COVID-19 RELIEF FOR AGRICULTURAL BUSINESSES

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Overview

The 2020 Coronavirus pandemic has caused widespread economic devastation across the country. Agricultural producers have been impacted on a number of fronts through severe market disruptions and workforce interruptions. In response to the nationwide economic crisis, Congress has passed a number of laws to provide assistance to businesses and individuals alike. This material reviews COVID-19 laws, regulations, and proclamations potentially impacting agricultural producers and businesses, as of September 1, 2020.

Legislative and Executive Response

As of September 1, 2020, Congress had passed the following COVID-19 legislation:

- March 6, 2020 - Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020 (Phase I) ($ 8.3 billion) [Public Law 116-123].
- March 18, 2020 - Families First Coronavirus Response Act (Phase II) ($ 192 billion) [Public Law 116-127].
- March 27, 2020 - Coronavirus Aid, Relief, and Economic Security CARES Act (Phase III) ($ 2.2 trillion) [Public Law 116-136].
- April 24, 2020 - Paycheck Protection Program and Health Care Enhancement Act [Public Law 116-139].
- June 5, 2020 – Paycheck Protection Program Flexibility Act of 2020 [Public Law 116-142].

In addition to the above legislation, IRS issued relief for tax deadlines, and the President took executive action on August 8, 2020.

Families First Coronavirus Response Act

On March 18, 2020, the President signed the Families First Coronavirus Response Act (FFCRA), H.R.6201, into law. The law, which is a temporary expansion of the Family and Medical Leave Act, requires most private employers with fewer than 500 employees to provide emergency paid sick leave and emergency paid family and medical leave to their employees for coronavirus-related absences from April 1, 2020, through December 31, 2020. The FFCRA creates a corresponding refundable paid sick leave credit and paid child care leave credit for these employers. Self-employed individuals are offered equivalent credits.

Impacted employers may take immediate advantage of the paid leave credits by retaining and accessing 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 may seek an expedited advance from the IRS by submitting a streamlined claim form (IRS Form 7200).

Small Business Exemption

Employers with fewer than 50 employees are eligible for an exemption from the requirements to provide leave to care for a child whose school is closed or to care for a child when child care is unavailable. This exemption applies if meeting the FFCRA requirements would jeopardize the viability of the business. A Department of Labor temporary rule issued April 1 provides guidance on this standard. An employer may claim this exemption if an authorized officer of the business has determined that:

- The provision of paid sick leave or expanded family and medical leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
- The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
- There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

Required Sick and Family Leave

The Act generally provides that for COVID-19-related absences, employers with fewer than 500 employees must provide employees with up to 80 hours of paid sick leave (for full-time employees) and expanded paid child care leave when their children's schools are closed or child care providers are unavailable.

Sick Leave

The Emergency Paid Sick Leave Act portion of the Act requires private employers with fewer than 500 employees to provide paid sick leave where an employee is unable to work (or telework) because of several types of circumstances. The pay guaranteed a worker depends upon the reason for the absence.

Employees absent for the following reasons are entitled to sick leave paid at 100 percent of the usual rate of pay, but capped at $511 per day and $5,110 in the aggregate.

- The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID–19.
- The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID–19.

- The employee is experiencing symptoms of COVID–19 and seeking a medical diagnosis. Employees absent for the following reasons are entitled to 2/3 of the employee's usual rate of pay, capped at $200 per day and $2,000 in the aggregate.
- The employee is caring for an individual who is subject to a quarantine or isolation order or has been advised by a health care provider to self-quarantine.
- The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID–19 precautions.
- The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

An employer may not require, as a condition of providing paid sick time, that the employee search for or find a replacement employee to cover the hours during which the employee is using paid sick time. Employers of an employee who is a health care provider or an emergency responder may elect to exclude such employee from the application of the sick leave provisions. Full-time eligible employees are entitled to receive two weeks of paid sick leave, up to 80 hours. Part-time employees are entitled to sick leave in an amount equal to the average number of hours they typically work in a two-week period. The paid sick time must be available for immediate use by the employee, regardless of how long the employee has been employed by an employer. Employers cannot require employees to use other paid leave before taking advantage of the sick leave provided by the Act.

Expanded Family Leave

Under the Emergency Family and Medical Leave Expansion Act, employers with fewer than 500 employees must provide employees (who have been employed for at least 30 days) with up to 12 weeks of leave for COVID-19-related needs (two weeks of sick leave, plus 10 weeks of expanded family leave).

This leave requirement applies to employees who are unable to work because of a need to care for a child whose school is closed or child care provider is unavailable for reasons related to COVID-19. The first 10 days of expanded family leave are unpaid, but the employee may receive sick pay during this time. After the first 10 days, an employee is eligible to receive paid leave, at 2/3 of the employee’s regular pay. This paid leave is capped at $200 per day or $10,000 in the aggregate.

Required Notice

Employers subject to these laws are required to post notices. For employees working from home, this notice can be "posted" by emailing these notices to the employees. Employers are subject to Fair Labor Standards Act violations if they fail to comply with the law.

Credits for Employers

To compensate employers subject to the new paid leave requirements, the law provides a corresponding refundable sick leave credit and paid child care leave credit for eligible employers. Eligible employers are businesses and tax-exempt organizations with fewer than 500 employees that are required to provide emergency paid sick leave and emergency paid family and medical leave under the Act. Eligible employers may claim these credits based on qualifying leave they provide to their employees from April 1, 2020, through December 31, 2020. Equivalent credits are available to self-employed individuals based on similar circumstances.

The credits are refundable payroll tax credits, designed to immediately and fully reimburse employers, dollar-for-dollar, for the cost of providing the required leave to their employees. Employers will receive 100 percent reimbursement for paid leave provided under the FFCRA.

Paid Sick Leave Credit

For an employee who is unable to work because of Coronavirus quarantine or self-quarantine or has Coronavirus symptoms and is seeking a medical diagnosis, eligible employers may receive a refundable sick leave credit for sick leave at the employee’s regular rate of pay, up to $511 per day and $5,110 in the aggregate, for a total of 10 days.

For an employee who is caring for someone with Coronavirus, or is caring for a child because the child's school or child care facility is closed, or the child care provider is unavailable due to the Coronavirus, eligible employers may claim a credit for 2/3 of the employee's regular rate of pay, up to $200 per day and $2,000 in the aggregate, for up to 10 days. Eligible employers are entitled to an additional tax credit based on costs to maintain health insurance coverage for the eligible employee during the leave period.

Child Care Leave Credit

In addition to the sick leave credit, for an employee who is unable to work because of a need to care for a child whose school or child care facility is closed or whose child care provider is unavailable due to the Coronavirus, eligible employers may receive a refundable child care leave credit. This credit is equal to 2/3 of the employee's regular pay, capped at $200 per day or $10,000 in the aggregate. Up to 10 weeks of qualifying leave counts towards the child care leave credit. Eligible employers are entitled to an additional tax credit based upon costs to maintain health insurance coverage for the eligible employee during the leave period.

Claiming the Credits

Eligible Employers are entitled to receive a credit in the full amount of the qualified sick leave wages and qualified family leave wages, plus allocable qualified health plan expenses and the employer’s share of Medicare tax, paid for leave during the period beginning April 1, 2020, and ending December 31, 2020.

Most employers claim the credits on their federal employment tax returns (Form 941, Form 943, Form 944, or CT-1). In anticipation of receiving the credits, employers can fund qualified leave wages (and allocable qualified health plan expenses and the employer’s share of Medicare tax on the qualified leave wages) by accessing federal employment taxes, including withheld taxes, that are required to be deposited with the IRS. Employers can benefit more quickly from the credits

by reducing their federal employment tax deposits. If there are insufficient federal employment taxes to cover the amount of the credits, employers may request an advance payment of the credits from the IRS by submitting a Form 7200, Advance Payment of Employer Credits Due to COVID-19. Employers may fax completed forms to 855-248-0552.

Example 1 – Retention of Deposits
During its last deposit period, Agribusiness, Inc. (an agribusiness filing Form 941) paid $5,000 in sick leave to its employees and was otherwise required to deposit $8,000 in payroll taxes, including taxes withheld from all its employees.

Example 2 – Requesting an Advance
Assume that Agribusiness, Inc. paid $10,000 in sick leave and was required to deposit $8,000 in taxes. Under the FFCRA, Agribusiness, Inc. could use the entire $8,000 of taxes in order to make qualified leave payments and file a Form 7200 to receive an accelerated credit for the remaining $2,000.

Interaction with Other Credits and Payroll Tax Deferral
For an example showing the interaction of the FFCRA credits with Employee Retention Credits and the employer payroll tax deferral also allowed under the CARES Act, see the next example below.

Self-Employed

The FFCRA provides equivalent leave credit amounts for self-employed individuals under similar circumstances. These taxpayers are allowed as an income tax credit to offset their federal self-employment tax for any taxable year equal to their "qualified sick leave equivalent amount" or "qualified family leave equivalent amount."

Qualified Sick Leave Amount

A self-employed person calculates the qualified sick leave amount in one of two ways.

Self-employed individuals are eligible for the credit if they are unable to work or telework because they:

- Are subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- Have been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
- Are experiencing symptoms of COVID-19 and seeking a medical diagnosis.

In these cases, the qualified sick leave equivalent amount is equal to the number of days during the taxable year that the individual cannot perform services in the applicable trade or business for one of the three above reasons, multiplied by the lesser of $511 or 100 percent of the "average daily self-employment income" of the individual for the taxable year.

Self-employed individuals are also eligible for a credit if they are unable to work or telework because they are:

- Caring for an individual who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19, or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- Caring for a child if the child's school or place of care has been closed, or child care provider is unavailable due to COVID-19 precautions; or
- Experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor

In these cases, the qualified sick leave equivalent amount is equal to the number of days during the taxable year that the individual cannot perform services in the applicable trade or business for one of the three above reasons, multiplied by the lesser of $200 or 67 percent of the "average daily self-employment income" of the individual for the taxable year.

