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**WEBINAR SERIES**

**SESSION 10** | Tuesday, June 16

**US Tax Update: Legislation and Other Guidance and Controversies in a COVID-19 Environment**

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# US TAX UPDATE: LEGISLATION AND OTHER GUIDANCE AND CONTROVERSIES IN A COVID-19 ENVIRONMENT

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# **COVID-19 IMPLICATIONS ON TAX ADMINISTRATION**

# Timeline of COVID-19 Relief Guidance



## CONGRESSIONAL LEGISLATION

- **Phase 1:** Coronavirus Preparedness and Response Supplemental Appropriations Act (\$8.3 billion of aid to the United States' public health response)
- **Phase 2:** Families First Coronavirus Response Act (relief for employers and employees affected by COVID-19)
- **Phase 3:** Coronavirus Aid, Relief and Economic Security (CARES) Act (\$2.2 trillion stimulus package)
- **Phase 4:** What is coming down the pike from Congress?

## IRS GUIDANCE

- Between March and June composed of at least:
  - Nine Revenue Procedures
  - Thirteen Notices
  - Hundreds of FAQs and News Releases

## STATE GUIDANCE

- Varies by jurisdiction
- Does not necessarily follow federal approach or law

# Key IRS Administrative Guidance



**Notice 2020-18 (March 20, 2020)**, issued to restate and expand upon Notice 2020-17 (March 18, 2020) and generally provides that the deadlines for both filing federal income tax returns and making certain payments are extended from April 15, 2020 to July 15, 2020.

**Notice 2020-20 (March 27, 2020)**, issued to update and amplify this relief to include Gift Tax and Generation-Skipping Transfer Tax returns.

**Notice 2020-23 (April 9, 2020)**, amplifies Notice 2020-18 and Notice 2020-20 and provides relief for many issues that the previous notices left unaddressed.

**Rev. Proc. 2020-29 (April 30, 2020)**, temporarily allows electronic submission of requests for letter rulings, closing agreements, determination letters, and information letters under the jurisdiction of the IRS Office of Chief Counsel, and for determination letters issued by LB&I. Until further modification of the procedure, the IRS will allow both electronic and paper submissions.

# State Tax Guidance

- **State Tax Relief – Extensions**
- **Telecommuting Employees/Mobile Workforce Issues**
  - Payroll Tax/Personal Income Tax
  - Corporate Income Tax
  - NYC UBT Sourcing Issues
- **Conformity to IRC Changes**
- **Morgan Lewis State Tax Response Chart:**

<https://www.morganlewis.com/pubs/state-and-local-tax-responses-to-covid-19>



The image shows a thumbnail of a chart titled "Morgan Lewis STATE TAX RESPONSE" with the subtitle "COVID-19". The chart is organized into a table with columns for "State" and "Relief Link". The "State" column lists various states, and the "Relief Link" column provides links to specific tax relief measures. The chart is partially obscured by a dark overlay.

State	Guidance Relief Provision for COVID-19	Relief Link
Alabama	...	...
Alaska	...	...
Arizona	...	...
Arkansas	...	...
California	...	...
Colorado	...	...
Connecticut	...	...
Delaware	...	...
District of Columbia	...	...
Florida	...	...
Georgia	...	...
Hawaii	...	...
Idaho	...	...
Illinois	...	...
Indiana	...	...
Iowa	...	...
Kansas	...	...
Kentucky	...	...
Louisiana	...	...
Maine	...	...
Maryland	...	...
Massachusetts	...	...
Michigan	...	...
Minnesota	...	...
Mississippi	...	...
Missouri	...	...
Montana	...	...
Nebraska	...	...
Nevada	...	...
New Hampshire	...	...
New Jersey	...	...
New Mexico	...	...
New York	...	...
North Carolina	...	...
North Dakota	...	...
Ohio	...	...
Oklahoma	...	...
Oregon	...	...
Pennsylvania	...	...
Rhode Island	...	...
South Carolina	...	...
South Dakota	...	...
Tennessee	...	...
Texas	...	...
Utah	...	...
Vermont	...	...
Virginia	...	...
Washington	...	...
West Virginia	...	...
Wisconsin	...	...
Wyoming	...	...



