

Recapture of Excess Employment Tax Credits Under the Families First Act and the CARES Act

A Rule by the [Internal Revenue Service](#) on 07/29/2020

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Temporary regulations.

SUMMARY:

This document amends the regulations under sections 3111 and 3221 of the Internal Revenue Code with the addition of temporary regulations issued under the regulatory authority granted by the Families First Coronavirus Response Act and the Coronavirus Aid, Relief, and Economic Security Act to prescribe such regulations as may be necessary for reconciling advance payments of refundable employment tax credits provided under these acts and recapturing the benefit of the credits when necessary. Consistent with this authority, these temporary regulations authorize the assessment of any erroneous refund of the credits paid under sections 7001 and 7003 of the Families First Coronavirus Response Act, including any increases in such credits under section 7005 thereof, and section 2301 of the Coronavirus Aid, Relief, and Economic Security Act. The text of these temporary regulations also serves as the text of the proposed regulations (REG-111879-20) set forth in the notice of proposed rulemaking on this subject in the Proposed Rules section of this issue of the **Federal Register**.

DATES:

Effective Date: These temporary regulations are effective on July 29, 2020.

Applicability Date: For date of applicability, see §§ 31.3111-6T and 31.3221-5T of these temporary regulations.

FOR FURTHER INFORMATION CONTACT:

Concerning these temporary regulations, NaLee Park at 202-317-6798.

SUPPLEMENTARY INFORMATION:

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Background

I. The Statutes in General: The Families First Act and the CARES Act

The Families First Coronavirus Response Act (Families First Act), [Public Law 116-127](#), 134 Stat. 178 (2020), enacted on March 18, 2020, and the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), [Public Law 116-136](#), 134 Stat. 281 (2020), enacted on March 27, 2020, provide relief to taxpayers from economic hardships resulting from the Coronavirus Disease 2019 (COVID-19).

The Families First Act, through the enactment of the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act, generally requires employers with fewer than 500 employees to provide paid leave due to certain circumstances related to COVID-19.

Division E of the Families First Act, the Emergency Paid Sick Leave Act (EPSLA), requires certain employers to provide employees with up to 80 hours of paid sick leave if the employee is unable to work or telework because the employee:

- (1) Is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- (2) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- (3) is experiencing symptoms of COVID-19 and seeking a medical diagnosis;

(4) is caring for an individual who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19, or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;

(5) is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions; or

(6) is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretaries of the Treasury and Labor.^[1]

An employee who is unable to work or telework for reasons related to COVID-19 described in (1), (2), or (3) above is entitled to paid sick leave at the employee's regular rate of pay or, if higher, the Federal minimum wage or any applicable State or local minimum wage, up to \$511 per day and \$5,110 in the aggregate. An employee who is unable to work or telework for reasons related to COVID-19 described in (4), (5), or (6) above is entitled to paid sick leave at two-thirds the employee's regular rate of pay or, if higher, the Federal minimum wage or any applicable State or local minimum wage, up to \$200 per day and \$2,000 in the aggregate.

Division C of the Families First Act, the Emergency Family and Medical Leave Expansion Act (EFMLEA), amends the Family and Medical Leave Act of 1993 to require certain employers to provide expanded paid family and medical leave to employees who are unable to work or telework for reasons related to COVID-19. An employee can receive up to 10 weeks of paid family and medical leave at two-thirds the employee's regular rate of pay, up to \$200 per day and \$10,000 in the aggregate if the employee is unable to work or telework because the employee is caring for a son or daughter whose school or place of care is closed or whose child care provider is unavailable for reasons related to COVID-19.

