# Community Bank Tax Update

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# Agenda

- Will the 21% Federal Tax Rate Survive?
- Income Tax Developments Under the CARES Act and Other COVID-19-Related Measures
- Payroll Tax Developments Under the CARES Act and Other COVID-19-Related Measures

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# Will the 21% Federal Tax Rate Survive?

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# Will the 21% Federal Tax Rate Survive?

- There is nearly universal support within the Democratic Party to raise the corporate income tax rate, but not necessarily back up to 35%
  - The Democratic Party platform officially calls for a 28% corporate income tax rate
- The House of Representatives, under Democratic Party control, is likely to pass a bill containing a corporate tax rate increase at some point
- The balance of power in the Senate awaits the results of the January GA senate run-off races, but even if the Republican Party retains control of the Senate, it will be by only a very slim margin
- Consequently, a reasonably bi-partisan tax bill containing a corporate tax rate increase seems likely to pass if Joe Biden is seated as president
- **When would such a tax rate increase likely be effective?**

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# What if the Tax Rate Increases?

- Deferred tax assets ("DTAs") and deferred tax liabilities ("DTLs") on corporate balance sheets will be re-measured for the effect of the rate increase
- For banks that are in a net DTA position (most are), the re-measurement resulting from a rate increase will produce recordable income
- Tax planning will be applied "in reverse" – i.e., accelerate income and defer deductions
- The goal of this planning is to increase the net DTA (or reduce the net DTL) that will be re-measured for the rate increase

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# Examples of Potential Planning Strategies

- Slow down fixed asset tax depreciation, including electing out of available bonus depreciation
- Defer the tax deduction for partial loan charge-offs
  - May require revocation of the bad debt conformity election if such an election is currently in place
- Maximize REIT dividends for a captive REIT subsidiary
- Refrain from engaging in transactions that trigger reversals of existing DTAs – e.g., devalued OREO properties, loans with tax basis>FMV, etc.
- **However** – banks must also consider the regulatory capital impact of maximizing DTAs

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# Income Tax Developments Under the CARES Act and Other COVID-19-Related Measures

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# Overview of the CARES Act

- Signed into law on 3/27/2020
- Enacted largely as an economic stimulus measure
- The corporate income tax provisions of the law are generally focused on improved liquidity, not permanent tax savings (except for those with net operating loss carryback potential)
- The payroll tax credit provisions of the law may provide a permanent savings for qualifying taxpayers
- The Paycheck Protection Program ("PPP") lending provisions significantly impact the banking industry, but do not provide any specific tax benefits to the lending banks

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# Paycheck Protection Program ("PPP") Loans

- Loans are guaranteed by the Small Business Administration ("SBA")
- Loans are forgiven if the proceeds are used for certain qualified purposes (SBA pays off the loan to the lending bank)
- The loan discharge is tax-exempt to the borrower, but the IRS clarified this means the borrower's expenses incurred to achieve the tax-exemption are non-deductible (see IRS Notice 2020-32)
  - Treasury recently issued Revenue Ruling 2020-27 holding that, in the situation where the PPP loan discharge has not yet occurred as of the end of the PPP borrower's 2020 tax year, the PPP borrower cannot deduct the qualifying PPP expenses on its 2020 income tax return if, as of the close of the 2020 tax year, the borrower reasonably expects the PPP loan to be forgiven in 2021

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# Paycheck Protection Program (“PPP”) Loans

- **Form 1099-C reporting**
- IRS Announcement 2020-12 relieves lenders of any discharge of indebtedness information reporting on form 1099-C for the forgiven portion of PPP loans
- What if the PPP borrower defaults on any unforgiven portion of the loan and the SBA pays off this portion to the originating lender under the 100% guarantee?
  - ✓ Bank should still not have a Form 1099-C reporting requirement, as there are specific provisions excluding reporting for a guarantor or surety
  - ✓ In other words, any further Form 1099-C filing obligation would reside with the SBA as the “conduit lender” on any remaining unforgiven PPP loan balance

