



## President to Sign \$2 Trillion CARES Act with Significant Tax and Workforce Relief for Businesses and Individuals

By BakerHostetler's Tax Group<sup>1</sup>

On March 25, 2020, the Senate passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act, an approximately \$2 trillion so-called Phase 3 relief and stimulus package containing a host of tax and economic provisions intended to help both businesses and individuals. Previously, on March 18, 2020, the president signed the Families First Coronavirus Response Act (Families First), so-called Phase 2 relief, which provides for free diagnosis testing for COVID-19, strengthens unemployment benefit programs and certain food assistance programs, and expands paid leave in limited situations. With respect to paid leave mandated by the Families First Act, the legislation also includes a new quarterly payroll tax credit intended to help employers pay for mandated paid leave. On March 6, 2020, the president signed the Coronavirus Preparedness and Response Supplemental Appropriations Act (P.L. 116-123), so-called Phase I relief, providing for approximately \$8.3 billion in emergency funding for federal agencies to respond to the COVID-19 threat.<sup>2</sup> In addition to these legislative enactments, many federal agencies,

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<sup>2</sup> P.L. 116-123 includes \$6.2 billion for the Department of Health and Human Services (of that \$2 billion is for the Biomedical Advanced Research and Development Authority (BARDA) for vaccine research; \$1.9 billion is for the Centers for Disease Control and Prevention (CDC), which includes \$950 million for state and local response efforts; \$836 million is for the National Institute of Allergy and Infectious Diseases (NIAID) for vaccine research at the National Institutes of Health (NIH); and \$61 million is for the Food and Drug Administration); \$20 million for the Small Business Administration (SBA) Disaster Loans Program, to help certain small businesses affected by the crisis;

including the Department of the Treasury and Department of Labor (DOL), have issued significant relief provisions.

## **I. The CARES Act**

### **A. Overview; including Hundreds of Billions in Available Grants and Loans**

The CARES Act, nearly 900 pages in length, includes numerous provisions to help large, mid-sized and small businesses and individuals. Most notably, the CARES Act provides hundreds of billions of dollars available to businesses of various types in the form of grants, tax credits and loans. Some are targeted to small businesses, some to medium-sized or large businesses, some to specific industries (For example, \$32 billion of payroll protection grants for air carriers and their contractors; \$17 billion of loans and guarantees for businesses critical to national security, etc.) or types of businesses; and some are available to every business. Many of the available grants are “no-strings attached” or have just a few, though meaningful, restrictions (i.e., payroll protection grants). Most of the available loans come with specific restrictions, but some loans are completely forgiven if certain conditions are met. And many employers are permitted to pass through limited portions of their grant or loan proceeds (or their own funds) to their employees entirely tax-free under Tax Code Section 139 for certain reasonable and necessary expenses employees incur in connection with this declared national disaster. Health and Human Services (“HHS”) has nearly unlimited discretion when it comes to providing billions in relief to hospitals; the Treasury Department expects to have application forms for relief programs it will administer within the next ten days.

The CARES Act establishes four categories of potential funding for large businesses that will be administered by the Treasury Department’s Exchange Stabilization Fund, with \$454 billion of that in support of Federal Reserve 13(3) lending. For mid-sized businesses (defined as having between 500 and 10,000 employees), the Treasury Department is creating a new program providing financing to banks and other lenders throughout the country that will, in turn, make direct loans to eligible businesses. The Treasury Department also will administer the 50-percent of wages payroll tax credit discussed in detail below, as well as the CARES Act directive to allow businesses, including the self-employed, to defer payment of the employer’s share of social security taxes. The relief package includes \$10 billion in funding to provide advances to small businesses and non-profits (SBA Economic Injury Disaster Loans, or EIDL) that will not need to be repaid in certain circumstances.

The list goes on and on, as further discussed in greater detail below. Eligibility for grant relief and loan relief is highly fact-dependent in many instances; BakerHostetler has established a team that currently is assisting many clients with evaluating which forms of relief may be best for them given their specific circumstances.

### **B. Certain Provisions Relevant to Businesses**

#### **1) Employee Retention Tax Credit**

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and \$1.6 billion for international responses (\$986 million goes to the U.S. Agency for International Development, \$264 million goes to the State Department and \$300 million goes to the CDC).

The Employee Retention Tax Credit (ERTC) is a refundable payroll tax credit against the employer's share of Social Security (OASDI) taxes equal to 50 percent of wages paid from March 13, 2020, to Dec. 31, 2020, up to a total of \$10,000 per employee (i.e., maximum credit of \$5,000 per employee). The ERTC is structured similar to the payroll credit for sick and family leave available under the Families First Coronavirus Response Act (details below), although employers may not claim both credits on the same wages. Qualifying wages, which include certain qualified health plan expenses, are paid by businesses during a shutdown order or during a period of significantly declined gross receipts.

- Shutdown Order: a full or partial suspension of operations due to orders from an appropriate governmental authority limiting commerce, travel, or group meetings.
- Period of Significant Decline in Gross Receipts: The first 2020 calendar quarter in which gross receipts have declined 50 percent relative to the same calendar quarter in the prior year, until the next calendar quarter in which gross receipts exceed 80 percent of receipts of the same calendar quarter of the prior year.

For employers with more than 100 full-time employees, the ERTC is available only for wages paid to employees who are not providing services due to these circumstances. The aggregation provisions of Sections 52 and 414 will apply to determine whether entities are treated as a single employer for this purpose. The ERTC is available for wages paid by both nonprofit and for-profit businesses (but not government employers). However, the ERTC is unavailable to businesses who receive small business interruption loans (discussed further below), and is subject to recapture. Certain other limitations also apply, including restrictions on amounts paid to related individuals and "double dipping" of other employment credits (e.g., active duty and empowerment zone credits).