# Practical Implications

- **Impact on IRS Operations**

- COVID-19 Shutdowns & “Mission Critical” Operations
- People First Initiative
- Recent IRS Announcements Regarding Reopening

- **Impact on the US Tax Court**

- May 29, 2020 Press Release
- Administrative Order 2020-02 – Remote Proceedings During COVID-19 Pandemic
- Administrative Order 2020-03 – Limited Entry of Appearance Procedures, Effective June 1, 2020

- **Impact on State Operations**

- Postponed Trials and Administrative Hearings
- Shift to Desk Audit Examinations



# CARES ACT TAX CHANGES

# Net Operating Losses (NOLs)—Reduced Limitation, Temporary Ability to Carry Back

- Prior to the 2017 Tax Cuts & Jobs Act (TCJA):
  - NOLs could be carried back two years and carried forward 20 years
  - NOLs could be used to fully offset taxable income
- The TCJA narrowed these rules by\*:
  - Repealing the historic two-year carryback period
  - Limiting the NOL for a taxable year to 80% of taxable income for the year
- The 2020 CARES Act relaxes the rules enacted under the TCJA by:
  - Allowing NOLs to fully offset taxable income generated in 2018, 2019, and 2020
  - Allowing NOLs generated in 2018, 2019, or 2020 to be carried back five years

\* Rules apply to NOLs generated in post-TCJA years

# Limits on Deductibility of Interest Expense



- **Prior to the TCJA, section 163(j) “earnings stripping” rules limited deductions on interest paid to related parties not subject to US tax.**
- **The TCJA replaced the old “earnings stripping” rules with a broad limitation on the deduction of business interest expense.**
  - Business interest expense is deductible to the extent of the sum of (i) business interest income, (ii) 30% of adjusted taxable income, and (iii) floorplan financing interest (disallowed interest expense is carried forward).
  - Rule applies at both the partner and partnership levels.
- **The CARES Act relaxes the rules enacted under the TCJA by providing the following:**
  - For 2019 and 2020, 30% adjusted taxable income limitation increased to 50%.
  - Partnerships get a special rule for 2019 – if the partnership had disallowed business interest expense, 50% of a partner’s share of the 2019 disallowed business interest expense will be deductible in 2020 (without limitation) and 50% is still subject to the normal carryforward rules.
  - For 2020, taxpayer can choose to use 2019 adjusted taxable income for limitation purposes.
  - Taxpayers can elect out of these relief provisions.

# Implications of NOLs and Interest Deduction Changes for Hedge Funds



- **The CARES Act changes regarding NOLs and interest deductions are relevant to:**
  - Hedge funds that are engaged in business, e.g., active trading funds
  - Hedge funds with side-pocket equity investments in portfolio companies that are operating businesses
- **Other CARES Act changes, e.g., expanded ability to currently deduct certain capital improvements, may be relevant to, in particular, hedge funds with investments in portfolio companies entitled to these benefits.**
- **Claiming benefits will generally require the filing of an amended return or a request for tentative refund**
  - Procedural choices for this are discussed below
  - Shifting ownership in hedge funds adds complications in terms of which partners might receive a tax benefit
  - Further complications with respect to benefits are triggered at a portfolio company level, where the portfolio company was under different prior ownership
- **Use of NOLs or interest deductions may have other indirect impacts, particularly where there are non-US subsidiaries or operations**
  - 965 (transition tax) – CARES Act assumes taxpayers elected not to apply NOLs to Section 965 liability (see Section 965(n))
  - GILTI – Use of additional NOLs to offset GILTI may “dilute” value of NOLs or interest deductions
  - BEAT – Use of additional NOLs or interest deductions may increase BEAT liability by increasing Modified Taxable Income and reducing regular tax liability

# Excess Business Losses

- Prior to the TCJA:
  - No specific limitation or guidance concerning excess business losses (losses in excess of \$250K of taxable income)
- The TCJA limits deduction of certain business losses by:
  - Disallowing noncorporate taxpayers from deducting excess business losses between 2018 and 2025
- Disallowed loss treated as an NOL that may be carried forward
- The CARES Act relaxes the rules enacted under the TCJA by postponing excess business loss disallowance rules until taxable years beginning in 2021



# **AMENDED PARTNERSHIP RETURNS**

# Revenue Procedure 2020-23



- Under Revenue Procedure 2020-23, certain partnerships are allowed to amend returns for the 2018 and 2019 taxable years.
- The guidance is intended to allow partners to more immediately benefit from retroactive provisions in the CARES Act, some of which are irrelevant for funds and managers.
- In general, the Bipartisan Budget Act of 2015 (the BBA):
  - Does not allow partnerships that are subject to the BBA to file amended returns,
  - Instead, it requires them to file administrative adjustment requests (AARs), which in the case of favorable adjustments can only produce partner-level benefits on AAR-year taxable income.
- The BBA rules would thus require relief under an AAR to be deferred until current-year returns of partners are filed (for many, in 2021).

