



Morgan Lewis

CARES ACT

TAX RELIEF AND ENHANCING LIQUIDITY FOR EMPLOYERS DURING COVID-19

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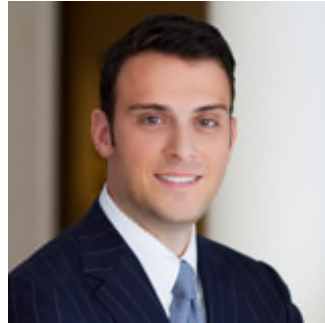
Today's Presenters



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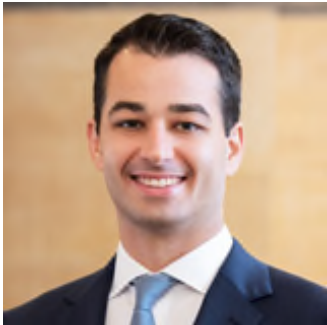
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Agenda

- Families First Coronavirus Response Act: Tax Credit Provisions
- CARES Act: Business Tax Provisions Providing Cash Flow and Preserving Liquidity
- IRS Filing and Payment Relief for Taxpayers Affected by the COVID-19 Pandemic
- State Filing and Payment Relief

A Timeline of Federal COVID-19 Relief Provisions and Activity

- **March 13, 2020:** President declares national emergency.
- **March 18, 2020:** President signs the “**Families First Coronavirus Response Act**”.
- **March 20, 2020:** IRS issues Notice 2020-18 superseding and expanding on Notice 2020-17 to extend income tax *payment & filing* deadlines.
- **March 24, 2020:** IRS issues Frequently Asked Questions regarding Notice 2020-18.
- **March 25, 2020:** IRS issues IR 2020-59, the “People First Initiative”.
- **March 27, 2020:** President signs the “**Coronavirus Aid, Relief, and Economic Security Act**”.
- **March 31, 2020:** IRS issues Notice 2020-22, “Relief from Penalty for Failure to Deposit Employment Taxes.”
- **April 8, 2020:** IRS issues Rev. Proc. 2020-23, granting partnerships the ability to file amended returns to take advantage of the CARES Act provisions.
- **April 9, 2020:** IRS issues Notice 2020-23, extending over 300 deadlines and Notice 2020-26, providing relief for certain taxpayers to take advantage of the NOL provisions in the CARES Act.
- **April 13, 2020:** IRS issues FAQs about fax filing procedures to enable processing during COVID-19 shut downs.

**FAMILIES FIRST
CORONAVIRUS RESPONSE
ACT:
TAX CREDIT PROVISIONS**

Families First Coronavirus Response Act Tax Credits

- Provides refundable credits for small and midsize businesses (i.e., businesses and tax-exempt organizations with fewer than 500 employees).

Emergency Paid Sick Leave Act:

- For an employee who cannot work because of circumstances related to COVID-19, eligible employers may receive a refundable credit at the employee's regular pay, up to \$511 per day and \$5,110 in the aggregate, for a total of 10 days (80 hours).
- For an employee who is caring for someone else because of circumstances related to COVID-19, eligible employers may claim a credit up to \$200 per day and \$2,000 in the aggregate, for a total of 10 days.

Emergency Family & Medical Leave Expansion Act:

- Eligible employers may receive a refundable credit up to \$200 per day while the employee is receiving paid leave, or an aggregate of \$10,000.

Employment Tax Deposit Offset and Advance Payment of Credits

- Rather than depositing employment taxes with the IRS, eligible employers retain an amount of employment taxes equal to the amount of qualified sick and family leave wages they have paid out.
- The employment taxes offset by the credits include the employee and employer share (for all employees) of Social Security and Medicare taxes and withheld federal income taxes.
- If the amount of the credit exceeds the employer's employment tax liability, the employer may seek an expedited advance from the IRS using Form 7200.
 - Form 7200 is submitted via fax to 855-248-0552.
- The credits apply to qualified wages paid during the period beginning April 1, 2020, and ending December 31, 2020.