## 2) Payroll Tax Payment Deferrals

The CARES Act defers payment of the employer share of Social Security (OASDI) taxes, both for employers and self-employed individuals. More specifically, this includes (i) 50 percent of the 12.4 percent tax on self-employment income under Section 1401(a) (including any quarterly installments of estimated taxes); and (ii) 100 percent of the 6.2 percent tax on wages imposed on employers. Fifty percent of such deferred amounts must be paid by Dec. 31, 2021, and the balance must be paid by Dec. 31, 2022. However, the deferral of Social Security taxes is not available for any taxpayers who take advantage of certain provisions in the CARES Act providing partial loan forgiveness for certain SBA guaranteed loans, discussed further below.

## 3) NOLs

The CARES Act temporarily repeals certain limitations on net operating loss (NOL) deductions that were enacted as part of the Tax Cuts and Jobs Act (TCJA). By way of background, the TCJA amended Section 172 to limit a taxpayer's NOL deduction for

a taxable year to 80 percent of its taxable income. The TCJA also eliminated a taxpayer's ability to carryback an NOL to a prior taxable year. The CARES Act generally reverses these TCJA changes for the 2018, 2019 and 2020 taxable years. In particular, for taxable years beginning before Jan. 1, 2021, the 80 percent taxable income limitation does not apply, and a taxpayer's NOL may fully offset its income. In addition, an NOL arising in a taxable year beginning after Dec. 31, 2017, and before Jan. 1, 2021, may be carried back to offset income in the preceding five taxable years. The CARES Act also includes a technical correction to make clear that the TCJA's amendments to section 172 do not apply to taxable years beginning before January 1, 2018 and ending after December 31, 2017.

Special carryback rules apply to REITs and insurance companies. In addition, taxpayers that carry back an NOL to a year in which they had an inclusion under Section 965 are treated as if they made an election under Section 965(n) for that year, meaning any 965 inclusion will not be taken into account in determining the amount of taxable income which may be reduced by the NOL carryback. Alternatively, a taxpayer may elect to exclude a taxable year containing a Section 965 inclusion from its carryback period. If a taxpayer elects to waive a carryback with respect to an NOL arising in a taxable year beginning in 2018 or 2019 under Section 172(b)(3), it must make the election by the due date (including extensions) for filing its return for the first taxable year ending after the date of the CARES Act's enactment.

To claim a carryback, individual taxpayers (including estates and trusts) file IRS Form 1045, Application for Tentative Refund, and corporate taxpayers file IRS Form 1139, Corporation Application for Tentative Refund. In general, Form 1045 or Form 1139 must be filed on or after the date the return for the NOL year is filed, and within 12 months after that taxable year. For NOLs arising in taxable years beginning before Jan. 1, 2018, and ending after Dec. 31, 2017, the CARES Act provides that carryback claims filed within 120 days of its enactment will be treated as timely filed.

As noted above, the CARES Act's NOL provisions are temporary. The 80 percent taxable income limitation is restored for taxable years beginning after Dec. 31, 2020. For this purpose, taxable income is computed without regard to deductions under section 199A with respect to qualified business income and section 250 for global intangible taxable income (GILTI) and foreign-derived intangible income (FDII). In addition, the 80 percent limitation is applied after first reducing taxable income for an applicable taxable year by the amount of any NOLs which arose in taxable years beginning before January 1, 2018 (pre-TCJA) and are carried to that year. Carrybacks are prohibited for NOLs arising in taxable years beginning Jan. 1, 2021.

#### 4) Loss Limitation Rule Deferred

The CARES Act defers application of Section 461(l), which limits a non-corporate taxpayer's loss deductions, to apply to taxable years beginning after Dec. 31, 2020. This change is consistent with the CARES Act's temporary repeal of limitations on NOL deductions in Section 172.

Section 461(l), enacted as part of the TCJA, provides that a non-corporate taxpayer, including a pass-through entity, individual, trust or estate, cannot deduct an “excess business loss”; any such loss is treated as an NOL carryover under Section 172. For this purpose, excess business loss generally is defined as the excess of a taxpayer’s aggregate trade or business-related deductions for a taxable year over its aggregate trade or business-related income for that year plus \$250,000 (or \$500,000 for a joint return), subject to adjustment for inflation. In addition to relaxing the loss limitation rule, the CARES Act makes certain amendments relating to the computation of excess business loss, including specifying that items attributable to a trade or business of performing services as an employee are not taken into account.

Though it is not entirely clear, it appears that a taxpayer must file an amended return to request relief with respect to losses previously disallowed under Section 461(l). An individual taxpayer generally may amend a prior year’s return by filing Form 1040-X within three years of the date the original return was filed or within two years of the date the tax was paid, whichever is later. It is especially unclear how a partnership and its partners would obtain relief; under the new partnership audit rules (effective for taxable years beginning in 2018), a partnership is not permitted to file an amended return but rather must utilize the administrative adjustment request process. The loss limitation rule is restored for taxable years beginning on or after Jan. 1, 2021, and before Jan. 1, 2026.

#### 5) Refundable AMT Credits

The TCJA repealed the alternative minimum tax (AMT) on corporations and also allowed corporations to offset their regular tax liability by any minimum tax credit (MTC) they may have had for any tax year. Beginning in 2018, a portion of the MTC was permitted to be refunded. The Act adds Section 53(e)(5) to the Internal Revenue Code, which provides that a corporation may make an election to take its entire MTC refundable amount in 2018.