In either case, the maximum number of days a self-employed individual may take into account in determining the qualified sick leave equivalent amount is 10.

Qualified Family Leave Amount
A self-employed person calculates his or her "qualified family leave amount" by counting the number of days (up to 50) during the taxable year that he or she cannot perform services for which he or she would be entitled to paid family leave if employed by someone else. This number is multiplied by the lesser of two amounts: (1) $200, or (2) 67 percent of the average daily self-employment income of the individual for the taxable year.

Claiming the Credits
A self-employed individual may fund sick leave and family leave equivalents by taking into account the credit to which they will be entitled. The taxpayer will claim the credit on Form 1040, in determining required estimated tax payments. A self-employed taxpayer can effectively reduce payments of estimated income taxes that the individual would otherwise be required to make if the individual was not entitled to the credit on the Form 1040.

CARES Act – Deferral of Payroll Taxes, RRTA Tax, and SECA

Section 2302(a)(1) of the CARES Act allows employers to temporarily defer (through December 31, 2020) payment of the employer's portion of social security and RRTA payroll taxes (6.2 percent). Section 2302(a)(2) of the CARES Act likewise provides that deposits of the employer's share of Social Security tax that would otherwise be required to be made during the payroll deferral period may be deferred as well. The deferral applies to deposits of the employer's share of Social Security tax that would otherwise be due after December 31, 2020, as long as the deposits relate to the tax imposed on wages paid (a) during the quarter ending on December 31, 2020, for employers filing quarterly employment tax returns, or (b) during the payroll tax deferral period for all other employers (including those filing Form 943).

How to Defer

An employer defers the employer's share of Social Security tax by reducing required deposits or payments for a calendar quarter (or other employment tax return period) by an amount up to the maximum amount of the employer's share of Social Security tax for the return period to the extent the return period falls within the payroll tax deferral period.

Applies to Annual Employment Returns

Employers that file annual employment tax returns (Form 943, Form 944, and Form CT-1) may also defer deposit and payment of the employer's share of Social Security tax.

Applies to the Self-Employed

The law provides the same opportunity to self-employed individuals for one-half of the self-employment tax. IRS has stated that the self-employed may use “any reasonable method” to allocate 50 percent of the Social Security portion of self-employment tax attributable to net earnings from self-employment earned from March 27, 2020, through December 31, 2020.

The IRS states, for example, that an individual may allocate 22.5% of the individual's annual earnings from self-employment to the period from January 1, 2020, through March 26, 2020, and 77.5% of the individual's annual earnings to the period from March 27, 2020, through December 31, 2020. Similarly, an individual may use any reasonable method in applying the Social Security wage base or taking into account partnership income in determining the portion of 50 percent of the Social Security portion of self-employment tax attributable to net earnings from self-employment for the period from March 27, 2020, through December 31, 2020.

Required Repayment

The requirement to deposit these taxes is delayed through the end of 2020. The delayed taxes must then be repaid in two equal installments, one due by December 31, 2021, and the other due by December 31, 2022.

Interaction with Paycheck Protection Program

Originally, PPP borrowers who received a forgiveness decision from their lender were not eligible for the payroll tax deferral. The PPP Flexibility Act, however, changed that. An employer that receives a PPP loan may also defer payment of the employer’s share of Social Security tax.

Interaction with Employer Credits

Employers may defer payroll taxes and claim the employee retention credit and a credit under the Families First Coronavirus Response Act. For an example of the interaction of these credits with the deferral example below.

CARES Act – Employee Retention Credit

Section 2301 of the CARES Act allows “eligible employers” a fully refundable payroll tax credit equal to 50 percent of “qualified wages” paid to each employee for each calendar quarter during the COVID-19 crisis (March 13, 2020, through December 31, 2020). This credit is designed to encourage employers to keep employees on their payroll.

Amount of the Credit

The qualified wages which may be taken into account cannot exceed $10,000 per employee for all quarters (maximum credit is $5,000 per employee). The credit is taken against the applicable employment taxes on the qualified wages (reduced by any credits taken under the Families First Coronavirus Response Act or the employer credit for paid family and medical leave). The balance is fully refundable.

Eligibility

"Eligible employers" are those employers (including non-profit employers):

- Whose businesses were fully or partially suspended during the calendar quarter due to orders from an appropriate governmental authority limiting commerce, travel, or group meetings due to COVID-19 OR
- Who experienced a "significant decline in gross receipts" for a given calendar quarter.

An employer becomes an "eligible employer" under the "significant decline in gross receipts" test during the first calendar quarter for which gross receipts for that quarter are less than 50 percent of gross receipts for the same calendar quarter in the prior year. The eligibility period ends in the calendar quarter following the first calendar quarter in which gross receipts are greater than 80 percent of gross receipts for the same calendar quarter in the prior year.

"Qualified Wages"

The definition of "qualified wages," which includes the cost of health benefits, depends upon the size of the employer.

- Eligible employers that had an average of 100 or fewer full-time employees in 2019 may take the credit for all employee wages, whether or not the employee was furloughed.
- For eligible employers with more than 100 average employees in 2019, the employer may take the credit only for the wages of employees who were actually furloughed or placed on reduced hours because of a business closure or reduced gross receipts.

Exclusions

This credit is not available to those employers who receive loans from the Paycheck Protection Program or for wages of an employee for whom the employer is allowed a Work Opportunity Credit. The credit is also not available to federal, state, and local governments, and their agencies or instrumentalities.

Claiming the Credit

To claim the ERC, eligible employers report their total qualified wages and related health insurance costs for each quarter on their quarterly employment tax returns (for Form 941 filers), beginning with the second quarter. The credit is taken against the employer's share of social security tax but the excess is refundable under normal procedures. Employers that file an annual Form 943 are also eligible to take the credit.

In anticipation of claiming the credit, employers fund qualified wages by:

- Retaining federal employment taxes, including withheld taxes that are required to be deposited with the IRS, and
- Requesting an advance of the credit from the IRS for the amount of the credit that is not funded by accessing the federal employment tax deposits.

Taxes allowed to be retained include federal income tax withholding, the employees' share of Social Security and Medicare taxes, and the employer's share of Social Security and Medicare taxes for all employees, up to the amount of the credit, without penalty, taking into account any reduction for deposits in anticipation of the paid sick and family leave credit provided in the Families First Coronavirus Response Act.

Eligible employers, including those that file a Form 943, can request an advance of the Employee Retention Credit by submitting Form 7200.

Interaction with Payroll Tax Deferral and the FFCRA

The ability to defer deposit and payment of the employer's share of Social Security tax (6.2 percent) under section 2302 of the CARES Act applies to all employers, including employers entitled to paid leave credits and employee retention credits.

If an employer reduces its deposits by an amount in excess of the allowable FFCRA paid leave credits, employee retention credit, and deferral, then the failure to deposit penalty may apply to the excess reduction. An employer is entitled to defer deposit and payment of the employer's share of Social Security tax prior to determining whether the employer is entitled to the FFCRA paid leave credits or the employee retention credit, and prior to determining the amount of employment tax deposits that it may retain in anticipation of these credits, the amount of any advance payments of these credits, or the amount of any refunds with respect to these credits.

Penalty Relief

On March 31, IRS issued Notice 2020-22, offering penalty relief to employers that reduce employment tax deposits in anticipation of the credits with respect to Qualified Retention Wages paid with respect to the period beginning on March 13, 2020, and ending December 31, 2020.

> **Example 3 – Applying the Credits**
> Pastures LLC, a business filing a Form 941, is eligible for the paid sick leave credit and employee retention credit. In its first payroll period of the second quarter of 2020, Pastures pays $10,000 in qualified wages and $3,500 in qualified sick leave wages under the FFCRA, among other wages for the payroll period. Pastures has a federal employment tax deposit obligation of $9,000 for the first payroll period of the second quarter of 2020 (of which $1,500 relates to the employer's share of Social Security tax) prior to (a) any deferral of the deposit of the employer's share of Social Security tax and (b) any amount of federal employment taxes not deposited in anticipation of credits for qualified sick leave wages under the FFCRA.

Pastures reasonably anticipates a $5,000 employee retention credit (50 percent of qualified wages) and a $3,500 credit for paid sick leave (100 percent of qualified sick leave wages) thus far for the second quarter.

Interaction Between Payroll Tax Deferral, ERC, and FFCRA

		Deferred Amount (Employer's share of SS)	**Anticipated Credits**
Qualified Wages	$10,000		-$5,000
Qualified Sick Leave	$3,500		-$3,500
Deposit Obligation	$9,000	-$1,500	
Post-Deferral Deposit Obligation	$7,500		
Post-Credit Obligation	-$1,000		-$8,500
Overpayment Request	**$1,000**		

Pastures first defers deposit of the $1,500 employer's share of Social Security tax under section 2302 of the CARES Act. This results in a remaining federal employment tax deposit obligation of $7,500. Pastures then reduces this federal employment tax deposit obligation by the $3,500 anticipated credit for qualified sick leave wages, leaving a federal employment tax deposit obligation of $4,000. Finally, Pastures further reduces the deposit of all remaining federal employment taxes by $4,000 for the $5,000 anticipated employee retention credit for qualified wages. Pastures will not incur a failure to deposit penalty for reducing its federal employment tax deposit for the first payroll period of the second quarter to $0.

The amount of the excess $1,000 in employee retention credit available is refundable as an overpayment and Pastures may file a Form 7200 to request a credit or refund of this amount in advance of the close of the quarter (but not for any amount of the employee retention credit that was already used to reduce the deposit obligation). If Pastures does not request an advance, it may request that the $1,000 overpayment be credited or refunded when it files its second quarter Form 941.

