Current Federal Tax Developments

Week of April 26, 2021

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CURRENT FEDERAL TAX DEVELOPMENTS
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SECTION: 451
SAFE HARBOR PROVIDED TO ALLOW SOME TAXPAYERS TO DEDUCT EXPENSES PAID WITH PPP LOAN PROCEEDS IN YEAR FOLLOWING THE YEAR THEY WERE INCURRED

Citation: Revenue Procedure 2021-20, 4/22/21

The IRS has provided relief for some taxpayers who filed returns for tax years ending on or after March 26, 2020 and on or before December 31, 2020 who did not deduct expenses paid with PPP loan proceeds in Revenue Procedure 2021-20.[1] Those taxpayers may now worry that they will have to amend their already filed tax returns or face the loss of a deduction for those expenses that were retroactively allowed as a deduction by the COVID-related Tax Relief Act that was enacted on December 27, 2020.

Original IRS Guidance Denying the Deduction and Congressional Action to Overturn IRS Rulings

Former Treasury Secretary Mnuchin famously announced in a television interview that it was "Tax 101" that taxpayers who did not recognize forgiveness of their PPP loans as income due to paying certain expenses could not claim a deduction for those expenses. The IRS issued guidance backing up that position during 2020.

As the Procedure explains:

> On April 30, 2020, the Treasury Department and the IRS released Notice 2020-32, 2020-21 IRB 837 (May 18, 2020), which clarified that no deduction was allowed for an otherwise deductible expense if the payment of the expense resulted in forgiveness of an original PPP covered loan. On November 18, 2020, the Treasury Department and the IRS released Rev. Rul. 2020-27, 2020-50 IRB 1552 (December 7, 2020), which held that a taxpayer that incurred otherwise deductible expenses in its 2020 taxable year could not deduct those expenses if, at the end of the taxpayer's 2020 taxable year, the taxpayer had a reasonable expectation of reimbursement of the expenses in the form of covered loan forgiveness. Also on November 18, 2020, the Treasury Department and the IRS released Rev. Proc. 2020-51, 2020-50 IRB 1599 (December 7, 2020), which provided a safe harbor to address situations covered by Rev. Rul. 2020-27 when the taxpayer's expectation of covered loan forgiveness was not realized in a subsequent taxable year.[2]

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[1] Revenue Procedure 2021-20, April 22, 2021, https://www.taxnotes.com/research/federal/irs-guidance/revenue-procedures/irs-provides-safe-harbor-for-some-ppp-loan-recipients/52gyq (retrieved April 23, 2021)

[2] Revenue Procedure 2021-20, April 22, 2021, Section 2.02

As well known as the former Secretary's position was, it was also well known that three of the four ranking members of the tax committees had penned a letter strenuously disagreeing with that position, and they committed to passing legislation to overturn that result.

While it took a while, in December the change became law as part of the COVID-related Tax Relief Act. The Notice continues:

> On December 27, 2020, the Appropriations Act was enacted. Section 304(b)(1)(A) of the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act (Economic Aid Act), which was enacted as Title III of Division N of the Appropriations Act, redesignated § 1106 of the CARES Act as § 7A of the Small Business Act, transferred the section to the Small Business Act (15 U.S.C. § 631 et seq.), and inserted that section so as to appear after § 7 of the Small Business Act (15 U.S.C. § 636)). Section 276(a)(1) of the COVID-related Tax Relief Act amended § 7A(i) of the Small Business Act to provide new rules regarding the Federal income tax consequences of forgiveness of original PPP covered loans. Specifically, § 7A(i) of the Small Business Act provides, in relevant part, that "no amount shall be included in the gross income of the eligible recipient by reason of forgiveness of indebtedness [on an original PPP covered loan]," and "no deduction shall be denied, no tax attribute shall be reduced, and no basis increase shall be denied, by reason of [that] exclusion from gross income."[3]

In late January 2021, the IRS followed up with a ruling formally taking back the prior guidance:

> Rev. Rul. 2021-2, 2021-4 IRB 495 (Jan. 25, 2021), which was released on January 6, 2021, obsoleted Notice 2020-32 and Rev. Rul. 2020-27 due to the enactment of § 276(a) of the COVID-related Tax Relief Act. Rev. Rul. 2021-2 provides that, as of December 27, 2020, the conclusion stated in Notice 2020-32 and the holding stated in Rev. Rul. 2020-27 are no longer accurate statements of the law. Likewise, the legal premise underlying Rev. Proc. 2020-51 is no longer accurate and, as of December 27, 2020, taxpayers could not have complied with the requirements of section 3.01 or 3.02 of Rev. Proc. 2020-51.[4]

What if a Taxpayer Filed a Return Based on the IRS Guidance?