A corporation that makes this election may apply for a tentative refund under the rules applicable to tentative carrybacks and refunds under Code Section 6411 (the so-called Quickie Refund rules.) The corporation may file an application for a refund providing that the refund is due by reason of new Code Section 53(e)(5) prior to Dec. 31, 2020.

The application should include (i) the amount of the refundable MTC claimed under Section 53(e)(5), (ii) the amount of refundable MTC claimed for any previously filed return for such taxable year and (iii) the amount of the refund claimed. The Internal Revenue Service (IRS) will review it and determine the amount of the overpayment and then apply, credit or issue a refund to the corporation within 90 days of the application. The overpayment is first applied to any unpaid taxes for 2018, then credited against any unpaid taxes for 2017, then credited against any tax liability or installment then due or refunded to the corporation.

## 6) Business Interest Expense Limitation

The CARES Act increases taxpayers' ability to deduct trade or business interest expense, raising the 30 percent adjusted taxable income limitation to 50 percent. Under Section 163(j), interest expense is generally limited to the sum of business interest income, floor plan financing interest (applicable only for taxpayers selling various motorized vehicles) and 30 percent of the taxpayer's adjusted taxable income (ATI, which is generally EBITDA through Dec. 31, 2021, and EBIT thereafter).

For partnerships, the limitation applies at the partnership level. To the extent the partnership's interest expense is limited by Section 163(j), the excess business interest expense (EBIE) that is disallowed is carried forward to future taxable years. Each partner is allocated its distributive share of EBIE and must reduce (but not below zero) its outside basis by that amount. The partners may treat EBIE as business interest paid or accrued by that partner in the next taxable year in which the partner is allocated excess taxable income from the partnership. The CARES Act increases the 30 percent of ATI limitation to 50 percent for taxable years beginning in 2019 and 2020. This provision does not apply, however, to partnerships for any taxable year beginning in 2019. But unless a partner elects otherwise, 50 percent of any EBIE allocated to a partner for such taxable year is treated as paid or accrued by such partner in its first taxable year beginning in 2020, regardless of whether the partner is allocated any excess taxable income from the partnership in such year. The other 50 percent shall continue to be subject to the generally applicable rules on EBIE. Additionally, for the taxable year beginning in 2020, the CARES Act permits (but does not require) a taxpayer to use its ATI from its previous taxable year beginning in 2019 to calculate the interest expense limitation. For any short taxable year beginning in 2020, the substituted ATI must be prorated based on the number of months included in the short taxable year.

Electing real property trades and businesses who depreciate their assets over longer recovery periods under the Alternative Depreciation System are not subject to the interest expense limitation. Although such assets are generally not "qualifying property" eligible for bonus depreciation under Section 168(k), the real property trade or business election was almost always advantageous for qualifying taxpayers due to a technical error in prior legislation which prohibited bonus depreciation on qualified improvement property. Although this error has been eliminated by the CARES Act, as further discussed below, the real property trade or business election is irrevocable; it is unclear whether the IRS will offer relief due to these legislative changes.

We note that the interest expense limitation and the election to avoid it are of particular importance in the real estate development industry, especially for highly leveraged projects in the development stage. This would include projects financed in significant part by syndicated tax credits and other development incentives. Sponsors of such projects may now need to reexamine whether electing out of the interest expense limitation is worthwhile in light of the temporary increase in interest deductibility and the resulting elimination of bonus depreciation.

This provision may also impact a taxpayer's state tax filing position. Because the composition of a taxpayer's state filing group may not be the same as its federal consolidated group, the manner in which the business interest limitation is calculated for state purposes may not be the same as for federal purposes. Further, whether a particular state adopts the Internal Revenue Code automatically, on a rolling basis or in another manner, will impact whether and when this CARES Act provision impacts a taxpayer's state limitation. Whether and how a state's add-back provisions apply may also confound this state-specific calculation. Finally, because states have taken a wide variety of approaches to making this calculation, a taxpayer should consult each state's rules on this topic.

#### 7) Depreciation of Qualified Improvement Property

The CARES Act includes a technical correction that makes qualified improvement property eligible for 100 percent bonus depreciation if placed in service before Jan. 1, 2023. Available bonus depreciation is reduced by 20 percent per year annually thereafter through 2026. Qualified improvement property generally includes any improvement to the interior of a building placed in service after the building was first placed in service, but excluding enlargements, elevators, escalators and improvements to the internal structural framework of the building. The CARES Act adds qualified improvement property to the list of 15-year property under Section 168(e)(3)(E), which therefore qualifies for bonus depreciation under Section 168(k) by virtue of having a recovery period of 20 years or less. The CARES Act also assigns qualified improvement property a 20-year recovery period under the Alternative Depreciation System.

Prior to the TCJA, categories of qualified leasehold improvement property, qualified retail improvement property and qualified restaurant property that would otherwise be depreciable under the generally applicable 39-year recovery period for nonresidential real property under MACRS were designated as 15-year property under Section 168(e)(3)(E). Also, qualified improvement property was eligible for 50 percent bonus depreciation in the year in which it was placed in service under Section 168(k)(2)(A)(iv). The TCJA attempted to streamline these depreciation incentives by eliminating the separate categories of qualified leasehold improvement property, qualified retail improvement property and qualified restaurant improvement property and including them all within the umbrella of qualified improvement property, which was supposed to be designated as 15-year property and therefore eligible for bonus depreciation available under Section 168(k)(2) for any property with a recovery period of 20 years or less. However, through a drafting error, the TCJA eliminated the separate definitions of qualified leasehold improvement property, qualified retail improvement property and qualified restaurant improvement property, but failed to assign a 15-year recovery period to qualified improvement property. The CARES Act correction is effective as if the TCJA drafting error had not occurred and is therefore effective for assets placed in service after 2017.

