May 19, 2020

House Passes Health and Economic Recovery Omnibus Emergency Solutions Act (HEROES Act)

*****This legal development is still in progress. We will update this Alert as the Act makes its way through the legislative process.*****

On Friday evening (May 15, 2020), the House passed, in a 208-199 vote (mostly along party lines, though 14 Democrats and one Independent voted "No" and one Republican voted "Yes," with 23 Members abstaining), the Health and Economic Recovery Omnibus Emergency Solutions Act (HEROES Act). The HEROES Act is commonly referred to as Phase 4 of the federal government's response to the COVID-19 outbreak.

- Complete language for the HEROES Act can be found here.

The Senate Republicans have declared this act "dead on arrival" (DOA), and the White House has threatened to veto the act.

Nonetheless, further below are highlights of 17 notable tax-related provisions: (i) provisions that may be negotiated further (based in part on current Congressional comments in the press, contrary to the DOA comment above); as well as (ii) provisions that are simply notable because they would change tax law in the CARES Act that one may not expect.

HEROES Act—Cost of the Act

The projected cost of the HEROES Act is $3 trillion.

- $1 trillion (roughly) is allocated to state and local governments.
- $883 million is allocated to tax provisions, as estimated by the Joint Committee on Taxation.
- $0 additional funds is allocated to the Paycheck Protection Program (PPP).

One of the initial questions commonly being asked is "what does $3 trillion mean?"

For some perspective, below are two charts:

i. the itemized costs for all phases of the federal government's relief in response to COVID-19, including this proposed Phase 4; and
ii. the top five worldwide GDP numbers for 2019, by country.

Phase	Legislation Name	Cost
Phase 1	Coronavirus Preparedness and Response Supplemental Appropriations Act	$8.3 billion
Phase 2	Families First Coronavirus Response Act (FFCRA)	$192 billion
Phase 3	Coronavirus Aid, Relief, and Economic Security Act (CARES Act)	$2.2 trillion (later reduced by Congressional Budget Office (CBO) to $1.72 trillion)
Phase 3.5	Paycheck Protection Program and Health Care Enhancement Act (PPP Expansion)	$483 billion
Phase 4	HEROES Act	$3 trillion (estimated)
Total		$5.9 trillion ($5.4 trillion per CBO)

Country	GDP for 2019 (top 5)[1]	Population[2]
United States	$21.44 trillion	329.2 million
China	$14.14 trillion	1.4 billion
Japan	$5.15 trillion	126.2 million
Germany	$3.86 trillion	83.1 million
India	$2.94 trillion	1.4 billion

HEROES Act—Highlight of Certain Key Tax-Related Provisions

Part A: Changes to Net Operating Losses, Modifying CARES Act

1. Modifies and reverses (in part) the CARES Act's provisions that generally allow corporate taxpayers a five-year carryback of net operating losses (NOLs) arising in each of 2018, 2019 and 2020 to each of the five taxable years preceding the taxable years of such NOLs.
   - Under the HEROES Act, any corporate NOL arising in a taxable year **beginning after December 31, 2018** and before January 1, 2021 shall be a NOL carryback to each taxable year preceding the taxable year of such loss, **but not to any taxable year beginning before January 1, 2018**.
   - Such carrybacks will not be allowed with respect to a loss arising in a taxable year in which the corporate taxpayer (or any related person) is (i) not allowed a deduction by reason of section 162(m) of the Internal Revenue Code of 1986 (the "Tax Code") (relating to certain executive compensation of public companies in excess of $1 million) or Tax Code section 280G (relating to "golden parachute" payments) or (ii) is a specified corporation for that taxable year.

- A specified corporation is one that has aggregate distributions and redemptions during all taxable years ending after December 31, 2017 that exceed the sum of the aggregate fair market value of stock issued by the corporation during those years (in exchange for money or property other than its own stock) plus 5% of the fair market value of its stock as of the last day of the taxable year. (See § 20302.)

2. Reverses the CARES Act by restoring and making permanent the pre-CARES Act disallowance of excess business losses of non-corporate taxpayers. Applies (retroactively) for taxable years beginning after December 31, 2017. (See § 20301.)