Sections 7001 and 7003 of the Families First Act generally provide that employers subject to the paid leave requirements under EPSLA and EFMLEA ("eligible employers") are entitled to fully refundable tax credits to cover the cost of the leave required to be paid for those periods of time during which employees are unable to work or telework for reasons related to COVID-19.^[2]

Eligible employers are entitled to receive a refundable credit equal to the amount of the qualified sick leave wages and qualified family leave wages (collectively "qualified leave wages"), plus allocable qualified health plan expenses. Under the respective provisions, qualified leave wages are defined to mean wages (as defined in section 3121(a) of the Internal Revenue Code (Code)) and compensation (as defined in section 3231(e) of the Code) paid by an employer which are required to be paid under the EPSLA and EFMLEA. See section 7001(c) and 7003(c). The credit is allowed against the taxes imposed on employers by section 3111(a) of the Code (the Old-Age, Survivors, and Disability Insurance tax (social security tax)), first reduced by any credits claimed under sections 3111(e) and (f) of the Code, and section 3221(a) of the Code (the Railroad Retirement Tax Act Tier 1 tax), on all wages and compensation paid to all employees. Under section 7005 of the Families First Act, the qualified leave wages are not subject to the taxes imposed on employers by sections 3111(a) and 3221(a) of the Code. In addition, section 7005 provides that the credits under sections 7001 and 7003 of the Families First Act are increased by the amount of the tax imposed by section 3111(b) of the Code (employer's share of Medicare tax) on qualified leave wages.^[3]

The CARES Act provides an additional credit for employers experiencing economic hardship related to COVID-19. Under section 2301 of the CARES Act, certain employers who pay qualified wages to their employees are eligible for an employee retention credit. Employers eligible for the employee retention credit are employers that carry on a trade or business during calendar year 2020 and tax-exempt organizations that

either have a full or partial suspension of operations during any calendar quarter in 2020 due to an order from an appropriate governmental authority limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to COVID-19, or experience a significant decline in gross receipts during the calendar quarter.

Qualified wages are wages (as defined in section 3121(a) of the Code) and compensation (as defined in section 3231(e) of the Code) paid by an employer to some or all employees after March 12, 2020, and before January 1, 2021, and include the employer's qualified health plan expenses that are properly allocable to such wages or compensation. For employers that averaged more than 100 full-time employees during 2019, qualified wages are wages and compensation (including allocable qualified health plan expenses), up to \$10,000 per employee, paid to employees that are not providing services because operations were fully or partially suspended due to orders from an appropriate governmental authority or due to a decline in gross receipts. For employers who averaged 100 full-time employees or fewer during 2019, qualified wages are wages and compensation (including allocable qualified health plan expenses), up to \$10,000 per employee, paid to any employee during the period operations were suspended due to orders from an appropriate governmental authority or due to a decline in gross receipts, regardless of whether its employees are providing services.

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The employee retention credit is a fully refundable tax credit for employers equal to 50 percent of qualified wages. Because the maximum amount of qualified wages taken into account with respect to each employee is \$10,000, the maximum employee retention credit for an eligible employer for qualified wages paid to any employee is \$5,000. The credit is allowed against the taxes imposed on employers by section 3111(a) of the Code, first reduced by any credits allowed under sections 3111(e) and (f) of the Code and sections 7001 and 7003 of the Families First Act, and the taxes imposed under section 3221(a) of the Code that are attributable to the rate in effect under section 3111(a) of the Code, first reduced by any credits allowed under sections 7001 and 7003 of the Families First Act, on all wages and compensation paid to all employees. The same wages or compensation cannot be counted for both the Families First Act leave credits and the CARES Act employee retention credit.

II. Refundability of Credits

Sections 7001(b)(4) and 7003(b)(3) of the Families First Act provide that if the amount of the paid sick and family leave credits under these sections exceeds the taxes imposed by section 3111(a) or 3221(a) of the Code for any calendar quarter, such excess shall be treated as an overpayment that shall be refunded under sections 6402(a) and 6413(b) of the Code. Section 2301(b)(3) of the CARES Act provides that if the amount of the employee retention credit exceeds the taxes imposed by section 3111(a) or 3221(a) (limited to the portion attributable to the rate in effect under section 3111(a)) of the Code for any calendar quarter, such excess shall be treated as an overpayment that shall be refunded under sections 6402(a) and 6413(b) of the Code.