When Pastures defers payment of the $1,500 employer's share of Social Security tax on its Form 941 for the second quarter of 2020, it will not be required to pay any portion of the deferred amount until December 31, 2021, at which time 50 percent is due ($750), with the remaining amount ($750) due December 31, 2022. If Pastures fails to pay the required amounts at those times, it may be subject to failure to deposit penalties and failure to pay penalties accruing from the deferred due date for payment.

CARES Act – Economic Impact Payments

The most wide-reaching provision in the CARES Act (section 2201) provided "2020 recovery rebates for individuals," called "Economic Impact Payments" (EIPs). The EIPs, characterized as credits against 2020 taxable income, were issued in the amount of $1,200 for "eligible individuals" or $2,400 for "eligible individuals" filing a joint return. In addition, "eligible individuals" received $500 for each "qualifying child," as defined by I.R.C. § 24(c), for purposes of the child tax credit. This generally included dependent children under the age of 17 for whom the individual had a social security number.

- "Eligible individuals" included "any individual" except:
- Nonresident alien individuals
- Individuals who can be considered a dependent of another individual
- An Estate or Trust

AGI Phase-out

The amount of the recovery rebate credit was reduced by five percent of the amount by which a taxpayer's adjusted gross income exceeds $150,000 for joint return filers, $112,500 for those filing head of household, or $75,000 for other taxpayers.

The recovery rebate is to be "treated as allowed" as a refundable tax credit.

No Income is Required

Although called a "credit against 2020 taxable income," recovery rebate credits are wholly refundable credits for which no taxable income is required.

Determining the Recovery Rebate Amount

To allow IRS to efficiently determine the amount of the recovery rebate credit for each individual and pay that amount quickly, the law defined an "advance refund amount." This was the amount of the recovery rebate credit that the Treasury Department distributed to taxpayers "as rapidly as possible." The "advance refund amount" was the amount that would have been allowed as a credit to that individual in 2019 had the recovery rebate credit been part of the law in 2019.

In the case of an individual who had not filed a tax return for 2019, the Treasury substituted taxable year 2018 for taxable year 2019. In other words, if no 2019 return was on file, the "advance refund amount" was the amount that would have been allowed as a credit to that individual in 2018 had the recovery rebate credit been part of the law in 2018. If an individual did not file a return in 2018 or 2019, the Secretary used information for the individual's 2019 calendar year provided in that person's Social Security Benefit Statement or Social Security Equivalent Benefit Statement. The law stated that those who were "eligible individuals" for the 2019 taxable year (or the 2018 taxable year if the 2019 return has not been filed) were treated as having made a tax payment in the amount equal to the "advance refund amount" for that taxable year.

Advance Refund Payments

The Treasury Department was instructed to distribute to taxpayers "as rapidly as possible" an advance refund of the EIP (recovery rebate credit). The law directed the Secretary to certify and disburse the advance refund payments electronically to an account to which the payee has authorized, on or after January 1, 2018, the delivery of a tax refund. If direct deposit was not available, the IRS opened a portal through which taxpayers would enter their bank account information. Many taxpayers received prepaid debit cards.

Under the law, no interest is allowed on any overpayment attributable to these advance rebate payments. Within 15 days of the date the advance refund payment was distributed, notice of the payment was to be mailed to the taxpayer's last known address.

Reconciling the Advance Refund Payment and the Recovery Rebate Credit

When filing the 2020 return, the amount of the 2020 EIP (recovery rebate credit) will be reduced (but not below zero) by the aggregate refunds and credits made or allowable to the taxpayer through an advance refund payment. With joint filers, half of each credit will be treated as made or allowed to each individual.

Considerations

The statutory language provides that if the advance refund payment sent to the taxpayer was more than the 2020 recovery rebate credit calculated at the time the 2020 return is filed, the taxpayer will not be required to repay the difference. If, however, the taxpayer is entitled to a higher credit using actual 2020 data, the taxpayer will be entitled to recover the difference as an offset against 2020 tax liability or as a refundable credit.

If 2019 income did not limit the credit, but 2020 income would, the taxpayer will receive the full credit. Conversely, if 2019 income limited the credit, but 2020 income does not, the taxpayer may claim the full credit when filing the 2020 return.

CARES ACT – Retirement Provisions

Penalty-Free Distributions

Section 2202(a) of the CARES Act provides special treatment for coronavirus-related distributions from eligible retirement accounts. For qualifying distributions (up to $100,000), the law:

- Provides an exception to the 10% penalty for early withdrawals,
- Allows the distribution to be included in income ratably over three years, and
- Provides that the distribution will be treated as though it were paid in a direct rollover to an eligible retirement plan if the distribution is eligible for tax-free rollover treatment and is recontributed to an eligible retirement plan within the three-year period beginning on the day after the date on which the distribution was received.

Who is Eligible?

The CARES Act specifically provided that this special treatment is available for these "qualified individuals":

- An individual diagnosed with the virus SARS-CoV-2 or with coronavirus disease 2019 (COVID-19) by a test approved by the Centers for Disease Control and Prevention;
- An individual whose spouse or dependent is diagnosed with SARS-CoV-2 or with COVID-19 by a test approved by the Centers for Disease Control and Prevention;
- An individual who experiences adverse financial consequences as a result of being quarantined, being furloughed or laid off, or having work hours reduced due to SARS-CoV-2 or COVID-19;
- An individual who experiences adverse financial consequences as a result of being unable to work due to lack of child care due to SARS-CoV-2 or COVID-19; or
- An individual who experiences adverse financial consequences as a result of closing or reducing hours of a business that you own or operate due to SARS-CoV-2 or COVID-19.

On June 19, 2002, IRS issued Notice 2020-50, expanding the relief to apply to an individual who experiences adverse financial consequences as a result of:

- The individual having a reduction in pay (or self-employment income) due to COVID-19 or having a job offer rescinded or start date for a job delayed due to COVID-19;
- The individual's spouse or a member of the individual's household being quarantined, being furloughed or laid off, or having work hours reduced due to COVID-19, being unable to work due to lack of childcare due to COVID-19, having a reduction in pay (or self-employment income) due to COVID-19, or having a job offer rescinded or start date for a job delayed due to COVID-19; or
- Closing or reducing hours of a business owned or operated by the individual's spouse or a member of the individual's household due to COVID-19.

For purposes of applying these additional factors, a member of the individual's household is someone who shares the individual's principal residence.

The guidance states that the definition of coronavirus-distribution under the CARES Act does not limit these distributions to amounts withdrawn solely to meet a need arising from COVID-19. If an individual is a "qualified individual" as a result of experiencing adverse financial consequences as described above, coronavirus-related distributions are permitted without regard to the qualified individual's need for funds. Furthermore, the amount of the distribution is not required to correspond to the extent of the adverse financial consequences experienced by the qualified individual.

Including the Distribution in Income

There are two methods for a qualified individual to include the taxable portion of a coronavirus-related distribution in income.

- A qualified individual who receives a coronavirus-related distribution is permitted to include the taxable portion of the distribution in income ratably over a three-year period that begins in the year of the distribution.
- Alternatively, a qualified individual is permitted to elect out of the three-year ratable income inclusion and include the entire amount of the taxable portion of the distribution in income in the year of the distribution.
    - This election cannot be made or changed after the timely filing of the individual's federal income tax return (including extensions) for the year of the distribution.
    - All coronavirus-related distributions received in a taxable year must be treated consistently (either all distributions must be included in income over a three-year period or all distributions must be included in income in the current year).

Recontribution Within Three Years

If a coronavirus-related distribution is eligible for tax-free rollover treatment, a qualified individual is permitted, at any time in the three-year period beginning the day after the date of a coronavirus-related distribution, to recontribute any portion of the distribution, but not an amount in excess of the amount of the distribution, to an eligible retirement plan. This recontribution will not be treated as a rollover contribution for purposes of the one-rollover-per-year limitation.

Retirement Plan Loans

The law also relaxes the rules for loans from qualified plans, including temporarily increasing the loan limit from $50,000 to $100,000 and delaying repayment dates for some outstanding loans by one year.

Waiver of RMD Requirements

Section 2203 of the law temporarily waives Required Minimum Distributions (RMDs) for calendar year 2020 for a number of retirement plans and individual retirement accounts. This applies to all RMDs, even those for beneficiaries.

On June 23, 2020, IRS issued Notice 2020-51, providing guidance for the waiver of 2020 RMDs made possible by the CARES Act. The guidance also provides sample plan amendments. The guidance stated that anyone who took a 2020 RMD-distribution from a defined-contribution plan impacted by the CARES Act waiver was eligible to roll those funds over into a retirement account by August 31, 2020, to avoid paying tax on the distribution.

Remote Notaries Allowed

Notice 2020-42 granted temporary relief for retirement plan participant elections and spousal consents required to be witnessed by a plan representative or a notary public. This relief applies retroactively, from Jan. 1, 2020, through Dec. 31, 2020.

CARES Act – Charitable Contribution Provisions

Allowance of Partial Above-the-Line Deduction for Charitable Contributions

Section 2204 of the CARES Act provides that taxpayers who do not itemize deductions may take an above-the-line deduction on their 2020 return for qualified charitable contributions in an amount not to exceed $300.

Modification of Limitations on Charitable Contributions

Section 2205 of the CARES Act temporarily suspends the 60 percent AGI limit for cash charitable contributions that can be deducted by individuals. In 2020, individuals may deduct qualified contributions in an amount up to 100 percent of AGI. The deduction limit for cash charitable contributions for corporations is increased for 2020 from 10 percent of taxable income to 25 percent of taxable income for qualified contributions. Qualified contributions do not include contributions to a donor advised fund. The law also provides that a corporation can take a deduction in amount up to 25 percent of taxable income for donations of food inventory to charitable organizations in 2020. The food must be used for the care of the ill, needy, or infants. The usual deduction limit for these contributions is 15 percent.