**CARES ACT:
BUSINESS TAX PROVISIONS
PROVIDING CASH FLOW AND
PRESERVING LIQUIDITY**

Employee Retention Credit

- Provides a qualifying employer with a refundable payroll tax credit of 50% of each employee's qualified wages paid from March 13, 2020 through December 31, 2020, up to a maximum credit of \$5,000 per employee.
- An employer is generally an eligible employer if its operations were fully or partially suspended during the COVID-19 crisis by a governmental shut-down order, or if its gross receipts declined by more than 50% when compared to the same quarter in 2019.
 - For employers that averaged more than 100 full-time employees in 2019, "qualified wages" available for the tax credit include wages paid (including health benefits) to employees who are not providing services due to a shutdown or slowdown.
 - For employers that averaged 100 or fewer full-time employees in 2019, "qualified wages" available for the tax credit include wages paid (including health benefits) to all employees, whether or not wages are paid due to a shutdown or slowdown.
- Rather than depositing employment taxes with the IRS, eligible employers retain an amount of employment taxes up to \$5,000 for each employee's qualified wages.
- If the amount of the credit exceeds the employer's employment tax liability, the employer may seek an expedited advance from the IRS using Form 7200.
- Qualified wages do not include wages used in the computation of sick or family leave credits.
- Government entities and employers receiving emergency SBA loans under the paycheck protection program are not eligible for this credit.

Payroll Tax Deferral

- Provides that employers may delay payment of 100% of the employer share of Social Security tax (6.2% rate) on wages where such taxes are due between the CARES Act enactment on March 27, 2020 and January 1, 2021.
- The deadline for paying the first 50% of the deferred taxes is December 31, 2021, and the deadline for paying the remaining 50% of taxes is delayed until December 31, 2022.
- The tax deferral is available regardless of workforce size.
- An employer receiving an emergency SBA loan under the paycheck protection program that is forgiven is not eligible for the payroll tax deferral, for periods after the loan is forgiven.
- Coordination with the retention credit is complicated, with key questions unanswered.

Modifications for Net Operating Losses

- The CARES Act provides taxpayers with additional cash flow and liquidity through the temporary repeal of the 80% of taxable income limitation on the utilization of net operating loss (NOL) carryovers imposed by the Tax Cuts and Jobs Act (PL 115-97).
- Taxpayers may also carry back NOLs arising in 2018, 2019, and 2020 to their five preceding taxable years.
- Taxpayers can benefit from the carry back of losses to pre-2018 years when the maximum corporate tax rate was 35%.
- Taxpayers may obtain cash refunds by filing amended federal income tax returns or applications for tentative refunds.
- The CARES Act also modifies section 461(l) to temporarily permit carryback of excess business losses.

Modifications for Net Operating Losses (cont.)

- In IRS Notice 2020-26 (April 9, 2020), the IRS granted a 6-month extension to file Form 1045 or Form 1139 to request a refund of a NOL that arose in a taxable year beginning during calendar year 2018 and that ended on or before June 30, 2019.
 - Under section 6411, a taxpayer must file an application for a tentative carryback adjustment within 12 months of the close of the taxable year in which the NOL arose.
 - A Corporation with a calendar year end, can now file Form 1139 by June 30, 2020 to request a refund of a NOL generated in 2018.
- Rev. Proc. 2020-24 (April 9, 2020) provides procedures for: (1) electing to waive carrybacks generated in 2018 and 2019; (2) electing to exclude years in which the taxpayer has a section 965(a) transition tax inclusion from the carryback period for NOLs generated in 2018 through 2020; and (3) electing to waive or reduce a carryback period, and revoking an election to waive a carryback for a fiscal year beginning before January 1, 2018 and ending after December 31, 2017.

Modifications for Net Operating Losses (cont.)

- April 13, 2020 IRS announces in FAQs that it will begin accepting claims on Forms 1139 and 1045 by fax.
 - Temporary procedures will begin April 17.
 - Only claims allowed under CARES Act section 2303 (Modifications for NOLs) and section 2305 (Modifications for Alternative Minimum Tax Credit) are eligible.
 - Taxpayers can disregard instructions that prohibit the filing of Form 1139 or 1045 to apply for a refund in a year with a section 965(a) inclusion.
 - A maximum of 100 pages can be faxed and the IRS will follow up for further documents if needed.
 - Previously mailed forms can now be faxed. Form 1139 can be faxed to 844-249-6236 and Form 1045 can be faxed to 844-249-6237.
 - The processing of the claims remains the same.
 - Processed in a first in, first out method.
- Forms 4466 (Quick Refund of Overpayment of Estimated Tax) still must be mailed.