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# Paycheck Protection Program ("PPP") Loans

- SBA pays a loan processing fee directly to the lending bank that is not added to the borrower's loan obligation
- The proper timing of recognition of these fees in taxable income has been the subject of some debate
- There appear to be two divergent views on this proper timing, both supported by reasonable arguments
- The different conclusions are generally based upon whether the analysis stops at a strict reading of the SBA fee terms v. whether recent judicial precedent for taxing fees associated with lending transactions is taken into account
- The difference between the two methods in 2020 may be significant if the underlying PPP loans are not largely paid off / forgiven by year-end

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# Paycheck Protection Program ("PPP") Loans

- **The argument for current tax recognition**
- Points to the terms surrounding the SBA processing fee, which state expressly that the fee is to compensate the bank for processing the loan application
- If argued successfully that the payment is for a service, then the fee does not represent interest or a finance charge, and therefore does not constitute Original Issue Discount ("OID"), and must be recognized when received
- Such treatment would likely require an M adjustment, as the fees are generally treated as an adjustment to the loan yield and taken into income over the loan life for book purposes
  - Accelerated tax recognition may be desirable if a corporate tax rate increase is enacted in 2021

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# Paycheck Protection Program ("PPP") Loans

- **The argument for following the book timing**
- Points to the holding in Regulation §1.1273-2(g)(4) which states that any amount paid to the lender by a third party in a lending transaction is treated as paid by the borrower to the lender
- See ruling in *Capital One Financial Corporation and Subsidiaries v. Commissioner*
  - Notwithstanding the agreement terms, amounts charged by the lender to the borrower related to a debt obligation are interest for tax purposes if they are intended to enhance the financial yield on the debt instrument v. to compensate for any specific service
- PPP loan fee characteristics supporting interest treatment
  - Are calibrated as a percent of the amount borrowed v. a flat fee
  - Supplement what would otherwise be a below-market yield on the PPP loan (compared to yields on other types of federally guaranteed loans)
  - Fee exceeds the lender's loan processing costs by a substantial amount

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# Paycheck Protection Program ("PPP") Loans

- **The argument for following the book timing**
- Regulation §1.1273-2(g)(2)(i) holds that advance payments of interest in a lending transaction create OID, which is taken into taxable income over the loan life, similar to the book treatment
- If this approach is followed, there would not likely be any difference in the book v. tax timing of the PPP loan fee income recognition (i.e., no M adjustment required)
- Even if the PPP loan fees are recognized currently for book purposes (i.e. not recognized over the loan life), the tax treatment would still likely have to follow the book treatment
  - See Proposed Regulations §1.451-3(i)(2) and §1.1275-2(l)

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# CARES Act NOL Carryback Provisions

- The one income tax provision within the CARES Act that may provide certain banks with a potentially significant recordable tax benefit is the Net Operating Loss (“NOL”) carryback provision
- Recall that, prior to 2018, corporate taxpayers could carry back a NOL to offset taxes paid in the prior two years, and the remainder could be carried forward for 20 tax years
- The TCJA eliminated the two-year carryback for post-2017 NOLs and made the carryforward period indefinite, but placed an 80% annual offset limitation on the use of those NOL carryforwards

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# CARES Act NOL Carryback Provisions

- The CARES Act temporarily reinstates the corporate NOL carryback provision and on a more expansive basis:

| For NOLs arising In: | 5-year carryback applies |
|---|---|
| 2018 | 2013*, 2014*, 2015*, 2016*, 2017* |
| 2019 | 2014*, 2015*, 2016*, 2017*, 2018 |
| 2020 | 2015*, 2016*, 2017*, 2018, 2019 |

*taxes were paid at 34%/35% in these years

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# CARES Act NOL Carryback Provisions

- Given the ability to carry back NOLs arising in 21% tax years to offset taxes paid in 34%/35% tax years, a permanent tax rate benefit of 13%/14% will be achieved on the amount carried back to refund taxes paid at these rates
- The financial statement impact of this rate benefit is recorded as a reduction to 2020 income tax expense
- For those banks with known NOLs or NOLs that could be reliably forecasted, the tax benefit was supposed to have been recorded and disclosed in the quarter ended 3/31/2020 (i.e., the quarter of enactment)