# Scope?

**Although prompted by the CARES Act, the Revenue Procedure does not require any changes on the amended returns to relate to the CARES Act.**



# How Is This Relevant to Funds?



- IRS representatives have informally confirmed this view—amendment is allowed even if all changes are unrelated to the CARES Act.
- But the right to amend a return doesn't mean that funds will (or even should) amend a return.
- Consequences
  - Amendment allowed before September 30, 2020.
  - Partnerships that avail themselves of the right to amend their returns must comply with the terms of Rev. Proc. 2020-23 and also furnish corresponding amended Schedules K-1 to their partners.
- Are partners required to amend?
  - Generally, the BBA rules require consistency.
  - But a taxpayer generally has no duty to amend a return.
  - Because any amendment would likely result in a favorable change, partners may want to amend. But, for partners with relatively small interests, amendment might not make economic sense.

# How Is This Relevant to Managers?



- Certain CARES Act provisions are more relevant to managers than to funds.
- Managers and other entities structured as partnerships may be able to amend.
- Other types of entities are generally allowed to amend.

# Considerations

- Does anything in the CARES Act justify amendment?
- Does anything outside the CARES Act justify amendment?
- If there's a reason to amend, what do the relevant operating agreement and any other documents (e.g., side letters) require?
- Would an AAR be better?
- Should some partnerships amend with respect to one or more issues, and follow the BBA rules with respect to one or more other issues?
- There are special rules for amending returns that are already under audit.



# **PAYROLL TAX CREDITS AND DEFERRALS**

# Payroll Tax Credit



- The CARES Act provides a maximum \$5,000-per- “eligible employee” refundable tax credit against employer-side OASDI (i.e., Social Security taxes) for certain employers, provided (1) their trade or business operations fully or partially shut down due to COVID-19—related government orders, or (2) they experienced a more than 50% decline in gross receipts (or operations, for tax-exempt employers) as compared to the corresponding calendar quarter in 2019.
- The credit applies to 50% of the “qualified wages” paid to employees between March 13, 2020 and December 31, 2020.
- For large employers (more than 100 full-time (30 hours) employees during 2019), “qualified wages” (including health benefits) available for tax credit are capped at \$10,000 (thus limiting the maximum potential 50% credit to \$5,000). For eligible employers with 100 or fewer full-time employees, 50% of all employee wages up to \$10,000 per employee, including health benefits, qualify for up to a \$5,000-per employee-tax credit, whether or not the wages were paid during a shutdown or slowdown.
- The credit is *not* available to employers who have received a loan under the “Paycheck Protection Program.”
- There are a number of items that are still unclear, including (1) how full and partial suspensions will be determined; (2) how the credit applies to large employers that provide reduced hours for employees; (3) whether the credit applies to any new employees added after enactment; and (4) whether the credit will be expanded, as similar prior refundable credits were, to cover other federal employment taxes (i.e., federal income tax withholding, employer portion of Medicare tax, and employee portion of Social Security and Medicare taxes).

