



Tax News

December 2020

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Small Business Hiring Credit – Get your reservation now!

The time to get your reservation for the new Small Business Hiring Credit has begun! To claim the credit, taxpayers must obtain a tentative credit reservation between December 1, 2020, and January 15, 2021. The California Department of Tax and Fee Administration (CDTFA) administers the reservations where you can apply for one. The total amount of credit available is \$100 million and will be allocated on a first-come-first-served basis.

The credit can offset either sales and use tax, or income and franchise tax. Taxpayers must make this election as to which tax they will offset when applying for their reservation.

Eligible taxpayers must:

- Have had 100 or fewer employees on December 31, 2019
- Have had a 50% reduction in their gross receipts for the period of April through June 2020 when compared to the same period in 2019.
- Must not file or be eligible to file a combined report

Each taxpayer is eligible for up to \$100,000 in credit. The amount of credit is \$1,000 per increase in employees, as measured in average monthly full-time-employee equivalents. The increase is measured by comparing the period from July through November, 2020, to the period from April through June, 2020.

For additional information and requirements related to the credit, visit CDTFA's SB 1447 Small Business Hiring Tax Credit or our Small Business Hiring Credit webpage.

New Forms for 2020 to Report Minimum Essential Coverage and Premium Assistance Subsidies

Individuals will start reporting minimum essential coverage, also known as qualifying health coverage, on their 2020 tax returns. The following information may be helpful.

Information you need from your clients

Here are the health care forms your clients will need to provide you for return preparation:

- FTB 3895, California Health Insurance Marketplace Statement
- Form 1095-A Health Insurance Market Place Statement; 1095-B, Health Coverage, or 1095-C, Employer-Provided Health Insurance Offer and Coverage

New health care forms

Draft California 2020 forms and instructions are available on our website. Final versions are expected to be available on December 15, 2020.

- FTB 3849, Premium Assistance Subsidy form (to reconcile advance premium assistance subsidy payments)
- FTB 3853, Health Coverage Exemptions and Individual Shared Responsibility Penalty
- FTB 3895, California Health Insurance Marketplace Statement
- Publication 3949A, Premium Assistance Subsidy
- Publication 3995B, California Instructions for Filing Federal Forms 1094-B and 1095-B
- Publications 3895C, California Instructions for Filing Federal Forms 1094-C and 1095-C

540 forms

We updated our 540 forms to report qualifying health coverage and premium assistance subsidies.

- Forms 540, 540NR and 540EZ include a check box to indicate qualifying health coverage for the entire year.
- Forms 540 and 540NR can be used to report the premium assistance subsidy, health coverage exemptions, and the Individual Shared Responsibility Penalty.
- Form 540EZ can be used to report health coverage exemptions and the Individual Shared Responsibility Penalty, but cannot be used to report the premium assistance subsidy, including the repayment of excess advance payment received.

FTB initiated Administrative Dissolution process to begin in January 2021

The start date for the FTB initiated administrative dissolution program was delayed due to COVID-19, but will now begin in January 2021. Under the involuntary (FTB initiated) dissolution process, we may initiate an administrative dissolution of a domestic corporation or administrative cancelation of a domestic limited liability company (LLC) if the following requirements are met, the entity has:

- Been suspended by FTB for 60 or more consecutive months.
- Never done business in California at any time after the time of its incorporation in this state or has ceased doing business.
- Paid all taxes, penalties and interest due as of the date the entity ceased doing business.
- Filed all returns due as of the date the entity ceased doing business.
- Been notified.

Currently, FTB is only processing requests for voluntary dissolutions. A domestic corporation or domestic LLC may submit a written request for abatement of unpaid qualified tax, interest, and penalties. You can learn more about this process and whether an entity qualifies at our voluntary administrative dissolution/cancelation webpage.

It's important to note that if an entity has been dissolved but continues to do business, or has remaining assets that were not disclosed by the entity when the request for abatement was

made, the abated qualified tax, interest, and penalties will be immediately due and payable. In addition, a 50% penalty of the total tax abated plus interest may be assessed in addition to any other penalty imposed.