Part B: Benefits for Certain Loan Recipients (such as PPP Recipients)

3. Expands exclusion from taxable income for PPP loan forgiveness and certain other business financial assistance from gross income.
    - Allows taxpayers to exclude from gross income:
        i. PPP loan forgiveness (described in CARES Act § 1109(d)(2)(D)),
        ii. Emergency EIDL grants (described in CARES Act § 1110(e)), and
        iii. Certain covered loan payments (described in CARES Act § 1112(c)). (See § 20233.)
    - Reverses recent IRS Guidance (IRS Notice 2020-32) by explicitly permitting tax deductions and basis adjustments for expenditures giving rise to loan forgiveness, without regard to whether such loan forgiveness is excluded from gross income. (See § 20235.)
4. Allows payroll tax deferral for recipients of PPP loan forgiveness, amending CARES Act section 2302(a).
    - Allows recipients of the PPP loan forgiveness under CARES Act sections 1106 or 1109 to defer payment on applicable employment taxes for the payroll deferral period. This amendment takes effect as if included in CARES Act section 2302. (See § 20231.)

Part C: Benefits for Eligible Individuals

5. Makes retroactive changes to the CARES Act's recovery rebates, which IRS refers to as "economic impact payments" (**now referenced** as "CARES recovery rebates").
    - Expands the additional amounts granted for qualifying child by replacing "qualifying child" with dependent. (See § 20101.)
    - Expands the eligibility of individuals from those who have a Social Security Number (SSN) to those who have **either** a SSN or a Taxpayer Identification Number (TIN).
        - For joint filers where one filer does not have either a SSN or TIN, allows the filer who has a SSN or TIN to receive a CARES recovery rebate as though they were an individual filer. (See § 20102.)
    - Changes apply retroactively to enactment of the CARES Act, and distributes newly available sums to eligible individuals. (See § 20106.)

6. Implements a second round of payments of recovery rebates (HEROES recovery rebates) for eligible individuals, but with an increased maximum payment of $6,000 for a joint return ($2,400) with three dependents (now $3,600).
    - $1,200 per individual (for joint return: $2,400 if both filers have TINs or $1,200 if one filer does not have a TIN). (Same $1,200 amount as the CARES recovery rebate.)
    - Additional $1,200 per dependent (maximum of three dependents). (In contrast, under the Cares Act this amount was $500 per dependent, with no cap on the number of dependents.)
    - As in the CARES Act, limitations include reducing the rebate where modified AGI exceeds $75,000 for individuals ($150,000 for joint returns). (See § 20111.)
7. Reversing 2017 tax reform, allows deduction of state and local taxes (SALT) without limitation for taxable years beginning on or after January 1, 2020 and on or before December 31, 2021. (See § 20161.)
8. Expands the earned income tax credit (EITC). (See §§ 20121–20126.)
9. Expands the child tax credit (CTC).
    - Increases the amount of the CTC from $2,000 per child to $3,000 per child (and $3,600 for a qualifying child under 6) for any taxable year beginning in 2020.
    - Expands the age range of qualifying children to include 17-year-olds.
    - Makes the CTC fully refundable. For taxpayers eligible for advance CTC payments, payments would be made on a monthly basis (or as frequently as the Treasury Secretary determines to be administratively feasible). (See § 20131.)
10. Increases deductions for certain expenses for first responders, essential employees and teachers.
    - First Responders (including law enforcement officers, firefighters, paramedics, and EMTs): Eligible to deduct up to $500 from their gross income for expenses paid on relevant professional development courses as well as uniforms used in their service. This deduction is effective for any taxable year beginning in 2020. (See § 20202.)
    - Essential Employees: Employees who perform at least 1,000 hours of essential work in the trade or business of an employer are eligible for a $500 deduction from their gross income for expenses paid on uniforms, supplies, and equipment. This temporary deduction is effective for any taxable year beginning in 2020. (See § 20203.) (See § 20203.)
    - Elementary and Secondary School Teachers: Eligible to deduct up to $500 from their gross income, an increase from the current limit of $250, for expenses paid on relevant professional development courses, as well as books, supplies, and equipment used in the classroom. This deduction is effective for any taxable year beginning in 2020. (See § 20201.)
11. Student recipients of qualified emergency financial aid grants may exclude the grant from gross income. (See § 20232.)

