

March 28, 2020

**CONGRESSIONAL UPDATE:**  
**TAX CHANGES RELATED TO CORONAVIRUS PANDEMIC**

On March 27, 2020, President Donald J. Trump signed into law the Coronavirus Aid, Relief, and Economic Security Act (H.R. 748) (the “CARES Act”). On March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act (H.R. 6201) (the “FFCRA”), which includes the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act (“FMLA Expansion Act”).

The following is a summary of important tax-related rights and obligations under the CARES Act, FFCRA and other recent tax changes related to the Coronavirus pandemic. Rules and regulations currently being written by the Internal Revenue Service (“IRS”) may materially change the application of the terms of the CARES Act and the FFCRA. We have also prepared a summary of the key terms and provisions of Title I (Keeping American Workers Paid and Employed Act) of the CARES Act, which pertains to paycheck protection and loan forgiveness (the “Title I Memo”). If you would like a copy of this separate summary of Title I of the CARES Act, please contact us and we would be happy to share it with you.

**Net Operating Losses and Other Deductions for Businesses**

Net operating losses (“NOLs”) allow taxpayers to reduce certain business income on their tax returns. Generally, the Internal Revenue Code (the “IRC”) disallows NOLs to be carried back to prior tax years and limits the use of NOLs to 80% of taxable income for future taxable years. Prior to the 2017 Tax Cuts and Jobs Act, companies could carryback or carryforward NOLs to offset 100% of taxable income (subject to certain restrictions). The CARES Act amends Section 172(b)(1) of the IRC to generally allow taxpayers to carry back NOLs from 2018, 2019 and 2020 for up to five years. A taxpayer may elect to forgo such carryback and instead carry the NOL forward to future taxable years. The CARES Act amends Section 172(a) of the IRC to temporarily suspend the 80% of taxable income limitation on NOLs and allow for carryforward NOLs to apply to 100% of taxable income. The CARES Act includes special rules related to NOLs for real estate investment trusts (REITs).

The 2017 Tax Cuts and Jobs Act added to the IRC a new Section 461(l) that limits the amount of net business loss that a non-corporation taxpayer may use to reduce income. The Section 461(l) cap is initially \$250,000 (\$500,000 for joint filers). Under that section, any loss in excess of the cap is considered to be carryforward NOLs to subsequent taxable years. The CARES Act postpones the effective date of the limitation under Section 461(l)(1) of the IRC on the amount a non-corporation taxpayer can deduct from a pass-through entity from January 1, 2018 to January 1, 2021. Applicable taxpayers can file amended returns for prior applicable years to take advantage of the changed effective

date. This modification is intended to allow pass-through entities to benefit from the new NOL carryback rules described above.

The CARES Act amends Section 163(j) of the IRC to provide for an increase in the deduction for business interest from 30% to 50% of adjusted taxable income (which is similar to EBITDA) for 2019 and 2020 (except for taxpayers who elect out of such increase). In addition, for 2020, the CARES Act allows taxpayers to elect to determine their limitation using their adjusted taxable income from 2019 rather than 2020 (since many taxpayers may have significantly reduced income in 2020). For entities taxed as partnerships, such 50% limitation does not apply for 2019 and the interest expense is allocated to the partners and suspended. 50% of such suspended interest expense becomes deductible in 2020 and the remaining 50% remains suspended until the partnership allocates excess taxable income or excess interest income to the partner. In accordance with the 2017 Tax Cuts and Jobs Act and Section 163(j)(3) of the IRC, a small business taxpayer (i.e., generally less than \$26,000,000 in gross receipts, as adjusted for inflation) is not subject to the limitation on deduction of business interest.

#### **Delayed Employer Payroll and Self-Employment Tax Payments**

The CARES Act delays the due date for an employer's share of the 6.2% FICA tax (i.e., Social Security tax) imposed by Section 3111(a) of the IRC and 50% of the 12.4% self-employment income tax imposed by Section 1401(a) of the IRC related to the period beginning on the enactment of the CARES Act and ending on January 1, 2021. The due date for 50% of such taxes will be December 31, 2021 and the due date for the remaining 50% of such taxes will be December 31, 2022. An employer is not entitled to such deferred due date of the employer's share of the FICA tax if such employer has had indebtedness forgiven with respect to a covered loan under Paragraph (36) of Section 7(a) of the Small Business Act (as described in the Title I Memo). Employers are still required to withhold and pay the employee's share of the FICA tax. It appears that generally an employer can (i) defer payment of all of the employer's share of the FICA tax until 2021 and 2022, as applicable; and (ii) receive the employee retention credit (described below). Further guidance from the IRS may clarify how these delays and credits interact and the effect on future tax filings.