Section 6402(a) of the Code provides that, within the applicable period of limitations, overpayments may be credited against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and any remaining balance refunded to such person. Section 6413(b) provides that if more than the correct amount of employment tax imposed by sections 3101, 3111, 3201, 3221, or 3402 is paid or deducted and the overpayment cannot be adjusted under section 6413(a),^[4] the amount of the overpayment shall be refunded (subject to the applicable statute of limitations) as the Secretary may prescribe in regulations.

The IRS has revised Form 941, *Employer's Quarterly Federal Tax Return*, and is revising Form 943, *Employer's Annual Federal Tax Return for Agricultural Employees*, Form 944, *Employer's Annual Federal Tax Return*, and Form CT-1, *Employer's Annual Railroad Retirement Tax Return*, so that employers may use these returns to claim the paid sick and family leave credits under the Families First Act and the

employee retention credit under the CARES Act. The revised employment tax returns will provide for any credits in excess of the taxes imposed under sections 3111(a) or 3221(a) (for the employee retention credit, only the taxes imposed under section 3221(a) that are attributable to the rate in effect under section 3111(a)) to be credited against other employment taxes and then for any remaining balance to be refunded to the employer (per section 6402(a) or section 6413(b)).^[5]

III. Advance Payment of Credits and Erroneous Refunds

Section 3606 of the CARES Act amends sections 7001(b)(4) and 7003(b)(3) of the Families First Act to provide that, in anticipation of the paid sick and family leave credits under these sections, including any refundable portions (which would include any increases in the credits under section 7005), these credits may be advanced, according to forms and instructions provided by the Secretary, up to the total allowable amount and subject to applicable limits for the calendar quarter. Section 2301(l)(1) of the CARES Act provides that the Secretary shall issue such forms, instructions, regulations, and guidance as are necessary to allow the advance payment of the employee retention credit under section 2301, subject to the limitations provided in section 2301 and based on such information as the Secretary shall require.

To implement the advance payment provisions of the Families First Act and the CARES Act, the IRS has created Form 7200, *Advance Payment of Employer Credits Due To COVID-19*, which employers may use to request an advance of the paid sick or family leave credits under the Families First Act, the employee retention credit under the CARES Act, or two or more of them. Employers are required to reconcile any advance payments claimed on Form 7200 with total credits claimed and total taxes due on their employment tax returns. A refund, a credit, or an advance of any portion of these credits to a taxpayer in excess of the amount to which the taxpayer is entitled is an erroneous refund for which the IRS must seek repayment.

IV. Assessment Authority

Section 6201, in general, authorizes the Secretary to determine and assess tax liabilities including interest, additional amounts, additions to the tax, and assessable penalties. However, the general authority to assess tax liabilities under section 6201(a) does not allow the assessment of any non-rebate ^[6] portion of an erroneous refund of a refundable credit. Instead, non-rebate refunds are generally recovered or recaptured through voluntary payment or litigation. The government by appropriate action can bring civil litigation to recover funds which its agents have wrongfully, erroneously, or illegally paid, and no statute is necessary to authorize the government to sue in such a case, since the right to sue is independent of statute. *United States v. Wurts*, 303 U.S. 414, 415 (1938), citing *United States v. The Bank of the Metropolis*, 40 U.S. 377 (1841). However, the statutory language of the Families First Act and the CARES Act provides for the administrative recapture of these non-rebate refunds by authorizing the promulgation of regulations or other guidance to do so.

Sections 7001 and 7003 of the Families First Act and section 2301 of the CARES Act grant authority to the Department of the Treasury (Treasury Department) and the IRS to issue regulations or other guidance to recapture an erroneous refund of the credits. Specifically, sections 7001(f) and 7003(f) of the Families First Act and section 2301(l) of the CARES Act authorize the Secretary to issue guidance to allow for the administrative reconciliation and recapture of erroneous refunds. Sections 7001(f) and 7003(f) of the Families First Act provide, in relevant part, that the Secretary (or the Secretary's delegate) shall provide such regulations or other guidance as may be necessary to carry out the purposes of the credit, including regulations or other guidance: (1) To prevent the avoidance of the purposes of the limitations under this provision; (2) to minimize compliance and record-keeping burdens associated with the credit; (3) to provide for a waiver of penalties for failure to deposit amounts in anticipation of the allowance of the credit; (4) to