This correction may be of particular importance to developers of real estate projects financed in part by syndicated rehabilitation credits under Section 47 of the Code,

which are available only for property depreciated via the straight-line method. As was the case before the TCJA, developers in such projects will again have to carefully weigh the benefits of electing out of available bonus depreciation in order to increase their rehabilitation credit base.

### **C. Federally Guaranteed Forgivable Business Loans (Paycheck Protection Program) for Small Businesses**

The CARES Act provides for government-backed forgivable loans to affected eligible businesses through a so-called Payroll Protection Program. The maximum eligible forgiven amount generally is equal to the cumulative amount of payroll costs, rent, utility payments, and interest on mortgages on real or personal property paid during the eight-week period following origination of the loan.

#### 1) Eligibility

Federally guaranteed Small Business Administration (SBA) loans are available to businesses with 500 or fewer employees, including corporations, partnerships, sole proprietorships, independent contractors, certain nonprofit organizations, veterans organizations and Tribal businesses. Restaurant and hotel entities are eligible to apply the 500-or-fewer-employee test on the basis of each physical location. Special rules apply to hotel and restaurant businesses operating as franchises, and certain generally applicable affiliation rules are waived for hotel and restaurant businesses. The affiliation rules will cause many companies with common ownership to be ineligible for a Paycheck Protection Program loan. The application process will end on June 30, 2020 (the Covered Period).<sup>3</sup> The Paycheck Protection Program simplifies the rigid SBA requirements for loans in favor of a 500-employee size limit, provided the borrower (a) was operating on Feb. 15 and (b) paid salaries and payroll taxes to and on behalf of employees, or paid independent contractors through Forms 1099. The SBA has the authority to increase the 500-employee limitation on an industry-by-industry basis. Employers receiving the employee retention tax credit under the CARES Act are not eligible for these loans. Specific language in the Paycheck Protection Program states the SBA should issue guidance to lenders prioritizing loans to small businesses, rural markets, minority-owned businesses, veteran-owned businesses and business in operation for less than two years.

#### 2) Loan Terms and Amounts

The amount of each loan is limited to the lesser of (a) \$10 million or (b) the borrower's average total monthly "payroll costs" for the 1-year period ending on the date the loan is made multiplied by 2.5, plus any refinanced SBA economic injury disaster loan obtained after Jan. 31, 2020. There is a special rule to compute the average monthly payroll costs for seasonal businesses. During the Covered Period, borrowers are not required to provide collateral security for the loans or cause owners or affiliates to guarantee the loans. Payroll costs include the cumulative amount of salaries, wages, tips, retirement benefits, certain employer-provided

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<sup>3</sup> The Covered Period is Feb. 15 through June 30.

benefits, severance payments, state and local taxes paid on employee compensation, and other compensation paid to employees and independent contractors, excluding, however, any compensation paid to an employee or independent contractor in excess of an annualized amount of \$100,000. Payroll costs do not include amounts paid to persons who reside outside the United States, certain taxes imposed or withheld during the Covered Period, and certain payroll costs for which tax credits were allowed pursuant to the Families First Coronavirus Response Act. The Paycheck Protection Program expands the permitted use of these SBA loan proceeds to include payroll costs, employee benefits, commissions, interest payments on mortgages, rent, utilities and interest on debt obligation incurred before the Covered Period.

### 3) Deferral

Lenders are required to provide “complete payment deferment relief” for a period between six months and one year on all principal and interest. Loans may have a maximum maturity date, which is 10 years after the borrower applies for the debt forgiveness described below. During the Covered Period, interest rates are capped at 4%. After expiration of the Covered Period, loans will bear interest at comparable SBA rates. While no interest payments are required during the deferment period, interest will accrue on the loan from the day the loan is made.

### 4) Lenders

Loans will be made by banks and other commercial lenders with existing authority to make SBA loans and other lenders the SBA determines are qualified to originate and administer the loans. While repayment of the loans will be guaranteed by the federal government, potential borrowers will work directly with their originating lenders to close and administer the loans. The SBA will reimburse lenders the following processing fees: (a) 5% of the principal balance for loans \$350,000 and below; (b) 3% of the principal balance for loans between \$350,000 and \$2,000,000; and (c) 1% of the principal balance for loans greater than \$2,000,000.

