White and Williams LLP

## CARES Act Deferral of Employment Tax Payment Update

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The Internal Revenue Service (IRS) has issued supplemental guidance regarding The Coronavirus Aid, Relief, and Economic Security Act's (CARES Act) deferral of employment tax payment (Deferral). The Deferral is typically considered in connection with the availability of the employee retention credit (Credit) and we have summarized the key aspects of the Credit and the Deferral in previous alerts.

The supplemental guidance is in the form of frequently asked questions regarding the Deferral (FAQs). The IRS posts information on its website regarding COVID-19 and the "Coronavirus and Economic Impact Payments: Resources and Guidance" contains the FAQs. The key aspects of the FAQs are as follows:

### EMPLOYMENT TAXES SUBJECT TO DEFERRAL

The CARES Act states that the Deferral applies to the <u>employer</u> portion of Social Security taxes and the portion of taxes imposed on railroad employers under the Railroad Retirement Tax Act that corresponds to social security taxes. While the Credit also starts with these employer taxes, in application it can be used against the balance of employer employment taxes as well as the employee portion of employment taxes. This is a major distinction in how the Credit and Deferral operate. The Deferral also applies with respect to self-employed individuals. The portion of these taxes subject to deferral is 50 percent of the social security tax on net earnings from self-employment tax.

### DEFERRAL PERIOD AND DEPOSIT REQUIREMENTS

In the case of an employer, the Deferral applies to deposits and payments that would otherwise be required to be made during the period beginning on March 27, 2020 and ending on December 31, 2020. In the case of a self-employed individual, the deferral period relates to earnings subject to self-employment tax for the period beginning on March 27, 2020 and ending on December 31, 2020. Fifty percent of the deferred taxes is due on December 31, 2021 and the remaining 50 percent of the deferred taxes is due on December 31, 2022.

The IRS will update Form 941 for the second quarter of 2020 to reflect the reporting of deferred taxes. Deferred taxes for March 27, 2020 through March 31, 2020 will be reflected on Form 941 for the <u>second</u> quarter of 2020. No special election is required, however, for an employer to take advantage of the Deferral.

### ELIGIBLE EMPLOYERS AND THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT /CREDIT

The Families First Coronavirus Response Act (FFCRA) requires certain businesses to provide paid leave to workers who are unable to work or telework due to circumstances related to COVID-19 and provides refundable tax credits to offset the cost of the paid leave. Wages used for purposes of the credit under the FFCRA cannot also be used for purposes of the Credit.

The FAQs make it clear that the Deferral applies to all employers, not just to employers entitled to the Credit or paid leave credits under the FFCRA. In addition, an employer can use the Deferral prior to determining whether the Credit or the paid leave credits under FFCRA are available. Given this ability to use the Deferral, there does not seem to be any reason not to defer payment even if an employer anticipates receiving one of these credits which would offset the applicable employment taxes.

## PAYCHECK PROTECTION PROGRAM LOANS

Although the Credit is not available if an employer obtains a loan under the Paycheck Protection Program (PPP), a PPP loan does not prevent an employer from taking advantage of the Deferral. However, if an employer obtains loan forgiveness under the PPP, the Deferral no longer applies (prospectively) after the date an employer receives a decision from its lender that the PPP loan is forgiven. Future employment taxes need to be paid consistent with the employer's payroll deposit method.

The employment taxes that were deferred prior to the loan forgiveness decision continue to receive favorable treatment. The FAQs state that 50 percent of these deferred taxes is due on December 31, 2021 and the remaining 50 percent of these taxes is due on December 31, 2022, which aligns with the general deferral dates. Even if an employer receives PPP loan forgiveness, there does not seem to be any disadvantage to using the Deferral for pre-forgiveness taxes.

The Deferral is designed to work in conjunction with the Credit and the paid leave credits under FFCRA, although it applies to a broader range of employers than employers eligible for either of these credits. We suggest that employers and self-employed individuals review the application of the Deferral to their operations given the significant benefit available.

The availability of the Deferral is an important aspect of the CARES Act and employers should evaluate whether they can benefit from this tax provision. To discuss how the Deferral provision applies to your business, please contact John Eagan (eaganj@whiteandwilliams.com; 212.868.4835) or Stephen Bowers (bowerss@whiteandwilliams.com; 215.864.6247).

As we continue to monitor the novel coronavirus (COVID-19), White and Williams lawyers are working collaboratively to stay current on developments and counsel clients through the various legal and business issues that may arise across a variety of sectors. Read all of the updates here.

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