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CLIENT ALERT

The world is in an unprecedented state of upheaval because of the COVID-19 pandemic. In times of business uncertainty, the federal government and many state governments have recognized that businesses need flexibility with regard to their tax obligations. In recent days and as part of several emergency acts, the U.S. Congress has enacted multiple tax credit measures aimed at relieving the burden on employers. State and local tax authorities have also enacted tax relief packages, and the relief adopted has been far-reaching, extending not only to both personal and corporate income taxes but also to sales and use taxes, and various other business activity taxes. We summarize below the key tax measures adopted in recent days, based on legislation (and announcements interpreting the legislation) as of March 27, 2020.

FEDERAL PAYROLL AND EMPLOYMENT TAX CREDITS

<u>Tax credits available to employers</u>

Tax credits are available for those employers providing paid leave and expanded FMLA leave under the Families First Coronavirus Response Act (FFCRA), which was enacted on March 18, 2020. These tax credits are designed to help employers retain their workforce, by providing for immediate and full reimbursement by the federal government to an employer for the wages paid to employees taking paid sick or expanded FMLA leave, including the health care costs of the employees.

Tax credits are only available for paid leave wages and costs incurred **beginning April 1, 2020,** when the FFCRA becomes effective. Any paid leave wages and costs incurred prior to April 1 will not be eligible for tax credits. In other words, the tax credits are not retroactive.

Beginning April 1, to take advantage of the applicable paid leave tax credits, businesses can retain and access taxes they would otherwise be required to pay to the IRS beginning on April 1. Taxes available for retention include withheld federal income taxes, and both the employee and employer share of social security and Medicare taxes. If those retained amounts are insufficient to cover the costs of paid leave, employers can seek an expedited advance from the IRS. The IRS expects to begin processing these requests within the next two weeks. Claim forms, as well as additional guidance, should be available next week.

To be clear, only those employers covered by the FFCRA are eligible for these tax credits. The FFCRA applies to private employers with fewer than 500 employees, and likely all public sector employers. Employers with fewer than 50 employees are eligible for an exemption from FFCRA requirements if those requirements will jeopardize the viability of the business.

<u>Tax credits available to employers under the CARES Act</u>

In the early morning of Wednesday, March 26, the Senate unanimously passed the Coronavirus Aid, Relief and Economic Security Act (CARES Act), which, as currently written, contains additional tax credits for employers.[1]

Employee Retention Credit

The CARES Act will provide employers, including non-profits, with a 50% refundable credit against payroll tax (i.e., employers Social Security and Medicare contributions) for the first $10,000 of wages (which includes salary and the cost of health care benefits) per employee. However, wages do not include those payments made by the employer under the FFCRA for either paid sick leave or expanded FMLA leave. This credit is effective for wages and health care benefits costs paid between March 12, 2020 and January 1, 2021. Therefore, wages and costs incurred *prior* to March 12, 2020, but paid on or after this date, qualify for the tax credit.

To be eligible for this tax credit, an employer must have carried on a trade or business[2] during 2020, and either have 1) fully or partially suspended business operations due to government orders limiting commerce, travel, or group meetings, or 2) experienced at least a 50% reduction in gross receipts as compared to the same calendar quarter in the prior calendar year (and will remain eligible for subsequent quarters until gross receipts exceed 80% as compared to the same calendar quarter in the prior calendar year).

It should be noted that employers with more than 100 full-time employees – only those employees <u>not</u> providing services for the company due to COVID-19 will be counted towards the tax credit under the CARES Act. In other words, only those employees with reduced hours resulting from their employer's closure or reduced gross receipts, or those on furlough, go towards the credit. For employers with an average of 100 or fewer employees during 2019, all employee wages are eligible for this tax credit – even those on furlough. Additionally, this tax credit is not available to employers who receive Small Business Interruption Loans under Sec. 1102 of the CARES Act.

There is no guidance yet available clarifying *how* the credit may be claimed by employers.

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[1] The CARES Act must be voted on by the House and signed into law by the President to become effective, and thus, these provisions are subject to change. As of the writing of this alert, it is anticipated that the Act will be enacted as it passed the Senate.

[2] The following terms have not been defined, but likely will be by regulation: "Trade or business," "limiting commerce", or "government".