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# CARES Act NOL Carryback Provisions

- Most banks will not be in a NOL position for 2020
- However, banks that are currently carrying forward NOLs from post-2017 tax years can now retroactively carry those NOLs back to prior years
- Even profitable banks may have NOL carryback potential if they acquired a target in a tax-free reorganization or a stock purchase transaction and the acquired target had NOLs (especially in the pre-closing short period tax return of the target)
  - These NOLs would have to be carried back to the target's prior tax years
  - My be a means of circumventing an otherwise applicable IRC §382 limitation

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# CARES Act NOL Carryback Provisions

- Some banks may determine that a 2020 NOL could be created or increased with tax planning strategies aimed at accelerating tax deductions and / or deferring taxable income
- Examples of potential tax planning strategies:
  - Claim maximum bonus depreciation (including “QIP fix” discussed later)
  - Adjust employee bonus plans as needed to secure a current deduction
  - Defer REIT dividends from a captive REIT subsidiary
  - Trigger reversals of existing DTAs – e.g., devalued OREO properties, loans with tax basis > FMV, etc.

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# CARES Act NOL Carryback Provisions

- **However**, these strategies will likely reduce the bank's recorded DTA or increase its recorded DTL, so they must take into consideration the resulting exposure to potential tax rate increases in post-2020 years
- **Example:**
  - Bank is projecting 2020 taxable income of $25 million
  - Bank decides to purchase an operating lease portfolio of $35 million, all of which is eligible for direct expensing under the bonus depreciation provisions
  - Assume the available 2020 tax depreciation deduction on this lease portfolio is $1 million if bank elects out of available bonus depreciation, uses straight-line depreciation and the mid-quarter depreciation convention applies
  - Assume a tax rate increase to 28% is enacted in 2021

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# CARES Act NOL Carryback Provisions

- **Example, continued**

| | |
|---|---|
| 2020 Taxable Income Before Bonus Depreciation | $ 25,000,000 |
| Bonus Depreciation | $(35,000,000) |
| 2020 Net Operating Loss | $(10,000,000) |
| Tax Rate Benefit (35% - 21%) | $ 1,400,000 |

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# CARES Act NOL Carryback Provisions

- **Example, continued**

| | |
|---|---|
| 2020 Taxable Income Before Bonus Depreciation | $ 25,000,000 |
| Bonus Depreciation | $(35,000,000) |
| 2020 Net Operating Loss | $(10,000,000) |
| Tax Rate Benefit (35% - 21%) | $ 1,400,000 |
| | |
| Tax Deferral Pushed Into Higher Tax rate Years | $ 34,000,000 |
| Incremental Tax (28% - 21%) | $ (2,380,000) |
| Net Tax Cost of NOL Strategy | $ (980,000) |

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# CARES Act NOL Carryback Provisions

- **Example, continued**
- Assume that the tax rate increase to 28% is enacted in 2022, instead of 2021

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# CARES Act NOL Carryback Provisions

- **Example, continued**

| | |
|---|---|
| 2020 Taxable Income Before Bonus Depreciation | $ 25,000,000 |
| Bonus Depreciation | $(35,000,000) |
| 2020 Net Operating Loss | $(10,000,000) |
| Tax Rate Benefit (35% - 21%) | $ 1,400,000 |
| | |
| Lost Opportunity to Deduct Depreciation at Higher Rate | $ 27,000,000 |
| Incremental Tax (28% - 21%) | $ (1,890,000) |
| Net Tax Cost of NOL Strategy | $ (490,000) |

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# CARES Act NOL Carryback Provisions