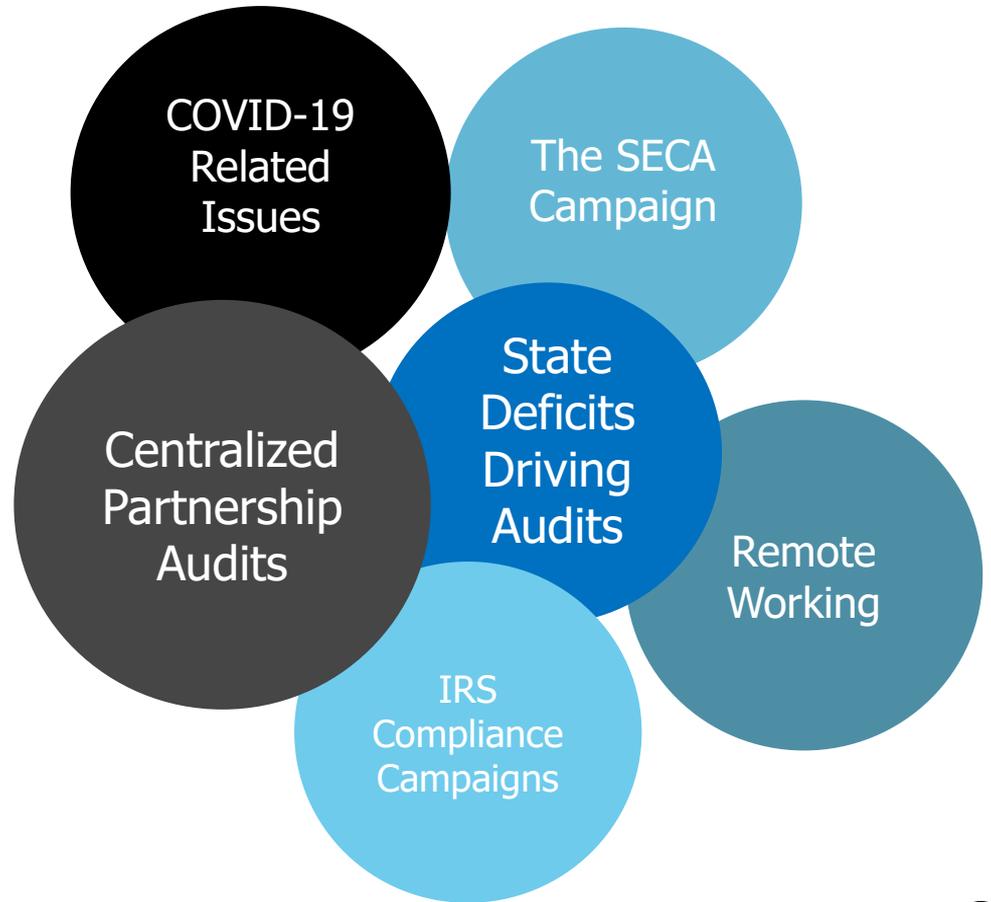
# Payroll Tax Deferral

- The CARES Act provides that employers may delay payment of 100% of the employer-side OASDI tax (i.e., Social Security taxes) due between enactment of the Act on March 27, 2020 and December 31, 2020. Similarly, self-employed individuals may delay payment of 100% of Social Security taxes on self-employment income (at the 6.2% tax rate) paid between enactment of the Act and December 31, 2020. The deadline for paying the first half of the deferred taxes is December 31, 2021, and the deadline for paying the remaining 50% of taxes is delayed until December 31, 2022. These delay relief provisions are available regardless of workforce size.
- There are some special rules where employer is recipient of PPP loan that is ultimately forgiven.



# **CONTROVERSY UPDATE**

# Looming Controversies



# The Centralized Partnership Audits Have Begun

- **Passed in 2015 and effective for tax years beginning after December 31, 2017**
- **Overhauled the manner in which partnerships are audited and assessed**
  - Audit, adjustment, assessment, and payment at partnership level with limited exceptions
  - Vests all authority to bind the partnership in one person, the Partnership Representative
- **Intended to make it easier for the IRS to audit partnerships with projected \$9.3 billion revenue raiser (federal alone)**
- **Regulations implementing legislation rolled out June 2017–Dec. 2018**
- **IRS trained and revamped its partnership audit function**
  - Hired at least 500 new agents last year
  - All new operating procedures, forms, and publications
  - Focused training for agents in partnership issues

# IRS “Compliance Campaigns”

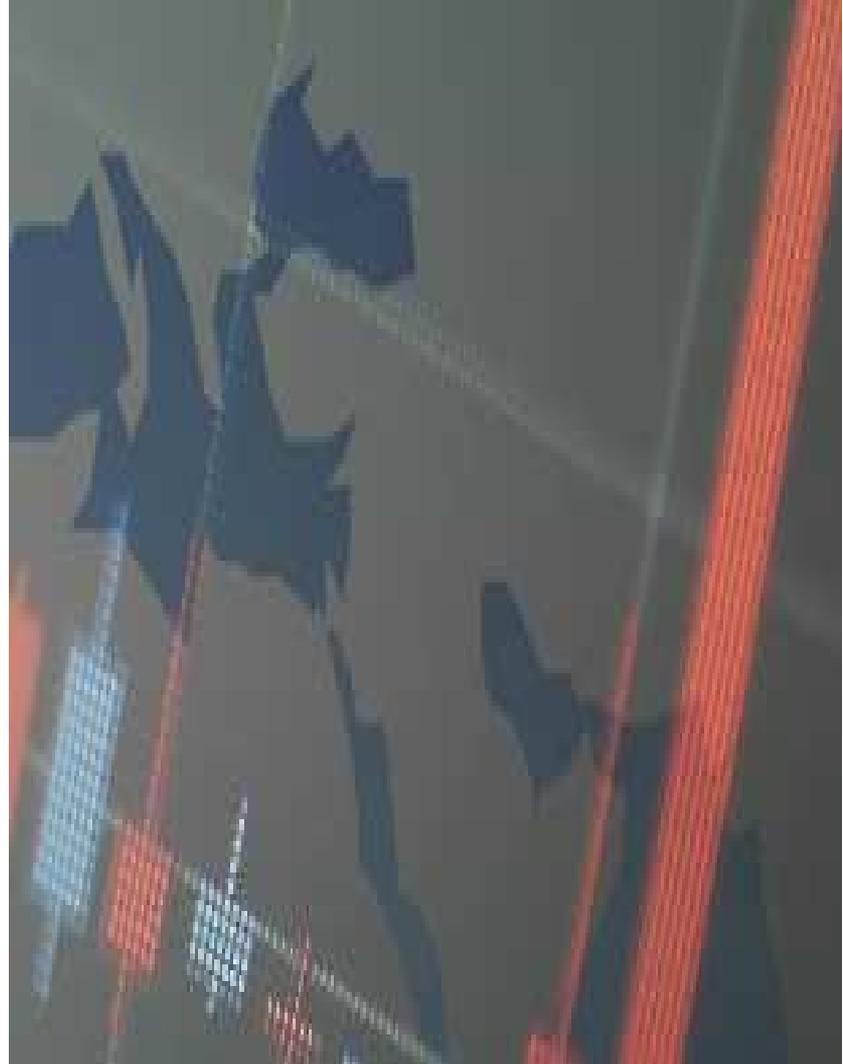
- IRS rollout of “Compliance Campaigns”
- Specially identified issues that the IRS has determined present a risk
- Through identification of areas of greatest risk and focused use of resources, IRS achieves a better return on investment
- Development of “treatment streams” to drive IRS compliance objectives
  - IRS rollout of internal training and directives around certain issues
  - Designation of cases for litigation
- Currently 50+ Compliance Campaigns, with full listing at <https://www.irs.gov/businesses/full-list-of-lb-large-business-and-international-campaigns>

