PPP Forgiveness and Second Round

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Employee Retention Credit-Changes for 2020

- MOST IMPORTANT CHANGE: Section 206(c)(2)(B) strikes Section 2301(j) from the CARES Act. Section 2301(j) had previously provided that "if an eligible employer receives a covered loan under paragraph (36) of section 7(a) of the Small Business Act (a PPP loan), such employer shall not be eligible for the credit under this section."

- Section 206(e) provides that, in general, the amendments made by this section take effect <u>as if included in the provisions of the CARES Act to which they relate</u>.

- Thus, PPP borrowers are now eligible for an ERC back to the beginning of the program – March 12, 2020. It's just a matter of how to claim that credit.

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Employee Retention Credit-Changes for 2020

- Now that Section 2301(j) has been removed from the CARES Act and PPP borrowers can claim the ERC, ground rules are needed to avoid claiming a credit and forgivable expenses for the same amounts.

- Section 206(c)(1) amends the definition of forgivable PPP payroll costs in Section 7A(a)(12) of the Small Business Act by adding, "Such payroll costs shall not include qualified wages taken into account in determining the credit allowed under Section 2301 of the CARES Act or qualified wages taken into account in determining the credit allowed under subsection (a) or (d) of section 303 of the Taxpayer Certainty and Disaster Relief Act of 2020."

- Stated in another way, this Section 206(c) established an important ordering rule: any payroll costs – W-2 wages or health care costs – for which a taxpayer claims an ERC (or a new disaster ERC as allowed by the latest bill) are NOT eligible to be forgiven as part of the PPP process. Thus, while a taxpayer may BOTH claim the ERC and borrow a PPP loan, they cannot do it on the SAME wages or health care costs, and the priority goes to the ERC rather than the PPP.

Employee Retention Credit-Changes for 2020

- Section 2301(g)(1) will allow a taxpayer to elect to not include certain wages and allocable health care costs in the computation of the ERC credit. Clearly, this would be done so as to preserve those costs for PPP forgiveness.
- Section 2301(g)(2) is then further amended to require the SBA to issue guidance providing that if a taxpayer elects under Section 2301(g)(1) to count wages for PPP forgiveness rather than the ERC credit, if it turns out that PPP payroll costs are NOT forgiven, the payroll costs can STILL be treated as qualified wages for purposes of the ERC.

Employee Retention Credit-Changes for 2020

- Putting it all together, assume a taxpayer borrowed $100,000 as a PPP loan on April 3, 2020. During the second and third quarters of 2020, the taxpayer has “eligible quarters” and is thus eligible for the ERC. Over the 24-week covered period, the taxpayer spends $80,000 on W-2 wages and qualified health care costs and $20,000 on rent. Included in those wages are $40,000 of qualified wages eligible for the ERC. The taxpayer would rather have the $40,000 in payroll costs forgiven than claim an ERC on those amounts. The general rule of new Section 7A(a)(12), however, provides that the $40,000 of qualified wages are eligible for the ERC, and are NOT eligible to be forgiven.

- The taxpayer may then elect, however, under Section 2301(g)(1) to treat the $40,000 of qualified ERC wages as “payroll costs” for purposes of PPP forgiveness. If the loan is fully forgiven, no ERC can be claimed on the $40,000 of wages. It appears, however, that if the loan is eventually not forgiven, Section 2301(g)(2) and future guidance from the SBA will allow the $40,000 of qualified wages to revert BACK to the ERC and be eligible for the credit.

Employee Retention Credit-Changes for 2021

- Section 207(a)(1) extends the ending date for the ERC from December 31, 2020 to June 30, 2021.
- The section then makes a series of computational changes to the credit that apply only for 2021; they are NOT retroactive to 2020.

Paycheck Protection Program Changes: Deductibility of Expenses

- Ever since the IRS published Notice 2020-32, borrowers and tax professionals alike have put their faith in Congress to overrule the Service and provide a double benefit: tax-free forgiveness of loan proceeds AND deductible expenses paid with PPP funds.
- Section 276 of Division N of the latest bill does just that, providing that "no deduction shall be denied or reduced, no tax attribute shall be reduced, and no basis increase shall be denied, by reason of the exclusion from gross income."
- Importantly, this rule applies to ALL borrowers; even those who have already applied for forgiveness. Thus, expenses paid with PPP funds are now completely deductible.
- Consider, however, WHEN does the basis increase relating to the exclusion from income arise? If it is not until the loan is forgiven – 2021 in most cases – might the taxpayer incur losses in 2020 that cannot be utilized because of a lack of basis?