Modification of Limitation on Business Interest

- Under the CARES Act, for tax years beginning in 2019 and 2020, the limitation on deductible business interest expense under Section 163(j) is increased.
- Rather than using 30% of the taxpayer's adjusted taxable income (ATI) for the year in the formula to compute allowable interest, the taxpayer may use 50% of ATI.
- Taxpayers may elect out of using this increased ATI limit for an eligible taxable year.
- Taxpayers may elect to use 2019 ATI amounts when computing their business interest deduction limitation in 2020.
 - In the case of a partnership, the election is made at the partnership level.
- For partnerships, the increase in ATI limit from 30% to 50% applies only to the 2020 tax year.

Modification of Limitation on Business Interest (cont.)

- On April 10, 2020, the IRS issued Rev. Proc. 2020-22, which provides guidance to taxpayers for making elections under section 163(j).
- Rev. Proc. 2020-22 provides guidance on the time and manner of making elections to:
 - Elect out of the 50% ATI limitation for tax years beginning in 2019 and 2020.
 - Use the taxpayer's ATI for the last taxable year beginning in 2019 to calculate the taxpayer's section 163(j) limitation for the 2020 tax year.
 - Elect out of deducting 50% of excess business interest expense (EBIE) for taxable years beginning in 2020.
- Rev. Proc. 2020-22 also provides an extension of time to make an election to be a real property trade or business or an electing farming business. In addition, the Rev. Proc. provides an opportunity for taxpayers to withdraw a prior election to be a real property trade or business or an electing farming business.

Refundable Alternative Minimum Tax Credits

- The CARES Act relaxes the limitations imposed by the TCJA and permits corporations with alternative minimum tax (“AMT”) credit carryovers to accelerate the recovery of refundable AMT credits in 2018 or 2019.
- Corporations with newly allowed refundable AMT credits can file an application for a tentative refund (e.g., Form 1139) to claim the credits.

Reduction of the Applicable Recovery Period for Qualified Improvement Property

- As enacted in 2017, the TCJA contained a drafting error that subjected qualified improvement property (such as interior improvements to retail stores and restaurants) to a 39-year recovery period instead of the 15-year recovery period intended by Congress. The CARES Act corrects this “retail glitch” by shortening the recovery period for qualified improvement property to 15 years.
- These technical amendments make qualified improvement property eligible for bonus depreciation.
- Taxpayers electing to claim bonus depreciation for qualified improvement property placed in service during 2018 and 2019 need to ascertain whether an amended return can be filed or if an accounting method change is required.
 - IRS and Treasury may issue guidance providing flexibility to taxpayers claiming bonus depreciation for qualified property placed in service in 2018 and 2019.

**IRS FILING AND PAYMENT
RELIEF FOR TAXPAYERS
AFFECTED BY THE COVID-19
PANDEMIC**

IRS Notices 2020-18, 2020-20 & 2020-23

- **Notice 2020-18 (March 20, 2020)** restates and expands upon Notice 2020-17 (March 18, 2020) and generally provides that the deadlines for both **filing** federal income tax returns and making certain **payments** are extended from April 15, 2020, to July 15, 2020.
- **Notice 2020-20 (March 27, 2020)** issued to update and amplify this relief to include Gift Tax and Generation-Skipping Transfer Tax returns.
- **Notice 2020-23 (April 9, 2020)** amplifies Notice 2020-18 and Notice 2020-20 and provides relief for many issues that the previous notices left unaddressed.
- Relief applies to specified filings and payment obligations due on or after April 1, 2020 and before July 15, 2020 including:
 - Filings by individuals (including nonresident aliens); corporations and partnerships with calendar or fiscal years; estates and trusts; and exempt organizations.
 - Transition tax installments payments made pursuant to a section 965(h) election.
 - Quarterly estimated income tax payments.
 - Hundreds of other filings and elections as listed in Revenue Procedure 2018-58.