- The NOL is generally carried back via IRS form 1139, but can also be carried back via an amended return
- The time for filing the NOL carryback claim via IRS form 1139 is extended to 18 months after the close of the tax year for tax years beginning in 2018 and ending on or before 6/30/2019 (see IRS Notice 2020-26)
- For NOL carrybacks filed on or after 6/1/2020, the IRS has advised to treat the amount of any AMT NOL carryback as zero (will not impact the refund, since all AMT credits are now refundable in 2019)
- Taxpayers can elect to forego the NOL carryback (Rev. Proc. 2020-24)

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# CARES Act – Other NOL Provisions

- A 2-year NOL carryback is permitted for fiscal tax years beginning in 2017 and ending in 2018
- The NOL carryback cannot offset the IRC §965 transition tax income inclusion and taxpayers can elect to “skip” an IRC §965 inclusion year in the carryback to avoid certain refund offset provisions
- International taxpayers may need to consider whether NOL carrybacks negatively impact certain foreign tax benefits
- The 80% annual taxable income offset limitation otherwise applied to carryforwards of post-2017 NOLs is eliminated for the 2018, 2019 and 2020 tax years

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# CARES Act NOL Carryback Provisions

- **Regulatory Capital Relief for all Banks – for 2020 only**
- The mere existence of the NOL carryback statute will benefit virtually all banks in the determination of their 2020 Common Equity Tier-1 regulatory capital, even though the bank does not have a 2020 NOL
- This is because of the favorable regulatory capital treatment afforded to DTA's that could be realized if a hypothetical reversal is applied to the bank's DTAs and a hypothetical resulting loss could be carried back to offset taxes paid in prior years (assuming there are sufficient taxes paid in those prior years)
- This enables these DTAs to be counted without limitation and risk-weighted at 100% (v. 250%)

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# Qualified Improvement Property ("QIP") Fix

- QIP is defined as:
  - Depreciable property related to interior improvements made to non-residential buildings that are made subsequent to the date the building was originally placed into service (excludes certain structural improvements)
- The TCJA contained a drafting error that inadvertently omitted these assets from qualifying for bonus depreciation in post-2017 tax years and relegated them to 39-year straight-line depreciation status
- The CARES Act retroactively corrects this omission, thus enabling bonus depreciation and a 15-year depreciation life
- Retroactive deductions can either be claimed via amended tax returns or an automatic IRS form 3115 (NOL planning may drive this decision)

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# Net Business Interest Deduction Limitation

- This limitation was enacted as part of the TCJA [IRC §163(j)]
- It generally imposes an annual deduction limitation on net business interest expense (interest expense > interest income) equal to 30% of EBITDA; disallowed amount is carried forward indefinitely
- As a practical matter, banks are not directly impacted by the limitation because they have net interest income (not expense)
- However, it may be a significant issue for the bank's highly leveraged loan customers and it can also indirectly impact banks that invest in partnerships, as the limitation applies to partnerships and their partners

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# Net Business Interest Deduction Limitation

- The CARES Act temporarily eases this limitation in several ways:
  - For taxpayers other than partnerships - retroactively increases the 30% limitation to 50% for tax years beginning in 2019 and 2020
- For partnerships:
  - Increases the 30% limitation to 50% for tax years beginning in 2020
  - 50% of the otherwise non-deductible excess business interest passed through to partners in 2019 will be deductible by the partner in 2020
- Allows taxpayers to calculate the 2020 interest limitation using 2019 EBITDA
- Taxpayers can elect out of these relief provisions if desired

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# Loan Forbearance and Suspension of TDR Accounting

- The CARES Act temporarily suspends the regulatory accounting for loan modifications that would otherwise be categorized as troubled debt restructurings ("TDRs") for the period beginning 3/1/2020 and ending on the earlier of 12/31/2020 or the date that is 60 days after the date on which the federally-declared COVID-19 national emergency terminates
- However, there has been no such suspension of Treasury Regulation §1.1001-3 governing the determination of when a significant modification of a debt instrument results in a deemed taxable exchange of the "old" debt instrument (pre-modification) for a "new" debt instrument (post-modification)
- In many cases, taxpayers have historically relied upon the book TDR accounting as reasonably proximate to the tax rules, thereby avoiding a tax Schedule M adjustment, so the suspension of the book accounting treatment may result in tax Schedule M adjustments where none have been considered before

