

TYPES NOT MAPPED YET May 14, 2020 | TTR not mapped yet | Edward J. Buchholz, David J. Kaufman

# HEROES Act proposes more potential tax incentives

As part of a “phase 4” COVID-19 economic relief package, House Speaker Nancy Pelosi introduced a more than 1,800 page bill known as the Health and Economic Recovery Omnibus Emergency Solutions Act (“HEROES Act”). While neither the Senate nor House has enacted the HEROES Act, nor has the Administration expressed its specific views, the following is a summary of the significant tax incentives set forth in the bill. The tax incentives ultimately included in any enacted legislation will be subject to significant negotiations among Republicans and Democrats in Congress, as well as the Administration.

### State and local tax deduction

The Tax Cuts and Jobs Act of 2017 (the “TCJA”) limits itemized deductions for state and local taxes to \$5,000 for a married person filing a separate return (and \$10,000 for all other tax filers). The TCJA limit on state and local taxes applies to tax years beginning after December 31, 2017, and before January 1, 2026. The HEROES Act proposes that the TCJA limit on state and local taxes only apply to tax years beginning before January 1, 2020, or after December 31, 2021 (i.e., the limitation on deductibility of state and local taxes would not apply to the 2020 and 2021 tax years of calendar year taxpayers).

### Employee retention tax credit

The HEROES Act proposes increasing the employee retention tax credit (the “ERTC”) from 50% of “qualified wages” (capped at \$10,000 in the aggregate) to 80% of “qualified wages” (capped at \$15,000 in any calendar quarter and \$45,000 in the aggregate). In other words, the maximum ERTC under the HEROES Act would equal \$36,000 (rather than \$5,000 under the enacted Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”).

As you are likely aware, the CARES Act generally provides that if an employer has greater than 100 full-time employees, qualified wages are limited to those wages paid to an employee **not providing services**. The HEROES Act proposes applying the “not providing services” limitation only to “large employers” (i.e., (i) average number of full-time employees employed by an employer is greater than 1,500 or (ii) the gross receipts of an employer are greater than \$41.5 million).

Finally, the CARES Act provides that the ERTC is only available to “eligible employers.” The CARES Act generally defines an eligible employer as an employer that either (i) fully or partially suspends its trade or business because of a governmental order (the “Governmental Order Test”) or (ii) experiences a more than 50% decrease in gross receipts (the “Gross Receipts Test”). The HEROES Act proposes to require only a 10% decrease in gross receipts to satisfy the Gross Receipts Test; however, with respect to employers experiencing a decrease in gross receipts between 10% and 50%, the HEROES Act proposes only a partial ERTC. With respect to employers experiencing a decrease in gross receipts greater than 50%, the HEROES Act proposes a full ERTC.

### Fixed expense tax credit

The HEROES Act proposes a new fixed expense tax credit (the “FETC”) against employment taxes owed by certain “eligible employers” generally equal to 50% of “qualified fixed expenses” paid or incurred by an employer during a calendar quarter. For purposes of the FETC, the HEROES Act proposes a definition of “eligible employer” similar to the definition used for the ERTC. The HEROES Act proposes to define “qualified fixed expenses” as the payment or accrual of any covered mortgage obligation, covered rent obligation, or covered utility payment.

The HEROES Act proposes that the amount of qualified fixed expenses taken into account for purposes of the FETC cannot exceed the lesser of: (i) the qualified fixed expenses paid by the employer in the corresponding 2019

calendar quarter; (ii) \$50,000; or (iii) the greater of (x) 25 percent of wages paid to employees for such calendar quarter or (y) 6.25 percent of the employer's gross receipts in the corresponding 2019 calendar quarter.

Similar to the ERTC proposal, (i) the HEROES Act proposes a partial FETC with respect to employers experiencing a decrease in gross receipts between 10% and 50%, and (ii) the HEROES Act proposes a full FETC with respect to employers experiencing a decrease in gross receipts greater than 50%. Also similar to the ERTC, the HEROES Act proposes that the FETC act as a fully refundable tax credit (i.e., the credit can exceed the amount of taxes owed).

### Net operating losses

As we previously discussed ([Effect of COVID-19 tax legislation on NOL carryforwards and carrybacks](#)), the CARES Act provides the following with respect to carrying back net operating losses ("NOLs"): (i) NOLs generated in any taxable year beginning on or before December 31, 2017, can be carried back two taxable years; (ii) NOLs generated in any taxable year beginning after December 31, 2017, and on or before December 31, 2020, can be carried back five taxable years; and (iii) NOLs generated in any taxable year beginning on or after January 1, 2021, are not eligible for carryback.

The HEROES Act proposes that taxpayers cannot carry back any NOLs generated in a taxable year beginning after December 31, 2018, and before January 1, 2021, to any taxable year beginning before January 1, 2018.

NOL generated in taxable years	Carryback eligibility
Beginning on or before December 31, 2017	Two taxable years
Beginning after December 31, 2017, and on or before December 31, 2018	Five taxable years
Beginning after December 31, 2018, and on or before December 31, 2020	Cannot be carried back to any taxable year beginning before January 1, 2018 (i.e., preventing the carrying back of NOLs to taxable years in which the corporate federal income tax rate equaled 35%)
Beginning on or after January 1, 2021	Generally, no carryback

### Excess business losses

The TCJA generally disallows "excess business losses" of noncorporate taxpayers generated in taxable years beginning after December 31, 2017, and before January 1, 2026. The CARES Act modifies the relevant taxable years such that the TCJA limitation on excess business losses only applies to taxable years beginning after December 31, 2020, and before January 1, 2026. The HEROES Act proposes to reinstate, and make permanent, the TCJA limitation on excess business losses.

If you have any questions on these proposed incentives, please feel free to call or e-mail your regular contact at Thompson Coburn. For more information from Thompson Coburn related to COVID-19, please visit our resource page.

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