IRS Notice 2020-23 (cont.)

- Extends relief to time-sensitive actions that are due on or after April 1, 2020 and before July 15, 2020. Taxpayers now have until July 15, 2020 to:
 - File Tax Court petitions.
 - File for review of a Tax Court decision.
 - File a claim for credit or refund of any tax.
 - Bring suit upon a claim for credit or refund of any tax.
- Grants a 30-day postponement for certain IRS actions if the last date for performance of the action is on or after April 6, 2020, and before July 15, 2020.
- Extension automatically applies—taxpayers do not need to take action to take advantage of the relief.
- Does not extend the statutory or regulatory extension deadlines.
- No interest, penalties, or additions to tax for failure to file federal income tax returns or pay federal income taxes will accrue on the deferred filings or payments through July 15, 2020.

IRS Rev. Proc. 2020-23 (April 8, 2020)

- Partnerships subject to the centralized partnership audit procedures under the Bipartisan Budget Act of 2015 (BBA), may now file amended Form(s) 1065 and issue amended Schedules K-1 for taxable years that began in 2018 or 2019 to take advantage of the CARES Act tax provisions as well as “any other tax attributes to which the partnership is entitled by law.”
 - Amended returns must be filed before September 30, 2020.
- Code Section 6031(b) generally prohibits BBA partnerships from amending their returns. Without this relief, partners could not immediately benefit from the favorable CARES Act tax provisions because they would have to wait until the partnership filed an Administrative Adjustment Request (AAR) for its 2020 taxable year in 2021 to realize any applicable tax benefits.

STATE FILING AND PAYMENT RELIEF

State Tax Relief

- State and Local Tax Filing Extensions
 - Corporate Income/Franchise and Individual Income Taxes
 - Most states have conformed to the federal deadline extensions; however, some states have decided to not fully conform and/or delay announcements confirming income tax deadlines.
 - Unclear guidance as to how extensions apply to fiscal year taxpayers and income tax estimated payments.
 - Non-Income Taxes
 - Several states have extended certain non-income tax deadlines, such as sales, excise, and withholding tax deadlines; however, relief is often limited to small businesses, such as filers or businesses that do not exceed a specific revenue threshold.
- MLB State Tax Response Chart: <https://www.morganlewis.com/pubs/state-and-local-tax-responses-to-covid-19>

State Payroll Tax Observations

- State Payroll Tax Registration and Filing Concerns
 - State “Work-from-Home” orders inadvertently trigger state payroll tax issues
 - Thresholds requiring state payroll tax registration and filing requirements vary significantly amongst states, and include no specific threshold at all, or specific wage and day thresholds.
 - Many states are easing threshold requirements.
 - Reciprocal Agreements amongst states must be considered – confirm compliance with documentation requirements.
 - Determine “convenience of employer” state implications in CT, DE, NE, NY, and PA.
 - Consider local wage tax implications (e.g., Philadelphia).
- Action Item: Determine proper telecommuting policies are in place, including documentation, employee work location tracking, and FAQs.

Non-Payroll State Tax Observations

- Nexus Concerns
 - State “Work-from-Home” orders inadvertently trigger “nexus” with a state for corporate income/franchise tax purposes.
 - Several jurisdictions, including DC, MI, NJ, OR, and PA, have announced via express guidance, or informal statements, that they will ease nexus requirements impacted by employees working from home as a result of COVID-19.
- General State Tax Conformity to IRC Changes
- Receipts Factor Sourcing Concerns
 - If employee resides or works in a state that differs from employer’s state, the shifting of employee’s responsibilities to remote locations can impact sourcing of revenues in both states that adopt cost-of-performance and market-based sourcing type regimes.
- Local Gross Receipts Tax Implications (e.g., San Francisco, Los Angeles)

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IRS COVID-19 Resources

- For additional IRS COVID-19 related tax guidance, see:
 - <https://www.irs.gov/coronavirus/coronavirus-and-economic-impact-payments-resources-and-guidance>

QUESTIONS?