CARES Act – Student Loan Relief

Exclusion for Certain Employer Payments of Student Loans

Current law allows an employee to exclude from income up to $5,250 of employer payments made under an educational assistance program for the employee's education. Section 2206 of the CARES Act allows student loan repayments by an employer to be included in qualifying payments under an educational assistance program. In other words, an employee can exclude from income up to $5,250 of student loan payments made on his or her behalf by an employer if no other educational assistance was provided. Employees may not also take a deduction for the interest on those payments.

Other Student Loan Relief

Pursuant to a Presidential Order, federal student loan payments have been suspended through December 31, 2020, and the interest rate has been temporarily set to zero on a number of federal loans. Students can continue to make payments during this time.

CARES Act – Paycheck Protection Program

The Paycheck Protection Program, implemented by section 1102 of the CARES Act, expanded the Small Business Administration 7(a) loan program to provide up to $349 billion (expanded by an additional $310 billion on April 24) in 100% federally-guaranteed loans to small employers and eligible self-employed individuals impacted by COVID-19. These loans were designed to be forgivable under section 1106 if requirements are met.

Background

The CARES Act amended the Small Business Act to expand the small business loan program by creating section 7(a)(36), the Paycheck Protection Program. The program, administered through the Small Business Administration, expands the definition of eligible small businesses and organizations to include many not ordinarily eligible for an SBA loan. The SBA was authorized

to guarantee loans under the Paycheck Protection Program, through August 8, 2020 (extended from the original deadline of June 30, 2020). The loans were offered on a first-come, first served basis. At the close of the loan period, $ 133,987,798,876 of PPP funds remained undistributed.

Covered Loan and Covered Period

The PPP provided "covered loans" during the "covered period." For purposes of section 1102, the term "covered loan" was a loan made under the program during the covered period. The term "covered period" under section 1102 means the period beginning on February 15, 2020, and ending December 31, 2020 (extended from the original June 30, 2020 end date). For purposes of section 1106 (loan forgiveness), the covered period is the 8-week period or the 24-week period beginning on the date of the origination of a covered loan. "Covered loan" has the same definition in each section.

Additional Lenders

Borrowers obtained the loans through independent lenders, not the SBA directly. The CARES Act extended the authority to make Paycheck Payment Program loans (but not other SBA loans) to lenders determined by the SBA Administrator and the Secretary of the Treasury to have the necessary qualifications to process, close, disburse, and service loans made with the guarantee of the SBA. Lenders authorized to make covered loans were eligible to be reimbursed from the SBA Administrator at one of the following rates (based on the balance of the financing outstanding at the time of disbursement of the covered loan):

- Five percent for loans of not more than $350,000
- Three percent for loans of more than $350,000 and less than $2,000,000, and
- One percent for loans of not less than $2,000,000.

Prioritization of Loans - "Sense of the Senate"

The CARES Act sought to give priority to PPP loans to certain underserved markets:

> It is the sense of the Senate that the Administrator should issue guidance to lenders and agents to ensure that the processing and disbursement of covered loans prioritizes small business concerns and entities in underserved and rural markets, including veterans and members of the military community, small business concerns owned and controlled by socially and economically disadvantaged individuals, women, and businesses in operation for less than two years.

Eligible Businesses

Specifically, during the covered period, in addition to "small business concerns" meeting standards under current SBA regulations, any of the following entities were eligible to receive a covered loan if they employed 500 or fewer employees:

- business concern,
- 501(c)(3) nonprofit,
- veterans' organization, or
- Tribal business concern

The term “employee” for purposes of determining how many employees a business employs includes individuals employed on a full-time, part-time, or other basis. Additionally, lodging and restaurant businesses were eligible to receive a loan if their multi-location business did not employ more than 500 employees per physical location. Businesses meeting the definition of an SBA “small business concern” were eligible for a loan, even if they had more than 500 employees. A business must also have been in operation on February 15, 2020, to qualify for a PPP loan.

Agricultural Businesses

Although there were no restrictions on agricultural businesses applying for PPP loans in the CARES Act, many lenders were concerned that they did not qualify. Although agricultural enterprises have been ineligible for SBA 7(b) loans, section 7(a) has no such restriction. Nor did the statute place a revenue limit on these businesses.

Eligible Self-Employed Individuals

During the covered period, individuals who operate under a sole proprietorship or as an independent contractor, and “eligible self-employed individuals” were also be eligible to receive a covered loan. To be eligible, the self-employed person must have:

- Been in operation on February 15, 2020
- Self-employment income as an independent contractor or sole proprietor
- A principal place of residence is in the United States, and
- Filed with or will file with a Schedule C for 2019

An eligible self-employed individual, independent contractor, or sole proprietorship seeking a covered loan must submit documents to establish the individual as eligible, including payroll tax filings, Forms 1099-MISC, and income expenses from the sole proprietorship, as determined by the SBA.

Who is Ineligible?

The following potential borrowers were ineligible for PPP loans:

- Engaged in any activity that is illegal under federal, state, or local law;
- Household employer (individuals who employ household employees such as nannies or housekeepers);
- 20 percent or more owner of employer is incarcerated, on parole, subject to criminal indictment or convicted of a felony within the last five years (one-year for non-financial felonies); or
- Any business owned or controlled by them has ever obtained a direct or guaranteed loan from SBA or any other federal agency that is currently delinquent or has defaulted within the last seven years and caused a loss to the government.

Additionally, 13 CFR §120.110 exclusions applied to prevent other non-profits, passive landlords, financial businesses, and life insurance companies from receiving PPP loans.

Maximum Loan Amount

During the covered period, the maximum loan amount was the lesser of:

- $10,000,000 or
- 2.5 times the average monthly payroll costs (prior 12 months or 2019 calendar year), plus any refinanced Economic Injury Disaster loans received after January 31, 2020 through April 3, 2020.

Startups that were not in business between February 15, 2019, and July 31, 2019, calculate average monthly payroll costs based upon the period beginning January 1, 2020, through February 29, 2020. Seasonal employers may calculate the average monthly payroll costs based on the 12-week period beginning on February 15, 2019 or, alternatively, the period from March 1, 2019 through June 30, 2019.

Payroll Costs

"Payroll costs" include compensation with respect to compensation to employees (whose principal place of residence is the United States) that includes:

- Compensation to employees in the form of salary, wages, commissions, and similar compensation;
- Payment of cash tips or equivalent;
- Payment for vacation parental, family, medical, or sick-leave;
- Allowance for dismissal or separation;
- Payment required for group health care coverage, including insurance premiums and retirement;
- Payment of state or local tax assessed on employee compensation;
- The sum of payments of any compensation to or income of a sole proprietor or independent contractor that is a wage, commission, income, net earnings from self-employment, or similar compensation and that is in an amount that is not more than $100,000 in one year, as prorated for the covered period.

Commodity Wages

SBA and Treasury provided no guidance on whether commodity wages were "payroll costs" for purposes of calculating the loan amount. Because of the broad statutory definition of compensation and the lack of a requirement for "cash" wages, there is nothing to exclude commodity wages from the definition of payroll costs for purposes of calculating the loan amount.

Excluded from Payroll Costs

Payroll costs do NOT include:

- Cash compensation of an individual employee in excess of an annual salary of $100,000, as prorated for the covered period;
- Payments to independent contractors;

- Federal employment or withholding taxes imposed during the covered period;
- Compensation to an employee whose principal residence is outside of the U.S (i.e. many H-2A workers).;
- Qualified sick leave for which a credit is allowed under section 7001 of the Families First Coronavirus Response Act (other sick leave qualifies); and
- Qualified family leave wages for which a credit is allowed under sections 7001 and 7003 of the Families First Coronavirus Response Act

Employment Taxes

Federal employment or withholding taxes include, "Federal employment taxes imposed or withheld between February 15, 2020, and June 30, 2020, including the employee's and the employer's share of FICA and Railroad Retirement Act taxes, and income taxes required to be withheld from employees." In other words, payroll costs are not reduced by taxes imposed on an employee and required to be withheld by the employer, and they are not increased by the employer's share of payroll taxes. This rule applies for loan qualification, loan use, and loan forgiveness purposes.

Calculating the Loan Amount - Employees

Businesses with employees calculated their loan amounts using the following steps:

Step 1: Compute 2019 payroll by adding the following:

- For self-employed: 2019 Form 1040 Schedule C line 31 (or Schedule F, line 34) net profit amount, up to $100,000 annualized (owner compensation replacement)
- For partnerships: 2019 Schedule K-1 net earnings from self-employment of U.S. based general partners subject to self-employment tax, computed from box 14a (reduced by Section 179 expenses, unreimbursed partnership expenses, and depletion) multiplied by .9235, in an amount up to $100,000 per partner.
- 2019 gross wages and tips paid to employees whose principal place of residence is in the United States (subtract amounts over $100,000 each)
- 2019 employer health insurance contributions, retirement contributions, and state and local taxes assessed on employee compensation

Step 2: Divide the amount from Step 1 by 12.

Step 3: Multiply the average monthly net profit amount from Step 2 by 2.5.

Step 4: Add the outstanding amount of an Economic Injury Disaster Loan (EIDL) made between January 31, 2020 and April 3, 2020, less the amount of any "advance" under an EIDL COVID-19 loan (because it does not have to be repaid).

Calculating the Loan Amount – Self-Employed with No Employees

Step 1: Determine the 2019 IRS Form 1040 Schedule C, line 31 net profit amount (or Form 1040 Schedule F, line 34 net profit amount). If this amount is over $100,000, reduce it to $100,000. If this amount is zero or less, no loan.

Step 2: Calculate the average monthly net profit amount (divide the amount from Step 1 by 12).

Step 3: Multiply the average monthly net profit amount from Step 2 by 2.5.

Step 4: Add outstanding amount of Economic Injury Disaster Loan (EIDL) that the borrower seeks to refinance, less the amount of any advance.