Approximately one-third of the requests for voluntary dissolutions, since January 2019 have been approved. The two most common reasons why business entities do not qualify are they have remaining assets or they have not filed and paid up to the business cessation date.

FTB hosts virtual stakeholder meetings

Recently, we hosted 2 stakeholder meetings to gain input from the public. We appreciated the attendees taking the time to participate and share their thoughts.

Legislative Proposal Stakeholder Meeting

On Tuesday, November 10, 2020, we hosted our annual Legislative Proposal (LP) Stakeholder Meeting. This year's meeting was held virtually with, and approximately 40 participants joined the meeting to discuss the LPs.

We presented five LPs, which are summarized here:

21-A Modified Conformity to the Federal Alternative Simplified Credit (ASC) and Elimination of the Alternative Incremental Research Credit (AIRC)

Under this proposal, the ASC method for computing the California research credit would be available as an election for taxable years beginning on or after January 1, 2022. The election would remain in effect unless revoked with the consent of the FTB. The proposal would also eliminate the AIRC method for calculating the California research credit, consistent with elimination of the AIRC method at the federal level.

Eliminating the AIRC method and conforming to the ASC method would provide businesses and individuals conducting research in California with a simplified calculation option, eliminate differences between federal and state law, and reduce recordkeeping requirements.

21-B Real Estate Withholding/ Internal Revenue Code (IRC) section 1031 Deferred Like-kind Exchange/Failure to Withhold by Qualified Intermediaries (QI)/ Cash-Poor Exchange

Under this proposal, Revenue and Taxation Code (R&TC) Section 18662 relating to real estate withholding would be amended to limit the QI's withholding obligation to available funds in those situations where the QI does not receive sufficient funds from escrow or the QI disbursed funds for the purpose of completing an exchange under IRC Section 1031. This proposal would also authorize FTB to prescribe regulations to implement this change by clarifying when a disbursement is for the purpose of completing an IRC Section 1031 exchange.

21-C Taxation of Income from an Incomplete Gift Non-Grantor (ING) Trust

This proposal would amend the Personal Income Tax Laws to require that the net income derived from an ING trust's assets be included in the grantor's gross income and be subject to California income tax. It would treat grantors who transfer assets into an ING trust in the same manner as grantors of a grantor trust and provide consistent and fair treatment of income distributed to similarly situated taxpayers.

21-D Taxpayers' Bill Of Rights Annual Report to the Legislature/Change Due Date From December 1st to January 15th

This proposal would change the due date of the statutorily-required Taxpayers' Bill of Rights Annual Report from December 1st to January 15th. Changing the due date to January 15th will allow the FTB to inform the legislature on the most current issues, including FTB's legislative proposals for the upcoming year.

21-E State Controller's Office Unclaimed Property Data Sharing

This proposal would amend R&TC Section 19554 to allow the FTB to share additional specified tax return information with the State Controller's Office to aid them in identifying holders of unclaimed property.

Next Steps for LPs

The five LPs will be presented for approval at the next three-member Franchise Tax Board (Board) Meeting, scheduled for December 18, 2020. Should the Board approve the LPs, the FTB will begin to look for legislative sponsors for the approved proposals.

Conformity Stakeholder Meeting Highlights

On Wednesday, November 18, 2020, we hosted our Conformity Stakeholder Meeting to seek feedback and input on conformity to federal law. The meeting was also held virtually and nearly 50 attendees participated. The discussion included Public Laws (PL) enacted in 2020 that amended the IRC and the department's Summary of Federal Income Tax Changes (SOFITC) report and new tool for accessing information from the report.

R&TC Section 19522 requires FTB to submit an annual report, which summarizes changes to the IRC and their impact to California. Federal Laws discussed during the conformity meeting included:

- Families First Coronavirus Response Act (PL 116-127)
- Coronavirus Aid, Relief, and Economic Security Act, also known as the CARES Act (PL 116-136)
- Paycheck Protection Program and Health Care Enhancement Act (PL 116-139)
- Paycheck Protection Program Flexibility Act of 2020 (PL 116-142)

The conformity discussion was followed by a demonstration of the new SOFITC report tool. This tool will allow users to access an interactive version of the report, by allowing them to filter the SOFITC report using the PL number, the R&TC Section, or other key words.