Delay of Employer Payroll Taxes

Payment of an employer's portion of Social Security and Railroad Retirement Act taxes (but *not* Medicare) are deferred. It appears as if this provision goes into effect immediately upon signing by the President, and applies to any applicable payroll taxes that would have been due during the period between the date the law goes into effect and January 1, 2021. The amounts deferred are payable in two installments over the next two years, with the first half due December 31, 2021, and the second half due December 31, 2022. This provision does not apply to employers who have Small Business loans forgiven under Sec. 1106 or 1109 of the CARES Act.

STATE AND LOCAL TAX RELIEF

As has been widely published, late last week the IRS issued Notice 2020-18 (as updated Mar. 21, 2020), postponing until July 15 the payment and filing deadlines of federal income taxes.[3] Penalties and interest will not accrue during the extension period, but will only begin to accrue as of July 16, 2020.

State and local income tax relief for businesses has been shaped largely by the degree to which state and local taxes adopt federal income tax provisions. As a result, the actions taken by state and local authorities have fallen into three groups: 1) automatic relief for state income tax deadlines tied to the federal extension; 2) specific, limited relief adopted by special act; and 3) additional relief for other business activity taxes, including sales and use.

A large number of states tie their income tax return filing and payment deadlines to those established in the Internal Revenue Code. For that reason, the filing deadlines in those states were automatically extended to July 15 upon the issuance of Notice 2020-18. Many other states, while not automatically tied to the federal deadlines, also quickly adopted the federal extension dates. Like federal income taxes, penalties and interest in all of these states will not begin to accrue until July 16, 2020. The states that extended their personal and corporate income tax filing deadlines to July 15 include:

[List on next page]

[3] The tax filing extension referenced not a particular taxpayer, but rather was tied to a specific due date (April 15, 2020). Thus, the extension applies to any individuals, estates, trusts, partnerships, associations, companies or corporations whose tax filing (including returns as well as quarterly estimated payments) was April 15. The extension does *not* apply to pass-through entity information returns that were due on March 15, 2020.

- AL
- AK
- AR (income and information returns)
- AZ
- CA
- DC
- DE
- GA
- IN
- IL
- KS
- LA (income and franchise taxes)
- MD (includes fiscal year filers with FY ending on or before 3/31/2020)
- ME
- MN
- MO
- *MT* -- limited to personal income tax*
- NE
- NM
- NY
- NC
- ND
- *OH* (legislation passed and awaiting Governor signature)*
- OK
- OR
- PA (income and information returns)
- RI
- SC
- *UT* -- limited to personal income tax*
- VT
- WI

In the second group are those states that have announced extensions to specific dates (not tied to the federal extension) or other more limited relief.

- CT – Income taxes extended to July 15; income-related business taxes due between March 15 and June 1 also extended to July 15
- CO – filing deadline extended to October 15, but payment deadline extended only to July 15
- FL – no formal, universal extension; the FL DOR will offer flexibility on deadlines of taxes due (including income and sales) on request
- HI – extended to July 20
- IA – extended to July 31
- ID – extended to June 15
- KY – filing and payment deadline extended to July 15, but interest will accrue on the deferred income tax payments
- MS – extended to May 15
- TN—extension of Income, Excise and Franchise taxes, but not Business Tax
- VA – payment deadline extended to June 1; returns must still be timely filed, interest will accrue on deferred payments
- WA – extensions of 30-60 days considered by request; penalty waiver will be granted on request

In group three fall those states that have extended relief to other business activity taxes, including sales and use taxes. We have provided detailed information related to relief available for sales and use taxes in a series of updates over the last week. As of today, 14 states or local jurisdictions have formally extended the filing deadline for the tax periods ending in February, 2020 (which are normally due to be filed and paid in March); several among those states have also extended the deadlines of the March and April tax periods as well. Another 10 states have announced that they will consider penalty waiver on request for businesses impacted by COVID-19, but have not formally extended any deadlines. As to other business activity taxes, such as gross receipts taxes several state and local authorities, including Washington and San Francisco, have also announced varying degrees of relief for businesses impacted by the virus.

Finally, a limited number of states have taken no action to extend income or business activities tax filing deadlines. Those states include Michigan, New Hampshire (business taxes), New Jersey, South Dakota, Texas, West Virginia, and Wyoming.

The tax team at Brann & Isaacson, including alert authors Jamie Szal and Hannah Wurgaft, and the following lawyers – Martin Eisenstein, George Isaacson, David Bertoni, David Swetnam-Burland, Nat Bessey, and Michael Carey – would be happy to answer any questions you may have.

It goes without saying, we hope you, your families, and your businesses are safe and secure in these extraordinary times, and stand ready to assist in whatever way we are able.