

## Part III - Administrative, Procedural, and Miscellaneous

### Additional Administrative Relief with Respect to Deadlines Applicable to Employment Taxes, Employee Benefits, and Exempt Organizations Affected by the Ongoing Coronavirus Disease 2019 Pandemic

Notice 2020-35

#### **I. PURPOSE**

On March 13, 2020, the President of the United States issued an emergency declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act in response to the ongoing Coronavirus Disease 2019 (COVID-19) pandemic (Emergency Declaration). The Emergency Declaration instructed the Secretary of the Treasury “to provide relief from tax deadlines to Americans who have been adversely affected by the COVID-19 emergency, as appropriate, pursuant to 26 U.S.C. 7508A(a).”

Pursuant to section 7508A of the Internal Revenue Code (Code), the Internal Revenue Service (IRS) is postponing deadlines for certain time-sensitive actions on account of the COVID-19 emergency. This relief is provided with respect to certain employment taxes, employee benefit plans, exempt organizations, individual retirement arrangements (IRAs), Coverdell education savings accounts, health savings accounts (HSAs), and Archer and Medicare Advantage medical saving accounts (MSAs) that,

with certain exceptions, are due to be performed on or after March 30, 2020, and before July 15, 2020. In addition, pursuant to § 31.3511-1(g)(2)(ii) of the Treasury Regulations (Regulations), the IRS is providing a temporary waiver of the requirement that Certified Professional Employer Organizations (CPEOs) file certain employment tax returns and their accompanying schedules on magnetic media. The relief provided in this notice is provided on account of the ongoing COVID-19 pandemic and is in addition to the relief provided under Notice 2020-18, 2020-15 IRB 590, Notice 2020-20, 2020-16 IRB 660, and Notice 2020-23, 2020-18 IRB 742.

## **II. BACKGROUND**

### **A. COVID-19 Disaster Relief – Prior Postponement of Certain Deadlines and Other Requirements Pursuant to Section 7508A**

Section 7508A provides the Secretary with the authority to postpone the time for performing certain acts under the internal revenue laws for a taxpayer determined by the Secretary to be affected by a federally declared disaster as defined in section 165(i)(5)(A). Pursuant to section 7508A(a), a period of up to one year may be disregarded in determining whether the performance of certain acts is timely under the internal revenue laws.

Section 7508A(b) provides that, in the case of a pension or other employee benefit plan, or any sponsor, administrator, participant, beneficiary, or other person with respect to such a plan, affected by a federally declared disaster or a terroristic or military action described in section 7508A(a), the Secretary may specify a period of up to one year that may be disregarded in determining the date by which any action is

required or permitted to be completed. If the Secretary exercises that authority, no plan will be treated as failing to be operated in accordance with its terms solely because the plan disregards any period pursuant to this relief.<sup>1</sup>

Following the Emergency Declaration, the Department of the Treasury (Treasury Department) and the IRS published guidance utilizing the authority provided under section 7508A for the Secretary of the Treasury or his delegate (Secretary) to postpone certain deadlines in the case of a federally declared disaster.

On March 18, 2020, the Treasury Department and IRS issued Notice 2020-17, 2020-15 IRB 590, providing relief under section 7508A(a), which postponed the due date for certain federal income tax payments from April 15, 2020, until July 15, 2020. On March 20, 2020, the Treasury Department and IRS issued Notice 2020-18, which superseded Notice 2020-17 and provided expanded relief, postponing the due date for filing federal income tax returns and for making federal income tax payments from April 15, 2020, until July 15, 2020. On March 27, 2020, the Treasury Department and the IRS issued Notice 2020-20, which amplified Notice 2020-18 and provided additional relief, postponing certain federal gift (and generation-skipping transfer) tax return filings and payments from April 15, 2020, until July 15, 2020.

On April 9, 2020, the Treasury Department and the IRS issued Notice 2020-23, which provided additional relief pursuant to the Emergency Declaration. Notice 2020-23 provides relief for persons with a federal tax payment obligation specified in section III.A

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<sup>1</sup> Sections 518 and 4002(i) of the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974), as amended (ERISA), similarly authorize the provision of relief under Titles I and IV of ERISA.

of the notice (Specified Payment), or a federal tax return or other form filing obligation specified in section III.A of the notice (Specified Form), due to be performed (originally or pursuant to a valid extension) on or after April 1, 2020, and before July 15, 2020 (Affected Taxpayers). Notice 2020-23 also provides that the term Affected Taxpayer includes any person who performs a time-sensitive action listed in either § 301.7508A-1(c)(1)(iv) - (vi) of the Regulations or Rev. Proc. 2018-58, 2018-50 IRB 990, due to be performed (originally or pursuant to a valid extension) on or after April 1, 2020, and before July 15, 2020 (Specified Time-Sensitive Action). Thus, for example, under Notice 2020-23, Affected Taxpayers include persons described in section 7508A(b), such as sponsors or plan administrators of qualified retirement plans, due to perform a Specified Time-Sensitive Action. In addition, Affected Taxpayers include exempt organizations with a federal tax payment, federal tax return, or other form filing obligation specified in section III.A of Notice 2020-23, and exempt organizations performing time-sensitive acts listed in Rev. Proc. 2018-58, which includes the filing of Form 990 series annual information returns.