### 5) Loan Forgiveness

A borrower may apply for forgiveness of a portion of its loan. The maximum eligible forgiven amount is equal to the cumulative amount of payroll costs, rent, utility payments, and interest paid on mortgages on real or personal property paid during the eight-week period following origination of the loan. The foregoing amounts include arrearages. The forgiven amount is not included in the borrower’s federal taxable income. Amounts eligible for forgiveness may be less than the principal amount of the loans depending on the borrower’s utilization of the proceeds. The SBA will reimburse the forgiven amount together with additional accrued interest to the lender within 90 days after the forgiven amount is finally determined. The forgiven amount is subject to several reductions and limitations. Payroll costs that were not taken into account to compute the maximum loan amount are not taken into account to compute the loan forgiveness amount. The amount forgiven cannot exceed the principal balance of the loan. The forgiven amount is reduced by

multiplying the amount forgiven by a fraction; the numerator is the average number of full-time employees per month during the eight-week period following origination of the loan and the denominator is, at the election of the borrower, one of the two following values: (a) the average number of full-time employees per month between Feb. 15, 2019, and June 30, 2019; or (b) the average number of full-time employees per month between Jan. 1, 2020 and Feb. 29, 2020. Employees terminated between Feb. 15, 2020 and 30 days after passage of the CARES Act, but rehired by June 30, 2020, qualify in the numerator so long as they're fully paid as if they weren't terminated. A borrower will need to calculate its average number of full-time employees in both 2019 and between Jan. 1, 2020 and Feb. 29, 2020 to determine the most favorable result. Accordingly, if a borrower's workforce is 60% of the workforce during the applicable comparison period, then only 60% of the maximum expected forgiven amount qualifies for forgiveness. If the borrower maintains 100% of the workforce, then 100% of the forgiven amount qualifies for forgiveness. The forgiveness amount is also subject to reduction based on salary reductions. Generally, the borrower's forgiven amount is reduced by salary reductions greater than 25%. Lastly, if any portion of a borrower's loan is forgiven, then the borrower cannot defer its 2020 payroll tax obligations.

#### 6) Impact on Existing Loans

Prior to applying for a forgivable SBA loan, all prospective borrowers should review all existing loan agreements, notes, and bond or trust indentures to determine whether incurring additional debt will cause a default or otherwise violate the terms of those agreements. Companies may also be guarantors of their parent entity's existing debt and may, therefore, be subject to the same restrictions. Financial covenants, permitted debt definitions, permitted investments and other terms of loan documents may need modifications to allow borrowers to access this government relief without technical defaults. Businesses with existing debt should consult with their legal counsel and lenders now about any necessary amendments or waivers to allow these loans. Existing lenders will likely support and encourage borrowers to obtain these loans.

#### 7) Borrowers of SBA Economic Injury Disaster Loans

The SBA also separately provides emergency loans of up to \$2 million to assist companies suffering from COVID-19 financial distress. The Paycheck Protection Program allows these loans to be refinanced as a federally guaranteed loan under the program. The refinanced loan proceeds become subject to all the conditions and limitations of the Paycheck Protection Program explained above.

The Paycheck Protection Program is a powerful tool in the CARES Act stimulus package because it will provide much-needed cash flow to businesses struggling to fund operations. Applications should be prepared immediately because the estimated time intervals between application submission, approval and funding are unknown.

## D. Certain Provisions Relevant to Individuals

### 1) “Recovery Rebate” Payments

The CARES Act provides for recovery rebates (treated as advance refunds of a 2020 tax credit) of up to \$1,200 for most individual U.S. residents, providing cash immediately to individuals and families. Married individuals who file a joint return are eligible for a rebate of up to \$2,400. The rebate amounts increase by \$500 for each child under age 17. No rebate will be made to anyone who is claimed as a dependent on another taxpayer’s federal income tax return. The rebate, which will be delivered via direct deposit when possible, acts as an advance payment of a refundable tax credit on the taxpayer’s 2020 federal income tax return.

The rebate amounts are reduced for higher income taxpayers and begin phasing out for taxpayers once adjusted gross income exceeds \$75,000 (the phase-out threshold is \$112,500 for heads of households and \$150,000 for joint filers). For these higher income taxpayers, the rebate amount is reduced by \$5 for each \$100 that a taxpayer’s adjusted gross income exceeds the phase-out threshold, and it will be completely phased-out when adjusted gross income exceeds \$99,000 for single filers (with no children), \$146,500 for heads of households with one child and \$198,000 for joint filers with no children.

The IRS will use the information on the taxpayer’s 2019 federal income tax return to determine rebate amounts and, if no 2019 tax return has been filed at the time of determination, the information will be based on the 2018 federal income tax return. If no 2018 federal income tax return has been filed, the IRS will use information on the taxpayer’s Form SSA-1099, Social Security Benefit Statement, or Form RRB-1099, Social Security Equivalent Benefit Statement for 2019 to determine the rebate amount.

The rebates will not be reduced or offset to pay debts owed to other federal agencies, past-due legally enforceable state income tax obligations or unemployment compensation debts. In addition, the rebates will not be reduced or offset by other assessed federal taxes that would otherwise be subject to levy or collection.

The CARES Act requires the Department of the Treasury to coordinate with the Social Security Administration and other relevant federal agencies to conduct a public awareness campaign regarding the availability of the rebates, including information with respect to individuals who may not have filed a federal income tax return for 2018 or 2019.

### 2) Charitable Contribution Provisions

*Allowance of Partial Above-the-Line Deduction.* To encourage Americans to contribute to charitable organizations in 2020, individuals who claim the standard deduction will be permitted to deduct up to \$300 of cash charitable contributions “above the line” on their 2020 federal income tax returns. This “above the line”

allowance will not apply to cash contributions to supporting organizations or donor advised funds.

*Increased Limitations for 2020.* The CARES Act increases the deduction limitations on 2020 cash charitable contributions by corporations, as well individuals who itemize their deductions.

- For individuals, the limitation on cash contributions to 50 percent of individual adjusted gross income is temporarily suspended for 2020. However, cash contributions are still limited to the excess of adjusted gross income over the amount of all other charitable contributions, with any excess cash contributions carried forward to subsequent tax years.
- For corporations, the limitation for cash contributions is increased from 10 percent to 25 percent of taxable income in 2020. Any excess corporate cash contributions will be carried forward to subsequent tax years.
- The CARES Act increases the limitation on deductions for charitable contributions of food inventory from 15 percent to 25 percent for 2020.

