

Part III – Administrative, Procedural, and Miscellaneous

Relief from Penalty for Failure to Deposit Employment Taxes

Notice 2020-22

SECTION 1. PURPOSE

The purpose of this notice is to provide penalty relief with respect to certain employers' deposits of Federal employment taxes with the Internal Revenue Service (IRS) under §§ 31.6302-1 or 31.6302-2 of the Employment Taxes and Collection of Income Tax at Source Regulations, including deposits of withheld income taxes, taxes under the Federal Insurance Contributions Act (FICA), and taxes under the Railroad Retirement Tax Act (RRTA) (collectively, Employment Taxes). Specifically, this notice provides relief to employers entitled to the new refundable tax credits provided under the Families First Coronavirus Response Act (Families First Act), Public Law No. 116-127 (March 18, 2020), and the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Public Law No. 116-136 (March 27, 2020).

Employers paying qualified sick leave wages and qualified family leave wages required by the Families First Act (collectively, Qualified Leave Wages), as well as qualified health plan expenses allocable to Qualified Leave Wages (Qualified Health Plan Expenses) are eligible for refundable tax credits under the Families First Act.

Additionally, certain employers experiencing a full or partial business suspension due to orders from a governmental authority due to the coronavirus disease 2019 (COVID-19) or experiencing a statutorily specified decline in business are also allowed a refundable tax credit under the CARES Act of up to fifty percent of the qualified wages, including allocable qualified health expenses and limited to \$10,000 per employee over all calendar quarters combined (Qualified Retention Wages). Under the Families First Act and the CARES Act, an employer paying Qualified Leave Wages or Qualified Retention Wages may take refundable tax credits against a specified portion of the employer's share of certain Employment Taxes.

Section 3 of this notice provides employers relief from the failure to deposit penalty imposed by section 6656 of the Internal Revenue Code (Code) for an employer's failure to timely deposit Employment Taxes to the extent that the amounts not deposited are equal to or less than the amount of refundable tax credits to which the employer is entitled under the Families First Act and the CARES Act. This relief ensures that such employers may pay Qualified Leave Wages required by the Families First Act or Qualified Retention Wages under the CARES Act using Employment Taxes that would otherwise be required to be deposited without incurring a failure to deposit penalty. This notice applies to deposits of Employment Taxes reduced in anticipation of the credits with respect to Qualified Leave Wages paid with respect to the period beginning April 1, 2020, and ending December 31, 2020, and in anticipation of the credits with respect to Qualified Retention Wages paid with respect to the period beginning on March 13, 2020, and ending December 31, 2020.

SECTION 2. BACKGROUND

Section 3111(a) of the Code (employer's share of the Old Age, Survivors, and Disability Insurance (social security) portion of FICA tax) and section 3221(a) of the Code (employer's share of the social security and Hospital Insurance (Medicare) portions of RRTA tax), along with section 3402 related to Federal income tax withholding, impose Employment Tax liability on employers. For most employers, this liability is reported on the quarterly Form 941, Employer's QUARTERLY Federal Tax Return.

Section 2302 of the CARES Act provides that the payment and deposit of the employer's share of the social security portion of FICA tax and the employer's share of the social security portion of RRTA tax for deposits that are due to be made during the period beginning on March 27, 2020, and ending before January 1, 2021, is not due before December 31, 2021 (for the first 50 percent of the liability), and December 31, 2022 (for the remaining 50 percent of the liability). Under this provision, an employer is treated as having timely made these required deposits of FICA and RRTA taxes if all such deposits are made not later than the applicable due dates. This deferral of payment does not apply to employers that have had indebtedness forgiven under either section 1106 or 1109 of the CARES Act.

Although Form 941 is due quarterly and payment and deposit of certain FICA (and RRTA) taxes is deferred under section 2302 of the CARES Act, section 6302 of the Code and regulations under that section generally require deposits of Employment Taxes to be made on a monthly or bi-weekly basis. Employers that accumulate \$100,000 or more of Employment Taxes on any day within a deposit period are required to deposit those liabilities with the IRS the next banking day. See § 31.6302-1(c).

The Families First Act generally requires employers of fewer than 500 employees to provide paid sick leave and expanded family and medical leave, up to specified limits, to employees unable to work or telework due to certain circumstances related to COVID-19. Generally, employers that are required to pay Qualified Leave Wages under the Families First Act are entitled to refundable tax credits administered by the IRS. (The government of the United States, the government of any State or political subdivision thereof, or any agency or instrumentality of the foregoing is not entitled to these refundable tax credits.)

Sections 7001 and 7003 of the Families First Act provide a refundable tax credit against an employer's share of the social security portion of FICA tax and an employer's share of the social security and Medicare portions of RRTA tax for each calendar quarter in an amount equal to 100 percent of Qualified Leave Wages paid by the employer plus Qualified Health Plan Expenses with respect to that calendar quarter. (For purposes of this notice, an employer's share of the social security portion of FICA tax and an employer's share of the social security and Medicare portions of RRTA tax, as applicable, are referred to as, Creditable Employment Taxes.) For employers subject to FICA tax, the credits under section 7001 and 7003 are increased by the amount of the employer's share of Medicare tax imposed on Qualified Leave Wages. . See section 7005(b)(1) of the Families First Act. (For purposes of this notice, the increase in credit under section 7005(b)(1) is treated as a credit under section 7001 or section 7003.) The refundable tax credit is reported on the employer's return for reporting its liability for FICA tax or RRTA tax, as applicable, which for most employers subject to FICA tax is the quarterly Form 941. An employer may claim an advance

payment of the refundable tax credits by filing Form 7200, Advance Payment of Employer Credits Due to COVID-19.