Of course, during this time fiscal years ended and taxpayers planned for calendar year 2020 returns based on the IRS guidance that indicated they would not obtain a deduction for such expenses. Taxpayers who filed a return that followed the IRS guidance either because it was in effect when they filed their return (say for fiscal year C corporations with year ends from March to November) or because they weren't aware of the change in the law and IRS revocation of the earlier rulings when they prepared their return now seemed to be required to go back and amend those prior returns.

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[3] Revenue Procedure 2021-20, April 22, 2021, Section 2.03(1)

[4] Revenue Procedure 2021-20, April 22, 2021, Section 2.03(2)

As a general rule, a deduction must be claimed in the year in which the tax law provides for it to be claimed—a taxpayer can't "bank" deductions and then take them in a later year. Thus, if these taxpayers did not go back and amend those prior returns, they faced the potential loss of any benefit from those deductions.

The IRS has released this Revenue Procedure to provide an option for certain taxpayers to deduct these expenses in the following year if they had filed a return that did not claim the expenses. But, as we will discover, it only gives relief for those who were following the then current text of the Internal Revenue Code at the time they filed the return.

Relief Provided

There are limits on this ability to claim the deductions in the following year, but it should cover those situations where taxpayers were otherwise looking at having to amend an already filed return, at least so long as the taxpayer's return was filed on or before December 27, 2020.

Taxpayers who meet the requirements are given the following option:

> …[A] taxpayer may elect to deduct otherwise deductible original eligible expenses on the taxpayer's timely filed, including extensions, original Federal income tax return or information return, as applicable, for the taxpayer's immediately subsequent taxable year, rather than on an amended return or administrative adjustment request for the taxpayer's 2020 taxable year in which the expenses were paid or incurred…[5]

To be eligible, the taxpayer must be:

- A *Covered Taxpayer* (as defined in Section 3.02 of the procedure); and
- Satisfy all of the requirements found in Section 3.04 of the procedure.[6]

Covered Taxpayer

A *Covered Taxpayer* must meet all of the following requirements:

- The taxpayer received an original PPP covered loan;
- The taxpayer paid or incurred original eligible expenses during the taxpayer's 2020 taxable year;
- On or before December 27, 2020, the taxpayer timely filed, including extensions, a Federal income tax return or information return, as applicable, for the taxpayer's 2020 taxable year; and

[5] Revenue Procedure 2021-20, April 22, 2021, Section 3.01
[6] Revenue Procedure 2021-20, April 22, 2021, Section 3.01

- On the taxpayer's Federal income tax return or information return, as applicable, the taxpayer did not deduct the original eligible expenses because —
  - The expenses resulted in forgiveness of the original PPP covered loan; or
  - The taxpayer reasonably expected at the end of the 2020 taxable year that the expenses would result in such forgiveness.[7]

The most significant thing to note is that *any return filed after December 27, 2020* will not qualify for this relief. Even though the IRS did not formally withdraw their prior rulings until January 25, 2021, the enactment of the COVID-related Tax Relief Act on December 27 overrode those IRS rulings. Thus, the IRS will not provide relief to a taxpayer who may have filed the return on December 28, not yet having digested the entire 5,500 pages of the appropriations bill that contained the COVID-related Tax Relief Act as a portion of the much larger package.

Taxpayers who filed after December 27, 2020 or otherwise fail to meet the requirements of this procedure will need to amend the return for the year the expenses were incurred to be able to claim a deduction for them.

Expenses Not Covered by the Safe Harbor

The IRS also provided a list of expenses that won't qualify for this safe harbor. The expenses are expenses that would not have led to forgiveness under the prior law, but now are available for forgiveness under some provision enacted on December 27, 2020.

