

## Relief from Penalty for Failure to Deposit Employment Taxes

Notice 2021-24

### SECTION 1. PURPOSE

This notice amplifies the guidance in Notice 2020-22, 2020-17 I.R.B. 664, which provides for penalty relief under section 6656 of the Internal Revenue Code (Code) for an employer's failure to timely deposit Employment Taxes<sup>1</sup> with the Internal Revenue Service (IRS). This notice extends the penalty relief provided in Notice 2020-22 to apply to deposits of Employment Taxes reduced in anticipation of the following credits:

- a. Paid sick and family leave credits under the Families First Coronavirus Response Act (Families First Act), Pub. L. No. 116-127, 134 Stat. 179 (March 18, 2020), as amended by the COVID-related Tax Relief Act of 2020 (Tax Relief Act), enacted as Subtitle B of the Consolidated Appropriations Act, 2021 (Appropriations Act), Pub. L. No. 116-260, 134 Stat. 1182 (December 27, 2020), with respect to qualified leave wages paid with respect to the period beginning January 1, 2021, and ending March 31, 2021;
- b. Paid sick and family leave credits under sections 3131, 3132, and 3133 of the Code, added by section 9641 of the American Rescue Plan Act of 2021 (ARP), Pub. L. No. 117-2, 135 Stat. 4 (March 11, 2021), with respect to qualified leave wages paid with respect to the period beginning April 1, 2021, and ending September 30, 2021;

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<sup>1</sup> "Employment Taxes" means withheld income taxes, taxes under the Federal Insurance Contributions Act (FICA), and taxes under the Railroad Retirement Tax Act (RRTA).

- c. The employee retention credit under section 2301 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116-136, 134 Stat. 281 (March 27, 2020), as amended by the Taxpayer Certainty and Disaster Tax Relief Act of 2020 (Relief Act), enacted as Division EE of the Appropriations Act, with respect to qualified wages paid with respect to the period beginning January 1, 2021, and ending June 30, 2021;
- d. The employee retention credit under section 3134 of the Code, added by section 9651 of the ARP, with respect to qualified wages paid with respect to the period beginning July 1, 2021, and ending December 31, 2021; and
- e. The credit for Continuation Coverage Premium Assistance under section 6432 of the Code, as added by section 9501(b) of the ARP, for COBRA continuation coverage premiums not paid by assistance eligible individuals for such coverage by reason of section 9501(a)(1) of the ARP during the period beginning April 1, 2021, and ending September 30, 2021.

## 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), section 3111(b) of the Code (employer's share of the Hospital Insurance (Medicare) portion of FICA tax), section 3221(a) of the Code (employer's share of the social security and Medicare portions of RRTA tax), and section 3402 of the Code 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.

Although Form 941 is due quarterly, section 6302 of the Code and regulations under that section generally require deposits of Employment Taxes to be made on a monthly or semiweekly 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) of the Employment Taxes and Collection of Income Tax at Source Regulations.

#### Paid Sick and Family Leave Credits

The Families First Act generally required 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, through December 31, 2020. Generally, employers that were required to pay qualified sick leave wages and qualified family leave wages 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) under the Families First Act are entitled to refundable tax credits administered by the IRS.

The Tax Relief Act did not extend the requirement to provide the Qualified Leave Wages and Qualified Health Plan Expenses, but did extend the refundable tax credits for Qualified Leave Wages and Qualified Health Plan Expenses, with modifications, paid for periods of leave after December 31, 2020, and before April 1, 2021, that would have been required to have been paid if the requirement to provide such leave had been extended.

Specifically, sections 7001 and 7003 of the Families First Act, as amended by the Tax Relief Act, provide refundable tax credits against an employer's share of the social

security portion of FICA tax, and so much of the Railroad Retirement Tax Act Tier 1 rate as is attributable to an employer's share of the social security portion of FICA tax, for each calendar quarter in an amount equal to the Qualified Leave Wages paid by the employer plus Qualified Health Plan Expenses with respect to that calendar quarter, with respect to periods of leave beginning on April 1, 2020, and ending on March 31, 2021. For purposes of this notice, an employer's share of the social security portion of FICA tax and so much of the Railroad Retirement Tax Act Tier 1 rate as is attributable to an employer's share of the social security portion of FICA tax, as applicable, are referred to as Creditable Employer Social Security Taxes. The credits under section 7001 and 7003 are increased by the amount of the employer's share of Medicare tax (or the portion of the Railroad Retirement Tax Act Tier 1 rate as is attributable to 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 the credit under section 7005(b)(1) is treated as a credit under section 7001 or section 7003.