# The SECA Tax Campaign

- Targets self-employment taxes paid on a partner's distributive share of income from a partnership
- Issue is whether limited partners in IM partnerships (or members in LLCs or LLPs) are subject to self-employment taxes on their distributions other than guaranteed payments
- Many investment management funds take the view that these LP distributions are not subject to self-employment tax, relying upon a long-standing statutory provision, technical interpretations of Treasury Regulations, and market practice
- IRS issued a series of proposed adjustments in the last few months focused on:
  - LPs that were recently converted from an LLC under state law
  - LPs whose partners overlap with the partners in the GP
- SECA audits vs. BBA

# COVID-19 Relief Related Controversies

- **Relief granted by CARES Act can be audited**
  - Employee retention credit—providing a qualifying employer with a refundable payroll tax credit of 50% of each employee's qualified wages paid from March 13, 2020 through December 31, 2020, up to a maximum credit of \$5,000
    - Were you a qualified employer?
    - Were the wages qualified wages?
- **Much of the IRS's guidance is in the form of FAQs**
  - FAQs are not sufficient for penalty protection
  - Defending a position largely based upon FAQs



# COVID-19 State Tax Controversy

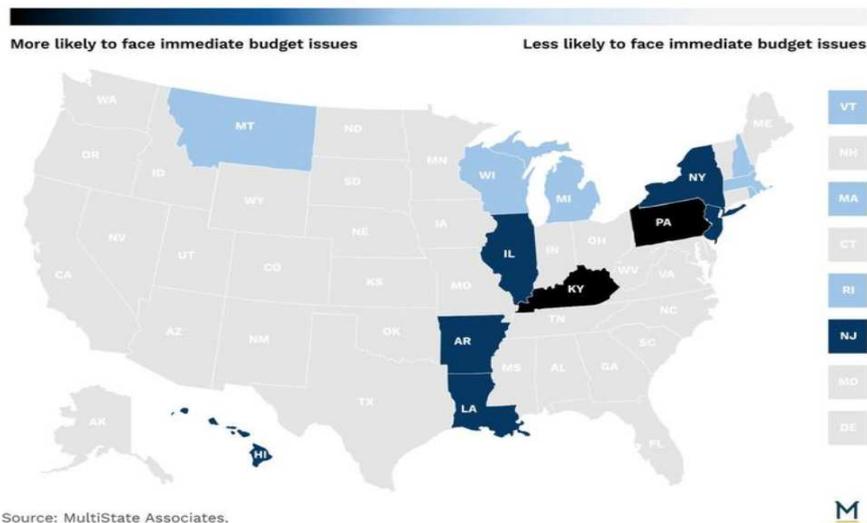
- **Cash-Strapped States**

- All states will face significant fiscal challenges as a result of COVID-19
- MultiState Associates predicts that KY and PA will be the states most likely to face immediate budget problems, followed by AK, HI, IL, LA, NJ, and NY