First, the IRS bars the expanded list of expenses that can be claimed to qualify for forgiveness for the first-draw PPP loans previously in existence:

> Section 304(b)(2) of the Economic Aid Act expanded the list of expenses for which an individual or entity that received an original PPP covered loan could receive forgiveness. See § 7A(a) of the Small Business Act (as amended by § 304(b)(2) of the Economic Aid Act). However, because those new expenses were not included as part of the original eligible expenses, those expenses are not eligible to be deducted through an election by a Covered Taxpayer to apply the safe harbor provided by section 3.01 of this revenue procedure.[8]

As well, if a taxpayer has excluded expenses based on expected forgiveness under the second-draw PPP loan program created by the December 27, 2020 package, those expenses will not qualify for this safe harbor:

> Section 311(a) of the Economic Aid Act amended § 7(a) of the Small Business Act to authorize Paycheck Protection Program Second Draw Loans (PPP Second Draw Loans) under the same terms, conditions, and processes as original PPP covered loans. See § 7(a)(37)(B) of the Small Business Act (as added by § 311(a) of the Economic Aid Act). PPP Second Draw Loans are not original PPP covered loans, and

[7] Revenue Procedure 2021-20, April 22, 2021, Section 3.02

[8] Revenue Procedure 2021-20, April 22, 2021, Section 3.03(1)

therefore eligible expenses that may result in forgiveness of such loans are not covered by this revenue procedure.[9]

Safe Harbor Limitations

The IRS notes that the agency is not giving up the right to challenge the expenses on other grounds, providing the procedure does not preclude the IRS from:

- Examining any issues relating to the claimed deductions for original eligible expenses, including
  - Determining whether a taxpayer is a Covered Taxpayer under this revenue procedure,
  - The amount of the deduction, and
  - Whether the Covered Taxpayer has substantiated the deduction claim; or
- Requesting additional information or documentation verifying any amounts described in the statement required by section 3.04(1) (the formal election described next) of this revenue procedure.[10]

Making the Election

As this procedure is optional, it must be elected by the taxpayer to be taken advantage of. The IRS provides the following rules governing the time and manner of making the election. A failure to satisfy the conditions imposed to make the election will invalidate the election.

The conditions that must be met are:

- <u>Election deadline.</u> A Covered Taxpayer must make the election by attaching the statement described in the following bullet to the Covered Taxpayer's timely filed, including extensions, Federal income tax return or information return, as applicable, for the Covered Taxpayer's first taxable year following the Covered Taxpayer's 2020 taxable year in which the original eligible expenses were paid or incurred.
- <u>Requirements for statement.</u> The statement required by this revenue procedure must be titled "Revenue Procedure 2021-20 Statement" *(and named RevProc2021-20.pdf for e-file attachments)* and include the following information:
  - The Covered Taxpayer's name, address, and social security number or taxpayer identification number;
  - A statement that the Covered Taxpayer is applying the safe harbor provided by section 3.01 of this revenue procedure;

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[9] Revenue Procedure 2021-20, April 22, 2021, Section 3.03(2)

[10] Revenue Procedure 2021-20, April 22, 2021, Section 3.05

- The amount and date of disbursement of the taxpayer's original PPP covered loan; and

- A list, including descriptions and amounts, of the original eligible expenses paid or incurred by the Covered Taxpayer during the Covered Taxpayer's 2020 taxable year that are reported on the Federal income tax return or information return, as applicable, for the Covered Taxpayer's first taxable year following that 2020 taxable year.[11]

SECTION: 3131
IRS ISSUES NEWS RELEASE AND FACT SHEET ON USING PAYROLL TAX CREDIT FOR REIMBURSING EMPLOYERS FOR PAID TIME OFF GIVEN FOR COVID-19 VACCINATION RELATED REASONS

Citation: "Under the American Rescue Plan, employers are entitled to tax credits for providing paid leave to employees who take time off related to COVID-19 vaccinations," IRS Fact Sheet FS-2021-09, April 21, 2021

Sometimes the IRS decides to make an announcement about what might appear to be a "new" development that really is just reminding taxpayers of items that were already part of the law. Such is the case with IRS News Release IR-2021-90[12] that discussed a tax credit available to subsidize employers who provide paid leave to employees receiving a COVID-19 vaccine or who take time off due to a reaction to the vaccine.

In this case the President decided to emphasize these credits in a speech on Wednesday[13] and many headlines implied that the program had just been created by the President. In reality, the President was simply emphasizing the changes made to the credit for paid sick leave (now found at IRC §3131) and qualified family leave wages (now found at IRC §3132) by the American Rescue Plan Act of 2021.

The news release directs readers to a new Fact Sheet (FS-2021-09)[14] that was issued at the same time as the news release.

