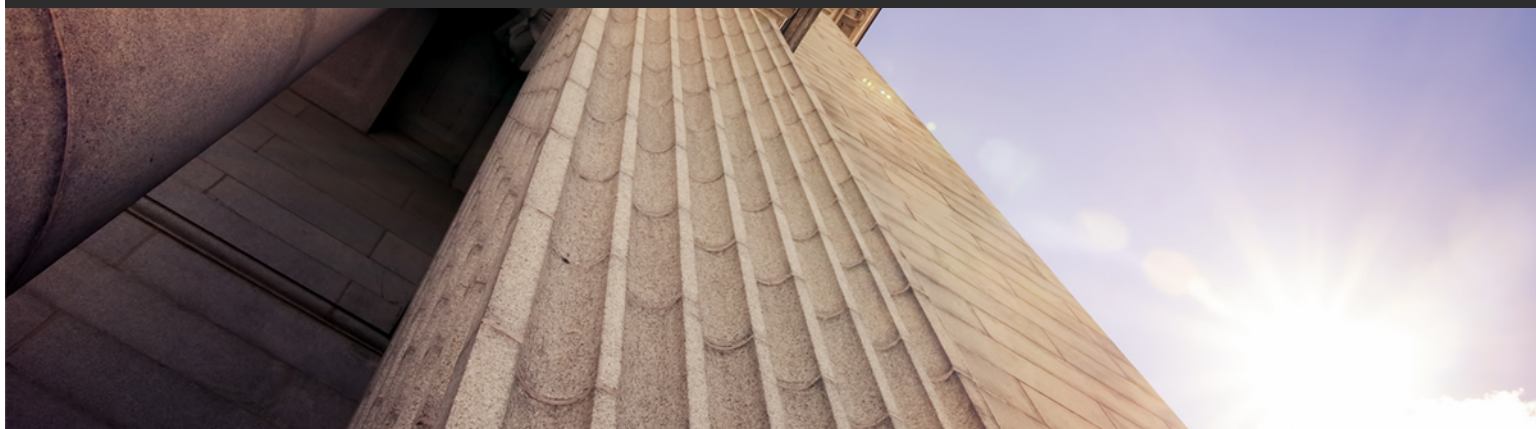


## **Alert** | State & Local Tax



July 2018

### **New York Guidance on Payroll Tax Workaround to \$10,000 SALT Deduction Limitation Issued**

On July 3, 2018, the New York State Department of Taxation and Finance issued a Technical Services Bureau Memorandum (TSB-M-18(1) ECEP) regarding the implementation of the recently enacted Employer Compensation Expense Program (Part MM of Chapter 59 of the Laws of 2018; Tax Law Article 24, Sections 850-857, 606(ccc), 171-a).

The Employer Compensation Expense Tax (ECET) was enacted as a ‘work around’ to deal with the limitation on the deductibility of state and local taxes that came with the Tax Cuts and Jobs Act (TCJA). The ECET is an optional tax beginning Jan. 1, 2019, for employers paying annual wages in excess of \$40,000 for each employee who elect to participate. If an employer elects to pay this tax, a credit will be available to the employee, reducing the employee’s New York personal income tax, thereby mitigating the effect of the federal SALT limitation.

TSB-M-18(1) ECEP, provides information to employers about how the program works including how to opt-in to the program. The election to opt-in must be made by Dec. 1 to be effective for the following year. The election must be made by an authorized officer of a corporation, an owner or other authorized individual of a partnership or sole proprietorship, an authorized member of a limited liability company, or by the chief executive officer of a governmental entity. Once the election is made the ECET will apply to each employee whose New York wages or compensation is more than \$40,000 annually. The rate of tax is one and a half percent for 2019; three percent for 2020 and five percent for 2021 and after.

The test for determining who is employed in New York is taken from the existing Metropolitan Commuter Transportation District test defining a New York employee as one who: 1) performs services within New

York or within and outside of New York where the services performed out of state are incidental; 2) the employee is assigned to a base of operations located in New York; or 3) if the place from which the employee is directed and controlled is in New York and some services of the employee are performed in New York.

The tax is collected at the same time and in the same manner as withholding tax on wages. There are penalties for nonfiling or late filing of returns and interest will accrue on any underpayments. The TSB-M indicates that withholding tax tables will not be changed, but that electing employers should consider communicating the implications of the tax to employees. The 2019 IT-2104 Employee Withholding Allowance certificate will be updated to reflect the ECET. The TSB-M reminds employers that they may not deduct the ECET from the wages of employees but that they may, in some circumstances, be able to adjust the wages of employees to account for the tax benefit.

There are several issues for employers to consider before making the election to be subject to the ECET including whether employment contracts or collective bargaining agreements may restrict the employer's ability to adjust wages to account for the tax. Furthermore, once the employer opts-in to this elective payroll tax, it will apply to every employee earning more than \$40,000, even if this state and local tax deduction limit workaround would not benefit the employee. For example, perhaps the employee might not itemize deductions. In addition, it is likely the Internal Revenue Service will closely examine this and other state 'work arounds' and may eventually issue guidance casting doubt on the deductibility of the ECET or tax implications for the employees.

Greenberg Traurig is available to review these tax and labor and employment issues and will provide updates on these issues on developments as they occur.

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