The ARP added sections 3131 and 3132 to the Code, under which eligible employers can claim refundable tax credits for qualified sick leave wages and qualified family leave wages, respectively, with respect to periods of leave beginning on April 1, 2021, and ending on September 30, 2021 (also referred to as Qualified Leave Wages for the remainder of this notice). The refundable tax credits under sections 3131 and 3132 of the Code apply against an employer's share of the Medicare portion of FICA tax, and so much of the Railroad Retirement Tax Act Tier 1 rate as is attributable to the employer's share of Medicare tax, which for purposes of this notice, are referred to as

Creditable Employer Medicare Taxes. The refundable tax credits are increased by the health plan expenses (also referred to as Qualified Health Plan Expenses for the remainder of this notice) and certain collectively bargained contributions paid by an eligible employer that are properly allocable to the related Qualified Leave Wages (Qualified Collectively Bargained Contributions), and both the employer's share of the social security and Medicare portions of FICA tax (and the employer's share of the Railroad Retirement Tax Act Tier 1 rate) imposed on the Qualified Leave Wages. See I.R.C. §§ 3131(d), 3131(e), 3132(d), 3133(e), and 3133. For purposes of this notice, the increase in the credit under section 3133 is treated as a credit under section 3131 or 3132 of the Code.

The refundable tax credits under section 7001 and 7003 of the Families First Act and sections 3131 and 3132 of the Code 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, in accordance with the instructions to the form.

#### Employee Retention Credits

Section 2301 of the CARES Act, as originally enacted, provided for an employee retention credit for eligible employers that pay qualified wages, including certain health plan expenses, to some or all employees after March 12, 2020, and before January 1, 2021. Eligible employers were allowed to claim a refundable tax credit under the CARES Act for fifty percent of qualified wages paid, limited to \$10,000 per employee over all calendar quarters combined in 2020 (Qualified Retention Wages).

Section 206 of the Relief Act amended section 2301 of the CARES Act to modify the employee retention credit for qualified wages paid after March 12, 2020, and before January 1, 2021, primarily relating to who may claim the credit. Section 207 of the Relief Act further amended section 2301 of the CARES Act to modify and extend the application of the employee retention credit for qualified wages paid after December 31, 2020, and before July 1, 2021. Under section 2301 of the CARES Act, as amended by section 207 of the Relief Act, eligible employers can claim a refundable tax credit for seventy percent of qualified wages paid, limited to \$10,000 per employee per calendar quarter in 2021 for the first and second calendar quarters of 2021 (also referred to as Qualified Retention Wages for the remainder of this notice).

Section 9651 of the ARP enacted section 3134 of the Code, which provides a substantially similar employee retention credit for qualified wages paid after June 30, 2021, and before January 1, 2022. Under section 3134 of the Code, eligible employers can claim a refundable tax credit for seventy percent of qualified wages paid, limited to \$10,000 per employee per calendar quarter in 2021 for the third and fourth calendar quarters of 2021 (also referred to as Qualified Retention Wages for the remainder of this notice).

The refundable tax credit under section 2301 of the CARES Act applies against Creditable Employer Social Security Taxes for each calendar quarter. The refundable tax credit under section 3134 of the Code applies against Creditable Employer Medicare Taxes for each calendar quarter. The refundable tax credits under section 2301 of the CARES Act, as amended, and section 3134 of the Code 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. For calendar quarters in 2021, eligible small employers may claim an advance payment of the refundable tax credits for Qualified Retention Wages under section 2301 of the CARES Act and section 3134 of the Code by filing Form 7200 in accordance with the instructions to the form.

#### COBRA Continuation Coverage Premium Assistance Credit

Section 9501(b) of the ARP added section 6432 of the Code<sup>2</sup> which provides a refundable tax credit for premiums payable for COBRA continuation coverage under section 9501(a)(1). The credit is calculated with respect to premiums not paid by assistance eligible individuals for such coverage by reason of section 9501(a)(1) during the period beginning April 1, 2021, and ending September 30, 2021.

