Legal Update Article

New York State Budget Includes Optional Employer Payroll Tax as a Potential SALT Cap Work Around

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As part of the FY 2019 NY State Budget, lawmakers recently enacted a program to potentially circumvent the recent Federal Tax Law change that imposes a $10,000 cap on the State and Local Tax Deduction (SALT) for individuals who itemize their deductions. The potential workaround, called the Employer Compensation Expense Program (ECEP), would allow employers to voluntarily opt in to a new ECEP structure that, when fully effective, would impose on employers a five percent payroll tax on all annual payroll expenses in excess of $40,000 per employee. The five percent would be phased in over three years beginning on January 1, 2019, starting at one and a half percent, three percent for Tax Year 2021 and five percent for 2021 and annually thereafter.

In order to opt in to this program, the employer must elect to do so by December first of each calendar year, and it will take effect the immediately succeeding calendar year. If an employer opts in after December first of a calendar year, it will first take effect in the second succeeding calendar year. The legislation includes different guidelines on how to opt in to the program based on whether an employer is a corporation, government entity, or not-for-profit corporation.

This new policy would allow employers who have no cap on their corporate state and local tax deduction to assume their employees' state tax liability. In effect, any lost Federal SALT Deduction for an individual would be made up by shifting the lost deduction to the employer who would still be able to take the deduction for corporate purposes. If an employer opts in to the program, it would most likely result in employees having not only a lower state tax liability, but a lower salary as a result. This is because policy-makers expect employers who opt in to correspondingly lower employee wages to cover the payroll tax the employer will then remit to the State. To avoid a reduction in take-home pay for employees, a new tax credit corresponding in value to the ECEP has been created that would cut the personal income tax on wages for those subject to the new ECEP.

Despite the passage of this new tax scheme, many questions remain as to whether or not the IRS will accept this new statutory structure or if it will be deemed an illegal work-around. In addition, there are complications for employers who must deal with collective bargaining agreements, state minimum wage laws, and other federal state and local regulatory impediments placed on employee wages.

If you have questions about this new program, please contact any member of the Government Relations practice or the Jackson Lewis attorney with whom you regularly work for assistance.