Self-Employed Farmers

Many self-employed farmers were ineligible for a PPP loan because they did not have positive net income on their 2019 Schedule F. Legislative proposals would allow farmers to calculate a new PPP loan based upon gross Schedule F income. This problem is exacerbated for farmers because of the frequency with which they trade equipment, thereby generating 4797 recapture income that is offset by Section 179 or depreciation on Schedule F.

Example 4 – Self-Employed Farmer PPP Loan

Jacey Nabor had $120,000 in net schedule income on her Schedule F in 2019. She did not acquire an EIDL loan prior to April 3 that was refinanced into the PPP loan.

Jacey qualified for a $20,833 loan [=($100,000/12) x 2.5]

Allowable Uses

During the covered period, recipients may use the proceeds of a covered loan for the following purposes:

- Owner compensation
- Employee payroll costs (including health care and retirement)
- Mortgage interest, rent, and utility payments
  - Mortgage interest payments (but not prepayments or principal payments) on business mortgage on real or personal property
    - e.g., interest on mortgage for the warehouse purchased to store business equipment or interest on auto loan for vehicle used to perform your business
  - Business rent payments
    - e.g., warehouse where you store business equipment
  - Business utility payments
  - e.g., cost of electricity in warehouse you rent or gas used to drive business vehicle.
- Interest payments on other debts incurred before 2/15/20 (not forgivable)

Percent Used for Payroll

Although the Treasury required in an early interim final rule that at least 75 percent of the PPP loan proceeds shall be used for “payroll costs,” this rule was changed by the Paycheck Protection Program Flexibility Act. The PPPFA requires that borrowers use 60 percent of the covered loan amount for payroll expenses. Forty percent of the loan amount may be used for interest on covered mortgage obligations, covered rent obligations, or covered utility obligations. For

purposes of determining the percentage of use of proceeds for payroll costs (but not for forgiveness purposes), the amount of any refinanced EIDL will be included in payroll costs.

If 60 percent of the proceeds are not used for payroll, a proportionate amount of the loan can still be forgiven. The Treasury interpreted the law to mean that 60 percent of forgiven expenses must be payroll costs.

> **Example 5 – 60 Percent Limit**
> Feed Mill Co. obtained a $200,000 loan based upon 2019 payroll costs. In 2020, the company lost a number of employees and ended up spending $100,000 of the loan proceeds on non-payroll costs and $100,000 on payroll costs. If all other rules were followed, Feed Mill Co. can receive forgiveness for $166,667 ($100,000/.60).

Misuse

The law provides that if PPP funds are used for unauthorized purposes, SBA will require the borrower to repay the loan, and the borrower may be subject to additional liability, such as charges for fraud.

Loan Terms for the Unforgiven Portion

In the event that the loan is not forgiven, PPP loans are subject to the following terms:

- One percent interest set by regulations
- Two-year term (this was set by regulation, although CARES Act said up to 10 years)
  - The PPPFA provides a five-year minimum term for loans made June 5 or later, although lenders and borrowers can agree to a longer term for other loans
- One loan per borrower
- E-signatures allowed
- First come, first served
- PPPFA says borrowers may defer payments until the lender receives compensation for the forgiven amounts
- Payments must begin 10 months from the end of the forgiveness covered period if no forgiveness application is made

Good Faith Certification

Those applying for a covered loan were required to make a good faith certification that:

- The uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations,
- That the funds will be used to retain workers and pay eligible expenses,
- That the applicant does not have an application pending for another loan for the same purpose, and
- That for the period beginning on February 15, 2020, and ending on December 31, 2020, the eligible recipient has not received amounts under the program for the same purpose

In response to some high profile public companies receiving PPP loans, Treasury issued guidance stating that borrowers should ensure that they had made the “economic uncertainty” certification in good faith. In conjunction with the guidance, the SBA allowed borrower to return loan funds by May 14, without recourse. This prompted a widespread reevaluation of the necessity of PPP loans that had been issued.

On May 13, 2020, Treasury and SBA assuaged unnecessary fears by issuing additional guidance stating that borrowers receiving PPP loans with a principal amount of less than $2 million will be deemed to have made the required certification in good faith. This, the agencies determined, was appropriate because borrowers of loans this size are less likely to have access to "adequate sources of liquidity in the current economic environment." The agencies also stated that the safe harbor will promote economic certainty and encourage these employers to retain and rehire employees (which was, after all, the intent of the program). The agencies stated that the safe harbor would also enable the SBA to conserve its limited audit resources to review larger loans, where compliance efforts will yield bigger returns.

As for the audits of larger loans, the guidance clarified that "importantly," borrowers with loans greater than $2 million that do not satisfy this safe harbor "may still have an adequate basis for making the required good-faith certification." In other words, the agencies appear to have realized that prior statements turned away many of the very borrowers the law was intended to assist. Although loans greater than $2 million (and others "as appropriate") will be reviewed by SBA, the guidance is not heavy handed with respect to the consequences of loans determined to lack an "adequate basis."

If upon audit the SBA determines that a borrower lacked an adequate basis for the required certification concerning the necessity of the loan request, the guidance states that SBA will seek repayment of the outstanding PPP loan balance and will inform the lender that the borrower is not eligible for loan forgiveness. If the borrower repays the loan after receiving notification from the SBA, the SBA will not pursue administrative enforcement or referrals to other agencies based on its determination. Furthermore, the determination will not affect the SBA’s loan guarantee.

Loan Forgiveness Rules

Section 1106 of the CARES Act provides loan forgiveness for “covered loans,” which are loans guaranteed under the PPP. Generally, a borrower is eligible for loan forgiveness on a covered loan in an amount equal to the sum of eligible costs incurred and payments made during the “covered period.”

Covered Period

The covered period begins when the lender makes the disbursement of the loan. Although the CARES Act provided an eight-week covered period during which borrowers could spend the funds, the PPPFA extended the covered period from eight weeks after loan disbursement to 24 weeks after the loan disbursement. Those who obtained the loan before June 5 can choose an eight-week period if they prefer. Borrowers with a biweekly (or more frequent) payroll schedule may elect to calculate eligible payroll costs using the 24-week (168-day) period that begins on

the first day of their first pay period following their PPP loan disbursement date (i.e., the "Alternative Covered Period"). The same rule applies to loans received before June 5, 2020, which retain, at the election of the borrower, the eight-week (56-day) period.

Costs Eligible for Forgiveness

The following costs are eligible for forgiveness:

- Payroll Costs, including salary, wages, and tips, up to $100,000 annualized pay per employee
  - For a 24-week covered period, the maximum = $46,154 per non-owner employee, $20,833 for owner-employee
  - For an 8-week covered period, the maximum = $15,385 per employee, including owner-employee
  - Covered benefits allowed for employees (and some employee-owners) beyond the maximums
- Owner compensation replacement (this is a payroll costs)
  - For 8-week period, maximum = $15,385
  - For 24-week period, maximum = $20,833
- Interest on mortgage obligations on real or personal property incurred before February 15, 2020 (business mortgage payments)
- Rent payments on lease agreements in force before February 15, 2020 (business rent payments)
- Utility payments under service agreements dated before February 15, 2020 (business utility payments)

Self-employed borrowers must have claimed or have been entitled to claim a deduction for mortgage interest, rent, and utility expenses on the 2019 Form 1040 Schedule C (or Schedule F) for them to be a permissible use during the eight-week or 24-week period following the disbursement of the loan.

Owner Compensation

Special rules and caps apply to cash and non-cash compensation paid on behalf of owners. Whether the costs are forgivable or subject to a cap depend upon the business structure of the employer. The rules are summarized below.

Schedule C or F Filer Cash Compensation

Self-employed cash compensation eligible for loan forgiveness is limited to 2.5/12 of 2019 net profit as reported on IRS Form 1040 Schedule C line 31 (or 2.5/12 of 2019 net farm profit, as reported on IRS Form 1040 Schedule F line 34) (or for new businesses, the estimated 2020 Schedule C (or Schedule F) net income. This compensation cannot exceed $20,833 for 24 weeks or $15,385 for eight weeks.

Example 6
Jacey Nabor from Example 2.4, received a $20,833 loan. After the PPPFA extended the covered period to 24 weeks, Jacey can receive full forgiveness for her loan as owner compensation replacement. This is because her forgiveness limit for the 24-week period is determined based upon 2.5/12 of her 2019 net farm profit (the same formula used for determining the loan amount). If Jacey elects the eight-week forgiveness period, she will only be eligible for $15,385 in owner compensation replacement. She will, however, receive forgiveness for the additional loan proceeds, as long as she expended the additional $5,448 on other eligible costs paid or incurred during the eight-week forgiveness period

Owner Compensation Replacement Documentation
In the absence of guidance to the contrary, owners should write themselves a check or transfer the funds to a personal account during the covered period to ensure the distribution is recognized as a payment of owner compensation replacement.

Partners' Cash Compensation
The compensation of general partners that is eligible for loan forgiveness is limited to 2.5/12 of their 2019 net earnings from self-employment that is subject to self-employment tax, which is computed from 2019 IRS Form 1065 Schedule K-1 box 14a (reduced by box 12 section 179 expense deduction, unreimbursed partnership expenses deducted on their IRS Form 1040 Schedule SE, and depletion claimed on oil and gas properties) multiplied by 0.9235. Compensation is only eligible for loan forgiveness if payments are made during the covered period. This compensation cannot exceed $20,833 for 24 weeks or $15,385 for eight weeks.

C Corporation Owner-Employee Cash Compensation
The employee cash compensation of a C-corporation owner-employee, defined as an owner who is also an employee (including where the owner is the only employee), is eligible for loan forgiveness up to the amount of 2.5/12 of his or her 2019 employee cash compensation. This amount cannot exceed $20,833 for 24 weeks or $15,385 for eight weeks.

S Corporation Owner-Employee Cash Compensation
The employee cash compensation of an S-corporation owner-employee, defined as an owner who is also an employee, is eligible for loan forgiveness up to the amount of 2.5/12 of their 2019 employee cash compensation. This cannot exceed $20,833 for 24 weeks or $15,385 for eight weeks.