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recapture the benefit of the credit in cases where there is a subsequent adjustment to the credit; and (5) to ensure that the wages taken into account for the credit conform with the paid sick leave and paid family leave required to be provided under the Families First Act. Similarly, section 2301(l) of the CARES Act provides in relevant part that the Secretary shall issue such forms, instructions, regulations, and guidance as are necessary to provide for the reconciliation of an advance payment of the employee retention credit with the amount advanced at the time of filing the return of tax for the applicable calendar quarter or taxable year, and to provide for the recapture of the credit under section 2301 of the CARES Act if such credit is allowed to a taxpayer that receives a small business loan under section 1102 of the CARES Act during a subsequent quarter.

Accordingly, this document amends the Employment Tax Regulations ([26 CFR part 31](#)) by adding temporary regulations under sections 3111 and 3221 of the Code. Concurrent with the publication of this Treasury decision, the Treasury Department and the IRS are publishing in the Proposed Rules section of this issue of the **Federal Register** a notice of proposed rulemaking (REG-111879-20) on this subject that cross-references the text of these temporary regulations. *See* section 7805(e)(1). Interested persons are directed to the **ADDRESSES** and COMMENTS AND REQUESTS FOR A PUBLIC HEARING sections of the preamble to REG-111879-20 for information on submitting public comments or requesting a public hearing on the proposed regulations.

Explanation of Provisions

Sections 7001 and 7003 of the Families First Act and section 2301 of the CARES Act provide that the credits described in these sections are taken against the taxes imposed on employers under sections 3111(a) or 3221(a) of the Code (for the employee retention credit, only the taxes imposed under section 3221(a) that are attributable to the rate in effect under section 3111(a) of the Code). Additionally, if the amount of the credit exceeds the taxes imposed under sections 3111(a) or 3221(a) of the Code (for the employee retention credit, only the taxes imposed under section 3221(a) that are attributable to the rate in effect under section 3111(a) of the Code) for any calendar quarter, such excess shall be treated as an overpayment to be refunded or credited under sections 6402(a) and 6413(b) of the Code. Any credits claimed that exceed the amount to which the employer is entitled and that are actually credited or paid by the IRS are considered to be erroneous refunds of the credits. These temporary regulations provide that erroneous refunds of these credits are treated as underpayments of the taxes imposed under sections 3111(a) or 3221(a) of the Code and authorize the IRS to assess any portion of the credits erroneously credited, paid, or refunded in excess of the amount allowed as if those amounts were tax liabilities under sections 3111(a) and 3221(a) subject to assessment and administrative collection procedures. This allows the IRS to efficiently recover the amounts, while also preserving administrative protections afforded to taxpayers with respect to contesting their tax liabilities under the Code and avoiding unnecessary costs and burdens associated with litigation. These assessment and administrative collection procedures will apply in the normal course in processing employment tax returns that report advances in excess of claimed credits and in examining returns for excess claimed credits.

Specifically, these temporary regulations provide that any amount of the credits for qualified leave wages under sections 7001 and 7003 of the Families First Act, plus any amount of credits for qualified health plan expenses under sections 7001 and 7003, and including any increases in these credits under section 7005, and any amount of the employee retention credit for qualified wages under section 2301 of the CARES Act that are erroneously refunded or credited to an employer shall be treated as underpayments of the taxes imposed by section 3111(a) or section 3221(a), as applicable, by the employer and may be administratively assessed and collected in the same manner as the taxes. These temporary regulations provide that the determination of any amount of credits erroneously refunded must take into account any credit amounts advanced to an employer under the process established by the IRS in accordance with sections 7001(b)(4)(A)(ii) and 7003(b)(3)(B) of the Families First Act and section 2301(l)(1) of the CARES Act.