Section 2301 of the CARES Act provides a refundable tax credit against an employer's Creditable Employment Taxes for each calendar quarter for Qualified Retention Wages paid by the employer. The refundable tax credit is reported on the employer's return for reporting its liability for FICA tax or RRTA tax, as applicable, which for most employers subject to FICA tax is the quarterly Form 941. An employer may claim an advance payment of the refundable tax credit for Qualified Retention Wages under section 2301 of the CARES Act by filing Form 7200, Advance Payment of Employer Credits Due to COVID-19.

Section 6656 of the Code imposes a penalty for any failure to deposit amounts as required by the Code or regulations on the date prescribed therefor, unless such failure is due to reasonable cause and not due to willful neglect. A failure to deposit taxes as required under section 6302 of the Code would generally subject an employer to the section 6656 penalty.

Sections 7001(i) and 7003(i) of the Families First Act, as added by section 3606(a) and (c) of the CARES Act, and section 2301(k) of the CARES Act, instruct the Secretary of the Treasury (or the Secretary's delegate) to waive the penalty under section 6656 of the Code for failure to deposit the employer share of social security tax in anticipation of the allowance of the refundable tax credits allowed under the Families First Act and the CARES Act. Furthermore, sections 7001(f) and 7003(f) of the Families First Act specifically authorize guidance providing for waiver of penalties for failure to deposit amounts in anticipation of the allowance of the credits provided by the Families

First Act. Section 3 of this notice provides relief from the penalty under section 6656 pursuant to the Families First Act and the CARES Act.

SECTION 3. RELIEF FROM FAILURE TO MAKE A DEPOSIT OF TAXES

a. Employment Taxes Related to Qualified Leave Wages

An employer will not be subject to a penalty under section 6656 for failing to deposit Employment Taxes relating to Qualified Leave Wages in a calendar quarter if—

(1) The employer paid Qualified Leave Wages to its employees in the calendar quarter prior to the time of the required deposit,

(2) The amount of Employment Taxes that the employer does not timely deposit is less than or equal to the amount of the employer's anticipated credits under sections 7001 and 7003 of the Families First Act for the calendar quarter as of the time of the required deposit, and

(3) The employer did not seek payment of an advance credit by filing Form 7200, Advance Payment of Employer Credits Due to COVID-19, with respect to the anticipated credits it relied upon to reduce its deposits.

Thus, an employer may reduce, without a penalty under section 6656 of the Code, the amount of a deposit of Employment Taxes by the amount of Qualified Leave Wages and Qualified Health Plan Expenses paid by the employer in the calendar quarter prior to the required deposit, plus the amount of the employer's share of Medicare tax on such Qualified Leave Wages, as long as the employer does not also seek an advance credit with regard to the same amount.

For purposes of this section 3.a of this notice, the total amount of any reduction in any required deposit may not exceed the total amount of Qualified Leave Wages and

Qualified Health Plan Expenses and the employer's share of Medicare tax on the Qualified Leave Wages in the calendar quarter, minus any amount of Qualified Leave Wages, Qualified Health Plan Expenses, and employer's share of Medicare tax that had been previously used (1) to reduce a prior required deposit in the calendar quarter and obtain the relief provided by this notice or (2) to seek payment of an advance credit.

b. Employment Taxes Related to Qualified Retention Wages

An eligible employer will not be subject to a penalty under section 6656 for failing to deposit Employment Taxes relating to Qualified Retention Wages in a calendar quarter if—

(1) The employer paid Qualified Retention Wages to its employees in the calendar quarter prior to the time of the required deposit,

(2) The amount of Employment Taxes that the employer does not timely deposit, reduced by the amount of Employment Taxes not deposited in anticipation of the credits claimed for Qualified Leave Wages, Qualified Health Plan Expenses, and the employer's share of Medicare tax on the Qualified Leave Wages under sections 7001 and 7003 (as described in section 3.a of this notice), is less than or equal to the amount of the employer's anticipated credits under section 2301 of the CARES Act for the calendar quarter as of the time of the required deposit, and

(3) The employer did not seek payment of an advance credit by filing Form 7200, Advance Payment of Employer Credits Due to COVID-19, with respect to the anticipated credits it relied upon to reduce its deposits.

Thus, after a reduction, if any, of a deposit of Employment Taxes by the amount of credits anticipated for Qualified Leave Wages under sections 7001 and 7003 (as

described in section 3.a of this notice), an employer may further reduce, without a penalty under section 6656 of the Code, the amount of the deposit of Employment Taxes by the amount of Qualified Retention Wages paid by the employer in the calendar quarter prior to the required deposit, as long as the employer does not also seek an advance credit with regard to the same amount.

For purposes of this section 3.b of this notice, the total amount of any reduction in any required deposit may not exceed the total amount of Qualified Retention Wages in the calendar quarter, minus any amount of Qualified Retention Wages that had been previously used (1) to reduce a prior required deposit in the calendar quarter and obtain the relief provided by this notice or (2) to seek payment of an advance credit.

SECTION 4. CONTACT INFORMATION

The principal author of this notice is Michael A. Franklin of the Office of the Associate Chief Counsel (Procedure and Administration). For further information, please contact Mr. Franklin at (202)317-5436 (not a toll-free number).