## **B. Employment Taxes**

### *1. Interest-free adjustments to correct employment tax reporting errors*

For purposes of this notice, “employment tax” means Federal Insurance Contributions Act (FICA) tax imposed on employees by sections 3101(a) and 3101(b) and on employers by sections 3111(a) and 3111(b); Railroad Retirement Tax Act (RRTA) tax imposed on employees by sections 3201(a) and 3201(b) and on employers

by sections 3221(a) and 3221(b); and income tax withholding (ITW) imposed by section 3402. To the extent other types of withholding are treated as ITW under section 3402(a) (such as gambling withholding, pension withholding, and backup withholding as set forth in sections 3402(q)(7), 3405(f), and 3406(h)(10), respectively), these other types of withholding are also included in the term “employment tax.”

Sections 6205 and 6413 permit interest-free adjustments to correct employment tax reporting errors, and sections 31.6205-1, 31.6413(a)-1 and 31.6413(a)-2 of the Regulations provide related rules for making these adjustments. Notice 2020-23 provided relief for filing claims for credit or refund of any tax, including employment tax, due to be filed on or after April 1, 2020, and before July 15, 2020. However, Notice 2020-23 did not provide relief for employers making interest-free adjustments to correct employment tax reporting errors.

## *2. Electronic filing requirements for CPEOs*

Section 31.3511-1(g)(2) provides that CPEOs must file on magnetic media any Form 941, Employer's QUARTERLY Federal Tax Return, and Form 943, Employer's Annual Federal Tax Return for Agricultural Employees, along with all required accompanying schedules. However, § 31.3511-1(g)(2)(ii) provides that the IRS may waive the requirements to file on magnetic media in cases of undue economic hardship. Individual requests for waivers from CPEOs must be made in accordance with applicable guidance. The term “magnetic media” generally includes electronic filing as well as other media specifically permitted under applicable guidance.

## **C. Employee Benefits**

### *1. Funding provisions for qualified defined benefit pension plans*

Section 412 provides minimum funding standards for qualified defined benefit and other pension plans. Section 412(c) provides for waivers of the minimum funding requirements in the event of temporary substantial business hardship. In order for a plan other than a multiemployer plan to receive a waiver, section 412(c)(5) provides that an application for a waiver must be submitted no later than the 15th day of the 3rd month beginning after the close of the plan year for which the waiver is sought.

Section 432(b)(3)(A) provides special rules for certain multiemployer defined benefit plans. For a plan that is subject to those requirements, the plan actuary must make certain certifications each year regarding the plan's funded status. The deadline for these certifications for a plan year is the 90th day of the plan year. Under section 432(b)(3)(D), in certain circumstances, the plan sponsor is required to provide notice regarding the plan's funded status to the participants and beneficiaries, the bargaining parties, the Pension Benefit Guaranty Corporation, the Secretary of Labor and, if applicable, the Secretary of the Treasury. Section 432(c)(1) requires, for the first plan year that a multiemployer plan is in endangered status, that the plan sponsor adopt a funding improvement plan providing one or more schedules of revised benefit structures, revised contribution structures, or both, no later than 240 days following the required date for the actuarial certification of endangered status and notify the bargaining parties of the schedules within 30 days after their adoption. Section

432(c)(6) requires the plan sponsor to update the funding improvement plan and schedules annually and attach that update to the Form 5500 filed for the plan year. Section 432(e)(1)(A) and (3)(B) impose similar adoption, notification, and update requirements with respect to a rehabilitation plan for a multiemployer plan that is certified to be in critical status.

Section 433 provides special funding rules for cooperative and small employer charity pension (CSEC) plans as defined under section 414(y), including rules for certification of funded status and the adoption of a funding restoration plan.

Sections 302, 305 and 306 of ERISA contain provisions that are parallel to sections 412, 432 and 433 of the Code, respectively.