Part D: Benefits for Eligible Employers & Businesses

12. Expands the (Phase 2) FFCRA's sick and family leave credits, with many taking effect as if included in the FFCRA.
    - Extends the availability of the refundable payroll tax credits for paid sick and family leave from the end of 2020 to the end of 2021. (See § 20221.)
    - Increases the rate of credit for qualified sick leave wages from $200 to $511 per day (but this is not effective until the date of the enactment of the HEROES Act). (See § 20222.)
    - Increases the payroll tax credits threshold for qualified family leave from $10,000 to $12,000. (See § 20223.)
    - Gives federal, state and local government employers credits for paid sick and paid family and medical leave. (See § 20225.)
    - Amends definition of qualified wages that would apply to paid sick leave, paid family and medical leave, and the exclusion of such leave from the employer's portion of Social Security tax. (See § 20226.)
13. Expands the CARES Act's employee retention credits, taking effect as if included in the CARES Act.
    - Increases the applicable percentage of qualified wages on which an employer may receive a credit, from 50% to 80%.
    - Increases the limit on qualified wages taken into account to qualify for the credit from $10,000 for all quarters to $45,000 for all quarters (though limited to $15,000 per quarter).
    - Introduces a phase-in so that employers with a decline in gross receipts between 10% and 50% can receive a partial credit.
    - Significantly increases the threshold that determines whether the wages of **all** working employees are qualifying wages, or just **affected** employees:
        - The CARES Act's threshold for qualifying wages to be those for affected employees only (versus **all** employee) is where the employer has more than 100 full-time employees.
        - The HEROES Act's threshold for qualifying wages to be those for **affected** employees only is a two-part threshold: more than 1,500 full-time employees **and** more than $41.5 million of gross receipts in 2019. (See § 20211.)
14. Creates a payroll credit for certain fixed expenses of employers subject to closure by reason of COVID-19.
    - Introduces a 50% refundable phased-in payroll tax credit, which includes covered rent obligations, covered mortgage obligations, and covered utility payments. The qualified expenses taken into account to calculate this credit each quarter are limited to 25% of qualified wages or 6.25% of 2019 gross receipts, with a maximum credit amount of $50,000. Employers with 1,500 or more full-time employees **or** $41.5 million in gross receipts in 2019 are ineligible for the credit. (See § 20212.)
15. Creates a payroll credit for certain pandemic-related employee benefit expenses paid by employers.

- Employers are eligible to claim a credit against payroll taxes, of up to a maximum amount of $5,000 per employee, (i) for 50% of qualified pandemic-related employee benefit expenses paid with respect to an employee if a substantial portion of the services performed by the employee constitutes essential work; and (ii) for 30% of qualified pandemic-related employee benefit expenses paid with respect to any other employee. Qualified pandemic-related employee benefit expenses includes amounts paid to reimburse an employee for reasonable and necessary personal, family, living, or funeral expenses incurred as a result of a federally declared disaster related to the COVID-19 outbreak. (See § 20204.)

Part E: Benefits for Self-Employed Individuals

16. Expands the (Phase 2) FFCRA sick and family leave credits with respect to self-employed individuals.
    - Increases the rate of credit for the qualified sick leave equivalent amount for self-employed individuals from $200 to $511 per day, and increases the corresponding average daily self-employment income rate for the taxable year from 67% to 100%. This is effective as of the date of the enactment of the HEROES Act. (See § 20222.)
    - Increases the number of days for which the credit for the qualified family leave equivalent amount can be taken, from 50 to 60 days. This is effective as of the date of the enactment of the FFCRA. (See § 20223.)
    - Increases the reduction threshold for the qualified family leave equivalent amount for self-employed individuals also receiving certain wages from an employer, from $10,000 to $12,000. (See § 20223.)
    - Taxpayers can elect to use net earnings from self-employment income from 2019, rather than 2020, for calculating both (i) credits for sick leave and (ii) credits for family leave. This is effective as of the date of the enactment of the FFCRA. (See § 20224.)
17. Creates a business interruption credit for certain self-employed individuals.
    - Introduces a tax credit to eligible self-employed individuals of 90% on qualified self-employment income. A taxpayer is eligible where there is a reduction in gross receipts from 2019 to 2020 that exceeds 10%.
    - Income taken into account for the calculation of the credit cannot exceed the reduction in gross income and is capped at $45,000.
    - The credit begins to phase out for taxpayers with adjusted gross income of $60,000 ($120,000 in the case of a joint return) in 2020. (See § 20213.)