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# Loan Forbearance and Suspension of TDR Accounting

- The CARES Act provides that borrowers on federally backed mortgage loans who have directly or indirectly experienced a verifiable financial hardship due to the COVID-19 emergency can request loan payment forbearance of up to 180 days (plus an additional 180 days at the borrower's request)
- The mandatory forbearance is available only during the period beginning 3/27/2020 and ending on the earlier of 12/31/2020 or the date on which the federally-declared COVID-19 national emergency terminates
- During the forbearance period, interest (but no additional fees or penalties) will continue to accrue on the loan in the same amount as if all scheduled payments were made timely under the original loan terms
  - So, the interest is deferred, but not forgiven

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# Loan Forbearance and Suspension of TDR Accounting

- Federally backed mortgage loans are 1-4 family residential mortgage loans
  - Insured by, or guaranteed by, various federal agencies (e.g., FHA); or
  - Purchased or securitized by the FHLMC of FNMA
- A shorter forbearance period of 30 days (plus two additional 30 day periods at the borrower's request) is available for federally backed multi-family residential loans
- Aside from these required forbearances, banks may also voluntarily offer their loan customers payment forbearance relief, interest-free "holiday" periods or other forms of loan relief to cope with the COVID-19 emergency
- These loan modifications, and their treatment for financial accounting purposes, may give rise to tax Schedule M adjustments that do not typically arise under normal conditions

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# Loan Forbearance and Suspension of TDR Accounting

- For example, some of these modifications may be “significant” for tax purposes, thereby triggering the deemed exchange of the “old” loan (pre-modification) for a “new” loan (post modification) discussed in previous slides
- Interest that continues to accrue during the payment forbearance period is taxable to an accrual basis lender, provided it is deemed to be collectible
- If a lender chooses not to recognize collectible accrued interest in financial statement income during the forbearance period, an M adjustment may be needed to recognize the accrued interest in taxable income
  - Interest accruing during the payment forbearance period would not typically be treated as non-performing interest by the lender, as forbearance does not result in delinquency

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# Miscellaneous CARES Act Tax Provisions

- Refund of remaining corporate AMT tax credits accelerated to 2019, or upon election of the taxpayer, to 2018
- Corporate charitable contributions limitation increased from 10% of taxable income to 25% (2020 only)
- Expansive retirement plan withdrawal and borrowing provisions applicable for 2020

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# Payroll Tax Developments Under the CARES Act and Other COVID-19-Related Measures

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# Employee Retention Tax Credit

- A refundable tax credit applied against an employer’s share of Social Security taxes on employee wages
- To qualify on a quarterly basis, the employer must be an “eligible employer” for that particular calendar quarter (2020 only)
- The tax credit is claimed against post-3/12/2020 “qualified wages” paid to employees during certain 2020 eligibility periods
- Credit = 50% x per-employee “qualified wages” (maximum of $10,000 for the year, so maximum 2020 credit is $5,000 per employee)
- Employer’s wage deduction is reduced by the tax credit
- The credit is claimed on the eligible employer’s 2020 federal payroll tax returns (IRS form 941) beginning in Q2

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# Employee Retention Tax Credit

- **Who is an “eligible employer”?**
- Any employer who can demonstrate, in a particular 2020 calendar quarter, either:
  - A 50% reduction in quarterly gross receipts in 2020 v. 2019; or
  - That its business operations were fully or partially suspended due to a governmental order limiting commerce, travel or group meetings due to the COVID-19 pandemic

- Uncertainties surround bank qualification in many jurisdictions because they may be permitted to remain open as an “essential business”

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# Employee Retention Tax Credit

