

## [Business tax provisions in Senate-passed third coronavirus relief package, Federal Tax Update \(03/27/2020\)](#)

2020 COVID-19 News

# **Business tax provisions in Senate-passed third coronavirus relief package**

[Senate-passed version of the Coronavirus Aid, Relief, and Economic Security Act \(CARES Act, H.R. 748\)](#)

### [Summary of CARES Act Unemployment Insurance and Tax Provisions](#)

By a unanimous vote on March 25, the Senate passed a third coronavirus relief package, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act, H.R. 748, the Act). This article discusses the tax relief provisions for businesses that are contained in the Act.

For the tax relief provisions for individuals that are contained in the Act, see [Individual tax provisions in Senate-passed third coronavirus relief package](#).

The CARES Act contains a few additional tax provisions, including provisions on the non-taxability of certain loan forgiveness, advance refunding of certain credits and the suspension of certain aviation taxes. Checkpoint will provide information about these additional tax provisions in a future Federal Tax Update.

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### **Employee retention credit for employers**

**New law.** This provision provides a refundable payroll tax credit for 50% of wages paid by eligible employers to certain employees during the COVID-19 crisis. (Act Sec. 2301(a))

*Eligible employers.* The credit is available to employers, including non-profits, whose operations have been fully or partially suspended as a result of a government order limiting commerce, travel, or group meetings. The credit is also provided to employers who have experienced a greater than 50% reduction in quarterly receipts, measured on a year-over-year basis. (Act Sec. 2301(c)(2))

The credit is not available to employers receiving Small Business Interruption Loans under Sec. 1102 of the Act. (Act Sec. 2301(j))

*Wages paid to which employees?* For employers who had an average number of full-time employees in 2019 of 100 or fewer, all employee wages are eligible, regardless of whether the employee is furloughed. For employers who had a larger average number of full-time employees in 2019, only the wages of employees who are furloughed or face reduced hours as a result of their employers' closure or reduced gross receipts are eligible for the credit. (Act Sec. 2301(c)(3)(A))

No credit is available with respect to an employee for any period for which the employer is allowed a Work Opportunity Credit ( **Code Sec. 21** ) with respect to the employee. (Act Sec. 2301(h)(1))

*Wages.* The term "wages" includes health benefits and is capped at the first \$10,000 in wages paid by the employer to an eligible employee. ((Act Sec. 2301(c)(3)(C); Act Sec. 2301(b)(1))

Wages do not include amounts taken into account for purposes of the payroll credits, for required paid sick leave or required paid family leave in the Families First Coronavirus Act (part of P.L. 116-127) (Act Sec. 2301(c)(3)(A)), nor for wages taken into account for the **Code Sec. 45S** employer credit for paid family and medical leave. (Act Sec. 2301(h)(2))

*Other.* IRS is granted authority to advance payments to eligible employers (Act Sec. 2301(l)(1)) and to waive applicable penalties for employers who do not deposit applicable payroll taxes in anticipation of receiving the credit. (Act Sec. 2301(k))

**Effective date.** The credit applies to wages paid after March 12, 2020 and before Jan. 1, 2021. (Act Sec. 2301(m))

### **Delay of payment of employer payroll taxes**

**Background.** Employers are required to withhold social security taxes ( **Code Sec. 3111(a)** ) and tax under the Railroad Retirement Tax Act (RRTA) from wages paid to employees. ( **Code Sec. 3211(a)** and **Code Sec. 3221(a)** ). Self-employed individuals are subject to self-employment (SECA) tax. ( **Code Sec. 1401(a)** )

**New law.** The CARES Act allows taxpayers to defer paying the employer portion of certain payroll taxes through the end of 2020. Thus, notwithstanding any other provision of law, the payment for "applicable employment taxes" for the "payroll tax deferral period" won't be due before the "applicable date." (Act Sec. 2302(a)(1))

For purposes of the above rules, the term "applicable employment taxes" means: (A) the taxes imposed under **Code Sec. 3111(a)** (social security taxes), (B) so much of the taxes imposed under **Code Sec. 3211(a)** as are attributable to the rate in effect under **Code Sec. 3111(a)** , and (C) so much of the taxes imposed under **Code Sec. 3221(a)** as are attributable to the rate in effect under **Code Sec. 3111(a)** (RRTA taxes). (Act Sec. 2302(d)(1))