Next Steps for the SOFITC Report

Our staff is working on finalizing the SOFITC report, which is generally due on January 10. We will release the SOFITC report by the due date.

At the conclusion of both meetings, the Legislative Services Bureau's email address (FTBLegislativeServices@ftb.ca.gov) was provided should stakeholders wish to provide additional comments.

Covid-19 relief for undocumented workers in California - is it taxable?

While the economic impact payments issued by the Internal Revenue Service provided relief for millions of taxpayers across the country, not all taxpayers qualified to receive these payments. In response, Governor Newsom announced on April 15, 2020, that \$125 million in disaster relief assistance would be available for working undocumented Californians impacted by COVID-19 who were ineligible for unemployment insurance benefits and disaster relief, including the CARES Act, due to their immigration status.

For California tax purposes, these payments are not subject to tax. Approximately 150,000 adult Californians received the one-time assistance of \$500 per adult with a cap of \$1,000 per household to deal with the specific needs arising from the COVID-19 pandemic.

Power of Attorney (POA) – Best Practices

When CalCPA posed a question to us about POAs at the October CalCPA Liaison meeting, we took the opportunity to share our POA best practices, which we summarize below. In addition, when your client would like you to have online access to their information, we now recommend that you check the "Yes" box to Authorize MyFTB Full Online Account Access in Part V of the POA form. When using the MyFTB POA Wizard to upload the POA form, select the "Full" access box.

Our top 3 reasons for rejection of POA forms are:

- 1. Submission errors
- 2. No response from the client when we request relationship verification
- 3. Electronic signature used when an original or "wet" signature is required

Submission errors stem from keying information into the MyFTB POA Wizard that is different from the uploaded POA document.

To avoid rejection and ensure that POA forms and Taxpayer Information Authorizations (TIAs) are submitted without issues, we encourage representatives and taxpayers to observe the following best practices when uploading a POA or a TIA form using MyFTB:

- Make sure that only one POA is included in the uploaded attachment; we will not accept multiple declarations uploaded for a single taxpayer.
- Submit separate POA declarations for each spouse or registered domestic partner.
- Key information from the POA declaration exactly, as written, into the MyFTB POA Wizard including names, authorizations, and additional representatives.
- Upload the POA declaration only with the taxpayer's original or "wet" signature, and review both the signature and date for completeness and legibility.

Other tips: if there is an error on the POA declaration, complete a new form and obtain your client's original signature, and then upload to MyFTB.

We offer 4 ways for taxpayers or tax professionals to submit a POA Declaration:

- 1. A tax professional may file a taxpayer's POA form electronically through the MyFTB POA Wizard without uploading a paper form. While this method does not require an original or "wet" signature, it requires the taxpayer to have their own MyFTB account, log into their account and approve the POA within 45 days of submission.
- 2. The tax professional may instead file a taxpayer's POA form electronically through the MyFTB POA Wizard and upload a signed and completed paper POA Declaration with the original taxpayer signature. The signed original POA Declaration serves as the taxpayer's authorization.
- 3. A taxpayer may submit and authorize a POA form electronically through their own MyFTB account, which does not require a "wet" signature.
- 4. Mail the signed and completed paper POA Declaration with original signature to FTB for processing.

Currently, we do not accept electronic signatures on our POA declarations. We will inform you if this changes.

For more information, visit our website and search POA.

Power of Attorney (POA) for pass-through entities

We received this question from our preparer community.

Does a tax professional need to complete a POA declaration for every member/partner when representing a pass-through entity (PTE)?

No, for a tax professional to represent a pass-through entity, we only require a POA declaration for the entity as a whole. If an individual member/partner of the PTE wants to be represented

by a tax professional (whether the same one who represents the PTE or a different one), then that individual must submit a separate POA declaration.

There are a few unique situations where a POA declaration must be filed for both the entity and an individual partner/member, such as:

- If the entity is participating in the Voluntary Disclosure Program
- Adjustments are being made at the individual level

If a tax professional is representing both the entity and any individual partners/member, then a separate POA declaration is required from the entity and each individual partner/member.

Update on the new Head of Household process

Back in January we began the new process of verifying Head of Household (HOH) filing status when incoming returns are processed using the information provided on FTB Form 3532.

