Eye on Washington

Regulatory Update

CARES Act Social Security Tax Deferrals: Late Repayment Would Subject All Deferrals to Penalty

The Internal Revenue Service (IRS) Program Manager Technical Assistance (PMTA) document, 2021-007, dated June 21, 2021, explains that late payment penalties would apply to all employer Social Security taxes deferred under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, Public Law 116-136 (March 27, 2020), if *any* repayments are late.

As background, CARES Act Section 2302(a)(2) permitted employers to defer the deposit of the employer portion of Social Security tax, due between March 27, 2020 and December 31, 2020, and provides that an employer will be treated as having timely made all deposits of deferred employment taxes "if all such deposits are made not later than December 31, 2021, with respect to 50% of the eligible amount of tax deferred; and December 31, 2022, with respect to the remaining tax deferred."

But this treatment is conditioned upon such deposits being made not later than the applicable date. If *any portion* of the repayment of amounts deferred is not made by the applicable date — whether December 31, 2021, for the first installment, or December 31, 2022, for the second installment — *"then the deferral is completely invalid."* In that case, the deposits would be treated as due on the original (2020) deposit due dates.

The PMTA memo outlines how the IRS will handle any late repayment of the employer Social Security tax deferred in 2020, confirming that if any deferred amount due is not deposited by the applicable due date, the *entire deferral* is subject to penalty.

> For example, if an employer deferred the deposit of $50,000 in employer Social Security taxes in 2020, and deposits $25,000 on December 31, 2021, but fails to deposit the remainder by December 31, 2022, the employer is liable for a late deposit penalty *on the entire $50,000*, even though the December 31, 2021 installment was paid timely.
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> For example, additionally, if an employer that deferred a total of $50,000 in 2020 in employer Social Security taxes in 2020 deposits only $5,000 on December 31, 2021 (rather than $25,000), a 10 percent penalty would apply to the entire $50,000 (i.e., the penalty would be $5,000).

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The penalty is 10 percent of the underpayment if the failure is for more than 15 days. If the tax is not paid within 10 days of the first IRS notice demanding payment of any delinquent amount, the penalty is 15 percent of the underpayment of the tax.

> As an example, if the IRS issues a notice demanding payment of the balance of the first installment on February 7, 2022, and the employer does not pay the full amount of the notice by February 17, 2022, the penalty rate increases to 15 percent (i.e., $7,500 in the example above).

The PMTA memo notes that "this advice may not be used or cited as precedent." However, it provides helpful clarification of how the IRS will apply the penalty to any late repayments of any amounts deferred under the CARES Act.

The IRS will issue reminder notices to taxpayers reflecting the total amount of deferred taxes and the payment due dates before each applicable due date. For the first installment due in December 2021, the IRS will begin issuing notices in October. Employers that deferred Social Security taxes in accordance with the CARES Act should pay any amounts due by the applicable due date if no reminder notice is received from the IRS.

Late Repayment of a 2021 Deferral Repayment Would Not Accelerate the December 2022 Deferral Deadline

The IRS has clarified that the entire deferral is not due immediately if the December 2021 payment is late, i.e., the 2nd installment would remain due on December 31, 2022.

Responsible Persons May Be Held Personally Liable for Employment Taxes

Employment taxes administered by employers are considered trust fund taxes held on behalf of the federal government and are held to a very high standard of care. Consequently, persons responsible for administering such taxes may be held personally liable for 100 percent of any taxes not withheld and/or not paid, under the Employment Tax Trust Fund Recovery Penalty (TFRP).

The TFRP may be assessed against any person who is responsible for collecting or paying withheld income and employment taxes, and who willfully fails to collect or pay them. A "Responsible Person" is any person who has the duty and the power to direct the collecting, accounting and paying of trust fund taxes. This person may be an officer, an employee, a partner, a board member or any person with authority and control over funds to direct their disbursement.

Employers that deferred employment taxes in accordance with the CARES Act should plan carefully to meet the December 2021 and December 2022 due dates for repayment. It is advisable to remit amounts in time to allow for any unforeseen problems or delays. Employers should consult with appropriate legal and tax advisors for guidance.

For additional information, see

- IRS Program Manager Technical Assistance (PMTA) 2021-007
- Deferral of employment tax deposits and payments through December 31, 2020 on IRS.gov.
- IRS: What Employers Need to Know about Repayment of Deferred Payroll Taxes
- IRS phone number for employers (800-829-4933 — Employment Tax Line)

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Updated on September 23, 2021