#### **Employee Retention Credit**

The CARES Act provides that eligible employers are entitled to receive an employee retention credit against applicable employment taxes for each calendar quarter in an amount equal to 50% of such employer's qualified wages (from March 13, 2020 to December 31, 2020) for each employee of such employer. The amount of qualified wages that may be taken into account is limited to \$10,000 for each applicable employee for all calendar quarters. Applicable employment taxes means the 6.2% FICA tax (i.e., Social Security tax) imposed by Section 3111(a) of the IRC (and certain other related taxes). An employer is an eligible employer if (i) the operation of the employer's business was fully or partially suspended during any calendar quarter during 2020 due to orders from an appropriate government authority resulting from COVID-19, or (ii) during the first calendar quarter in 2020 in which the employer's gross receipts for such calendar quarter were less than 50% of what they were for the same

calendar quarter in 2019 (and such eligibility continues until gross receipts for a calendar quarter exceed 80% as compared to the applicable 2019 calendar quarter).

For an employer with over 100 full-time employees during 2019, qualified wages are limited to those wages that were paid by the employer to employees not providing services due to the circumstances described above (i.e., the credit only applies to wages paid during a furlough of the employee). For an employer with under 100 full-time employees during 2019, qualified wages include all wages paid during the circumstances described above whether or not the employees are providing services.

Qualified wages include any qualified health plan expenses allocable to wages. Wages taken into account in determining the tax credits pursuant to the FFCRA may not be taken into account in determining qualified wages under the CARES Act. The employee retention credit is refundable if it exceeds the employer's liability for payroll taxes. A significant limitation to the employee retention credit for certain employers is that it does not apply if an employer receives a covered loan under Paragraph 36 of Section 7(a) of the Small Business Act (as described in the Title I Memo).

#### **Tax Credits to Offset Mandatory FFCRA Paid Leave Expenses**

In order to help offset the cost of the expanded paid leave requirements under the Emergency Paid Sick Leave Act and FMLA Expansion Act, Congress has provided new tax benefits to employers. Specifically, employers are allowed a credit against the employer's share of the 6.2% FICA tax imposed by Section 3111(a) of the IRC for each calendar quarter in an amount equal to (1) 100% of the qualified sick leave wages paid by the employer with regard to such calendar quarter; and (2) 100% of the qualified family leave wages paid by the employer with respect to such calendar quarter, subject to certain per day and aggregate caps included in the FFCRA (i.e., \$511 per day or \$5,110 in the aggregate for emergency paid sick leave, \$200 per day or \$10,000 in the aggregate for emergency childcare leave and \$200 per day or \$2,000 in the aggregate for any of the other paid leave required by the FFCRA). If the amount of tax credit exceeds the FICA tax of the employer imposed by Section 3111(a) of the IRC, the excess amount will be treated as an overpayment and refunded to the employer.

Employers also are allowed to expand the credit referenced above by as much of the employer's qualified health plan expenses that are properly allocable to the employee's qualified sick leave and FMLA childcare leave. Finally, any wages required to be paid under the FMLA Expansion Act or Emergency Paid Sick Leave Act will not be considered FICA wages for purposes of the IRC.

On March 20, 2020, the U.S. Department of the Treasury, the IRS, and the U.S. Department of Labor issued a joint news release announcing that in order to enable employers to keep workers on their payrolls, small and midsize employers can begin taking advantage of two new refundable payroll tax credits, designed to immediately and fully reimburse employers for the cost of providing coronavirus-related leave to their employees under the FFCRA.

According to the news release, businesses 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 extended to employees under the FFCRA, employers will be able to seek an expedited advance from the federal government by submitting a streamlined claim form to the IRS. The IRS expects to process claims within two weeks or less.