Taxpayers who do not:

- Include the FTB Form 3532
- Qualify for the HOH based on the information provided on the form, receive a Notice of Tax Return Change (NTRC) denying the HOH filing status

During this 2020 filing season, approximately 2 million taxpayers claimed the HOH filing status for their 2019 tax year returns. Taxpayers not meeting the HOH status requirements received notification via NTRC within weeks of filing their returns. The NTRC provided specific reasons why they did not qualify for the HOH status. For taxpayers that disagreed with the NTRC, they were able to utilize our contact centers via phone, online chat, or correspondence, providing a simpler process for taxpayers to resolve their issue.

We are committed to providing excellent customer service and continue to explore innovative ways to improve our processes to better serve California taxpayers.

Discontinued: Business Entity Estimate Payment Notification - FTB 3713

We will no longer mail to business entities:

- Summary of Account Payments.
- Transfers.
- Credits.

This notice was developed to provide estimate payment information to business entities to reduce one of the most common contacts to the Tax Practitioner Hotline. However, call volumes for the Hotline has continued to grow annually.

All payment, transfer, and credit information previously included within FTB 3713 is available online to businesses and their tax representatives who register for a MyFTB account.

Using Web Pay is safe and simple, but remember to verify payment.

Using Web Pay is a safe and simple way to avoid problems and the extra work that comes when someone mails a payment to us and that payment isn't timely credited to their account. Some reasons a payment may not be timely credited or applied include:

- Mail delays
- Incorrect or missing information on a check
 - o Tax year
 - o Tax ID number
- Human error

When scheduling a payment make sure you include the correct bank information. If not, we will be unable to process the payment. By the time we send a notice, your clients could accrue substantial penalties and interest.

Our Web Pay Confirmation is just confirmation that we have received a request to process your payment and not confirmation of successful payment.

The failure to timely remit the balance due on a tax liability caused by an oversight does not, by itself, constitute reasonable cause. It is important to remember it is not sufficient to just attempt to use Web Pay to make a payment; exercise of ordinary business care and prudence is still needed.

The Office of Tax Appeals (OTA) held in a 2018 precedential case that reasonably prudent businesspersons exercising due care and diligence are expected to monitor their bank account and quickly determine whether a scheduled electronic payment to FTB was in fact paid. (Visit Appeal of Scanlon, 2018-OTA-075P, July 25, 2018.)

Visit our April Tax News article, Tips for using Pay by bank account (Web Pay) for businesses, for more information.

California State Controller (SCO) outreach events

The SCO's Unclaimed Property Division's Outreach and Compliance team is reaching out to educate business owners about the unclaimed property laws and reporting requirements for holders of unclaimed property.

SCO offers an Introduction to Reporting Unclaimed Property: California webinar, which covers:

- An overview of California's Unclaimed Property Law
- Mandated reporting requirements
- Review common terms
- Discuss how to avoid common reporting and remitting errors

Visit the SCO's Holder Outreach Events webpage for future workshops, seminars, and events.

Tax Appeals Assistance Program- announcing a new Supervising Attorney

In our January 2019 Tax News, we announced that the Tax Appeals Assistance Program (TAAP) for franchise and income tax would be administered by the Taxpayers' Rights Advocate's Office (TRAO) at the FTB. After almost 2 years in operation, TAAP has assisted hundreds of taxpayers with their appeals and helped resolve many cases. Beginning in January 2021, a new Supervising Attorney will join TAAP.

Mengjun He will be taking over for Craig Shaltes as the new Supervising Attorney for TAAP. Mengjun received her J.D. from the University of San Francisco, her M.Ed. from the University of Sydney in Australia, and her B.A. from China. She was a college lecturer in China, an education consultant in Australia, and has worked in a general practice law firm and a civil litigation firm specializing in personal injury cases.

