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September 27, 2010

On September 27, President Obama signed into law the Small Business Jobs Act of 2010 (H.R. 5297).

New rules for employer-provided cellphones

Among the tax changes in the Act is a relaxation of the tax rules for employer-provided cellphones, effective for 2010 and thereafter. The Act removes cellphones and similar telecommunications equipment from the definition of so-called "listed property." While this means that the heightened substantiation requirements and special depreciation limitations for listed property will no longer apply to cellphones, this change does not eliminate all substantiation requirements for employer-provided cellphones. Guidance issued in 2009 indicates that the IRS generally considers personal use of an employer-provided cellphone taxable to the employee and will require at least some substantiation to ascertain the value of such personal usage. The Act does not appear to override this general treatment. However, legislative history to the Act suggests that Treasury and the IRS have the ability to treat personal cellphone usage as a nontaxable de minimis fringe benefit. While we hope Treasury adopts this suggestion, we expect that Treasury will not provide a blanket rule that all personal cellphone usage automatically qualifies as a nontaxable de minimis fringe. As previewed in its 2009 guidance, we suspect Treasury will continue to require some level of substantiation (or safe harbor compliance) (i) as a condition for nontaxable de minimis fringe treatment and (ii) to ascertain the taxable amount where the requirements for de minimis fringe treatment are not satisfied.

Temporary expansion of other tax benefits

The Act also temporarily expands certain existing tax benefits with the intent of benefiting small businesses, including the following:

Complete Gain Exclusion for Qualified Small Business Stock. The Act increases from 75% to 100% the exclusion from capital gains tax on the sale of so-called "qualified small business stock" purchased during the remainder of 2010 and held for more than 5 years. The excluded capital gain is also temporarily excluded for purposes of the alternative minimum tax. This exclusion will return to its original 50% level (and the excluded gain will again be taken into account for alternative minimum tax purposes) for purchases of qualified small business stock on or after January 1, 2011.

Reduction of S Corporation Built-In Gains Period to 5 Years. S corporations that were previously C corporations (or acquired assets from a C corporation in certain nonrecognition transactions) are subject to a special corporate-level tax on gain from the sale of assets held at the time of the election to be classified as an S corporation (or the time of the acquisition from a C corporation). This corporate level tax, referred to as the "built-in gains tax," is not imposed if such assets are sold after the end of a "recognition period," which is generally 10 years (7 years for tax years beginning in 2009 or 2010). For tax years beginning during 2011 only, the Act reduces the recognition period to 5 years. Thus, if such assets are sold in a tax year beginning during 2011, and such tax year begins at least 5 years after the beginning of the recognition period, built-in gains on such assets will not be subject to the built-in gains tax.

Extended Business Credit Carry-back. The Act extends from one year to five years the carry-back period for general business credits of eligible small businesses determined in the first taxable year of the taxpayer beginning in 2010. In addition, for taxable years that begin during the calendar year 2010, these credits will not be subject to the alternative minimum tax.

Doubled Deduction Limit for Start-up Expenditures. The Act doubles the deduction limit for start-up expenditures made in taxable years beginning in 2010 to $10,000. The original $5,000 deduction limit will continue to apply to taxable years beginning on or after January 1, 2011.

Increased Expensing Limitations. The Act increases the tax code Section 179 expensing limitations to $250,000 for taxable years beginning in 2008 or 2009 and to $500,000 for taxable years beginning in 2010 or 2011. It also

increases the phase-out threshold amount to $800,000 for 2008 and 2009, and $2,000,000 for 2010 and 2011, and at the taxpayer's election adds certain qualified real property to the definition of "Section 179 Property" for any taxable year beginning in 2010 or 2011.

Extended Depreciation Provision on Certain Qualified Property. The Act provides a one-year extension of the 50% bonus depreciation provision created in the American Recovery and Reinvestment Act.

Temporary Health Insurance Deduction. The Act allows self-employed taxpayers to deduct the cost of health insurance for the purpose of computing 2010 self-employment taxes.

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If you have questions about the Small Business Jobs Act of 2010 please contact one of our tax attorneys or your regular Cooley contact.

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