- **Who is an “eligible employer”?**
- Treasury guidance suggests that:
  - Closing retail locations and / or limiting retail space (such as operating a drive-through window only) qualifies if done in direct compliance with a governmental order
  - Qualification is questionable if the above actions are taken voluntarily by an “essential business” that is allowed to remain open under the order
  - A business that is able to continue its operations remotely and is therefore not significantly impacted by the order does not qualify
  - A business with multiple locations and / or multiple affiliates qualifies even if only a single location / affiliate qualifies

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# Employee Retention Tax Credit

- **What are “qualified wages”?**
- For an employer with average employees =< 100 in 2019:
  - All wages paid to employees, plus associated health benefit costs

- For an employer with average employees >100 in 2019:
  - Only wages paid to employees while the employees are not providing any services, plus associated health benefit costs
    - Furloughed employees are the classic example
    - However, for non-furloughed employees, especially salaried professionals working from home, the considerations are more complicated

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# Employee Retention Tax Credit

- **When are wages deemed to not be for employee services?**
- Treasury guidance suggests that:
  - Wages paid to employees who are at home and cannot perform their work function while away from the employer's place of business qualify
    - e.g., bank tellers, custodial staff, security guards, etc.
  - Productivity arguments are not permissible
    - An employee must be "off the clock" but still getting paid in order for the wages to qualify (so, being "on call" or "expected to find something productive to do for the employer while at home because you are being paid" do not qualify)
  - Determining worked hours using other labor law provisions is reasonable
    - For example, employee hours considered "service hours" for purposes of qualification under the Family and Medical Leave Act would not be qualified wages

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# Families First Coronavirus Response Act

- Signed into law on 3/18/2020
- Requires affected employers to provide certain types of paid leave to employees impacted by COVID-19-related developments
- Employers are permitted to claim refundable tax credits for these paid leave wages, plus the employer Medicare taxes and incremental qualified health plan costs associated with these paid leave wages, against the employer’s Social Security tax on all employee wages
- No employer Social Security taxes are due on the paid leave wages
- Employer’s wage deduction is reduced by the tax credit
- These provisions apply to employers with fewer than 500 employees
- The credit applies to paid leave provided between 4/1/2020 and 12/31/2020 and is claimed on the IRS form 941 beginning in Q2

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# Miscellaneous CARES Act Tax Provisions

- Payment of employer share of Social Security tax on 2020 post-enactment wages can be delayed until 2021 (50%) and 2022 (50%)
- Employer payment of employee qualified education loans qualifies under the $5,250 wage exclusion for educational expenses (2020 only)

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# Other Disaster Relief Provisions

- IRC §139 enables employers to provide tax-free reimbursement to employees for reasonable and necessary costs of personal, family, living or funeral expenses incurred as a result of a qualified disaster
- IRS guidance on "major disaster leave-sharing plans" enables leave sharing to be accomplished without taxability to the leave donor if the leave-sharing results from a federally-declared disaster and certain other requirements are met (see, IRS Notice 2006-59)
- IRS issued guidance on leave-based donation programs under which employees can elect to forego vacation, sick leave or personal leave in exchange for the employer making a 2020 cash contribution to a qualified charity to offer relief to victims of the COVID-19 pandemic (see IRS Notice 2020-46)
  - Employees are not taxed on donated wages and cannot claim a tax deduction
  - Tax deduction is claimed by the employer

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# Other Disaster Relief Provisions

- **Presidential directive on employee payroll tax deferral**
- Issued 8/8/2020, IRS guidance issued 8/28/2020 (Notice 2020-65)
- Participation is optional at the discretion of the employer
- The directive enables employers to cease withholding the employee's share of the 6.2% Social Security tax on "applicable wages" for the period 9/1/2020 through 12/31/2020
- Applicable wages include employee wages for any payroll period if, when annualized, they do not exceed the equivalent of $104,000 of annual wages (measured independently for each payroll period)
- The benefit amounts to only a deferral, as the employee must repay the deferred amounts through additional withholding in 2021
- Most employers have opted out of participation due to the temporary nature of the benefit, unanswered questions as to recovery of the deferred taxes from departing employees and the difficult timing of implementation

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# Questions?

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