Mengjun has practiced state and local taxation law exclusively since 2007. She was a legal advisor to a BOE Board member for eight years. During that time, she worked on hundreds of tax appeals involving income tax, property tax, sales and use tax issues, and regulatory matters. Mengjun then went on to work in BOE's Legal Department, writing formal legal opinions and advising staff on various tax issues. Since BOE's reorganization, Mengjun has worked on OTA appeals, representing the California Department of Tax & Fee Administration. Now, as the new Supervising Attorney for TAAP, she will be teaching and supervising law school students as they represent taxpayers in all matters of their franchise and income tax appeals. She is a great addition for TAAP.

TAAP is a valuable program helping taxpayers navigate a complicated tax appeal process. In circumstances where you and your client may feel it may be beneficial, please consider referring your client to TAAP. TAAP can assist with appeals cases where the amount at issue is \$30,000 or less for certain tax issues. Please refer taxpayers to our TAAP webpage for more information or have them email ftbtaap@ftb.ca.gov.



Jozel Brunett Chief Counsel

Chief Counsel Corner

Carried interest

As many of you are probably aware, on August 14th 2020, Department of Treasury published proposed regulations under Section 1061 of the Internal Revenue Code (IRC) addressing carried interests. With the subject at the center of attention, questions came up as to the Franchise Tax Board's view on the sourcing of a carried interest for California personal income tax purposes.

A carried interest (sometimes referred to as an incentive allocation or a performance allocation) is an interest in a partnership's profits that the general partners of the partnership (i.e. private equity and hedge funds)

receive as compensation irrespective of their capital investment in the partnership. There has been much debate over the federal income tax treatment of a carried interest (i.e. capital gain vs. ordinary income).

In general, a carried interest is taxed as a partner's distributive share for federal income tax purposes.¹ The character of the income in the hands of the general partner is the same character as if such income were realized directly by the partnership² unless it is recharacterized under IRC Section 1061. As a result, the general partner may realize capital gain instead of ordinary income if the partnership generates capital gain income.

California generally conforms to the federal partnership provisions of the IRC, as they existed on January 1, 2015, through California Revenue & Taxation Code (R&TC) Section 17851. As of now, California does not conform to IRC Section 1061 and the proposed regulations thereunder. Additionally, California does not have preferential tax rates for capital gains. For California income tax purposes, a carried interest is treated as a partner's distributive share. Income and profits allocable to a carried interest holder will retain the partnership-level character.

California imposes a tax on the income of a nonresident, including his distributive share of partnership income, to the extent it is derived from sources within this State.³ With the exception of R&TC Section 17955 regarding investment partnerships, income from a partnership that carries on a trade or business is generally sourced under California Code of Regulations (CCR) Section 17951-4. A nonresident's carried interest (distributive share) from a partnership that does business wholly within California is sourced entirely to California.⁴ The opposite applies to partnerships that are wholly outside of California. In addition, CCR Section 17951-4(d) makes reference to the UDITPA rules (Sections 25120-25139) for sourcing income of a partnership that does business within and outside of California (i.e. an apportioning partnership). A nonresident's distributive share of an apportioning partnership's business income attributable to his carried interest is sourced to California in accordance with the UDITPA rules. For example, if the apportioning partnership derives all of its revenue from sales

¹ The character of a payment to a partner from a partnership is governed by the partnership provisions of the IRC governing distributive shares, payments under Section 707(a), and guaranteed payments under Section 707(c). A carried interest entitles its holder to partnership income allocation and thus is treated as a partner's distributive share.

² IRC Section 702(b).

³ R&TC Section 17041(b), 17951(a), and 17953. For purposes of R&TC Section 17041, guaranteed payments from a partnership is included in the computation of a nonresident's gross income from sources within this state in the same manner as if the payments were a distributive share of the partnership. CR&TC Section 17854.

⁴ CCR Section 17951-4(a).

of marketable securities, it will assign the receipts from the sales to its California sales factor numerator by applying CCR Section 25136-2(e) and use the result to compute its sales factor. The partnership will then use the sales factor to apportion its business income to California as required by R&TC Section 25128.7. The general partner owning the carried interest will be taxed on his distributive share of the partnership income apportioned to California per CCR Section 17951-4(d)(1). A nonresident's distributive share of a partnership's nonbusiness income attributable to his carried interest is sourced according to CCR Section 17951-4(d)(4).