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[11] Revenue Procedure 2021-20, April 22, 2021, Section 3.04

[12] "American Rescue Plan tax credits available to small employers to provide paid leave to employees receiving COVID-19 vaccines; new fact sheet outlines details," IRS News Release IR-2021-90, April 21, 2021, https://www.irs.gov/newsroom/american-rescue-plan-tax-credits-available-to-small-employers-to-provide-paid-leave-to-employees-receiving-covid-19-vaccines-new-fact-sheet-outlines-details (retrieved April 23, 2021)

[13] "Biden offers tax credits for COVID-19 vaccination paid time off," Reuters website, April 21, 2021, https://www.reuters.com/world/us/biden-offer-tax-credits-covid-19-vaccination-paid-time-off-2021-04-21/ (retrieved April 23, 2021)

[14] "Under the American Rescue Plan, employers are entitled to tax credits for providing paid leave to employees who take time off related to COVID-19 vaccinations," IRS Fact Sheet FS-2021-09, April 2021,

Changes to the Credits in the American Rescue Plan Act

The credits are based on the credits originally found in the Families First Coronavirus Response Act that was enacted in March of 2020. The original program required small employers to offer leave in certain circumstances, but provided a payroll tax credit to offset the required leave pay and potentially a portion of health plan costs paid for by the employer. These programs expired at the end of 2020.[15]

The original law outlined six conditions that triggered the required leave, three of which qualified for leave pay of up to $511 a day or 100% of the employee's normal compensation (which ever was less) for the leave period, and three others which qualified for a maximum of $200 a day or 66% of an employee's normal compensation (whichever was less).[16]

The COVID-related Tax Relief Act of 2020 §286 extended this credit into the first quarter of 2021, but dropped the mandate that employers must offer the leave. As well, it did not increase the maximum time period per employee over which the employer could be paid the credit—generally a maximum of 80 hours for the employee except for amounts paid under the extended paid family leave. So if an employee had used up his/her entire limit of COVID-related leave in 2020, he/she could not qualify for additional leave in the first quarter of 2021.

American Rescue Plan Act (ARPA) Extension and Expansion

The American Rescue Plan Act, enacted on March 11, 2021, extended the programs through the end of September and made additional changes effective April 1, 2021. Some of the key changes were:

- A nondiscrimination rule applies for such a leave program to qualify for the credit. No credit is allowed to an employer for any quarter if the employer with respect to the availability of the provision of qualified sick leave wages to which this section otherwise applies for such calendar quarter, discriminates in favor of highly compensated employees (within the meaning of IRC §414(q)), full-time employees, or employees on the basis of employment tenure with such employer.[17]

- The time period for the IRS to assess taxes related to this provision will not expire before five years from the date that is the later of:

  - The date on which the original return which includes the calendar quarter with respect to which such credit is determined is filed, or

  - The date on which such return is treated as filed under IRC §6501(b)(2).[18]

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https://www.irs.gov/newsroom/employer-tax-credits-for-employee-paid-leave-due-to-covid-19 (retrieved April 23, 2021)

[15] Families First Coronavirus Response Act (FFCRA) Sections 3102, 5102, 7001 and 7005

[16] FFCRA Act Sections 5102 and 5110

[17] IRC §3131(j)

[18] IRC §3121(f)(6) and IRC §3132(f)(6

- The first 10 days of paid family leave is no longer unpaid,[19] thus allowing the maximum amount to grow to $12,000 under the program.

- Maximum leave amounts start over beginning on April 1, 2021 for both credits, so an employee can again qualify for the credit even if he/she had used up the maximum amounts under the prior two programs.[20]

- Adding new qualifying conditions to the list of those for which the employer can receive a full or partial reimbursement of paid leave and a ratable portion of medical plan expenses, to include these items:

  – The employee is seeking or awaiting the results of a diagnostic test for, or a medical diagnosis of, COVID–19 and such employee has been exposed to COVID–19 or the employee's employer has requested such test or diagnosis, or

  – The employee is obtaining immunization related to COVID–19 or recovering from any injury, disability, illness, or condition related to such immunization.[21]

The news release and fact sheet emphasizes those new conditions to encourage employers to offer employees paid time off to obtain a COVID-19 vaccination and recover from reactions some individuals are having to the vaccine.[22]

Sick Leave for Which a Credit Can Be Claimed Related to the Vaccine

The fact sheet provides the following information on certain leave that can qualify for the payroll tax credit:

> Eligible employers are entitled to tax credits for wages paid for leave taken by employees who are not able to work or telework due to reasons related to COVID-19, including leave taken to receive COVID–19 vaccinations or to recover from any injury, disability, illness or condition related to the vaccinations. These tax credits are available for wages paid for leave from April 1, 2021, through September 30, 2021.[23]

Note that other events that qualified for paid leave previously, such as being quarantined due to COVID-19, still qualify for the tax credit.