### **Depreciation of Qualified Improvement Property**

The CARES Act includes technical amendments to Section 168 of the IRC for taxpayers to accelerate the depreciation of qualified improvement property (i.e., immediately write off), as originally intended by the 2017 Tax Cuts and Jobs Act (but due to technical drafting errors such accelerated depreciation was not allowable pursuant to such act). Qualified improvement property generally includes any improvement made to the interior portion of a nonresidential building. The CARES Act specifically adds qualified improvement property to the list of 15-year property in Section 168(e)(3)(E) and makes the changes retroactive to January 1, 2018, which should allow taxpayers the opportunity to amend their prior tax returns to benefit from the accelerated depreciation of qualified improvement property.

### **Recovery Rebates**

Pursuant to a new section, Section 6428, of the IRC, individual taxpayers are eligible for a tax credit, as an advance refund payment, related to their 2020 taxable income (i.e., recovery rebates) in the amount of \$1,200 (\$2,400 for joint filers) with additional \$500 payments per qualifying child (subject to the phase out described below for high income earners).

The recovery rebates are reduced by 5% of the amount of adjusted gross income that exceeds \$75,000 for individuals, \$112,500 for a head of household or \$150,000 for joint filers, as applicable. A taxpayer with an adjusted gross income (i.e., total income minus certain deductions) below \$99,000 (\$136,500 for heads of household, \$198,000 for married filing jointly and even higher levels of AGI for each category for those with qualifying children (e.g., \$218,000 for a married couple with two qualifying children)) will generally receive some amount of a recovery rebate. There is no phase in requirement and individuals that had little or no tax liability in 2019 (or 2018, if applicable) will generally receive the full applicable amount of the recovery rebate (subject to residency status, filing status and number of qualifying children).

Recovery rebates may (and most will) be deposited electronically to an account authorized by the taxpayer on a tax return on or after January 1, 2018. Generally, for purposes of the recovery rebates, the taxpayer's filing status, number of qualifying children, and adjusted gross income are based on the taxpayer's 2019 tax return, or 2018 tax return, if such taxpayer has not filed a 2019 tax return (subject to later adjustment based on information provided on 2020 tax returns).

### **Special Rules for Tax-Qualified Retirement Plans**

The CARES Act includes certain special rules for certain withdrawals, distributions and borrowing related to certain eligible retirement plans, including 401(k) plans, employee annuities and certain IRAs.

Generally, if an individual withdraws money from a qualified retirement plan before age 59½, such individual is required to pay federal income tax on such withdrawal plus a 10% penalty under Section 72(t) of the IRC. The CARES Act waives the 10% early withdrawal penalty under Section 72(t) of the IRC for amounts up to \$100,000 for any coronavirus-related distribution (as explained below) and, generally, the income for federal income tax purposes related to such withdrawals are spread ratably over a 3-year period. During the 3-year period following any coronavirus-related distribution the applicable individual may avoid income recognition by contributing any amount, up to the amount of such coronavirus-related distribution, to an eligible retirement plan (without regard to any annual cap on contributions).

A coronavirus-related distribution means any distribution after January 1, 2020 and prior to December 31, 2020 to an individual (I) *who is diagnosed* with the virus SARS-CoV-2 or with coronavirus disease 2019 (COVID-19), (II) whose *spouse or dependent* is diagnosed with such virus or disease or (III) who experiences *adverse financial consequences* as a result of being quarantined, being furloughed or laid off or having work hours reduced due to such virus or disease, being unable to work due to lack of child care due to such virus or disease, closing or reducing hours of a business owned or operated by the individual due to such virus or disease, or other factors as determined by the Secretary of the Treasury. The administrator of an eligible retirement plan may rely upon a participant's certificate that such participant satisfies the conditions for a coronavirus-related distribution.

The CARES Act increases the maximum amount an individual may borrow under a qualified retirement plan from \$50,000 to \$100,000 for the 180-day period following the enactment of the CARES Act (subject to other borrowing limitations under the IRC). The CARES Act also delays the repayment of certain outstanding loans under a qualified retirement plan for individuals that also qualify for coronavirus-related distributions. The CARES Act also waives the requirement to withdraw a minimum required distribution from a retirement plan for this calendar year 2020 by amending Section 401(a)(9) of the IRC. This allows taxpayers who are typically required to draw down on their benefits (generally after age 70 ½) to avoid taking from an account with deflated value due to the economic issues related to the coronavirus pandemic and to potentially realize upside in their account value as the economy recovers.