In summary, like federal law, California treats a carried interest as a partner's distributive share. Such distributive share is sourced to California according to CCR Section 17951-4 for California personal income tax purposes, provided that it is from a trade or business and R&TC Section 17955 does not apply.

MyFTB Corner

Renew your taxpayer information authorization (TIA) clients early

😫 MyFTB

We discovered a problem for business entity (BE) TIA client renewal in MyFTB.

We planned to change the renewal period for all accounts from 90 to 5 calendar days before the expiration date. However, we discovered that the updated renewal period has not been functioning for BE Clients whereas it is working as intended for Individual Clients.

Therefore, we recommend that you renew your BE TIA accounts early. Remember, you can renew a TIA client as early as 90 calendar days before its expiration.

Be sure to renew your BE TIA clients at least 10 business days before expiration. You will know when any client is eligible for renewal because the "Renew" link will appear in the Actions column of your Client List in MyFTB. When renewal has been completed, your client will receive standard letter: FTB 1125, Tax Information Authorization Filed.

If the renewal period has passed, you cannot renew your client using the "Renew" button. You must use "Add TIA Client" in MyFTB or submit form FTB 3534, Tax Information Authorization to add your client again. For more information about how to add a TIA client, refer to "How To Add TIA Client" in MyFTB. Reminder: You must have your client's permission to renew the TIA relationship.

We apologize for any inconvenience caused and we look forward to a system update for BE client renewal in early 2021.

All About Business

Assembly Bill 85 law changes for LLCs, LLPs, and LPs and the 15-day rule

During the 2020-21 legislative session, Assembly Bill 85 was enacted to make numerous changes to the California Revenue and Taxation Code. One of those changes was to eliminate the annual tax for Limited Liability Companies (LLCs), Limited Liability Partnerships (LLPs), and Limited Partnerships (LPs), that organize, register, or file with the Secretary of State on or after January 1, 2021, and before January 1, 2024, for their first taxable year, subject to an appropriation by the legislature to FTB for the costs of administration.

California law generally imposes a minimum franchise tax of \$800 on every corporation incorporated, qualified to transact business, or doing business in California. A corporation that incorporates or qualifies to do business in California is exempt from paying the minimum franchise tax in its first taxable year.

Business entities such as LLCs, LLPs, and LPs are subject to an \$800 annual tax. However, before the passage of AB 85, these entities were not able to receive the same benefit of that tax exemption for an entity's first taxable year. With AB 85 now being chaptered, the California Revenue and Taxation Code has been amended to extend the first year exemption to LLCs, LLPs, and LPs that organize, register, or file with the Secretary of State "on or after January 1, 2021, and before January 1, 2024."

Because of the operative date specified in AB 85, the 15-day rule may impact whether an LIC, LP, or LLP is eligible for the exemption from the annual tax during its first taxable year. The 15day rule is a set of provisions within the California law (R&TC Sections 17936, 17946, 17948.2, and 23114) that provide some relief to business entities (LPs, LLPs, LLCs, and corporations) from the general requirement to pay the annual/minimum tax.

A business entity is not subject to the \$800 annual/minimum tax if the entity both:

- Did not conduct business in the state during the taxable year
- The taxable year was 15 days or less

For example, if an entity filing on a calendar year basis is formed on December 17 or after and does no business for the remainder of the year, then it may not have to file a tax return and pay the \$800 annual/minimum tax for that short tax year. Since an entity that meets the 15-day rule is not required to file a tax return, this time period is not considered the first tax year. The following tax year will be considered the first taxable year.

However, AB 85 only provides an exemption from the annual tax for LLCs, LPs and LLPs that organize, register, or file with the Secretary of State **on or after** January 1, 2021, and before January 1, 2024. Therefore, entities taking advantage of the 15-day rule by registering on December 17, 2020, and on or before December 31, 2020, are not eligible for the first year tax exemption, regardless of whether the 15-day rule would apply for that short period. Only LLCs,

LLPs, or LPs that organize, register, or file after January 1, 2021, are eligible for the first taxable year annual tax exemption.

Event Calendar

As part of education and outreach to our tax professional community, we participate in many different presentations and fairs. We provide a calendar that shows the events we attend (virtually), as well as other events happening with us, such as interested party and board meetings.