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[19] IRC §3132(c)(2)(B)

[20] IRC §§3131(b)(2) and 3132(b)(2)

[21] IRC §3131(c)(2)(A)(i)

[22] Personally, I did not experience any such reaction to either dose, but I do know of some people who have experienced issues for a few hours up to two days.

[23] "Under the American Rescue Plan, employers are entitled to tax credits for providing paid leave to employees who take time off related to COVID-19 vaccinations," IRS Fact Sheet FS-2021-09, April 2021

Amount of the Credit and How to Calculate

The fact sheet describes the amount of the credit and how it is to be calculated as follows:

> The paid leave credits under the ARP are tax credits against the employer's share of the Medicare tax. The tax credits are refundable, which means that the employer is entitled to payment of the full amount of the credits if it exceeds the employer's share of the Medicare tax.
>
> The tax credit for paid sick leave wages is equal to the sick leave wages paid for COVID-19 related reasons for up to two weeks (80 hours), limited to $511 per day and $5,110 in the aggregate, at 100 percent of the employee's regular rate of pay. The tax credit for paid family leave wages is equal to the family leave wages paid for up to twelve weeks, limited to $200 per day and $12,000 in the aggregate, at 2/3rds of the employee's regular rate of pay. The amount of these tax credits is increased by allocable health plan expenses and contributions for certain collectively bargained benefits, as well as the employer's share of social security and Medicare taxes paid on the wages (up to the respective daily and total caps).[24]

Claiming the Credit

The fact sheet discusses how an employer claims the refundable credit, noting the credit is reported and can be claimed when the quarterly Form 941 is filed:

> Eligible employers may claim tax credits for sick and family leave paid to employees, including leave taken to receive or recover from COVID-19 vaccinations, for leave from April 1, 2021, through September 30, 2021.
>
> Eligible employers report their total paid sick and family leave wages (plus the eligible health plan expenses and collectively bargained contributions and the eligible employer's share of social security and Medicare taxes on the paid leave wages) for each quarter on their federal employment tax return, usually Form 941, *Employer's Quarterly Federal Tax Return*. Form 941 is used by most employers to report income tax and social security and Medicare taxes withheld from employee wages, as well as the employer's own share of social security and Medicare taxes.[25]

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[24] "Under the American Rescue Plan, employers are entitled to tax credits for providing paid leave to employees who take time off related to COVID-19 vaccinations," IRS Fact Sheet FS-2021-09, April 2021

[25] "Under the American Rescue Plan, employers are entitled to tax credits for providing paid leave to employees who take time off related to COVID-19 vaccinations," IRS Fact Sheet FS-2021-09, April 2021

However, the fact sheet notes that employers can reduce their payroll tax deposits in anticipation of having a reduced overall liability for the quarter rather than wait until the end of the quarter to receive the benefit:

> In anticipation of claiming the credits on the Form 941, eligible employers can keep the federal employment taxes that they otherwise would have deposited, including federal income tax withheld from employees, the employees' share of social security and Medicare taxes and the eligible employer's share of social security and Medicare taxes with respect to all employees up to the amount of credit for which they are eligible. The Form 941 instructions explain how to reflect the reduced liabilities for the quarter related to the deposit schedule.[26]

Finally, the fact sheet notes that if the employer is unable to receive the full benefit of the credit by reducing payroll tax deposits, the employer can apply for an advance payment of the credit:

> If an eligible employer does not have enough federal employment taxes set aside for deposit to cover amounts provided as paid sick and family leave wages (plus the eligible health plan expenses and collectively bargained contributions and the eligible employer's share of social security and Medicare taxes on the paid leave wages), the eligible employer may request an advance of the credits by filing Form 7200, *Advance Payment of Employer Credits Due to COVID-19*. The eligible employer will account for the amounts received as an advance when it files its Form 941*, Employer's Quarterly Federal Tax Return*, for the relevant quarter.[27]

Employers Eligible for the Credit

The fact sheet provides the following discussion of employers eligible for the credit:

> An eligible employer is any business, including a tax-exempt organization, with fewer than 500 employees. An eligible employer also includes a governmental employer, other than the federal government and any agency or instrumentality of the federal government that is not an organization described in section 501(c)(1) of the Internal Revenue Code.[28]

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[26] "Under the American Rescue Plan, employers are entitled to tax credits for providing paid leave to employees who take time off related to COVID-19 vaccinations," IRS Fact Sheet FS-2021-09, April 2021

[27] "Under the American Rescue Plan, employers are entitled to tax credits for providing paid leave to employees who take time off related to COVID-19 vaccinations," IRS Fact Sheet FS-2021-09, April 2021

[28] "Under the American Rescue Plan, employers are entitled to tax credits for providing paid leave to employees who take time off related to COVID-19 vaccinations," IRS Fact Sheet FS-2021-09, April 2021

Self-Employed Individual Credit

The fact sheet also notes that a comparable credit is available for self-employed individuals:

> Self-employed individuals may claim comparable tax credits on their individual Form 1040, *U.S. Individual Income Tax Return*.[29]

However, there is no advance payment option under this program, although the self-employed presumably could reduce their estimated tax payments (presuming they aren't planning on relying on the prior year's tax exception to the underpayment penalty).