Because in certain situations third party payors claim credits on behalf of their common law employer clients, these temporary regulations also provide that employers against whom an erroneous refund of credits can be assessed as an underpayment include persons treated as the employer under sections 3401(d), 3504, and 3511 of the Code, consistent with their liability for the section 3111(a) and section 3221(a) taxes against which the credit applied.

Finally, these temporary regulations apply to all credit refunds under section 7001 and 7003 of the Families First Act advanced or paid on or after April 1, 2020 and all credit refunds under section 2301 of the CARES Act advanced or paid on or after March 13, 2020. These applicability dates correspond to the effective dates of the statutory sections that provide for these credits and that authorize guidance to allow for the administrative reconciliation and recapture of erroneous refunds of these credits.

Sections 7001(g) and 7003(g) of the Families First Act provide that sections 7001 and 7003 apply to wages paid with respect to the period beginning on a date selected by the Secretary of the Treasury which is during the 15-day period beginning on the date of the enactment of the Families First Act (March 18, 2020). In Notice 2020-21, 2020-16 I.R.B. 660, the IRS provided that the tax credits for qualified sick leave wages and qualified family leave wages under sections 7001 and 7003 of the Families First Act apply to wages paid for the period beginning on April 1, 2020, and ending on December 31, 2020. Section 2301(m) of the CARES Act provides that section 2301 applies to wages paid on or after March 13, 2020, and before January 1, 2021.

Pursuant to section 7805(b)(2) of the Code, these temporary regulations are permitted to apply before the dates provided under section 7805(b)(1), including the date on which these temporary regulations are filed with the **Federal Register**, because these temporary regulations are being issued within 18 months of the date of the enactment of the relevant statutory provisions under the Families First Act and the CARES Act. Accordingly, these temporary regulations apply to all credits under sections 7001 and 7003 of the Families First Act, as modified by section 3606 of the CARES Act, including any increases in the credits under section 7005 of the Families First Act, refunded on or after April 1, 2020, including advanced refunds, as well as all credits under section 2301 of the CARES Act that are refunded on or after March 13, 2020, including advanced refunds.

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Special Analyses

The Office of Management and Budget's Office of Information and Regulatory Analysis has determined that these temporary regulations are not significant and not subject to review under section 6(b) of Executive Order 12866.

Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), the Secretary certifies that these temporary regulations will not have a significant economic impact on a substantial number of small entities because these temporary regulations impose no compliance burden on any business entities, including small entities. Although these temporary regulations will apply to all employers eligible for the credits under the Families First Act and the CARES Act, including small businesses and tax-exempt organizations with fewer than 500 employees, and will therefore be likely to affect a substantial number of small entities, the economic impact will not be significant. These temporary regulations do not affect the employer's employment tax reporting or the necessary information to substantiate entitlement to the credits. Rather, these temporary regulations merely implement the statutory authority granted under sections 7001(f) and 7003(f) of the Families First Act and section 2301(l) of the CARES Act that authorize the IRS to assess, reconcile, and recapture any portion of the credits erroneously credited, paid, or refunded in excess of the actual amount allowed as if the amounts

were tax liabilities under sections 3111(a) and 3221(a) subject to assessment and administrative collection procedures. Notwithstanding this certification, the Treasury Department and the IRS invite comments on any impact these temporary regulations would have on small entities.

Pursuant to section 7805(f), these temporary regulations have been submitted to the Chief Counsel of the Office of Advocacy of the Small Business Administration for comment on its impact on small business.