### **Charitable Contributions**

The CARES Act amends Section 62(a) of the IRC by adding a permanent above-the-line deduction, not to exceed \$300, for qualified charitable contributions for taxpayers that do not itemize deductions. The CARES Act also temporarily suspends the limitations of certain charitable cash contributions for individuals and corporations that itemize their deductions. For individuals, the 50%

adjusted gross limitation is suspended for 2020. For corporations, the 10% limitation is increased to 25% of taxable income. The CARES Act also increases the limitation on deductions for contributions of food inventory from 15% of taxable income to 25% of taxable income.

### **Student Loans**

The CARES Act amends Section 127 of the IRC to temporarily allow employers to pay student loans of employees in an amount of up to \$5,250 without the employees incurring taxable income (subject to other payments related to educational assistance).

### **Income Tax Payment Dates**

*Federal Income Tax Due Date.* On March 20, 2020, Treasury Secretary Steven Mnuchin announced, via a tweet, that Tax Day would be moving “from April 15 to July 15.” The IRS made this statement official by releasing Notice 2020-18 (which supersedes Notice 2020-17) pursuant to the authority granted to the IRS by President Trump’s emergency declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act. Notice 2020-18 automatically extends the deadline for filing Federal income tax returns and making Federal income tax payments from April 15, 2020 to July 15, 2020. This relief is solely related to Federal income taxes for the 2019 taxable year as well as certain estimated income tax payments for the 2020 taxable year that would have been due April 15, 2020. These changes do not apply to other Federal taxes or state taxes (except as provided by the applicable state). There is no limitation on the amount of the Federal income tax payment subject to such extension (whereas under Notice 2020-17 there was a cap of \$10 million for corporations and \$1 million for all other taxpayers). This extension applies to individuals, trusts, estates, partnerships, associations, companies and corporations.

*Utah State Income Tax Due Date.* Pursuant to Section 59-10-514(1)(a) of the Utah Code, generally, an individual income tax return is due on or before the day on which a federal income tax return is due under the IRC. Therefore, the deadline for filing individual tax returns in Utah was automatically extended to July 15, 2020 upon the release of Notice 2020-18 by the IRS. For pass-through entities and corporations, tax returns must be filed with the Utah State Tax Commission on or before the 15<sup>th</sup> day of the fourth month following the last day of the taxpayer’s taxable year pursuant to Sections 59-10-514(1)(c) and 59-7-505(2) of the Utah Code (see also Utah State Tax Commission new release, dated March 16, 2020). The tax payment and tax return filing due date for such entities are not automatically affected by the recent IRS changes. On March 26, 2020, the Utah State Tax Commission unanimously passed an emergency rule waiving interest and penalties for the 2019 tax returns and payments of pass-through entities and corporations, if such tax returns are filed and payments are paid by July 15, 2020. If a pass-through entity or corporation taxpayer does not file its Utah tax return by July 15, 2020, and it does not request an extension in April 2020, such taxpayer would be subject to late filing and extension penalties.

### **Other Tax Changes**

The CARES Act also includes the following tax changes:

- accelerates the ability to recover Alternative Minimum Tax (“AMT”) credits earned under the previously repealed corporate AMT regime to the current tax year;
- excludes cancellation of debt income from gross income for certain covered loans forgiven under the Paycheck Protection Program under the Small Business Act (as described in the Title I Memo);
- temporarily allows a plan to be treated as a high deductible health plan even though it does not have a deductible for certain telehealth services;
- includes certain over-the-counter medical products as qualified medical expenses;
- suspends collection of excise taxes on airline tickets, transportation of cargo, and aviation fuel until December 31, 2020; and
- suspends excise taxes on alcohol used in hand sanitizer.

The CARES Act includes other tax changes that are not described or otherwise mentioned in this memorandum. If you have any follow-up questions related to any tax changes included in the CARES Act, the FFCRA, certain IRS guidance or any other recent tax changes, please let us know and we would be happy to assist you.

*The foregoing legislative update is designed to be accurate and authoritative but is not intended to provide and should not be construed as providing legal advice or as creating any attorney client relationship with the author or Parr Brown Gee & Loveless, P.C. For legal advice regarding the Coronavirus Aid, Relief, and Economic Security Act, Families First Coronavirus Response Act and the other matters set forth above, you should consult with your legal counsel.*