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Paycheck Protection Loans

- Loan forgiveness feature: Section 1106 of the CARES Act, as modified by the PPP Flexibility Act: If the PPP is used for its intended purposes, the first 24 weeks worth of certain payments shall be eligible for forgiveness on a tax-free basis (1106(b); 1106(i))

- What payments are covered during the covered period?
  - Payroll costs
  - Interest on a mortgage on real or personal property incurred before February 15, 2020 (does not include any prepayment or payment of principal)
  - Rent for a lease in force before February 15, 2020
  - Certain utilities (electricity, gas, water, transportation, telephone, or internet access) for which service started before February 15, 2020
  - Four new expenses were just added by the Consolidated Appropriations Act, 2021:

Paycheck Protection Program Changes: Existing Round

- Four new expenses eligible for use/forgiveness
- **Covered operations expenditures**. Payments for any business software or cloud computing service that facilitates business operations, product or service delivery, the processing, payment, or tracking of payroll expenses, human resources, sales and billing functions, or accounting or tracking of supplies, inventory, records and expenses.
- **Covered property damage costs**. Costs related to property damage and vandalism or looting due to public disturbances that occurred during 2020 that was not covered by insurance or other compensation.
- **Covered supplier cost**. An expenditure made by an entity to a supplier of goods that are:
  - Essential to the operations of the entity at the time at which the expenditure is made, or
  - Is made pursuant to a contract, order, or purchase order that was either:
    - in effect at any time before the covered period with respect to the loan, or
    - with respect to perishable goods, in effect before or at any time during the period.

Paycheck Protection Program Changes: Existing Round

- **Covered worker protection**. These are operating or capital expenditures that are required to facilitate the adaptation of the business activities of an entity to comply with requirements established or guidance issued by the Department of Health and Human Services, the CDC, or OSHA during the period beginning on March 1, 2020 and ending on the date on which the national emergency declared by the President under the National Emergencies Act expires. Eligible costs are those related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to Covid–19. The term includes:
  - The purchase, maintenance, or renovation of assets that create or expand a drive-through window facility; an indoor, outdoor, or combined air or air pressure ventilation or filtration system; a physical barrier such as a sneeze guard; an indoor, outdoor, or combined commercial real property; an onsite or offsite health screening capability; or other assets relating to the compliance with the requirements of certain protective guidance.
  - The purchase of covered materials described in section 328.103(a) of title 44, Code of Federal Regulations, or any successor regulation; particulate filtering facepiece respirators approved by the National Institute for Occupational Safety and Health, including those approved only for emergency use authorization; or 0ther kinds of personal protective equipment, as determined by the Administrator in consultation with the Secretary of Health and Human Services and the Secretary of Labor.
- Not included in the definition of covered worker protection costs, however, are residential real property or intangible property.

Paycheck Protection Program Changes: Covered Period

- Previously, there were only two options for a covered period: 8 or 24 weeks. The Consolidated Appropriations Act, 2021, however, gives a borrower the right to choose ANY covered period beginning on the date a borrower receives the loan and ending on a date selected by the borrower during the period—
  - beginning on the date that is 8 weeks after such date of origination; and
  - ending on the date that is 24 weeks after such date of origination.
- Or stated in a simpler manner, a borrower is no longer locked into an 8 or 24 week period; instead, they can choose any period lasting BETWEEN 8 and 24 weeks as well.
- If a borrower chooses a different period, the maximum forgivable payroll costs must be prorated over the appropriate period (for example, a rank and file employee is no longer allowed to be paid a maximum of $46,154 if you use a covered period of less than 24 weeks. If you used 12 weeks, it would be half that amount).

Paycheck Protection Program Changes: Loans < $150,000

- This one is important: The bill delivers long-rumored streamlined forgiveness for loans of less than $150,000. These borrowers will only be required to submit a one-page online or paper form, and will only be subject to audit if they commit fraud or use the proceeds for improper purposes. It appears a small borrower will not be subjected to the required reductions in forgiveness amounts generally caused by slashing salaries or slashing headcount.