These increased deduction limitations likewise will not apply to cash contributions to supporting organizations or donor advised funds.

### 3) Exclusion for Employer Student Loan Repayment

The CARES Act expands the existing exclusion for up to \$5,250 of employer educational assistance, which currently applies to expenses such as tuition, fees and books, to include employer repayments of student loans. Employees may exclude employer student loan repayments made between the date of enactment and Dec. 31, 2020, but they are prohibited from deducting any employer-paid student loan interest expense excluded under this provision.

## **E. Employee Benefit Provisions**

The CARES Act has far-reaching impacts on employee benefit plans, providing relief for participants and plan sponsors of qualified plans and expanded benefits for participants in group health plans.

### 1) Relief for Participants in Qualified Retirement Plans

With respect to qualified retirement plans, the CARES Act:

- Provides for a special “coronavirus-related distribution” that is exempt from the 10 percent early withdrawal penalty, can be repaid over a three-year period without regard to the typical plan contribution limits and is includable in taxable income over a three-year period to the extent not repaid. Such distributions generally may not exceed \$100,000 in total for an individual. A coronavirus-related distribution means a distribution made on or after Jan. 1, 2020, and before Dec. 31, 2020, to an individual:

1. Who is diagnosed with COVID-19.
2. Whose spouse or dependent is diagnosed with COVID-19.
3. Who experiences adverse financial consequences as a result of being quarantined, furloughed, laid off, having work hours reduced, being unable to work due to lack of child care as a result of COVID-19, closing or reducing hours of a business owned or operated by the individual due to COVID-19, or other factors as determined by the Treasury Secretary.

The plan administrator may rely on an employee's certification that the employee satisfies the conditions noted above.

- Provides certain loan relief for a "qualified individual," defined to include those noted in 1-3 above, including:
  1. Providing a temporary increase on the plan loan limit (generally, up to the lesser of the present value of the nonforfeitable accrued benefit of the employee under the plan or \$100,000) for loans made during the 180-day period following enactment of the CARES Act.
  2. Delaying for an additional year any plan loan repayment that comes due during the period beginning on enactment of the CARES Act and ending on Dec. 31, 2020. Any subsequent repayments must be adjusted to reflect the delay in due date and any interest accrued during the delay.
- Provides a waiver of required minimum distributions required to be made in calendar year 2020 from qualified retirement plans, defined contribution plans under Internal Revenue Code Section 403(a) or 403(b), and eligible deferred compensation plans under Internal Revenue Code Section 457(b) (excluding those maintained by tax-exempt entities).

Under the CARES Act, plans would have until the end of the plan year beginning on or after Jan. 1, 2022, to adopt a retroactive amendment to reflect these changes, and plans would not be treated as failing to meet the requirements of Code Section 411(d)(6) or Section 204(g) of the Employee Retirement Income Security Act of 1974 (ERISA) by reason of such amendment. Governmental plans would have an additional two years to adopt the amendment.

## 2) Expanded Benefits for Participants in Group Health Plans

The CARES Act includes the following expanded benefits under group health plans:

- Group health plans and health insurance issuers shall be required to cover, without cost-sharing, any qualifying coronavirus preventive services. For this purpose, a "qualifying coronavirus preventive service" means an item, service or immunization that is intended to prevent or mitigate COVID-19 and that is (i) an evidence-based item or service that has in effect a rating of

“A” or “B” in the current recommendations of the U.S. Preventive Services Task Force; or (ii) an immunization that has in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved.

- The definition of COVID-19 diagnostic testing that is required to be covered by a group health plan or health insurance issuer without cost-sharing under the Families First Act has been expanded, and the group health plan or issuer shall reimburse the provider of the diagnostic testing as follows:
  1. At the negotiated rate, if the health plan has a negotiated rate for such service with the provider in effect before the public health emergency was declared in accordance with Section 319 of the Public Health Service Act.
  2. If there is not a negotiated rate, the cash price for such services as listed by the provider on a public website, or such plan or issuer may negotiate a rate with such provider for less than such cash price. Each provider of diagnostic testing for COVID-19 shall make public the cash price for such testing on a public website. Failure to comply with such internet posting may result in monetary penalties of up to \$300 per day.
- For plan years beginning on or before Dec. 31, 2021, a health plan shall not fail to be a high-deductible health plan for health savings account (HSA) purposes if the plan covers telehealth and other remote care services without application of a deductible.
- After Dec. 31, 2019, amounts paid for over-the-counter medicine and drugs, as well as menstrual care products, are treated as medical expenses for HSAs, healthcare flexible spending accounts, health reimbursement accounts and Archer Medical Savings Accounts.

### 3) Relief for Companies That Sponsor Defined Benefit Pension Plans

The CARES Act provides companies with cash flow concerns additional time to meet their single-employer plan funding obligations by delaying the due date for “minimum required contributions” otherwise due during 2020 until Jan. 1, 2021, at which time the 2020 contributions plus interest will be due. The interest accrues from the original due date to the actual payment date using the effective rate of interest for the plan for the plan year which includes such payment date. Note, however, that this special rule permitting a delay in payment only applies to “minimum required contributions” (as defined in Internal Revenue Code Section 430(a)); it does not provide additional time to make contributions that are required for other reasons, such as contribution obligations associated with a corporate transaction or the plan sponsor’s increase in debt or plan closing. Plan sponsors that are obligated under a collective bargaining agreement or by the terms of an agreement with the Pension Benefit Guaranty Corporation to make plan contributions should discuss the ability to delay such contributions with appropriate counsel before taking action.