The term "payroll tax deferral period" means the period beginning on the date of enactment of the Act and ending before Jan. 1, 2021. (Act Sec. 2302(d)(2))

The term "applicable date" means: (A) Dec. 31, 2021, with respect to 50% of the amounts to which Act Sec. 2302(a) (employment taxes) and Act Sec. 2302(b) (self-employment tax), as the case may be, apply, and (B) Dec. 31, 2022, with respect to the remaining 50% of those amounts. (Act Sec. 2302(d)(3))

Notwithstanding **Code Sec. 6302** (which authorizes IRS to set deadlines for tax deposits), an employer will be treated as having timely made all deposits of applicable employment taxes required (without regard to Act Sec. 2302) to be made during the payroll tax deferral period if all such deposits are made not later than the applicable date. (Act Sec. 2302(a)(2))

The above rules won't apply to any taxpayer which has had indebtedness forgiven under Act Sec. 1106 with respect to a loan under Small Business Act Sec. 7(a)(36), as added by Act Sec. 1102, or indebtedness forgiven under Act Sec. 1109. (Act Sec. 2302(a)(3))

Notwithstanding any other provision of law, the payment for 50% of the taxes imposed under **Code Sec. 1401(a)** (self-employment taxes) for the payroll tax deferral period won't be due before the applicable date. (Act Sec. 2302(b)(1))

For purposes of applying **Code Sec. 6654** (requiring individuals to make estimated tax payments) to any tax year which includes any part of the payroll tax deferral period, 50% of the self-employment taxes imposed under **Code Sec. 1401(a)** for the payroll tax deferral period won't be treated as taxes to which **Code Sec. 6654** applies. (Act Sec. 2302(b)(2))

For purposes of **Code Sec. 3504** (imposing third party liability for withholding tax), in the case of any person designated under that section (and any regulations or other guidance issued by IRS with respect to that section) to perform acts otherwise required to be performed by an employer, if an employer directs that person to defer payment of any applicable employment taxes during the payroll tax deferral period under Act Sec. 2302, the employer will be solely liable for the payment of the applicable employment taxes before the applicable date for any wages paid by that that person on behalf of that employer during that period. (Act Sec. 2302(c)(1))

For purposes of **Code Sec. 3511** (which requires certified professional employer organizations (CPEOs) to be treated as employers for employment tax withholding purposes), in the case of a CPEO (as defined in **Code Sec. 7705(a)**) that has entered into a service contract described in **Code Sec. 7705(e)(2)** with a customer, if that customer directs that CPEO to defer payment of any applicable employment taxes during the payroll tax deferral period under this section, the customer will, notwithstanding **Code Sec. 3511(a)** and **Code Sec. 3511(c)**, be solely liable for the payment of those applicable employment taxes before the applicable date for any wages paid by the CPEO to any worksite employee performing services for that customer during that period. (Act Sec. 2302(c)(2))

**Effective date** . The provisions of Act Sec. 2302 apply to the period beginning on the date of enactment of the Act. (Act Sec. 2302(d)(2))

### **Temporary repeal of taxable income limitation for net operating losses (NOLs)**

**Old law.** Under [Code Sec. 172\(a\)](#) the amount of the NOL 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 deduction allowable in this section. Thus, NOLs are currently subject to a taxable-income limitation and can't fully offset income.