Owner-Employee Safe Harbor
An August 24 Interim Final Rule specified that owner-employees with less than a five percent stake in a C corporation or an S corporation are not subject to the owner-compensation limits. The guidance does not discuss whether attribution rules apply.

Forgiveness for Owner Non-Cash Compensation
Different rules apply to the availability and limits of forgiveness for non-cash benefits, depending upon the business structure of the employer.

- C corporations can receive forgiveness in excess of $20,833 for health care benefits, retirement benefits, and state and local taxes paid on behalf of owner-employees. There is no cap on the amount of health care benefits that can be expended, but retirement contributions are capped at 2.5/12 of 2019 contributions.
- S corporations can receive forgiveness in excess of $20,833 for retirement benefits and state and local taxes paid on behalf of owner-employees. Retirement contributions are capped at 2.5/12 of 2019 contributions. S Corporations cannot receive forgiveness for health benefits paid on the behalf of owner-employees.
- Partners and Self-Employed (Schedule C or F filers) cannot receive forgiveness for health benefits or retirement contributions paid on their behalf. These amounts are considered factored into the net income calculation.

The following table summarizes these rules:

Forgiveness of Non-Cash Owner Compensation

	Health Insurance	Retirement Benefits	State and Local Taxes on Comp.
Self-Employed (Schedule C or F)	No	No	No
Partner	No	No	No
S Corp Owner-Employee	No	Yes*	Yes**
C Corp Owner-Employee	Yes**	Yes*	Yes**

*Does not count toward $20,833 cap, but is limited to 2.5/12 of 2019 contributions.

**Does not count toward $20,833 cap.

Forgiveness of Nonpayroll Costs

Nonpayroll costs are eligible for forgiveness if they were incurred or paid during the covered period. If a borrower elects to use an alternative covered period for payroll costs, the regular covered period still applies to nonpayroll costs.

Example 7 – Incurred but Not Paid
Bryan Inc.'s 24-week covered period runs from April 20 to October 4. On October 6, the Bryan receives an electric bill for September. Bryan pays the bill October 16. These costs are eligible for forgiveness because they were incurred during the covered period and paid before the next regular billing date (November 6).

Example 8 – Paid but Not Incurred
Green Farms' 24-week covered period runs from April 20 through October 4. On May 4, Green Farms receives its electricity bill for April and pays it on May 8. Although a portion of the electricity costs were incurred before the covered period, these electricity costs are eligible for loan forgiveness because they were paid during the covered period.

Self-Rental Payments

An August 24 Interim Final Rule addressed whether rent payments made to a related party are eligible for forgiveness. The rule states that any ownership in common between the business and the property owner is a related party for these purposes. The rule seeks to limit the forgiveness of a rental payment in this situation to the portion of the rent attributed to mortgage interest on the property. This approach, the guidance explains, seeks to put a business with a self-rental in the same position as a business that does not separate ownership of the real property from the ownership of the business operation.

The guidance states that a borrower must provide its lender with mortgage interest documentation to substantiate these payments. The IFR goes on to state, “PPP loans are intended to help businesses cover certain non-payroll obligations that are owed to third parties, not payments to a business’s owner that occur because of how the business is structured. This will maintain equitable treatment between a business owner that holds property in a separate entity and one that holds the property in the same entity as its business operation.”

Limits on Forgiveness

The amount of loan forgiveness cannot exceed the principal amount of the financing made available.

60 Percent Payroll Requirement

As explained above, at least 60 percent of the proceeds must be used for payroll (including owner replacement compensation) to receive full forgiveness. A proportionate amount of the loan can still be forgiven if the payroll expenditures are less than 60 percent.

Reduction in Employees or Salaries or Wages

The forgiveness amount is subject to reduction if there is a reduction in employees or a reduction in the salary or wages of any employee.

Reduction of Number of Employees. Loan forgiveness may be reduced by multiplying the presumed forgiveness amount by (the average full-time equivalent employees (FTEs) during the covered period ÷ average FTEs for the period from (1) February 15, 2019 through June 30, 2019, (2) January 1, 2020 through February 29, 2020, or (3) in the case of seasonal employers, either of the preceding periods or any consecutive 12-week period between May 1, 2019 and September 15, 2019. at the election of the borrower.) This reduction does not apply if:

- The borrower was unable to operate between February 15, 2020, and the end of the Covered Period at the same level of business activity as before February 15, 2020 due to compliance with requirements established or guidance issued between March 1, 2020 and December 31, 2020, by the Secretary of Health and Human Services, the Director of the Centers for Disease Control and Prevention, or the Occupational Safety and Health Administration related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19
- The borrower reduced FTE employee levels between Feb. 15 and Apr. 26, 2020, but then restored its FTE employee levels by not later than Dec. 31, 2020, to FTE levels in the pay period that included Feb.15.

- It is not clear how this requirement would be handled for borrowers who apply for forgiveness before the end of the covered period or the end of the year.

In addition to the above safe harbors, a borrower can except an individual employee from an FTE reduction if:

- The borrower makes a good-faith written offer to rehire or restore the reduced hours of an employee but the offer was rejected and the borrower has document of the offer and rejection.
- The employee was fired for cause.
- The employee voluntarily resigned.
- The employee requested and received a reduction in hours.
- The borrower can in good faith document the inability to rehire individuals who were employees on February 15, 2020 and hire similarly qualified individuals by December 31, 2020 (or the date of the forgiveness application).

Reduction in Salary and Wages. Likewise, loan forgiveness may be reduced by the reduction in total salary or wages of any employee during the covered period that is in excess of 25 percent of the total salary or wages during the most recent full quarter during which the employee was employed before the eight-week or 24-week coverage period.

Employees whose salaries or wages were reduced between February 15, 2020, and April 26, 2020, but restored by the earlier of December 31, 2020, or the date of the forgiveness application date do not count toward this reduction. Reductions that occur after April 26, however, are not eligible for this safe harbor.

Eight-Week vs. 24-Week Covered Period

If the borrower applies for forgiveness before the end of the covered period and has reduced employee salaries or wages in excess of 25 percent, the borrower must account for the excess salary reduction for the full 8-week or 24-week covered period. The forgiveness reduction will thus be greater for a 24-week covered period than for an eight-week covered period.

Application for Loan Forgiveness

A borrower may submit a loan forgiveness application any time on or before the maturity date of the loan (including any time before the end of the covered period) if the borrower has used all of the loan proceeds for which he or she is requesting forgiveness. Payments of principal and interest on the loan are not due until the lender determines the forgiveness amount. If a borrower does not submit the application for forgiveness within 10 months after the end of the covered period, payments on the loan must begin.

As of September 1, 2020, SBA offered two forgiveness applications, Form 3508 and Form 3508EZ. The latter form is a simplified application available where the following criteria is met:

- The borrower is self-employed and has no employees; OR

- The borrower did not reduce the salaries or wages of their employees by more than 25%, and did not reduce the number or hours of their employees; OR
- The borrower experienced reductions in business activity as a result of health directives related to COVID-19, and did not reduce the salaries or wages of their employees by more than 25%.

Simplified Application
As of September 1, 2020, Congress was debating allowing borrowers with loans below a certain amount to receive forgiveness by signing an affirmation that all rules were followed. Borrowers were advised to wait to submit applications until it was determined whether such a change would be made.

Mechanics of Forgiveness

Borrowers must apply for forgiveness with the lender servicing the loan. The amount of loan forgiveness can be up to the full principal amount of the loan and any accrued interest. That is, the borrower will not be responsible for any loan payment if the borrower uses all of the loan proceeds for forgivable purposes and employee and compensation levels are maintained. Amounts forgiven are cancelled indebtedness by the lender authorized under section 7(a) of the Small Business Act. Within 90 days after the date on which the forgiveness is determined, the SBA Administrator will remit to the lender the amount of the forgiven loan, plus any interest accrued through the date of the payment.

Lenders have 60 days to review and make a determination on the forgiveness application. The lender will be held harmless for decisions made based upon erroneous documentation. Any portion of the loan that is forgiven will be excluded from the gross income of the borrower.

Deductibility of Expenses Paid with PPP Proceeds

Current Treasury rules disallow deductions for expenses paid with forgiven PPP loan proceeds. Although Congress excluded forgiven PPP proceeds from a taxpayer's gross income, Treasury stepped in with Notice 2020-32 to say that expenses paid with forgiven proceeds (such as payroll costs) will not be deductible. I.R.C. § 265(a)(1), the notice explained, prevents a double tax benefit in such a case. Proposed legislation in the HEROES Act and the Small Business Expense Protection Act would overrule this result, with proponents of the proposals arguing that Congress intended the double benefit.

How to Handle Expenses
The expense deductibility question presents a quandary for those filing fiscal year returns. The deductibility restriction applies to the extent of loan forgiveness. If a loan hasn't yet been forgiven, the expense remains deductible. The PPP proceeds, at that time, are loan proceeds. It is not until after the loan is forgiven and the loan amount is excluded from gross income that the double tax benefit problem arises.

If Congress does not change the rules, the stroke of the forgiveness pen would trigger the recovery of the so-called tax benefit. This rule requires that when a taxpayer deducts an item from gross income but later recovers its value, the amount recovered is income and must be

recognized to the extent of the previous tax benefit. This would mean a tax bill in the year of forgiveness. But Treasury has yet to provide rules for fiscal year-end filers. In the meantime, taxpayers who deduct expenses while waiting for forgiveness must consider potential future tax liability.

Schedule C/F Filers with No Employees

Self-employed borrowers with no employees and no deductible expenses should not be impacted by Notice 2020-32. A Schedule F farmer who received a $20,833 loan, for example, should be allowed $20,833 of forgiveness under the new 24-week covered period. This amount, which is designated as "owner compensation replacement," is not impacted by the tax benefit rule. An owner "draw," which is what this amount represents, is not deductible. As such, this amount should be excluded from gross income, with no risk of future tax benefit recapture.