## *2. Form 5330, Return of Excise Taxes Related to Employee Benefit Plans*

The Form 5330 is used to report and pay a variety of excise taxes with respect to employee benefit arrangements and tax-exempt entities. See Table 1 of the Instructions for Form 5330 for a list of filing deadlines for those excise taxes.

## *3. Certain Tax Exempt and Government Entities/Employee Plans programs*

### *a. Initial remedial amendment period for section 403(b) plans*

Section 21.02 of Rev. Proc. 2013-22, 2013-18 IRB 985, as modified by Rev. Proc. 2014-28, 2014-16 IRB 944, and Rev. Proc. 2015-22, 2015-11 IRB 754, and clarified by Rev. Proc. 2017-18, 2017-5 IRB 743, establishes a remedial amendment period that permits an eligible employer to retroactively correct form defects in its written section 403(b) plan by timely adopting a section 403(b) pre-approved plan or by

otherwise timely amending its section 403(b) individually designed plan. Rev. Proc. 2017-18 provides that March 31, 2020, is the last day of this initial remedial amendment period.

Rev. Proc. 2019-39, 2019-42 IRB 945, sets forth a system of recurring remedial amendment periods for correcting form defects in section 403(b) individually designed plans and section 403(b) pre-approved plans first occurring after the initial remedial amendment period ends, and provides a limited extension of the initial remedial amendment period for certain form defects that is based, in part, on the initial March 31, 2020, deadline. Rev. Proc. 2019-39 also provides deadlines for the adoption of plan amendments for section 403(b) individually designed plans and section 403(b) pre-approved plans with respect to a form defect first occurring after the end of the initial remedial amendment period.

*b. Pre-approved defined benefit plans*

Rev. Proc. 2016-37, 2016-29 IRB 136, provides a regular six-year remedial amendment cycle that applies for pre-approved plans. Section 15.03(1) of Rev. Proc. 2016-37 provides that the remedial amendment period for a disqualifying provision will not end before the last day of a plan's first applicable remedial amendment cycle in which an application for an opinion or advisory letter that considers the disqualifying provision may be submitted.

Announcement 2018-05, 2018-13 IRB 461, provides that an adopting employer who adopts, by April 30, 2020, a master and prototype (M&P) or volume submitter (VS)

defined benefit plan that was approved based on Notice 2012-76, 2012-52 IRB 775 (2012 Cumulative List), will be considered to have adopted the plan within the second six-year remedial amendment cycle. Announcement 2018-05 also provides that an adopting employer of an M&P or VS plan may apply for an individual determination letter (if otherwise eligible) during the period beginning on May 1, 2018, and ending April 30, 2020. Announcement 2018-05 further provides that April 30, 2020, is the end of the second six-year remedial amendment cycle for pre-approved defined benefit plans. Rev. Proc. 2020-10, 2020-2 IRB 295, provides that the third six-year remedial amendment cycle for pre-approved defined benefit plans begins on the following day, and ends on January 31, 2025.

*c. Deadlines for voluntary correction under EPCRS*

Rev. Proc. 2019-19, 2019-19 IRB 1086, sets forth a system of correction programs for sponsors of retirement plans that are intended to satisfy the requirements of section 401(a), 403(a), 403(b), 408(k), or 408(p). The Employee Plans Compliance Resolution System (EPCRS) permits employers sponsoring these plans to correct certain failures and thereby continue to provide their employees with retirement benefits on a tax-favored basis. The components of EPCRS are the Self-Correction Program (SCP), the Voluntary Correction Program (VCP), and the Audit Closing Agreement Program (Audit CAP).

Under VCP, a plan sponsor may, at any time before audit, pay a limited fee and receive the IRS's approval for correction of a plan failure that has been identified to the

IRS, in writing, by the plan sponsor. Once agreement has been reached with the plan sponsor as to the appropriate corrective action to be undertaken, the IRS will send the plan sponsor a compliance statement specifying the corrective action required.

Pursuant to section 10.06(9) of Rev. Proc. 2019-19, the plan sponsor must implement the corrective action set forth in the compliance statement within 150 days of the date of the compliance statement. In addition, if the corrective action specified in the compliance statement includes the adoption of a corrective plan amendment, the corrective amendment must be adopted no later than 150 days after the date of the compliance statement (with a later deadline in the case of a governmental plan described in section 414(d)).

*d. Substitute mortality tables*

Rev. Proc. 2017-55, 2017-43 IRB 373, provides guidance with respect to the use of a substitute mortality table in accordance with section 430(h)(3)(C). Section 4 of Rev. Proc. 2017-55 notes that, under section 430(h)(3)(C)(v)(I), a request for approval to use substitute mortality tables generally must be submitted at least 7 months before the first day of the first plan year for which the substitute mortality tables are to apply.

