

TYPES NOT MAPPED YET April 16, 2020 | TTR not mapped yet | Edward J. Buchholz, David J. Kaufman

IRS clarifies Social Security tax deferral under CARES Act

[The Coronavirus Aid, Relief, and Economic Security Act](#) (the “CARES Act”) generally provides (i) employers with a deferral mechanism for the employer portion of any Social Security taxes and (ii) self-employed individuals with a deferral mechanism for the employer portion of any self-employment taxes attributable to Social Security. Under the CARES Act, 50% of any taxes eligible for deferral are due on December 31, 2021, and the remaining 50% of such taxes are due on December 31, 2022 (each such due date, the “Applicable Due Date”).

While the CARES Act was helpful with immediate guidance, a number of questions remained outstanding. In particular, questions remained with regard to the interaction of the deferral provisions and the Small Business Administration paycheck protection program (the “Paycheck Protection Program”).

IRS FAQs for deferral of employment taxes

In response to some of the outstanding questions, the IRS issued answers to several FAQs with respect to the deferral provisions under the CARES Act. The following are summaries of the responses to the [tax deferral FAQs](#) provided by the IRS:

Employers

1. Employers choosing to defer the employer portion of any Social Security taxes may defer those deposits and payments that would otherwise be required to be made for the period beginning on March 27, 2020, and ending on December 31, 2020. For example, an employer required to make a deposit of the employer portion of any Social Security taxes on April 30, 2020, can defer such taxes. The American Institute of Certified Public Accountants (“AICPA”) is seeking guidance on whether the deferral of the employer portion of any Social Security taxes definitely applies to wages earned prior to March 27, 2020; on its face, the FAQs would seem to answer this question in the affirmative.
2. All employers are eligible to defer the deposit and payment of the employer portion of any Social Security taxes, and there are no size thresholds.
3. An employer that receives a loan under the Paycheck Protection Program may defer deposit and payment of the employer portion of any Social Security taxes so long as such loan has not yet been forgiven. Once a Paycheck Protection Program loan is forgiven, an employer may no longer defer any deposits or payments of the employer portion of any Social Security taxes due after the date of such loan forgiveness. The employer portion of any Social Security taxes deferred prior to forgiveness of the Paycheck Protection Program loan remain deferred and are due on the Applicable Due Date.
4. Deferral of the employer portion of any Social Security taxes is in addition to the relief provided by IRS Notice 2020-22, which provides relief from the failure to deposit penalty when claiming (i) the tax credit for “qualified sick leave wages” or “qualified family leave wages” under the Families First Coronavirus Relief Act (“FFCRA”) or (ii) the tax credit for “qualified wages” for retained employees under the CARES Act.
5. Employers eligible for refundable paid leave tax credits and/or employee retention tax credits under the FFCRA and CARES Act may retain, rather than defer, the amount of the employer portion of any Social Security taxes in anticipation of and up to the amount of the anticipated credits.
6. In order to avoid a failure to pay penalty with respect to the employer portion of any Social Security taxes, such taxes must be paid by the Applicable Due Date.

Self-employed

1. Self-employed individuals choosing to defer the employer portion of any self-employment taxes attributable to Social Security may defer those deposits and payments that would otherwise be required to be made for the period beginning on March 27, 2020, and ending December 31, 2020. For example, a self-employed individual required to make an estimated payment attributable to self-employment taxes on July 15, 2020 can defer the employer portion of any self-employment taxes attributable to Social Security. The AICPA is seeking guidance on whether the deferral of the employer portion of any self-employment taxes attributable to Social Security applies to income earned prior to March 27, 2020; on its face, the FAQs would seem to answer this question in the affirmative.
2. To the extent that a self-employed individual elects to defer the employer portion of any self-employment taxes attributable to Social Security, such taxes are not taken into account for purposes of calculating the underpayment penalty.
3. In order to avoid a failure to pay penalty with respect to the employer portion of any self-employment taxes attributable to Social Security, such taxes must be paid by the Applicable Due Date.

Lost deduction for deferred taxes

A cash or accrual taxpayer can generally deduct the employer portion of any Social Security taxes or the employer portion of any self-employment taxes attributable to Social Security in the taxable year in which such taxes are paid to the United States Department of the Treasury. To the extent a taxpayer elects to defer the employer portion of any Social Security taxes or the employer portion of any self-employment taxes attributable to Social Security, the taxpayer will generally not be entitled to a deduction with respect to such taxes in 2020. Instead, when a taxpayer pays the deferred employer portion of any Social Security taxes or the deferred employer portion of any self-employment taxes attributable to Social Security in 2021 and 2022 to the United States Department of the Treasury, the taxpayer will generally be entitled to a deduction in such taxable year.

Taxpayers should take into account the relative benefits of deferral as compared to an immediate deduction that could reduce the taxpayer's 2020 taxable income or create a 2020 NOL that is now eligible for carryback under the CARES Act.

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