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IRS Issues Guidance on CARES Act’s Social Security Tax Deferral

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As **previously reported**, section 2302 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) allows an employer to defer the employer's share of Social Security tax that otherwise would be required to be deposited and paid during the period beginning March 27, 2020, and ending December 31, 2020. Fifty percent of the deferred tax is due December 31, 2021, and the remaining 50% is due December 31, 2022. The deferral provision applies broadly. For example, it is available to employers regardless of whether they are entitled to refundable tax credits for paid leave under the Families First Coronavirus Recovery Act (FFCRA) or employee retention credits under section 2301 of the CARES Act.

However, the deferral is not available to an employer that has had indebtedness forgiven under the CARES Act's Paycheck Protection Program (PPP). On April 10, 2020, the IRS issued **guidance** addressing, among other things, how this exception will apply, given that an employer will not know for some time whether its PPP loan will be forgiven.

The IRS has clarified that an employer that has received a PPP loan, but whose loan has not yet been forgiven, may take advantage of the deferral, without incurring penalties, until the date on which the lender issues a decision to forgive the PPP loan. Once an employer receives a decision from its lender that its PPP loan is forgiven, the employer may not utilize the deferral for Social Security tax due after that date. However, the tax that the employer deferred through the date on which the loan was forgiven continues to be deferred and will not be due until the applicable dates provided in the statute (i.e., December 31, 2021, and December 31, 2022).

The IRS guidance also provides a favorable ordering rule for the interaction between the Social Security tax deferral and the refundable employment tax credits under the CARES Act and the FFCRA. The guidance states that an employer is entitled to defer deposit of its share of Social Security tax ***before*** determining the amount of employment tax deposits that it may retain in anticipation of the refundable credits and the amount of any advancement of, or refund with respect to, those credits. Thus, the IRS guidance allows employers that are entitled to both the deferral and the refundable tax credits under the CARES Act and the FFCRA to obtain the intended cash flow benefits of both forms of relief.

The IRS guidance further explains that employers are not required to make a special election to be able to defer deposits and payments of Social Security tax as provided in section 2302 of the CARES Act. A revised Form 941, Employer's QUARTERLY Federal Tax Return, will be issued for the second quarter of 2020, and the IRS will provide information instructing employers how to reflect the deferred deposits and payments that were otherwise due on or after March 27, 2020, for the first quarter of 2020.

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