- **Prepare for Future Audit**

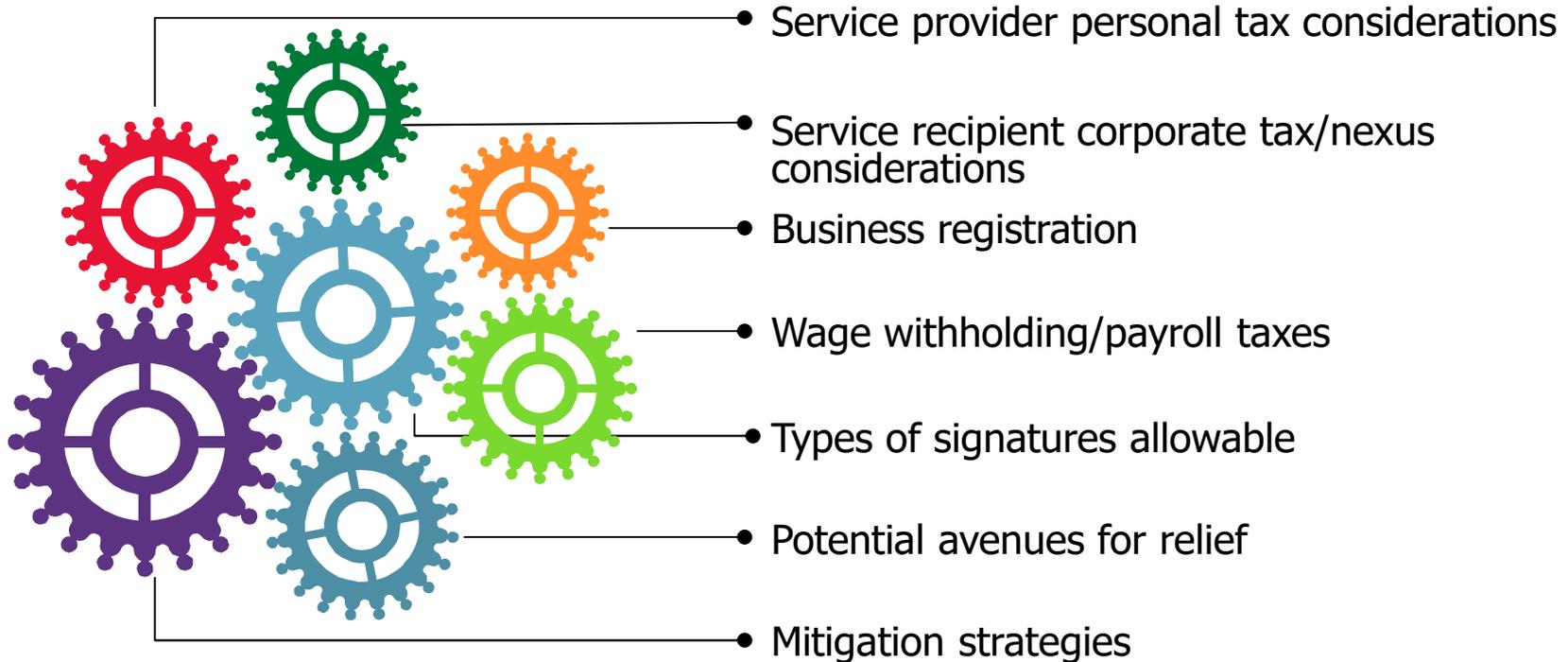
- Stay up to date on state guidance
- Regularly consult with advisors
- Documentation!

How likely is each state to have immediate budget issues as a result of COVID-19?