The refundable tax credit applies against Creditable Employer Medicare Taxes for each calendar quarter. 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 by filing Form 7200 in accordance with the instructions to the form.

#### Failure to Deposit Penalty Relief

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

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<sup>2</sup> A version of section 6432 was originally added to the Code in 2009 by section 3001 of the American Recovery and Reinvestment Act of 2009 (ARRA), Pub. Law 111-5, 123 Stat. 115 (February 17, 2009) (ARRA). Section 6432 was repealed by section 401(d)(7)(A) of Division U of Title IV of the Consolidated Appropriations Act, 2018, Pub. Law 115-141, 132 Stat. 348 (March 23, 2018).

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 her delegate (Secretary) to waive the penalty under section 6656 of the Code for failure to deposit the Creditable Employer Social Security Taxes in anticipation of the allowance of the refundable tax credits allowed under the Families First Act and the CARES Act, respectively. Sections 3131(i), 3132(i), 3134(k) and 6432(c)(2)(C) of the Code instruct the Secretary to waive the penalty under section 6656 of the Code for failure to deposit Creditable Employer Medicare Taxes in anticipation of the allowance of the refundable tax credits allowed under sections 3131, 3132, 3134 and 6432 of the Code, respectively. Furthermore, sections 7001(f) and 7003(f) of the Families First Act and sections 3131(g)(3) and 3132(g)(3) of the Code specifically authorize guidance providing for penalty relief for failure to deposit amounts in anticipation of the allowance of the credits provided by the Families First Act and sections 3131 and 3132 of the Code, respectively. Section 3 of this notice provides relief from the penalty under section 6656 pursuant to the Families First Act, the CARES Act, and sections 3131(i), 3132(i), 3134(k), and 6432(c)(2)(C) of the Code.

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

#### *a. Reduced Deposits for Paid Sick and Family Leave Credit*

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



(1) The employer paid Qualified Leave Wages, Qualified Health Plan Expenses, or Qualified Collectively Bargained Contributions with respect to the period beginning on April 1, 2021, and ending on September 30, 2021, 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 or sections 3131 and 3132 of the Code 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 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 the paid sick or family leave credit anticipated for 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.a of this notice, the total amount of any reduction in any required deposit may not exceed the total amount of the employer's anticipated credit under section 7001 or 7003 of the Families First Act or section 3131 or 3132 of the Code as of the time of the required deposit, minus any amount of such anticipated credits that had previously been 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. Reduced Deposits for the Employee Retention Credit*

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

(1) The employer paid Qualified Retention Wages with respect to the period beginning January 1, 2021 and ending December 31, 2021, 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 under sections 7001 and 7003 of the Families First Act or sections 3131 and 3132 of the Code (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 or section 3134 of the Code 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, 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 the anticipated paid sick or family leave credits, 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 the employer's employee retention credit anticipated for 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 the employer's anticipated credit under section 2301 of the CARES Act or section 3134 of the Code as of the time

of the required deposit, minus any amount of such anticipated credit that had previously been 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.

*c. Reduced Deposits for the COBRA Continuation Coverage Premium*

*Assistance Credit*

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

(1) The employer is a “person to whom premiums are payable” under section 6432(b) of the Code,

(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 under sections 7001 and 7003 of the Families First Act or sections 3131 and 3132 of the Code (as described in section 3.a of this notice), and the credits claimed under section 2301 of the CARES Act or section 3134 of the Code (as described in section 3.b of this notice), is less than or equal to the amount of the employer’s anticipated credits under section 6432 of the Code 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 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 the anticipated paid sick or family leave credits and the anticipated employee retention credit, 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 the

employer's COBRA continuation coverage premium assistance credit anticipated for 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.c of this notice, the total amount of any reduction in any required deposit may not exceed the total amount of the employer's anticipated credit under section 6432 of the Code in the calendar quarter as of the time of the required deposit, minus any amount of such anticipated credit that had previously been 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. EFFECT ON OTHER DOCUMENTS

Notice 2020-22 is amplified.

#### SECTION 5. 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).