

CARES ACT GUIDANCE: Overview of IRS Guidance Regarding Deferral of Employment Tax Deposits and Payments

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What You Need To Know:

- The IRS issued FAQs that clarified guidance on the deferral of employment tax deposits and the interaction with loan forgiveness under a Paycheck Protection Program loan.
- All employers are eligible to take advantage of the payroll tax deferral.
- No affirmative action or election is required to take advantage of this benefit.

Background

The Coronavirus Aid, Relief, and Economic Security (CARES) Act allows employers to defer the employer's portion of the Social Security payroll tax (6.2 percent) (and certain railroad retirement taxes) on wages paid from March 27, 2020, through December 31, 2020. The amounts deferred must be 50 percent repaid by no later than December 31, 2021, and the remainder by no later than December 31, 2022. The deferral is interest free. Companies would still continue to withhold Social Security payroll tax from employees and remit to the IRS; it is simply the company's portion of the tax that can be delayed (and the deferral amount does not include the 1.45 percent of Medicare tax that is still payable as scheduled).

The CARES Act tax deferral provision expressly states that it does not apply if a taxpayer obtains loan forgiveness under a Paycheck Protection Program (PPP) loan. For more information on the PPP, please see "[SBA Paycheck Protection Program](#)." This limitation relating to PPP loan forgiveness has been a source of confusion and uncertainty, and many businesses were unclear about whether to seek to obtain the benefit of the payroll tax deferral

if they were also seeking to obtain a PPP loan (which itself is uncertain since it requires the employer to find a willing bank with the capacity to accept and process the employer's application).

This uncertainty over application of the PPP exclusion created a conundrum for employers. More conservative taxpayers have been unwilling to defer payroll taxes and risk IRS penalties if the PPP exclusion were to apply retroactively from the date of the PPP loan forgiveness. However, other, more aggressive, taxpayers have been willing to risk deferring payroll taxes (with possible exposure to interest and penalties) with the intention of repaying them in full if they ultimately obtained loan forgiveness under a PPP loan.

Fortunately, the IRS has issued new guidance in the form of FAQs posted on its website on April 10, 2020, providing taxpayers with a more favorable outcome than either of the two scenarios above. See "[Deferral of employment tax deposits and payments through December 31, 2020](#)." Under the new guidance, employers can defer the payroll taxes up to the date of forgiveness and then continue the deferral

of such amounts up to the repayment dates listed in the statute—50 percent of the deferred amount by December 31, 2021, and the remainder by December 31, 2022. The only limitation is that the deferral is unavailable for additional payroll taxes that become due after the date the lender issues a notice of PPP loan forgiveness. Since, as a practical matter, loan forgiveness under a PPP loan may not occur until September or October of this year at the earliest, this is a favorable result that will allow the employer potentially to defer many months of its share of Social Security payroll taxes interest free until the end of 2021 and 2022, respectively. The IRS FAQs also provide some helpful guidance on the interplay between the deferral of payroll taxes and application of the CARES Act employee retention tax credit (as explained in Q&A 8 below).

Questions and Answers:

Q 1: Who is able to defer payroll taxes?

- A 1: Unlike certain other CARES Act benefits that are available only to specific categories of employers or to employers of a certain size (e.g., the PPP loans for employers that are limited, with certain exceptions, to those with no more than 500 employees), the payroll tax deferral benefit applies to all employers regardless of size (so any employer with payroll taxes otherwise due may defer them).

Q 2: How much is it estimated that the payroll tax deferral will save employers?

- A 2: The taxes eligible for deferral are calculated at 6.2 percent of each employee's wages up to the covered Social Security wage base (\$137,700 in 2020), and the potential savings will vary based upon the size of the employer's workforce and the amount of covered compensation. The actual dollar savings would be calculated based on the "time value of money" of the amount deferred over the period of the deferral (i.e., the value of the interest-free loan).

Q 3: Are there penalties and interest associated with the payroll tax deferral?

- A 3: No. The deferral is interest and penalty free unless an employer fails to make the required installment payments in accordance with the deferment schedule described above.

Q 4: Does taking advantage of the payroll tax deferral preclude employers from taking advantage of other benefits?

- A 4: As noted above, employers that receive a PPP loan may not defer payroll taxes that are otherwise due **after** the lender notifies the employer that the loan was forgiven. Until this time, employers that have applied for a PPP loan may defer payroll taxes that would otherwise come due.

Q 5: If an employer defers payroll taxes, is that information publicly disclosed?

- A 5: No. Employer payroll taxes are reported on Form 941, which is not publicly available.

Q 6: Is an employer required to file an election or take any action to defer payroll taxes?

- A 6: No special election or affirmative action is required. To take advantage of this benefit, an employer would simply not pay the taxes when they are otherwise due.

Q 7: What happens if the deferred payment is not timely repaid or if the employer becomes insolvent or goes bankrupt?

- A 7: The IRS guidance does not expressly address this scenario, but as a general matter, employers who fail to timely and fully remit Social Security taxes to the U.S. Treasury will be subject to interest and penalties and may, in certain cases, also be subject to criminal and civil penalties. Personal liability as a withholding agent which can apply to officers and other "responsible persons" who fail properly to withhold and pay over the employee's share of payroll taxes would not arise with respect to the failure to pay the employer's portion of payroll taxes, including any deferred amounts. If the employer ultimately becomes insolvent and is liquidated in bankruptcy, the IRS would become a creditor of the company for any deferred payroll taxes left unpaid and this would generally be treated as a priority claim.

Q 8: What is the interplay between the payroll tax deferral and the employee retention tax credit that is also available to eligible employers under the CARES Act?

- A 8: The employee retention tax credit is a tax credit (also against the employer's 6.2 percent portion of Social Security taxes) designed to incentivize employers

to retain employees during suspended or declining business operations due to COVID-19. Unlike the payroll tax deferral, which is available to all employers, the employee retention tax credit is available only to certain qualified employers. For more information on this tax credit, please see "[Key Tax and Employee Benefits Provisions of the CARES Act](#)." The IRS guidance clarifies that the ability to defer payroll taxes is in addition to (and not in lieu of) the availability of the employee retention tax credit. Therefore, as a practical matter, an employer can defer payroll taxes before determining whether the employer is entitled to any employee retention tax

credit and before determining the amount of employment tax deposits that it may retain in anticipation of any credit or related refunds. The employee retention tax credit is fully refundable if the amount of the credit is more than the employment taxes the employer owes for a calendar quarter (without taking into account the amount of such employment taxes otherwise subject to deferral under the CARES Act deferral rules).

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