**New law.** The CARES Act temporarily removes the taxable income limitation to allow an NOL to fully offset income. ( [Code Sec. 172\(a\)](#) , as amended by Act Sec. 2303(a)(1))

**Effective date.** The amendments made by Act Sec. 2303(a) apply to tax years beginning after Dec. 31, 2017, and to tax years beginning on or before Dec. 31, 2017, to which NOLs arising in tax years beginning after Dec. 31, 2017 are carried. (Act Sec. 2303(d)(1))

#### **Modification of rules relating to net operating loss (NOL) carrybacks**

**Old law.** [Code Sec. 172\(b\)\(1\)](#) provides 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.

**New law.** The CARES Act provides that NOLs arising in a tax year beginning after Dec. 31, 2018 and before Jan. 1, 2021 can be carried back to each of the five tax years preceding the tax year of such loss. ( [Code Sec. 172\(b\)\(1\)](#) as amended by Act Sec. 2303(b)(1))

**Effective date.** The amendments made by Act Sec. 2303(b) apply to NOLs arising in tax years beginning after Dec. 31, 2017 and to tax years beginning before, on or after such date to which such NOLs are carried. (Act Sec. 2303(d)(2))

#### **Modification of limitation on losses for noncorporate taxpayers**

**Old law.** [Code Sec. 461\(l\)\(1\)](#) disallows the deduction of excess business losses by noncorporate taxpayers for tax years beginning after Dec. 31, 2017 and ending before Jan. 1, 2026. Generally, [Code Sec. 461\(l\)\(3\)\(A\)](#) provides that 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 gross income or gain plus \$250,000 (as adjusted for inflation).

**New law.** The CARES Act temporarily modifies the loss limitation for noncorporate taxpayers so they can deduct excess business losses arising in 2018, 2019, and 2020. ( [Code Sec. 461\(l\)\(1\)](#) , as amended by Act Sec. 2304(a))

**Effective date.** The amendments made by Act Sec. 2304(a) apply to tax years beginning after Dec. 31, 2017. ( [Code Sec. 461\(l\)\(1\)](#) , as amended by Act Sec. 2304(a))

#### **Corporate minimum tax credit (MTC) is accelerated**

**Background.** Corporations (for which the alternative minimum tax was repealed for tax years after 2017) may claim outstanding MTCs (subject to limits) for tax years before 2021, at which time any

remaining MTC may be claimed as fully refundable. Thus, under **Code Sec. 53(e)** , the MTC is refundable for any tax year beginning in 2018, 2019, 2020, or 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. ( **Code Sec. 53(e)** )

**New law.** The CARES Act changes "2018, 2019, 2020, or 2021" (above) to "2018 or 2019," and changes "(100% for tax years beginning in 2021)" to "(100% for tax years beginning in 2019)" ( **Code Sec. 53(e)(1)** ) , as amended by Act Sec. 2305(a), and **Code Sec. 53(e)(2)** , as amended by Act Sec. 2305(a))



**Observation.** Thus, the CARES Act allows corporations to claim 100% of AMT credits in 2019.

The CARES Act also provides for an election to take the entire refundable credit amount in 2018. (Code Sec. 53(e)(5), as amended by Act Sec. 2305(b)(1))

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 made under **Code Sec. 6411** , i.e., as a tentative carryback refund claim. (Act Sec. 2305(d)(1))

Taxpayers may file an application for a tentative refund of any amount for which a refund is due by reason of an election under Code Sec. 53(e)(5). The application, which must be filed *before Dec. 31, 2020*, must be in the manner and form IRS provides, must be verified in the same manner as an application for a tentative carryback adjustment, and must set forth: (a) the amount of the refundable credit claimed under **Code Sec. 53(e)** for the tax year, (b) the amount of the refundable credit claimed under **Code Sec. 53(e)** for any previously filed return for the tax year, and (c) the amount of the refund claimed. (Act Sec. 2305(d)(2)(A))

Within 90 days from the date the application is filed, IRS must: (i) review the application, (ii) determine the amount of the overpayment, and (iii) apply, credit, or refund the overpayment, in a manner similar to that provided in **Code Sec. 6411(b)** (allowance of tentative carryback adjustments). (Act Sec. 2305(d)(2)(B))

For an application made by a corporation filing a consolidated return, the rules of **Code Sec. 6411(c)** apply to an adjustment, to the extent IRS provides. (Act Sec. 2305(d)(2)(C))

**Effective date.** The amendments made by Act Sec. 2305 apply to tax years beginning after December 31, 2017. (Act Sec. 2305(c))