In order to claim the self-employed refundable credits, the individual must be an individual who:

- Regularly carries on any trade or business within the meaning of IRC §1402 (the definition of income from self-employment) of the Internal Revenue Code of 1986, and
- Would be entitled to receive paid leave during the taxable year pursuant to the Emergency Paid Sick Leave Act if—
  - The individual were an employee of an employer (other than himself or herself), and
  - Such Act applied after March 31, 2021.[30]

The law provides that no credit will be allowed unless the taxpayer maintains such documentation as the IRS may prescribe to establish such individual as an eligible self-employed individual.[31] The mandatory documentation standard bars the taxpayer from trying to argue for qualification based on the argument that even lacking the documentation, the taxpayer has reasonably established qualification (*Cohan v. Commissioner*, CA2 (1930) 39 F. 2d 540).

Thus, advisers need to inquire of taxpayers if they have the documentation that the IRS may require in published guidance when they attempt to claim this credit.

For the self-employed the amount of the credit is the *qualified sick leave equivalent amount*. That means, with regard to the self-employed individual, an amount equal to:

- The number of days during the taxable year (but not more than 10) that the individual is unable to perform services in any trade or business referred to in section 1402 of the Internal Revenue Code of 1986 for a reason with respect to which such individual would be entitled to receive sick leave if he/she were an employee, multiplied by

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[29] "Under the American Rescue Plan, employers are entitled to tax credits for providing paid leave to employees who take time off related to COVID-19 vaccinations," IRS Fact Sheet FS-2021-09, April 2021

[30] American Rescue Plan Act of 2021 §9642(b)(1)

[31] American Rescue Plan Act of 2021 §9642(e)(1)

- the lesser of—
  - $200 ($511 in the case of any day of paid *sick time* described in the first three general categories), or
  - 67 percent (100 percent in the case of any day of paid sick time described in the first three categories) of the average daily self-employment income of the individual for the taxable year.[32]

The family leave for self-employed individuals is capped at the $200/67% limit per day. A day taken into account as qualified sick leave is not taken into account in determining the qualified family leave equivalent amount.[33]

Average daily self-employment income is an amount equal to:

- The net earnings from self-employment of the individual for the taxable year, divided by
- 260.[34]

At the taxpayer's election, the net self-employment income of the prior year, rather than the current year, may be used in the above calculation.[35]

SECTION: 6011
IRS EXTENDS AND EXPANDS TEMPORARY DEVIATION ALLOWING SOME FORMS TO BE SIGNED ELECTRONICALLY OR DIGITALLY

Citation: Sunita Lough, Deputy Commissioner for Services and Enforcement, "Temporary Deviation from Handwritten Signature Requirement for Limited List of Tax Forms," NHQ-10-0421-0002, 4/15/21

The IRS has once again extended its special relief for the temporary use of e-signatures on specified tax documents in Memorandum NHQ-10-0421-0002[36], now providing that digital signatures may be used beyond the June 30, 2021 expiration of the prior memorandum.

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[32] American Rescue Plan Act of 2021 §9643(c)(1)

[33] American Rescue Plan Act of 2021 §9643(c)(4)

[34] American Rescue Plan Act of 2021 §9643(c)(1)

[35] American Rescue Plan Act of 2021 §9643(c)(2)

[36] Sunita Lough, Deputy Commissioner for Services and Enforcement, "Temporary Deviation from Handwritten Signature Requirement for Limited List of Tax Forms," NHQ-10-0421-0002, April 15, 2021, https://www.irs.gov/pub/foia/ig/spder/nhq-10-0421-0002.pdf (retrieved April 23, 2021)

The memorandum, revising a memorandum issued on December 28, 2020,[37] states:

> As part of our response to the COVID-19 situation, we have taken steps to protect employees, taxpayers and their representatives by minimizing the need for in-person contact. Taxpayer representatives have expressed concerns with securing handwritten signatures during these times for forms that are required to be filed or maintained on paper. To alleviate these concerns while promoting timely filing, we are implementing a deviation with this memorandum that allows taxpayers and representatives to use electronic or digital signatures when signing certain forms that currently require a handwritten signature. The forms to which this flexibility applies can be found in the attachment to this memo. Such forms must be signed and postmarked on August 28, 2020 or later. The attachment may be updated from time to time to either add or remove applicable forms as appropriate.[38]

The new version of the form now shows an expiration date of December 31, 2021. As well, unlike the prior versions of this memorandum, the paragraph no longer refers to this as a *temporary* deviation. Since the memorandum will expire on December 31 it would appear that, without further action by the IRS, the deviation would be temporary. But removing that word may mean the IRS is considering taking formal action to expand the use of e-signatures, including potentially allowing more means of electronically signing documents.

Acceptable Electronic and Digital Signature Under This Deviation

The footnote discussing allowed methods of obtaining an acceptable electronic and digital signature does still refer to this as a "temporary" deviation, but continues to allow far more e-signatures than the IRS allowed in other cases, such as signing individual electronic filing authorizations:

> Electronic and digital signatures appear in many forms when printed and may be created by many different technologies. No specific technology is required for this purpose during this temporary deviation.[39]

As the memorandum lists the various e-File signature authorization form series as being covered by this deviation, it appears that while this memorandum is in force a preparer would not need to use an electronic signature system that meets the knowledge based authentication standards the IRS had demanded previously for individual tax returns. As well, the list of forms includes those for the electronic filing of many entities other

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[37] NHQ-10-1220-000, December 28, 2020

[38] Sunita Lough, Deputy Commissioner for Services and Enforcement, "Temporary Deviation from Handwritten Signature Requirement for Limited List of Tax Forms," NHQ-10-0421-0002, April 15, 2021

[39] Sunita Lough, Deputy Commissioner for Services and Enforcement, "Temporary Deviation from Handwritten Signature Requirement for Limited List of Tax Forms," NHQ-10-0421-0002, April 15, 2021

than individuals. Previously IRS policy appeared to require pen and ink signature for any electronic filing authorizations other than for an individual return.

List of Forms That Are Covered By the Revised Deviation

The new memorandum also expands the list of forms that can be filed using the digital signature options:

- Form 11-C, Occupational Tax and Registration Return for Wagering;
- Form 1066, U.S. Income Tax Return for Real Estate Mortgage Investment Conduit;
- Form 637, Application for Registration (For Certain Excise Tax Activities);
- Form 706, U.S. Estate (and Generation-Skipping Transfer) Tax Return;
- Form 706-A, U.S. Additional Estate Tax Return;
- Form 706-GS(D), Generation-Skipping Transfer Tax Return for Distributions;
- Form 706-GS(D-1), Notification of Distribution from a Generation-Skipping Trust;
- Form 706-GS(T), Generation-Skipping Transfer Tax Return for Terminations;
- Form 706-QDT, U.S. Estate Tax Return for Qualified Domestic Trusts;
- Form 706 Schedule R-1, Generation Skipping Transfer Tax;
- Form 706-NA, U.S. Estate (and Generation-Skipping Transfer) Tax Return;
- Form 709, U.S. Gift (and Generation-Skipping Transfer) Tax Return;
- Form 730, Monthly Tax Return for Wagers;
- Form 1120-C, U.S. Income Tax Return for Cooperative Associations;
- Form 1120-FSC, U.S. Income Tax Return of a Foreign Sales Corporation;
- Form 1120-H, U.S. Income Tax Return for Homeowners Associations;
- Form 1120-IC DISC, Interest Charge Domestic International Sales — Corporation Return;
- Form 1120-L, U.S. Life Insurance Company Income Tax Return;
- Form 1120-ND, Return for Nuclear Decommissioning Funds and Certain Related Persons;
- Form 1120-PC, U.S. Property and Casualty Insurance Company Income Tax Return;