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Sheri A. Dillon focuses on federal tax controversy matters, guiding clients through IRS examinations and appeals, the administrative claims process, and litigation. Sheri also counsels clients on a variety of business and tax-planning matters that involve acquisitions, dispositions, combinations, and debt restructuring and reorganizations, with a special focus on partnership transactions and closely held businesses.

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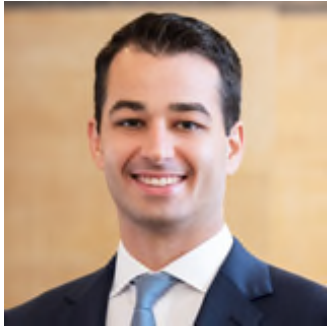
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Eric Albers-Fiedler focuses his practice on federal tax controversy matters. Eric represents clients before the Internal Revenue Service, aiding them with IRS examinations, ruling requests, and other administrative proceedings. Prior to joining Morgan Lewis, he served as a legal intern to Judge James S. Halpern of the US Tax Court and spent five years in the tax practice of Ernst & Young LLP. Eric is a Certified Public Accountant.

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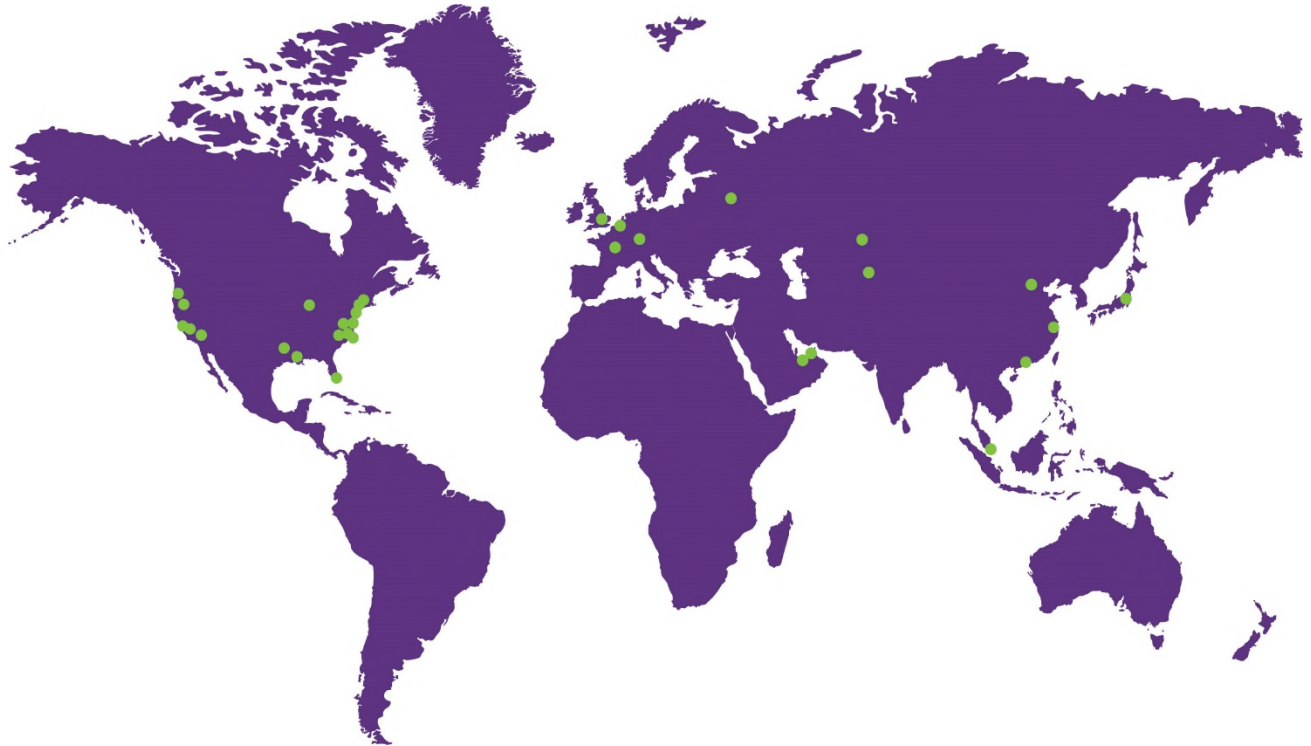
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