The CARES Act also provides plan sponsors with the option to use the plan's funded status for the last plan year ending before Jan. 1, 2020, for purposes of determining the funding-based benefit limitations under Internal Revenue Code Section 436 for plan years that include calendar year 2020. This provision will enable plan sponsors to avoid the restrictions on future benefit accruals and on distributions in optional forms under Internal Revenue Code Section 436, where a plan has a decline in funding status resulting from the market downturn tied to the COVID-19 pandemic.

Additional special relief is provided to pension plans sponsored by certain nonprofit employers. Specifically, the CARES Act extends the special cooperative and small employer charity pension plan rules to plans sponsored by an employer that satisfies the following four conditions: (i) is exempt from taxation under Internal Revenue Code Section 501(c)(3), (ii) has been in existence since 1938, (iii) conducts medical research directly or indirectly through grant making, and (iv) has as its primary exempt purpose of providing services with respect to mothers and children.

4) Expansion of Department of Labor Authority to Postpone Deadlines in the Event of a Public Health Emergency

The CARES Act amended Section 518 of ERISA to permit the Labor Secretary to provide extensions of certain ERISA compliance deadlines in the event of "a public health emergency declared by the Secretary of Health and Human Services." Such compliance extensions likely would be akin to the types of compliance extensions authorized by the Labor Secretary in response to presidentially declared disasters, such as the recently declared hurricane and wildfire disasters. ERISA plan sponsors, administrators and fiduciaries should watch for Department of Labor declarations of compliance deadline relief pursuant to the amended ERISA Section 518 in the coming weeks and months.

## **F. Economic Stabilization**

As noted in the introductory paragraph above related to The CARES Act, the Act authorizes up to \$500 billion in loans, loan guarantees and other investments in support of eligible businesses, states and municipalities which require liquidity due to coronavirus-related losses, specifically allocating \$25 billion to passenger air carriers, \$4 billion to cargo air carriers and \$17 billion to businesses critical to maintaining national security whose continued operations are jeopardized as a result of covered losses. Recipients of such loans and guarantees must agree to a number of conditions, including a prohibition on stock buybacks and maintenance of current staffing levels. For federal income tax purposes, economic stabilization loans and guarantees are treated as indebtedness, and interest paid is treated as qualified stated interest. Under forthcoming regulations, any equity issued to the federal government in connection with such loans or guarantees will not result in an ownership change for purposes of the Section 382 limitation on net operating losses.

## II. Families First Act

As noted above, the Senate passed and the president signed H.R. 6201, the Families First Act, on March 18, 2020. In addition to providing free diagnosis testing for COVID-19 and strengthening unemployment benefit programs and certain food assistance programs, the Families First Act expands paid leave in limited situations and includes a new quarterly payroll tax credit intended to fund the mandated paid leave obligation.

Employers with fewer than 500 employees generally are “covered employers” under the Families First Act and will be required to provide two weeks of employee emergency paid sick leave and 10 weeks of paid family leave. However, all public agencies that are subject to the Fair Labor Standards Act are covered employers, regardless of their number of employees. See our alert, [FAQs: The Families First Coronavirus Response Act for Employers](#), for a more detailed discussion of these issues. The DOL has issued guidance to assist employers with calculating which employees are included for purposes of the threshold. Only employees in the United States or its possessions or territories are included in the total. Employees of a single corporation, regardless of location or division, are all part of the same entity. In assessing the threshold, the employer can include (i) employees on leave; (ii) temporary employees who are jointly employed by the employer and another entity; and (iii) “day laborers” supplied by a temporary agency if there is a continuing employment relationship. The analysis becomes far more complicated for separate corporate entities, including wholly owned subsidiaries, and involves a detailed, fact-based analysis of multiple labor and employment relations factors.

The Families First Act requires sick leave for employee self-care (due to being quarantined or symptomatic and awaiting diagnosis) equal to 100 percent of regular pay, up to a maximum of \$511 per day. Sick leave provided to an employee caring for others, including children due to school closures, is equal to two-thirds of regular pay, up to a maximum of \$200 per day. Family leave, also equal to two-thirds of regular pay, up to a maximum of \$200 per day, is limited to employees who are “unable to work (or telework) due to a need for leave to care for a son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency” related to COVID-19.

The Families First Act includes a refundable payroll tax credit designed to fully reimburse employers for the cost of this mandated paid leave. In addition, a self-employed individual who would qualify for paid sick leave or paid family leave under the Act if the individual were an employee is eligible for the equivalent amount of credit against self-employment tax. The credit is not available for leave paid by government employers.

Eligible employers may forgo depositing payroll taxes, including federal income tax withholding and both the employer’s and employees’ shares of Social Security and Medicare taxes, equal to the amount of qualifying leave paid. Employers with insufficient payroll taxes to cover the amount of the qualified leave will be able to request accelerated payment from the IRS; such requests are expected to be processed in two weeks or less.

Because the tax credits specified in the Families First Act are intended to offset the cost of providing the mandated paid leave, the payroll tax credit is available only on mandated wage amounts an employer pays pursuant to the Act. Therefore, an employer with 500 or more employees that is not

required to pay qualified sick leave wages under the Act is also not entitled to claim the payroll tax credit on sick pay or family leave wages, regardless of whether the wages relate to COVID-19.

