in 2018, 2019, and 2020.

Modification of Credit for Prior Year Minimum Tax Liability of Corporations

The corporate alternative minimum tax (AMT) was previously repealed for tax years after 2017. Corporations can use outstanding minimum tax liability credits (MTCs) for tax years before 2021, at which time any remaining MTC can be claimed as fully refundable. Thus, the MTC is refundable for any tax year beginning in 2018 through 2021 in an amount equal to 50% (100% for tax years beginning in 2021) of the excess MTC for the tax year, over the amount of the credit allowable for the year against regular tax liability.

The CARES Act moves these dates up so that corporations can claim 100% of AMT credits in 2019. Additionally, it provides for an election to take the entire refundable credit amount in 2018. Under the CARES Act, a claim for credit or refund where a corporation elects to take the entire refundable credit amount in 2018 must be treated as a tentative carryback refund claim. Taxpayers can file application for this tentative refund and must do so before December 31, 2020.

Regulations will follow regarding the way a refund claim can be made. The application must include the amount of the:

- refundable credit claimed for the tax year
- refundable credit claimed for any previously filed return for the tax year
- refund claimed

The IRS has 90 days from the date the application is filed to (1) review the application; (2) determine the amount of overpayment; and (3) apply, credit, or refund the overpayment.

Modification of Limitation on Business Interest

In general, the Tax Cuts and Jobs Act limited the amount of business interest allowed as a deduction to 30% of adjusted taxable income. The CARES Act increases the limitation on the deductibility of business interest from 30% to 50% for tax years beginning in 2019 and 2020. It does so on a retroactive basis.

Under a rule for partnerships only, the increase in the limitation will not apply to partners in partnerships for 2019, it only applies to 2020. Any excess business interest of the partnership for any tax year beginning in 2019 that is allocated to a partner will be treated as follows:

1. 50% of the excess business interest will be treated as paid or accrued by the partner in the partner's first tax year beginning in 2020 and isn't subject to any limits in 2020; and
2. 50% of the excess business interest will be subject to the limitations of Section 163(j)(4)(B)(ii) in the same manner as any other excess business interest that is so allocated. In other words, it will remain suspended until the partnership allocated excess taxable income or excess interest income to the partner.

A taxpayer may elect out of the increase for any year in the time and manner prescribed by the IRS (regulations will presumably follow). Once an election out is made, the election can only be revoked with IRS consent. For partnerships, the election must be made at the partnership level and can be made only for tax years beginning in 2020.

Taxpayers can also elect to calculate the interest limitation for their tax year beginning in 2020 using the adjusted taxable income for their last tax year beginning in 2019. For partnerships, this election must be made at the partnership level.

Excise Tax Exception for Alcohol use to Produce Hand Sanitizer

The excise tax for alcohol used to create hand sanitizer consistent with FDA guidelines does not apply in 2020.

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