**D. Exempt organizations**

1. *Form 990-N electronic notice requirement for certain small exempt organizations*

Section 6033(i) requires organizations that are excused from filing an annual information return (Form 990 series) by reason of normally having annual gross receipts below a certain specified amount (currently \$50,000) to furnish an annual electronic

notification. The annual electronic notification (Form 990-N, e-Postcard) is due by the 15th day of the fifth month after the close of the organization's tax year.

*2. Time for filing suit for declaratory judgment*

Section 7428 provides that an organization may file, within a specified period, an appropriate pleading for declaratory judgment with the United States Tax Court, the United States Court of Federal Claims, or the district court of the United States for the District of Columbia, involving the IRS's determination, or failure to make a determination, with respect to the organization's initial or continuing qualification or classification as an exempt organization described in section 501(c) or (d) and exempt from tax under section 501(a), an organization described in section 170(c)(2), a private foundation under section 509(a), a private operating foundation under section 4942(j)(3), or a cooperative described in section 521(b). Although Notice 2020-23 postponed the time to commence an action for declaratory judgment with the United States Tax Court, it did not cover similar suits filed with the Court of Federal Claims or the district court of the United States for the District of Columbia.

**E. Forms 5498, -ESA, -SA**

Form 5498, IRA Contribution Information, Form 5498-ESA, Coverdell ESA Contribution Information, and Form 5498-SA, HSA, Archer MSA, or Medicare Advantage MSA Information, must be filed with the IRS and furnished to participants and beneficiaries by the times specified in the instructions to these forms.

**III. RELIEF GRANTED**

This notice amplifies the definition of Affected Taxpayer as provided in Notice 2020-23 to include Affected Taxpayers as defined in section III.A of this notice. This notice also amplifies the definition of Specified Time-Sensitive Actions as provided in Notice 2020-23 to include the Time-Sensitive Actions described in section III.B of this notice that are due to be performed on or after March 30, 2020, and before July 15, 2020. These amplified definitions, rather than the definitions in Notice 2020-23, apply for purposes of the relief described in this section III.

Pursuant to this notice, the revised deadline for an Affected Taxpayer to perform a Time-Sensitive Action described in section III.B of this notice is July 15, 2020, unless a different revised deadline is specified under section III.B.2(e) or III.B.4 of this notice. In the case of Time-Sensitive Actions with respect to provisions of the Code for which there are parallel provisions in ERISA, the relief provided under this section III also applies for purposes of those provisions under ERISA.

This notice also provides a temporary waiver of the requirement under § 31.3511-1(g)(2) that CPEOs file certain employment tax returns, and their accompanying schedules, on magnetic media (including electronic filing). This temporary waiver is extended to all CPEOs; individual requests for waiver do not need to be submitted. The waiver applies only to Forms 941 filed for the second, third, and fourth quarter of 2020 and only to Forms 943 filed for calendar year 2020, and their accompanying schedules. Accordingly, CPEOs are permitted, but not required, to file a paper Form 941, and its accompanying schedules, in lieu of electronic submission for

the second, third, and fourth quarters of calendar year 2020. In addition, CPEOs are permitted, but not required, to file a paper Form 943, and its accompanying schedules, in lieu of electronic submission for calendar year 2020.

#### **A. Affected Taxpayers**

For purposes of the relief provided with respect to Time-Sensitive Actions described in section III.B of this notice, Affected Taxpayers include:

1. With respect to employment taxes, employers who perform a Time-Sensitive Action described in section III.B.1 of this notice.
2. With respect to employee benefit plans, the plan (including a section 403(b) plan, a governmental section 457(b) plan, a SEP plan described in section 408(k), or a SIMPLE IRA plan described in section 408(p)), or any sponsor, administrator, participant, beneficiary, disqualified person, or other person with respect to such a plan who performs a Time-Sensitive Action described in section III.B.2 of this notice.
3. With respect to exempt organizations, those persons performing a Time-Sensitive Action described in section III.B.3 of this notice.
4. Filers of a Form 5498, Form 5498-SA, or 5498-ESA for whom filing the form is a Time-Sensitive Action described in section III.B.4 of this notice.

#### **B. Time-Sensitive Actions**

The Time-Sensitive Actions to which the relief under this section III applies are:

1. *Correction of employment tax reporting errors using the interest-free adjustment process under sections 6205 and 6413*

Actions to correct underpayments or overpayments pursuant to sections 6205 and 6413, respectively.