EIDL Loans

The CARES Act modified the traditional SBA 7(b)(2) loan program for economic injury disaster loans (EIDL) to offer more favorable terms in the wake of COVID-19. It did not, however, remove a preexisting restriction in the law applying to "agricultural enterprises."

Eligibility

The Paycheck Protection Program and Health Care Enhancement Act, signed into law on April 24, removed that restriction and allocated an additional $10 billion for emergency EIDL grants (the program was launched with $10 billion) and $50 billion for the general EIDL loan fund. Farmers and ranchers with 500 or fewer employees were eligible to apply for EIDL Loans. Eligible businesses now include:

- A business with no more than 500 employees, including agricultural enterprises
- Individual who operates under a sole proprietorship or as an independent contractor
- Cooperatives with no more than 500 employees
- Includes small agricultural cooperatives
- Employee stock ownership plan (ESOP) with no more than 500 employees
- A tribal small business concern with no more than 500 employees
- A business, including a business with more than 500 employees, that is deemed a small business under the SBA Size Standards
- A private non-profit organization that is granted tax exemption under 501(c), (d) or (e) of the Internal Revenue Code

To be eligible for an EIDL, the business must have been in operation on January 31, 2020. There is, however, no requirement that the applicant be in business for the one-year period prior to the loan or that the borrower is unable to obtain a loan from another source. In general, an EIDL loan is obtained directly through the SBA. The CARES Act authorizes the SBA to approve an application based solely upon a credit score, without a tax return or tax transcript.

Loan Terms

The terms of the COVID-19 EIDL loans are as follows:

- Loans up to $2,000,000 (based upon economic injury suffered)
- Interest rate = 3.75% for a small business and 2.75% for a non-profit
- Maximum term is 30 years
- SBA determines repayment period and monthly payments based upon the applicant's financial condition
- EIDL loans are not forgiven (except for an emergency advance explained below)
- Loans with a principal balance greater than $25,000 must be secured by collateral
- The CARES Act waives a personal guaranty when the EIDL loan is less than $200,000
- Loan payments are deferred for 12 months
- No application fee

Emergency Grant

The CARES Act provided that during the period between January 31, 2020, and December 31, 2020, an eligible business could request an emergency advance on the EIDL loan, in an amount not to exceed $10,000. The advance was supposed to have been received within three days of the application. The SBA was to verify eligibility for the advance by accepting a self-certification from the applicant under penalty of perjury. To maximize funds available, SBA restricted advances to $1,000 per employee. An applicant is not required to repay the advance, even if they were subsequently denied an EIDL loan under section 7(b)(2).

EIDL Advances

The funds for EIDL advances were extinguished in mid-July. EIDL loans, however, may be still be requested. Unlike PPP Loans, EIDL advances are not excluded from gross income.

Allowable Uses

The advance or the loan proceeds themselves may be used for any allowable purpose for a loan made under a section 7(b)(2) loan, including:

- Providing paid sick leave to employees unable to work due to the direct effect of the COVID–19;
- Maintaining payroll to retain employees during business disruptions or substantial slowdowns;
- Meeting increased costs to obtain materials unavailable from the applicant's original source due to interrupted supply chains;
- Making rent or mortgage payments; and
- Repaying obligations that cannot be met due to revenue losses.

EIDL loans may not be used for:

- Dividends and bonuses
- Disbursements to owners, unless for performance of services
- Repayment of stockholder/principal loans (with exceptions)
- Expansion of facilities or acquisition of fixed assets
- Repair or replacement of physical damages
- Refinancing long term debt
- Paying down (including regular installment payments) or paying off loans provided, or owned by another Federal agency (including SBA) or a Small Business Investment Company
- Payment of any part of a direct Federal debt, (including SBA loans) except IRS obligations
- Relocation

Interaction Between Paycheck Protection Program Loans and EIDL
If a borrower received an EIDL advance, SBA is required to reduce the borrower's loan forgiveness amount by the amount of the EIDL advance. SBA will deduct the amount of the EIDL advance from the forgiveness amount remitted by SBA to the lender. The lender will be able to confirm the amount of the EIDL advance that will be automatically deducted by SBA from the forgiveness payment by reviewing the borrower's EIDL advance information in the PPP Forgiveness Platform.

CARES Act – Other Business Tax Provisions

Net Operating Loss Provisions

The Tax Cuts and Jobs Act eliminated carrybacks for net operating losses arising in businesses other than farming businesses and casualty insurance companies for tax years ending after December 31, 2017. Instead, losses were carried forward indefinitely. Farm businesses were given a two-year carryback, instead of their traditional five-year carryback. The Tax Cuts & Jobs Act also limited the NOL deduction to 80% of taxable income for tax years beginning after December 31, 2017.

Five-year Carryback

Section § 2303(b) of the CARES Act modified IRC § 172(b)(1) by adding a new subsection (D) requiring net operating losses arising in tax years beginning in 2018, 2019, and 2020 to be carried back five years. The new five-year rule applies to all businesses, including farming businesses and casualty insurance companies. Farmers no longer have a two-year carryback option for these years. Taxpayers may, however, elect out of the carryback altogether and carry the loss from these years forward indefinitely.

No Taxable Income Limitation

Section 2303 of the CARES Act also modified section 172(a) to provide that, for taxable years beginning before January 1, 2021, a net operating loss carryover and/or carryback may offset 100 percent of taxable income.

Technical Correction

The Tax Cuts and Jobs Act provided that the changes to net operating loss carryforwards and carrybacks were effective for "taxable years ending after December 31, 2017." The committee report, however, stated that the effective date for the changes would be tax years "beginning after December 31, 2017." As written, fiscal year taxpayers with years ending in 2018 were subject to the new restrictions for their 2017 fiscal year, even if the majority of their tax year was in 2017. Section 2303(c) of the CARES Act corrects this error by providing that the modified carryover and carryback provisions apply to net operating losses arising in taxable years beginning after December 31, 2017. Impacted taxpayers had 120 days from the date of enactment (or until July 27, 2020) to adjust their elections accordingly.

Addressing the Changes

While helpful in many cases, the NOL changes mean that impacted taxpayers must take action to conform to the new law and take advantage of the relief provided.

Requesting the Carryback

To carryback NOLs to prior tax years, taxpayers may typically file an application for a tentative refund, Form 1139, for corporations and Form 1045 for individuals, estates, and trusts. This expedited process allows filers to generally receive a refund within 90 days. This procedure is generally available up to one year after the end of the tax year when the NOL was created.

The deadline to use expedited relief for tax year 2018 was originally December 31, 2019. IRS Notice 2020-26, issued April 9, 2020, provided taxpayers an additional six months to file Form 1045 or Form 1139 for tax years beginning in 2018 and ending before June 30, 2019. This gave calendar year filers until June 30, 2020, to file a carryback claim using the expedited procedures. Because IRS extended the deadline for actions required to be completed within this time, the actual deadline was July 15, 2020.

Filing an Amended Return

Once the deadline for expedited relief has passed, taxpayers can file amended returns for the carryback year up to three years after the due date of the taxable year in which the NOL arose. It can, however, take months to receive refunds from this process.

Faxing the Forms

On April 14, 2020, IRS issued temporary faxing procedures for expediting the processing of these forms. Starting on April 17, 2020, and until further notice, the IRS will accept eligible refund claims Form 1139 submitted via Fax to 844-249-6236 and eligible refund claims Form 1045 submitted via fax to 844-249-6237.

Waiving the Carryback

Revenue Procedure 2020-24, also issued April 9, sets forth procedures to allow taxpayers to elect under I.R.C. § 172(b)(3) to waive the carryback period for an NOL arising in a taxable year beginning after December 31, 2017, and before January 1, 2020.

The guidance states that taxpayers may elect to waive the carryback period for an NOL arising in a taxable year beginning in 2018 or 2019 no later than the due date, including extensions, for filing the taxpayer's federal income tax return for the first taxable year ending after March 27, 2020.

A taxpayer makes this election by attaching to its federal income tax return filed for the first taxable year ending after March 27, 2020, a separate statement for each of taxable years 2018 or 2019 for which the taxpayer intends to make the election. The election statement must state that the taxpayer is electing to apply § 172(b)(3) under Rev. Proc. 2020-24 and the taxable year for which the statement applies. Once made, the election is irrevocable.

The Farmer Dilemma

Because farmers previously had a two-year NOL carryback for tax years 2018 and 2019, they, unlike other taxpayers, had the ability to elect to waive those carrybacks in tax years 2018 and 2019. Even though the CARES Act has removed the two-year carryback for those tax years and now subjects all taxpayers to a five-year carryback, the new law did not provide farmers with an option to revoke their previous elections. In other words, if a farmer did not carry an NOL back two years in 2018 and 2019, he or she now has no option to take advantage of the CARES Act five-year carryback. IRS confirmed this interpretation with a Q&A:

> Q. Prior to the CARES Act, only certain farming businesses and insurance companies could carry back NOLs arising in taxable years beginning in 2018 and 2019. If I am in one of these categories and I previously filed elections to forgo the carryback period for NOLs arising in tax years 2018 and 2019, am I eligible to revoke those elections and claim the five-year carryback period with respect to such NOLs?
>
> A. No. The CARES Act does not provide for an election to revoke prior elections to forgo the carryback period for NOLs arising in these years. You may, however, make an election to revoke a prior election to relinquish the carryback period with respect to an NOL arising in a 2017 fiscal tax.

If a farmer did carryback an NOL two years in 2018 or 2019, her or she may now carryback that NOL five years, either by filing Form 1139 or 1145 for an expedited refund (if the time has not expired) or by filing an amended return to recover a refund.

Options for Farmers Unclear

In the absence of legislation or further guidance, it is unclear what happens if a farmer fails to take action to carry the two-year NOL back five years. The two-year carryback is no longer recognized under the statute for those years.