# REMOTE WORKING

# What Are the Tax Considerations of Remote Working?



# Remote Working – State Tax Action Plan

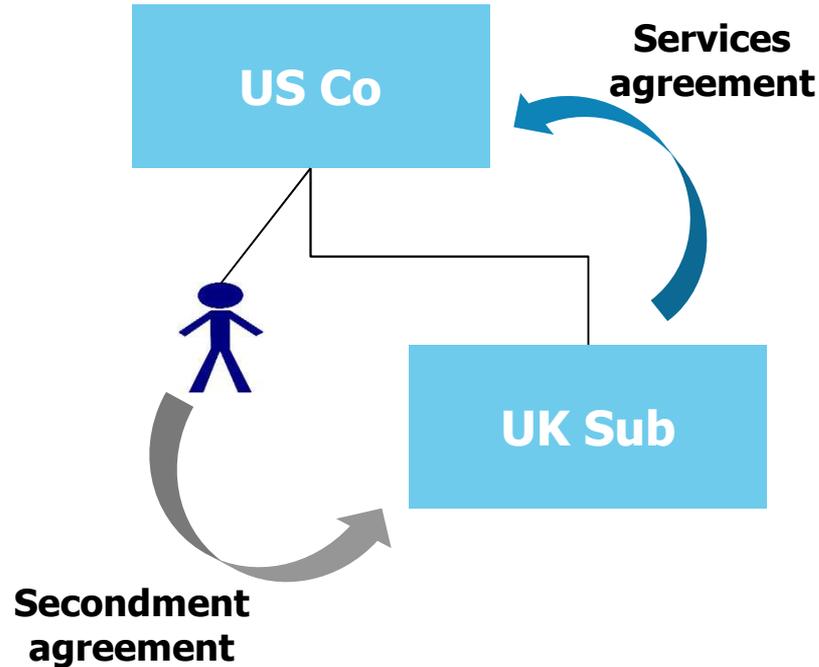
## Payroll Tax

- Confirm payroll tax thresholds in relevant states
- Determine state-specific COVID-19 guidance
- Navigate requirements for states with reciprocal agreements
- Determine “Convenience of Employer” state implications if an employer has a location in CT, DE, NE, NY, PA, and AR
- Revisit telecommuting policy

## Corporate Income Tax

- Determine economic and physical presence nexus standards in relevant states
- Determine state-specific COVID-19 guidance
- Consult with advisors to understand potential liability, including proper receipts factor sourcing
- File accordingly

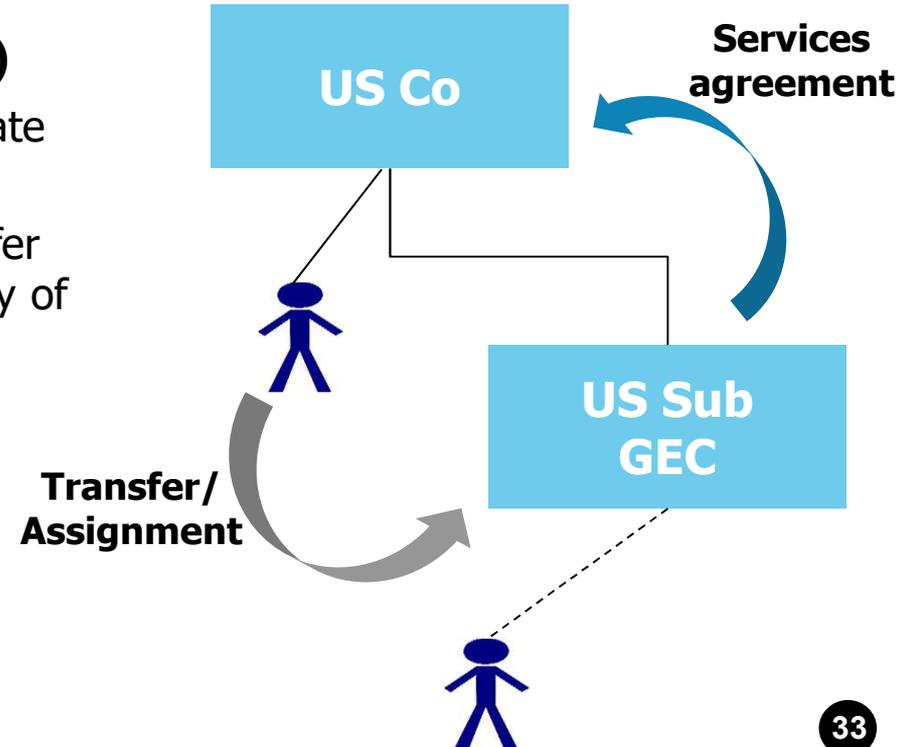
# Mitigation Strategy – Secondment/Leasing



# Mitigation Strategy – GEC

- **Global Employment Company (GEC)**

- Establish a controlled subsidiary to segregate cross-border tax exposure within group
- Use of intercompany agreement and transfer pricing documentation to define profitability of GEC
- Manage challenges to economic substance
- Consider also use of non-U.S. entities



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Charles (Chuck) Bogle's practice covers a wide range of federal income tax-related matters, with a principal focus on the tax aspects of structured finance transactions. Chuck represents sponsors, managers, and underwriters in collateralized bond, loan, and debt obligation transactions, as well as issuers and underwriters in various asset-backed and insurance-related transactions, including credit card, auto loan, marketplace loan, payment plan, and mortgage securitizations. In addition, Chuck has a depth of knowledge regarding the tax aspects of both taxable and tax-free mergers, acquisitions and dispositions, particularly in the investment management space.

Chuck also has more than two decades of experience with the tax considerations relevant to sponsors and managers of investment funds, including hedge funds and private equity funds. In addition, he has a deep background in the tax aspects of various types of financings, and with the tax aspects of leveraged ESOP transactions.