2. *Qualified retirement plans*

a. *Funding waiver*

Application for a funding waiver under section 412(c) for a defined benefit pension plan that is not a multiemployer plan.

b. *Multiemployer plan funding*

With respect to a multiemployer defined benefit pension plan, actions due to be performed on or before the dates described in:

- Section 432(b)(3) for the certification of funded status and the notice to interested parties of that certification.
- Sections 432(c)(1) and 432(e)(1) for the adoption of, and the notification to the bargaining parties of the schedules under, a funding improvement plan or rehabilitation plan.
- Sections 432(c)(6) and 432(e)(3) for the annual update of a funding improvement plan and its contribution schedules, or rehabilitation plan and its contribution schedules, and the filing of those updates with the Form 5500 annual return.

c. *CSEC plans*

With respect to a CSEC plan, actions to be performed on or before the date described in:

- Section 433(c)(9) for making the contribution required to be made for the plan year.
- Section 433(f)(3)(B) for making required quarterly installments.
- Section 433(j)(3) for the adoption of a funding restoration plan.
- Section 433(j)(4) for the certification of funded status.

d. *Form 5330*

Filing of Form 5330 and payment of the associated excise taxes. The period beginning on March 30, 2020, and ending on July 15, 2020, will be disregarded in the calculation of any interest or penalty for failure to file the Form 5330 or to pay the excise tax postponed by this notice.

Interest and penalties with respect to such postponed filing and payment obligations will begin to accrue on July 16, 2020.

e. *Tax Exempt and Government Entities Division, Employee Plans programs*

- *Extension of initial remedial amendment period for section 403(b) plans.* With respect to the remedial amendment period and plan amendment rules for section 403(b) plans described in Rev. Proc. 2017-18 and Rev. Proc. 2019-39, actions that are otherwise required to be performed on or before March 31, 2020, with respect to form defects or plan amendments. The deadline for those actions is postponed to June 30, 2020 (and “June 30, 2020” should be

substituted for all references to “March 31, 2020” in Rev. Proc. 2017-18 and in Rev. Proc. 2019-39).

- *Pre-approved defined benefit plans.* With respect to pre-approved defined benefit plans, the deadline for the following actions is postponed until July 31, 2020:
  - Adoption of a pre-approved defined benefit plan that was approved based on the 2012 Cumulative List;
  - Submission of a determination letter application under the second six-year remedial amendment cycle; and
  - Actions that are otherwise required to be performed with respect to disqualifying provisions during the remedial amendment period that would otherwise end on April 30, 2020.
- *EPCRS.* With respect to a compliance statement issued under VCP, implementation of all corrective actions, including adoption of corrective amendments, required by the compliance statement.
- *Substitute mortality table.* Request for approval of a substitute mortality table in accordance with section 430(h)(3)(C).

### 3. *Exempt organizations*

- a. *Form 990-N electronic notice requirement for certain small exempt organizations*

Electronic submissions of Form 990-N under section 6033(i).

b. *Time for Commencing a Suit for Declaratory Judgment Pursuant to Section 7428*

Filings by organizations listed in section 7428(a)(1) of an appropriate pleading for declaratory judgment with the United States Court of Federal Claims or the district court of the United States for the District of Columbia, within the period specified in section 7428(b)(3).

4. *Form 5498 series*

With respect to the Form 5498, IRA Contribution Information, Form 5498-ESA, Coverdell ESA Contribution Information, and the Form 5498-SA, HSA, Archer MSA, or Medicare Advantage MSA Information, the due date for filing and furnishing the forms is postponed to August 31, 2020. The period beginning on the original due date of those forms and ending on August 31, 2020, will be disregarded in the calculation of any penalty for failure to file those forms. Penalties with respect to such a postponed filing will begin to accrue on September 1, 2020.

**IV. EFFECT ON OTHER DOCUMENTS**

Rev. Proc. 2017-18, Rev. Proc. 2017-55, Announcement 2018-05, Rev. Proc. 2019-19, Rev. Proc. 2019-39, and Rev. Proc. 2020-10 are modified, and Notice 2020-18, Notice 2020-20, and Notice 2020-23 are amplified.

**V. DRAFTING INFORMATION**

The principal author of this notice is Diane S. Bloom of the Office of Associate Chief Counsel, Employee Plans, Exempt Organizations, and Employment Taxes, with the participation of staff from other offices. For further information regarding the guidance related to employment taxes under this notice, please contact Lynne A. Camillo at (202) 317-4774 or Nina Roca at (202) 317-6798. For further information regarding the guidance related to qualified retirement plans under this notice, please contact Diane S. Bloom at (202) 317-6700. For further information regarding the guidance related to exempt organizations under this notice, please contact Ingrid M. Vatamanu at (202) 317-4541. These telephone calls are not toll-free.