



Update: Tax Provisions of the CARES Act

A number of clients have recently asked us about the interplay between the covered loan program and the payroll tax provisions of the Coronavirus Aid, Relief, and Emergency Security Act (the “CARES Act”) and particularly whether claiming the Employee Retention Credit or deferring the payment of employer payroll taxes would affect their ability to receive covered loans and loan forgiveness under the Paycheck Protection Program.



Employer Retention Credit and Covered Loans

As mentioned in our earlier Client Alert dated March 26, 2020 - Coronavirus Alert Update: The CARES Act – What You Need to Know (available [here](#)) - an Eligible Employer that receives a covered loan under the Paycheck Protection Program is not eligible for the retention credit. Since the CARES Act requires the U.S. Department of the Treasury to provide regulatory guidance on how Employee Retention Credits claimed by an employer for one period are to be recaptured if that employer receives a covered loan in a subsequent period, it is fair to assume that merely claiming an Employee Retention Credit will not affect an employer’s eligibility to receive a covered loan. While the precise method by which Employee Retention Credits will be recaptured awaits the issuance of regulations, two recapture methods come to mind. The first would involve reducing the amount of covered loan forgiveness by the amount of the Employer Retention Credits claimed; the second would require repayment of the Employer Retention Credits claimed at or shortly after the covered loan closing. Under the first method, the employer would continue to enjoy the economic benefit of the Employer Retention Credit, net of a low interest charge, until the second anniversary of its receipt of the covered loan proceeds. Under the second method, the employer will neither benefit economically from claiming the Employee Retention Credit, nor will it suffer any economic cost. In

view of the uncertainty as to when covered loan proceeds will be received, employers might consider claiming the Employer Retention Credit.

Deferral of Employer Payroll Taxes and Loan Forgiveness

The provision of the CARES Act that permits employers to defer the payment of employer payroll taxes expressly provides that the right to defer does not apply to an employer who has “had” covered loans forgiven. The use of the past tense suggests strongly, but not conclusively, that deferring the payment of employer payroll taxes will not affect an employer’s right to forgiveness under the covered loan program. It is unclear whether loan forgiveness merely terminates an employer’s right to defer payment of employer payroll taxes that, absent the CARES Act, become due after loan forgiveness has occurred or will require the employer to pay taxes that had, absent the CARES Act, become due prior to that time. We presume the U.S. Department of the Treasury will provide regulatory guidance on these issues, as well.

If you have any questions regarding tax provisions of the CARES Act, please contact [Barry Klingman](#) at (212) 873-1978 or baklingman@wbny.com.

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