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Jennifer Breen concentrates her practice on tax controversy and planning matters, with an emphasis on audits and controversies and Internal Revenue Service (IRS) administrative proceedings. Jennifer routinely handles matters involving US federal income tax, foreign tax, state and local corporate and business tax, and sales and use tax. She has experience representing major corporations, partnerships, S corporations, and individuals in resolving domestic and international compliance and controversy issues before the IRS.

Prior to joining Morgan Lewis, Jennifer served as director of tax controversy at Mattel, Inc., where she developed and executed audit strategies, responded to information requests from respective tax authorities, and negotiated and resolved controversy matters. She was also responsible for accounting for income taxes under ASC 740, managing the company's global reportable transaction compliance, and ensuring compliance under the Foreign Account Tax Compliance Act.

Jennifer also served as director of tax controversy and regulatory services at PricewaterhouseCoopers LLP for more than seven years. She began her legal career as a lawyer with the IRS Office of Chief Counsel in Washington, DC, where she represented the IRS before the US Tax Court and advised on issues relating to practice and procedure.

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Sarah-Jane Morin focuses her practice on representation of public and private companies, private equity funds, venture capital funds, real estate funds, portfolio companies, and alternative investment vehicles in the tax aspects of complex business transactions and fund formations, including domestic and cross-border investment strategies, sponsor investment strategies, limited partner investment strategies, mergers, acquisitions, integrations, buyouts, recapitalizations, debt and equity restructurings, and ongoing operations and tax compliance issues. Additionally, she advises on international tax issues, including the tax aspects of offshore vehicles (CFC/PFIC/GILTI regimes), anti-deferral rules (Subpart F), withholding, cost sharing, and transfer pricing.

Sarah-Jane advises on the tax aspects of non-profit entity formation and operation, with an emphasis on IRC Section 501(c)(3). She has worked with a number of tax-exempt investors in their LP investments, as well as for clients in their applications for tax exemption.

Prior to joining Morgan Lewis, Sarah-Jane was a senior director in Oracle's tax planning department. Prior to joining Oracle, she was an associate at a multinational law firm.

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Jason P. Traue's practice focuses on federal tax matters. He works extensively with tax issues related to the formation and operation of registered and private investment funds. Jason also assists with merger and acquisition transactions, capital markets transactions, general corporate and partnership tax issues, and international tax issues.

Jason has assisted with the tax aspects of a number of innovative investment funds, including funds of MLPs, funds of hedge funds, and ETFs investing in Chinese A shares. He advises clients on transactions involving funds and on tax-related regulatory disclosure. Jason also has experience with the legal regime commonly referred to as "FATCA."

Jason has helped clients obtain numerous administrative rulings from the Internal Revenue Service and has assisted in federal and state tax controversy matters.

Jason previously worked as an associate at PricewaterhouseCoopers LLP, advising on various tax law issues.

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Working with businesses in industries such as media, financial services, aviation, shipping, and education, Richard S. Zarin counsels clients on tax matters involving international and US transactions. He also advises clients on ongoing tax planning. Richard's experience includes mergers, acquisitions, the formation and operation of joint ventures, debt and equity restructurings, and securities offerings. In addition, he represents organizers of and investors in onshore and offshore investment funds and other alternative investment vehicles.

Richard's work with investment funds and alternative investment vehicles includes those with a range of investment objectives, including private equity, venture capital, and hedge funds.

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**Morgan Lewis**

Cosimo A. Zavaglia advises corporations, partnerships, and individuals on state and local tax controversy, planning, and transactional matters. Cosimo routinely represents clients in high-stakes state and local tax audits, appeals, and litigations in matters throughout the United States, including defending clients in state False Claims Act cases and sales and use tax, individual residency, withholding tax, corporate income tax, and real estate transfer tax audits and disputes. He also advises clients on developing state and local tax planning strategies for corporate acquisitions, dispositions, restructurings, and mergers.

Cosimo works closely with a broad range of clients, including Fortune 500 companies, enterprising startups, and high-net-worth individuals, to develop solutions to mitigate state and local tax risks. He advises in all stages of state and local tax controversy—from initial information gathering, through negotiations and settlement, as well as litigation and appeals, if necessary. Cosimo also obtains formal and informal rulings from state and local tax authorities in many jurisdictions on several issues across tax types and has represented companies and industry groups in legislative and regulatory matters. Prior to joining Morgan Lewis, Cosimo worked in the state and local tax practice of PricewaterhouseCoopers LLP.

In addition to writing extensively on tax subjects, Cosimo has lectured on a broad range of state and local tax topics throughout the country, including for the Tax Executives Institute. He is also active in pro bono work, and is a member of the pro bono committee for the New York office.

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