



# TaxNewsFlash

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## Legislative update: Compensation and benefits issues in Senate Republican COVID-19 bills released this week

Senate Republicans this week released several bills intended to serve as components of a Senate response to the coronavirus (COVID-19) pandemic.

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While the bills address a variety of issues, this summary focuses on provisions in two of the bills that could affect compensation and benefits issues. These provisions address modifications to the Employee Retention Credit (ERC); introduce a new tax credit for certain COVID-19-related expenses; and provide clarifications related to several qualified plan issues raised in the “Coronavirus Aid, Relief and Economic Security Act” (CARES Act).

### **S.4318, the “American Workers, Families, and Employers Assistance Act”**

#### **Enhanced employee hiring and retention payroll tax credit**

The CARES Act provides a refundable credit for employers to retain workers. One of the Senate bills released this week (S.4318) would increase the percentage of credit to 65% of qualified wages from the current 50%. The maximum amount of qualified wages would be increased to \$10,000 per quarter up to \$30,000 total.

The gross receipts test would be amended to provide that an employer is eligible if they have a more than 25% decrease in gross receipts. An employer that was not an eligible employer for the calendar quarter ending on June 30, 2020, could elect to use an alternative quarter as prescribed by Treasury. Rather than look to the current quarter, an employer could look to a decline in gross receipts in the prior quarter to qualify. Gross receipts of tax-exempt organization would have a new clause specifying that any reference to gross receipts would be treated as a reference to gross receipts within section 6033, which would be retroactively effective as if enacted in the original CARES Act.

When looking at the number of full-time employees for purposes of determining qualified wages, the bill would modify the ERC to differentiate between employers with 500 or fewer employees and

employers with more than 500 employees. The CARES Act originally considered whether an employer had 100 or fewer employees.

The bill would clarify that health care expenses are qualified wages as long as the amount is excluded from income under section 106. This provision would be retroactive to the original date of enactment of the CARES Act.

The bill would allow employers to be eligible for both the Payroll Protection Program (PPP) and the ERC. However, the PPP would be amended to provide costs would not include qualified wages that are paid or incurred in calendar quarters beginning after June 30, 2020, and are taken into account in determining the credit under the ERC. However, if after June 30, 2020, an employer elected to not treat wages as eligible for the ERC, but instead as PPP costs, but the PPP loan was not forgiven, the wages could still be qualified for the ERC.

These changes are generally proposed to be effective for calendar quarters beginning after June 30, 2020. However, the clarification of health expenses and changes to gross receipts for tax-exempt entities would be retroactive to the original date of enactment the CARES Act.

### **Expansion of work opportunity credit**

The work opportunity tax credit (WOTC) provides an elective tax credit to employers hiring individuals in specific targeted groups.

The bill would expand the WOTC to provide a credit for “a qualified 2020 COVID-19 unemployment recipient,” who is someone certified by the designated local agency to have received or been approved to receive unemployment compensation. The unemployment or approval must be under state or federal law for either the week immediately preceding the hiring date or the week which includes the hiring date and the employee must begin work for the employer before January 1, 2021. The credit would be for 50% of qualified first-year wages, with a \$10,000 limitation on qualified first-year wages that may be taken into account with respect to each individual. The bill would remove the rehires exclusion for qualified 2020 COVID-19 unemployment recipients and would provide Treasury with regulatory authority to prevent abuse.

### **Safe and healthy workplace tax credit**

The bill would establish a refundable payroll tax credit equal to 50% of an employer’s expenses for:

- “Qualified employee protection expenses” including expenses for testing employees and customers for COVID-19, equipment to protect employees and customers (including masks, gloves, and disinfectants), and cleaning products and services to prevent the spread of COVID-19
- “Qualified workplace reconfiguration expenses” for modifications to areas regularly used by employees or customers to prevent the spread of COVID-19
- “Qualified workplace technology expenses” for expenses such as contactless point-of-sale systems and technology to track employee interactions with customers

The primary purposes of these expenses would need to be preventing the spread of COVID-19.

Applicable dollar limits on the credits for qualified expenses would be based on the employer’s average number of employees (on an aggregated employer basis). The credits for an employer could not exceed a cap equal to the sum of:

- \$1,000 multiplied by the average of employees employed during the quarter not in excess of 500; plus

- \$750 multiplied by the average number of employees in excess of 500 but not in excess of 1,000; plus
- \$500 multiplied by the average number of employees in excess of 1,000.

The credit would be limited to employment taxes reduced by any credits under the *Families First Coronavirus Response Act* (FFRCRA) for required paid sick leave and expanded Family and Medical Leave Act (FMLA) and any credits for the ERC. Any excess credit would be refundable. The credit would apply to amounts paid or incurred for qualified expenses after March 12, 2020, and before January 1, 2021.

### **COVID-19 assistance provided to independent contractors**

This provision would establish a safe harbor to allow marketplace platform companies to provide independent contractors with COVID-19-related benefits without affecting independent contractor status. The bill would provide that certain benefits would not be taken into account in determining the status of the individual as an employee. These benefits include:

- Financial assistance to an individual while the individual is not performing services or performing reduced services because of COVID-19
- Health care benefits related to COVID-19, including testing
- Equipment to protect the individual, service recipients or customers from contracting COVID-19 (including masks, gloves, and disinfectants)
- Cleaning products and services related to preventing the spread of COVID-19
- Training, standards, and guidelines or similar information related to COVID-19

Benefits (other than financial assistance) would be treated as section 139 qualified disaster relief payments excludable from the service provider's taxable income.

This provision would be effective for benefits provided after March 12, 2020, and before January 1, 2021.

### **Application of special rules to money purchase pension plans**

The CARES Act allows penalty-free coronavirus-related withdrawals from eligible retirement plans, and the participant can pay the applicable income tax over three years. The Senate bill would clarify that participants of a money purchase pension plan could be eligible for an in-service coronavirus-related distribution.

### **Clarification of delay in payment of minimum required contributions**

The CARES Act allows single-employer pension plans to delay the minimum required contributions otherwise due during 2020 until January 1, 2021. The Senate bill would amend that provision to delay the due date until January 4, 2021, which would allow employers to make the required pension contributions on the first business day of 2021.

### **Employee certification as to eligibility for increased CARES Act loan limits from employer plan**

The bill would provide that an administrator of a qualified employer plan could rely on an employee's certification that the employee meets the requirements for the increased retirement plan loan limits for 2020. The provision would be effective as if it had been originally included in CARES Act.

### **Temporary carryover for health and dependent care flexible spending arrangements**

The bill provides that a plan would not fail to be treated as a cafeteria plan or flexible spending arrangement (health or dependent care) because the plan allows participants to carry over unused

benefits or contributions remaining in the flexible spending arrangement (up to certain limits) from the plan year ending in 2020 to the plan year ending in 2021.

## **S.4319, the “Supporting America’s Restaurant Workers Act”**

This Senate bill would temporarily allow a full deduction for certain business meals. Section 274(n)(2) would be amended to provide a new exception that would allow a full deduction if the expense were for food or beverages provided by a restaurant and were paid or incurred before January 1, 2021. The provision would be effective for amounts paid or incurred after the date of enactment.

### **Next steps**

The U.S. House of Representatives on May 15, 2020, passed (on a largely party-line vote) the “Health and Economic Recovery Omnibus Emergency Solutions Act” (HEROES Act). There are many significant differences between the HEROES Act and this week’s Senate Republican proposals. For further legislation in response to COVID-19 to become law, the House, Senate, and White House all would ultimately have to agree on identical legislation.

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