Proposed Legislation
At the time of this writing, proposed legislation would allow farmers who had previously waived the two-year carryback to revoke that election and carry the NOL back five years for tax years 2018 and 2019. Likewise, the proposed legislation would allow farmers to leave a two-year carryback in place, without adjustment.

Modification of Credit for Prior Year Minimum Tax Liability for Corporations (§ 2305)

The Tax Cuts and Jobs Act repealed the corporate alternative minimum tax for taxable years beginning after Dec. 31, 2017. Corporations with AMT credits from prior taxable years could use them as refundable tax credits. The credits were to be used over tax years beginning after 2017 and before 2022. Section 2305 of the CARES Act accelerates use of these credits by allowing the full amount of the remaining refundable AMT credit to be available for the corporation's first taxable year beginning in 2019. The corporation may also elect to use all of its AMT credits in its first taxable year beginning in 2018.

Modification of Business Loss Limits for Taxpayers other than Corporations (§ 2304)

The Tax Cuts and Jobs Act enacted an "excess business loss" rule, restricting a noncorporate business taxpayer's loss to $250,000 ($500,000 in the case of a joint return). Section 2304 of the CARES Act temporarily suspends this loss limitation, allowing these taxpayers to deduct excess business losses arising in tax years 2018-2020.

Modification of Business Interest Deduction Limitation Rule (§ 2306)

The Tax Cuts and Jobs Act generally limited the deduction for business interest to 30 percent of adjusted taxable income for businesses with gross receipts in excess of $26 million (in 2019 and 2020). Section 2306 of the CARES Act temporarily and retroactively increases the business interest deduction limit from 30 percent to 50 percent for taxable years beginning in 2019 and 2020. A special rule applies to partnerships.

Technical Correction for Qualified Improvement Property (§ 2307)

The Tax Cuts and Jobs Act eliminated the separate definitions for "qualified leasehold improvement property," "qualified restaurant property" and "qualified retail improvement property," which were previously provided a statutory 15-year recovery period. It then expanded the definition of "qualified improvement property" to include "any improvement to the interior of a building if that building is nonresidential real property and such improvement is placed in service after the date such building was first placed in service." IRC 168(e)(6). Lawmakers intended to provide a 15-year MACRS recovery period for qualified improvement property." This 15-year life would mean that QIP would also qualify for bonus depreciation. This 15-year class-life provision, however, was not added to IRC § 168(e)(3)(E). As such, "qualified improvement property" remained 39-year non-residential property, not eligible for bonus depreciation.

Section 2307 of the CARES Act provides a fix to this error and modifies IRC § 168(e)(3)(E)(vii) to include "qualified improvement property" as 15-year MACRS property (20-year ADS). Qualified improvement property is thus eligible for bonus depreciation. This amendment is effective for property placed in service after December 31, 2017.

Temporary Exception from Excise Tax (§ 2308)

Section 2308 of the CARES Act waives for calendar year 2020 the federal excise tax on any distilled spirits used to produce hand sanitizers.

Presidential Action

After the breakdown of COVID-19 stimulus ("Phase IV") negotiations between Democrats and the Administration, the President took executive action on August 8, 2020, designed to assist those impacted by COVID-19 disruptions.

Memorandum on Deferring Payroll Tax Obligations in Light of the Ongoing COVID-19 Disaster

In this Memorandum, the President directed the Secretary of the Treasury to defer the withholding, deposit, and payment of the employee's old-age, survivors, and disability insurance (6.2 percent) paid during the period of September 1, 2020, through December 31, 2020. This deferral would apply to employees whose biweekly wages are less than $4,000 ($104,000/year). According to the Memorandum, amounts deferred would not be subject to interest or penalties. The Memorandum states that the Secretary of the Treasury "shall explore avenues, including legislation, to eliminate the obligation to pay the taxes deferred pursuant to the implementation of this memorandum." Without Congressional action, however, these funds will become due at some point down the road.

Touted as putting more money in Americans' pockets, the Memorandum has caused concern and confusion among many employers.

Deferral of Employer Payroll Tax

The CARES Act deferred the payment of the employer's portion of the old-age, survivors, and disability insurance (6.2 percent) through December 31, 2020. For those who defer, these taxes must be repaid in two equal installments, one due by December 31, 2021, and the other due by December 31, 2022.

IRS Guidance

On August 28, 2020, IRS issued Notice 2020-65, 2.5 pages of guidance related to the President's August 8 payroll tax deferral Memorandum. Based upon the risk this new program would impose upon employer and employee alike, it appears likely that many employers will not take advantage of this new option and choose to defer their employees' payroll taxes. It may be an option, however, for family farm companies looking for an interest free loan.

The Rules

The guidance defines "affected taxpayers" as employers required to withhold and pay the employee share (6.2 percent of wages) of social security tax under IRC § 3102(a) or the railroad

retirement tax equivalent under IRC § 3202(a). The guidance states that under the President's Memorandum, the due date for withholding and paying payroll taxes on "applicable wages" is postponed until the period beginning on January 1, 2021, and ending on April 30, 2021.

Deposit Obligation

The guidance points out in a footnote that because the employer's deposit obligation is triggered by the withholding obligation, the duty to deposit is likewise deferred.

"Applicable wages" are defined as social security or railroad retirement wages paid to an employee on a pay date during the period beginning on September 1, 2020, and ending on December 31, 2020. These wages are only "applicable wages" eligible for deferral, however, if:

- the amount of the wages or compensation paid for a bi-weekly pay period is less than $4,000, or
- the amount of wages or compensation paid for a different period does not exceed the equivalent of $4,000 for a two-week period.

The guidance states that the "applicable wages" determination is made on a payroll period-by-payroll period basis. In other words, an employee's wages might qualify for payroll tax deferral in one payroll period, but not another.

Repayment Obligation

The guidance states that the employer must withhold and pay all taxes previously deferred for an employee by ratably withholding them from wages and compensation paid to that employee between January 1, 2021, and April 30, 2021. On May 1, 2021, interest and penalties will begin to accrue. If necessary (presumably, for example, if the employee is no longer working for the employer), the employer "may make arrangements to otherwise collect the total taxes" from the employee.

Impact of the Guidance

Under this guidance, the employer and the employee will remain on the hook for the deferred payroll taxes until they are deposited (or until Congress perhaps acts to forgive them). Unless Congress takes such action, any employees with payroll taxes deferred would be subject to roughly double withholding from January through April of next year. Employers who are no longer paying those employees would apparently be left to "make arrangements" to otherwise collect the total taxes from those employees.

The guidance provides no opt-in or opt-out instructions for either employers or employees. It appears that employees have no say in the matter and that an employer can choose whether or not to defer for the eligible employees. It is difficult to imagine many employees wanting the risk of a double tax hit next year or many employers wanting to risk liability for unpaid taxes. These risks, coupled with the burden of reprogramming payroll software to accommodate it, will likely mean that many will choose not to participate in the new payroll tax deferral program. On the other hand, some may worry that if they don't defer, employees may miss out on a tax benefit down the road if Congress chooses to forgive deferred amounts.

Self-Employed Taxpayers
The guidance does not provide any relief to self-employed taxpayers in terms of allowing them to defer the other half of SECA taxes not already deferrable under the CARES Act.

Memorandum on Authorizing the Other Needs Assistance Program for Major Disaster Declarations Related to Coronavirus Disease 2019

CARES Act supplemental unemployment benefits of $600 per week ended July 31. One of the main points of contention in stimulus negotiations has been an extension of these benefits. Democrats have wanted $600/week in supplemental benefits in any new package, while Republicans have proposed no more than $400/week (the original proposal was $200/week).

In the August 8, Memorandum, the President authorized FEMA to use Stafford Act disaster funds to provide up to $44 billion in funding for “Lost Wage Assistance.” These benefits would end when the Disaster Relief Fund dips below $25 billion or on December 6, whichever happens first.

Under this program, money would be paid to states to implement the program if:

- The Governor agrees to a 25 percent cost share AND
- The Governor agrees to administer the program.

Eligible claimants under the Memorandum are those receiving at least $100 per week in unemployment compensation benefits. Under the CARES Act anyone receiving $1/week was eligible for the $600/week supplemental benefit. This program would also require a self-certification that the applicant is unemployed or partially unemployed because of COVID-19 disruptions.

Although the Memorandum states that it would provide up to $400/week in supplemental unemployment benefits, $100 of that amount would have to be contributed by the states. The Department of Labor clarified on August 11 that states can elect to receive $300 and not make the extra $100 contribution. The 25 percent requirement will be satisfied through the state’s payment of existing unemployment funds. Language in the Memorandum does suggest a retroactive payment to cover the week beginning August 1.

The program will end if legislation is passed. States that opt in must implement the program rapidly. Around 30 states, including Iowa, have elected to participate, although states must reprogram their systems to include the Lost Wages Assistance benefits.

Executive Order on Fighting the Spread of COVID-19 by Providing Assistance to Renters and Homeowners

The CARES Act put in place a 120-day eviction moratorium for those who receive federal housing assistance or live in a residence with a federally-backed mortgage. That protection ended July 24, 2020, although a 30-day notice provision effectively extended the relief into August. This Executive Order states that it seeks to minimize residential evictions and foreclosures, but doesn’t actually order relief. Instead it directs the Department of Health and Human Services and

the Centers for Disease Control to determine whether measures to halt evictions for failure to pay rent are necessary to prevent the spread of COVID-19. It also directs the Secretary of the Treasury and the Department of Housing and Urban Development to identify any federal funds to temporarily assist those struggling with monthly mortgage or rent. Likewise, the Director of the FHFA is instructed to look for existing resources to prevent evictions and foreclosures.

Memorandum on Continued Student Loan Payment Relief During the COVID-19 Pandemic

This Memorandum directed the Department of Education to continue the suspension of student loan payments and the waiver of interest on federal student loans through December 31, 2020.