- Form 1120-REIT, U.S. Income Tax Return for Real Estate Investment Trusts;
- Form 1120-RIC, U.S. Income Tax Return for Regulated Investment Companies;
- Form 1120-SF, U.S. Income Tax Return for Settlement Funds (Under Section 468B);
- Form 1127, Application for Extension of Time for Payment of Tax Due to Undue Hardship;
- Form 1128, Application to Adopt, Change or Retain a Tax Year;
- Form 2678, Employer/Payer Appointment of Agent;
- Form 3115, Application for Change in Accounting Method;
- Form 3520, Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts;
- Form 3520-A, Annual Information Return of Foreign Trust With a U.S. Owner;
- Form 4421, Declaration — Executor's Commissions and Attorney's Fees;
- Form 4768, Application for Extension of Time to File a Return and/or Pay U.S. Estate (and Generation-Skipping Transfer) Taxes;
- Form 8038, Information Return for Tax-Exempt Private Activity Bond Issues;
- Form 8038-G, Information Return for Tax-Exempt Governmental Bonds;
- Form 8038-GC; Information Return for Small Tax-Exempt Governmental Bond Issues, Leases, and Installment Sales;
- Form 8283, Noncash Charitable Contributions;
- Form 8453 series, Form 8878 series, and Form 8879 series regarding IRS e-file Signature Authorization Forms;
- Form 8802, Application for U.S. Residency Certification;
- Form 8832, Entity Classification Election;
- Form 8971, Information Regarding Beneficiaries Acquiring Property from a Decedent;
- Form 8973, Certified Professional Employer Organization/Customer Reporting Agreement; and
- Elections made pursuant to Internal Revenue Code section 83(b).

SECTION: 6654
IRS ADMITS THERE WERE DELAYS IN PROCESSING MEF PAYMENT REQUESTS, TAXPAYERS WILL BE CREDITED AS PAYING ON ORIGINAL REQUESTED PAYMENT DATE

Citation: "QuickAlerts - Technical - Delay in Processing Form(s) 1040, 1040-X, and 1040-ES Payments Submitted via Modernized e-File," IRS website, 4/22/21

The IRS has now admitted, via a QuickAlert[40] sent the afternoon of April 22, 2021, that there has been a delay in processing payments requested via Modernized e-File.

Many advisers began getting calls beginning on April 16 from clients concerned that payments scheduled to have been withdrawn from their accounts on April 15 had not been withdrawn. Reports on CPA society discussion forums and on TaxTwitter made it clear that this was not an isolated problem, impacting individuals all across the country.

While some tax software providers' support departments began reporting that the IRS was aware of the problem, the IRS did not publish anything official until a week later on April 22.

The IRS noted the problem and stated that it was now resolved in the April 22 message:

> We identified a delay in processing Form 1040 balance due, Form 1040-X amended, and Form 1040-ES estimated tax payment requests submitted via Modernized e-File. The issue has been resolved, and pending payments are being processed.[41]

Many clients and some advisers were worried about being treated as making the payments after the date they were due, but the IRS announcement provides that these payments will be credited as of their originally scheduled date (for instance, April 15 for first quarter 2021 estimated tax payments):

> The taxpayer's account will be credited with the original requested payment date(s).[42]

[40] "QuickAlerts - Technical - Delay in Processing Form(s) 1040, 1040-X, and 1040-ES Payments Submitted via Modernized e-File," IRS website, April 22, 2021, https://content.govdelivery.com/accounts/USIRS/bulletins/2cec118 (retrieved April 22, 2021)

[41] "QuickAlerts - Technical - Delay in Processing Form(s) 1040, 1040-X, and 1040-ES Payments Submitted via Modernized e-File," IRS website, April 22, 2021

[42] "QuickAlerts - Technical - Delay in Processing Form(s) 1040, 1040-X, and 1040-ES Payments Submitted via Modernized e-File," IRS website, April 22, 2021

The IRS indicates that taxpayers should **not** re-submit these payments. But, given the lack of IRS statements for a week, clearly some taxpayers have likely made the payments.

Unfortunately, the IRS doesn't offer a lot of help here, only giving a method to cancel the extra payment if the taxpayer had resubmitted the payment requests for a future date:

> If a taxpayer re-submitted any of these payment requests due to the delay in processing they may cancel them by calling 1-888-353-4537. Cancellation requests must be received no later than 11:59 p.m. Eastern time, at least two business days prior to the scheduled payment date.[43]

If the taxpayer is not able to stop the payment, as seems likely, then it appears the payment's recovery would depend on the nature of the payment. If the payment was for the first 2021 estimated tax payment, that would appear to be "stuck" in the IRS system until the 2021 return is filed. So the only relief would be for the taxpayer to reduce (or eliminate) the second quarter payment, which means they are going to wait until mid-June to be made whole.

If the payment was for a tax return balance (the Form 1040 or 1040-X), then taxpayers will need to wait for the IRS to determine they have extra funds for the year in question and begin the process of repaying those amounts to the affected taxpayers.

[43] "QuickAlerts - Technical - Delay in Processing Form(s) 1040, 1040-X, and 1040-ES Payments Submitted via Modernized e-File," IRS website, April 22, 2021