### **III. Treasury Department Tax Filing and Tax Payment Relief**

#### **A. Delayed Tax Payment Dates**

As specified in [Notice 2020-18](#) (which superseded Notice 2020-17), any corporation, partnership, individual, trust, estate or association that is affected by the COVID-19 emergency may postpone until July 15, 2020, payment of (i) all U.S. federal income taxes (including payments of tax on self-employment income) otherwise due on April 15, 2020, in respect of the 2019 taxable year, and (ii) all U.S. federal estimated income tax payments (including payments on self-employment income) due on April 15, 2020, in respect of the 2020 taxable year. No interest, penalties or additions to tax will be due with respect to any postponed payments made by July 15, 2020.

#### **B. Delayed Tax Filing Dates**

The due date for the filing of U.S. federal income tax returns of corporations, partnerships, individuals, trusts, estates and associations that are affected by the COVID-19 emergency for the 2019 taxable year and that otherwise are due on April 15, 2020, has been postponed until July 15, 2020, in accordance with Notice 2020-18. No interest, penalties or additions to tax will be due with respect to the filing of any such U.S. federal income tax returns made by July 15, 2020. Moreover, no IRS Form 4868 (Application for Automatic Extension of Time to File U.S. Individual Income Tax Return) or Form 7004 (Application for Automatic Extension of Time to File Certain Business Income Tax, Information, and Other Returns) needs to be filed in connection with this postponement. This notice, however, makes it clear that there is no postponement of the filing date of any U.S. federal information return. Taxpayers that are due an income tax refund are encouraged to file U.S. federal income tax returns as soon as possible to help accelerate refunds.

#### **C. Miscellaneous Federal Items: What about Section 965 “deemed repatriation tax” installment payments and estate and gift tax payments and returns?**

On March 24, 2020, the IRS [issued extensive FAQs](#) expanding upon and clarifying Notice 2020-18, including:

1. The extended filing and payment relief applies to Section 965(h) repatriation tax installment payments otherwise due April 15, 2020.
2. The extended filing and payment relief does not apply to estate and gift tax returns or payment dates or to payroll or excise taxes.
3. Second-quarter estimated tax payments due June 15, 2020, must still be paid on June 15, 2020.

#### **D. Impact on Retirement Plan and HSA Deadlines**

The FAQs issued pursuant to Notice 2020-18, provide the following relief related to employee benefits matters:

- Extended the deadline for making 2019 Individual Retirement Account (IRA) contributions from April 15, 2020, to July 15, 2020.
- Extended the deadline for paying additional 10 percent tax owed with respect to early distributions (prior to age 59½) from IRAs and retirement plans from April 15, 2020, to July 15, 2020.
- For employers with a tax filing deadline of April 15, 2020, extended the deadline for making 2019 retirement plan contributions to July 15, 2020.
- Extended the deadline for making 2019 HSA and Archer Medical Spending Account contributions from April 15, 2020, to July 15, 2020.

The FAQs also clarified that an employee who made excess deferrals to a retirement plan in 2019 is still required to take those excess deferrals (and income) out of the plan by April 15, 2020, in order to exclude the distributions from income.

#### **E. State Income Tax Returns**

State income tax return due date statutes generally fall into two categories: (i) same date as federal return is due (e.g., Alabama) and (ii) fixed date (e.g., Arizona, 15th day following close of calendar or fiscal year). Therefore, absent specific authority, a state taxing authority may not modify such due date. Given the exigencies of this situation, many states are changing their due dates (e.g., consistent with Executive Order N-25-20, California extended to July 15, 2020, the due date for individual income tax returns); you should check your specific state's filing requirements, as some of these are changing as time passes. Many state taxing agencies have closed or limited in-person taxpayer services and are encouraging taxpayers to use electronic and online services to the extent possible. Taxpayers who are due income tax refunds are encouraged to file their state income tax returns (rather than extension requests) by the due date in order to accelerate refund payments. Automatic extensions of time to file income tax returns continue to be available under existing laws and regulations. Please check your state's tax agency website for details regarding extension requests. A helpful summary of these details is located [here](#).

#### **F. State Income Tax Payments**

The March 17, 2020, announcement by Treasury Secretary Steven Mnuchin to allow the deferral of payment of income taxes without interest or penalties applies only to U.S. federal income taxes. The payment requirements for state income taxes vary from state to state; changes are occurring daily. Some states (e.g., South Carolina) have postponed payment due dates, and others (e.g., New Jersey) intend to follow the federal lead. Please check your state's taxation website for details about state income tax payment requirements.

#### **G. Other State Tax Filing and Payment Requirements**

In many cases, states have extended tax return filing and payment deadlines for a wide variety of taxes, including sales taxes, employment taxes and property taxes.

States are generally required to balance their budgets annually, and almost every state has a June 30 fiscal year-end. Putting aside that many state assemblies have curtailed their sessions due to COVID-19, taxpayers should expect the next few months, which is typically the period when most state tax legislation is enacted, to be very busy. The COVID-19 pandemic will put a great deal of new pressure on state budgets (e.g., New York State has announced that it anticipates the COVID-19 pandemic will reduce revenue by as much as \$13 billion in FY 21), so now is the time to plan state tax legislative strategy. Please see our Alert for more details on state legislative strategies and considerations [here](#).

#### **IV. More Relief Will Be Forthcoming**

The White House, Congress and all of the executive agencies are committed to making sure that businesses and individuals continue to thrive during this COVID-19 crisis. We will continue to keep clients and friends of BakerHostetler apprised of important developments as they arise.