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Top Federal Tax Policies Of 2020: Midyear Report

By **David van den Berg**

Law360 (July 6, 2020, 5:02 PM EDT) -- As in other areas, so far this year the biggest news in federal tax policy relates to the COVID-19 pandemic, with Congress passing economic relief laws and the IRS issuing key regulations despite its limited operations due to the virus.

Here, Law360 takes a look at notable legislative and regulatory developments in federal tax policy for the first six months of 2020.

CARES Act

In late March, President Donald Trump signed the Coronavirus Aid, Relief and Economic Security Act, a package of provisions to help businesses and individuals weather the economic fallout from the novel coronavirus. The law called on the Internal Revenue Service to distribute economic impact payments of $1,200 to individuals and $2,400 for couples filing joint returns, which would be reduced and then eliminated for incomes above specified thresholds. Last month, the IRS and the U.S. Department of the Treasury announced 159 million payments worth more than $267 million had been sent out.

Tax provisions in the law focused on "employment issues" and "immediate liquidity issues," said Marc Gerson of Miller & Chevalier Chtd. It's hard to assess their impact so far, but the IRS and Treasury have done well in providing guidance, Gerson said.

The impact payments were just one of a host of tax provisions in the virus relief law. It also provided employers a 50% refundable payroll tax credit for workers' wages if they were partly or entirely shut down because of the virus.

The virus relief law also allowed losses from 2018, 2019 and 2020 to be carried back for up to five years and temporarily exempted net operating losses from a taxable income limit, meaning they can fully offset income. Lawmakers also fixed the so-called retail glitch from the Tax Cuts and Jobs Act in the virus law by permitting retailers to instantly write off expenses related to physical improvements instead of depreciating them over 39 years.

Many changes in the CARES Act relating to rules for net operating losses and business interest deductions are favorable to taxpayers, said Ellen McElroy of Eversheds Sutherland.

"While helpful, in the event the financial downturn continues or the economy does not rebound as

quickly as hoped, the changes made to such rules may lapse while taxpayers are still in need of relief," she said.

Families First Law

Earlier in March, Trump signed into law the Families First Coronavirus Response Act, which provided payroll tax credits for businesses with fewer than 500 employees to help cover the costs of paid sick leave for workers. According to the U.S. Department of Labor, employees are eligible for two weeks of paid leave at regular pay if they are experiencing COVID-19 symptoms and waiting for a medical diagnosis or are unable to work because they are quarantined due to a government order or a health care provider's advice.

Workers who have a bona fide need to care for someone subject to quarantine or a child whose school is closed due to the COVID-19 outbreak are eligible for two-thirds of their pay for two weeks under the law, and parents can get two-thirds of their pay for an additional 10 weeks if they need to care for a child whose school or child care is closed for virus-related reasons, the Labor Department said.

To Veena Murthy of Crowe LLP, the purpose of the Families First law was to provide workers paid leave and protections for COVID-19-related needs as are traditionally provided under the Family and Medical Leave Act. Lawmakers erred in limiting the added 10 weeks of leave to parents because not everyone who cannot work because of COVID-19 is a parent, she told Law360. That policy choice is part of a bigger issue concerning which type of worker gets the relief and whether the law properly targeted that type of worker, she said.

It would have been better for eligibility for the program to be based on employees' salary, rather than the number of workers a business employs, so that the aid would go to those who need it most, Murthy said.

Carbon Capture Regs

In May, the IRS released proposed regulations describing how firms can qualify for carbon capture tax credits by showing they have securely stored or disposed of carbon captured from the atmosphere. The credit's value depends on when the equipment was placed in service and the type of treatment that projects apply to the carbon. The regulations also provided details on procedures for companies to allow third parties to claim the credit, and for the agency to recapture it when carbon isn't properly contained or disposed of.

Last month, the IRS issued corrections to the proposed regs, clarifying that the lookback period for recapturing credits is five years.

The proposed regulations and the corrections to them followed the IRS releasing a notice in February allowing investors to claim the credit by showing construction has started on a carbon capture facility by either starting significant, physical labor on a qualified facility or paying or incurring 5% of a facility's total cost.

The ability to rely on the May proposed regulations right away is very helpful and provides certainty needed for carbon capture projects to go forward, said Scott Cockerham of Kirkland & Ellis LLP. He also called the rules for transferring tax credits to contractors "extraordinarily flexible."

Louis Jenull of Thompson & Knight LLP said the investors were eagerly awaiting the guidance.

"Among the things I view as particularly helpful are the guidance on the length of the recapture period, as it helps parties to evaluate the risks on this important issue, and the details on transfers of credits that [help] provide flexibility to structuring deals," Jenull said. "Anything that helps to define the risks and provide flexibility should help investors get more comfortable with this program and potentially get this market moving."

Nonprofit Rules

Last month, the IRS issued proposed regulations that would relieve for-profit firms from having to pay a 21% excise tax on compensation their top executives earn when they volunteer at a related nonprofit. The rules cover a provision of the TCJA that imposed a 21% excise tax on executive pay over $1 million and excess parachute pay to a nonprofit's five top-paid employees.

Under the proposed rules, if such a volunteer receives no compensation from or merely works a relatively limited number of hours for the related nonprofit, there would be an exception to the tax.

Alexander Reid of Morgan Lewis & Bockius LLP told Law360 the tax should only apply to nonprofits that both receive services from a highly compensated employee and bear the economic burden of that compensation.

"Otherwise, the tax becomes a covert tax on small businesses through regulatory overreach," he said.

The executive compensation regulations were just one piece of guidance the IRS has issued regarding nonprofits so far in 2020. In April, the IRS released proposed regulations for a requirement in the 2017 tax law that forced nonprofits with more than one taxable side business to separately calculate their unrelated business taxable income for each of them. The proposed rules allow tax-exempt organizations to group losses and profits from related business activities to make it easier for them to comply with the tax law change.

The proposed regs took some important steps that will clarify and simplify compliance, said Rosemary Fei of Adler & Colvin.

"I credit the IRS for taking practitioner comments seriously and addressing them thoughtfully," she said.

Erin Bradrick of the NEO Law Group said the move in the proposed rules allowing organizations to use two-digit instead of six-digit codes under the North American Industry Classification System to separate trades or business is welcome. However, the rules could place an administrative burden, particularly on small organizations, by moving away from allowing nonprofits to use a reasonable method to determine what is a separate trade or business while relying on the codes as a safe harbor, she said.

--Additional reporting by Stephen Cooper, Amy Lee Rosen, Joshua Rosenberg and Theresa Schliep. Editing by Tim Ruel and Neil Cohen.

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