### **Deductibility of interest expense temporarily increased**

**Background.** The Tax Cuts and Jobs Act of 2017 ( **P.L. 115-97** , the "TCJA") generally limited the amount of business interest allowed as a deduction to 30% of adjusted taxable income. ( **Code Sec.**

## 163(j)(10) )

**New law.** The CARES Act temporarily and retroactively increases the limitation on the deductibility of interest expense under **Code Sec. 163(j)(1)** from 30% to 50% for tax years beginning in 2019 and 2020. (Code Sec. 163(j)(10)(A)(i) as amended by Act Sec. 2306(a))

*Special rules for partnerships.* Under a special rule for partnerships, the increase in the limitation will not apply to partners in partnerships for 2019 (it applies only in 2020). (Code Sec. 163(j)(10)(A)(ii)(I) as amended by Act Sec. 2306(a)) For partners that don't elect out, any excess business interest of the partnership for any tax year beginning in 2019 that is allocated to the partner will be treated as follows ( Code Sec. 163(j)(10)(A)(ii)(II) as amended by Act Sec. 2306(a)):

...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. (Code Sec. 163(j)(10)(A)(ii)(II)(aa) as amended by Act Sec. 2306(a))

...50% of the excess business interest will be subject to the limitations of paragraph 163(j)(4)(B)(ii) (relating to the usual treatment of excess business interest allocated to partners) in the same manner as any other excess business interest that is so allocated. (Code Sec. 163(j)(10)(A)(ii)(II)(bb) as amended by Act Sec. 2306(a)) In other words, it will remain suspended until the partnership allocates excess taxable income or excess interest income to the partner (or the partnership is no longer subject to **Code Sec. 163(j)** ).

*Election out of the increased limitation.* Taxpayers may elect out of the increase, for any tax year, in the time and manner IRS prescribes. Once made, the election can be revoked only with IRS consent. For partnerships, the election must be made by the partnership and can be made only for tax years beginning in 2020. (Code Sec. 163(j)(10)(A)(iii) as amended by Act Sec. 2306(a))

*Election to calculate 2020 interest limitation using 2019 adjusted taxable income.* In addition, taxpayers can 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 as the relevant base. For partnerships, this election must be made by the partnership. (Code Sec. 163(j)(10)(B)(i) as amended by Act Sec. 2306(a))

If an election is made to calculate the interest limitation using 2019 adjusted taxable income for a tax year that is a short tax year, the adjusted taxable income for the taxpayer's last tax year beginning in 2019 which is substituted under the election will be equal to the amount which bears the same ratio to such adjusted taxable income as the number of months in the short taxable year bears to 12. (Code Sec. 163(j)(10)(B)(ii) as amended by Act Sec. 2306(a))

**Effective date.** The amendments made by Act Sec. 2306 apply to tax years beginning after Dec. 31, 2018. (Act Sec. 2306(b))

## Bonus depreciation technical correction for qualified improvement property

**Background.** The Tax Cuts and Jobs Act of 2017 ( [P.L. 115-97](#) , the "TCJA") amended [Code Sec. 168](#) to allow 100% additional first-year depreciation deductions ("100% Bonus Depreciation") for certain qualified property. The TCJA eliminated pre-existing 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 ("QI Property"). A general 15-year recovery period was intended to have been provided for QI Property. However, that specific recovery period failed to be reflected in the statutory text of the TCJA. Thus, under the TCJA, QI Property falls into the 39-year recovery period for nonresidential rental property. That makes the QI Property category ineligible for 100% Bonus Depreciation.

**New law.** The CARES Act provides a technical correction to the TCJA, and specifically designates QI Property as 15-year property for depreciation purposes. (Code Sec. 168(e)(3)(E)(vii), as amended by Act Sec. 2307(a)(1)(A)) This makes QI Property a category eligible for 100% Bonus Depreciation. QI property also is specifically assigned a 20-year class life for the Alternative Depreciation System. ( [Code Sec. 168\(g\)\(3\)\(B\)](#) , as amended by Act Sec. 2307(a)(3)(B))

**Effective date.** The amendments made by Act Sec. 2307 are effective for property placed in service after Dec. 31, 2017. (Act Sec. 2307(b))

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