

IRS provides deposit penalty relief for employers eligible for new refundable credits due to COVID-19

The IRS has provided penalty relief for failure to deposit employment taxes under Code Sec. 6656 to employers entitled to the new refundable tax credits provided under the Families First Coronavirus response Act (Families First Act) (P.L. 116-127), and the Coronavirus Aid, Relief, and Economic Security (CARES) Act (P.L. 116-136). The relief is provided 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.

The relief applies to deposits of employment taxes reduced in anticipation of:

- the credits for qualified leave wages paid with respect to the period beginning April 1, 2020, and ending December 31, 2020; and
- the credits for qualified retention wages paid with respect to the period beginning on March 13, 2020, and ending December 31, 2020.

Refundable credits. 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 coronavirus disease 2019 (COVID-19). Generally, the Families First Act provides a refundable tax credit against an employer's share of the social security portion of Federal Insurance Contributions Act (FICA) tax and an employer's share of the social security and Medicare portions of the Railroad Retirement Tax Act (RRTA) tax ("creditable employment taxes") 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.

The CARES Act allows certain employers experiencing a full or partial business suspension due to orders from a governmental authority due to COVID-19 or experiencing a statutorily specified decline in business to claim a refundable tax credit against an employer's creditable employment taxes of up to 50 percent of the qualified wages, including allocable qualified health expenses and limited to \$10,000 per employee over all calendar quarters combined.

These refundable tax credits are 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.

Penalty Relief for Qualified Leave Wages. An employer will not be subject to a penalty for failing to deposit employment taxes relating to qualified leave wages in a calendar quarter if:

- the employer paid qualified leave wages to its employees in the calendar quarter prior to the time of the required deposit,
- 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 the Families First Act for the calendar quarter as of the time of the required deposit, and
- 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 penalty, 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.

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.

Penalty Relief for Qualified Retention Wages. An eligible employer will not be subject to a penalty for failing to deposit employment taxes relating to qualified retention wages in a calendar quarter if:

- the employer paid qualified retention wages to its employees in the calendar quarter prior to the time of the required deposit,
- 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, is less than or equal to the amount of the employer's anticipated credits under the CARES Act for the calendar quarter as of the time of the required deposit, and
- 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, an employer may further reduce, without a penalty, 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.

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. (*IRS Notice, 2020-22, IRB 2020-17, March 31, 2020.*)