The Treasury Department and the IRS have determined that good cause exists under section 553(b)(B) of the Administrative Procedure Act (APA) (5 U.S.C. 551 *et seq.*). Section 553(b)(B) provides that an agency is not required to publish a notice of proposed rulemaking in the **Federal Register** when the agency, for good cause, finds that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest. Employers must file Form 941, *Employer's Quarterly Federal Tax Return*, for the second quarter of calendar year 2020 by July 31, 2020, as required by section 6071 of the Code and Treas. Reg. § 31.6071(a)-1. Employers use Form 941 to claim qualified leave credits under the Families First Act and the employee retention credit under the CARES Act, as well as to report any advance of these credits they received during the quarter. In filing their second quarter 2020 Form 941, some employers will report and receive, or will have already received as an advance, refund amounts in excess of the refund to which they are entitled. These temporary regulations authorize the assessment of any such erroneous refunds. Without these temporary regulations, in some instances the IRS may not be able to avoid bringing costly and burdensome litigation to recover such reported erroneous refunds. Further, comments are being solicited in the cross-referenced notice of proposed rulemaking that is in this issue of the **Federal Register**, and any comments will be considered before final regulations are issued.

Statement of Availability of IRS Documents

IRS notices and other guidance cited in this preamble are published in the Internal Revenue Bulletin (or Cumulative Bulletin) and are available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at <http://www.irs.gov>.

Drafting Information

The principal author of these temporary regulations is NaLee Park, Office of the Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes). However, other personnel from the Treasury Department and the IRS participated in the development of these temporary regulations.

List of Subjects in [26 CFR 31](#)

- Employment taxes
- Income taxes
- Penalties
- Pensions
- Railroad retirement
- Reporting and recordkeeping requirements
- Social security
- Unemployment compensation

Adoption of Amendments to the Regulations

Accordingly, [26 CFR part 31](#) is amended as follows:

PART 31—EMPLOYMENT TAXES AND COLLECTION OF INCOME TAX AT SOURCE

Paragraph 1. The authority citation for part 31 is amended by adding entries for §§ 31.3111-6T and 31.3221-5T in numerical order to read in part as follows:

Authority: [26 U.S.C. 7805](#).

* * * * *

Section 31.3111-6T also issued under sec. 7001 and sec. 7003 of the Families First Coronavirus Response Act of 2020 and sec. 2301 of the Coronavirus Aid, Relief, and Economic Security Act of 2020.

* * * * *

Section 31.3221-5T also issued under sec. 7001 and sec. 7003 of the Families First Coronavirus Response Act of 2020 and sec. 2301 of the Coronavirus Aid, Relief, and Economic Security Act of 2020.

* * * * *

Par. 2. Section 31.3111-6T is added to read as follows:

§ 31.3111-6T Recapture of credits under the Families First Coronavirus Response Act and the Coronavirus Aid, Relief, and Economic Security Act.

(a) *Recapture of erroneously refunded credits under the Families First Coronavirus Response Act.* Any amount of credits for qualified sick leave wages or qualified family leave wages under sections 7001 and 7003, respectively, of the Families First Coronavirus Response Act (Families First Act), [Public Law 116-127](#), 134 Stat. 178 (2020), as modified by section 3606 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), [Public Law 116-136](#), 134 Stat. 281 (2020), plus any amount of credits for qualified health plan expenses under sections 7001 and 7003, and including any increases in those credits under section 7005 of the Families First Act, that are treated as overpayments and refunded or credited to an employer under section 6402(a) or section 6413(b) of the Internal Revenue Code (Code) and to which the employer is not entitled, resulting in an erroneous refund to the employer, shall be treated as an underpayment of the taxes imposed by section 3111(a) of the Code and may be assessed and collected by the Secretary in the same manner as the taxes.

(b) *Recapture of erroneously refunded credits under the Coronavirus Aid, Relief, and Economic Security Act.* Any amount of credits for qualified wages under section 2301 of the CARES Act that is treated as an overpayment and refunded or credited to an employer under section 6402(a) or section 6413(b) of the Code and to which the employer is not entitled, resulting in an erroneous refund to the employer, shall be treated as an underpayment of the taxes imposed by section 3111(a) of the Code and may be assessed and collected by the Secretary in the same manner as the taxes.

(c) *Advance credit amounts erroneously refunded.* The determination of any amount of credits erroneously refunded as described in paragraphs (a) and (b) of this section must take into account any amount of credits advanced to an employer under the process established by the Internal Revenue Service in accordance with sections 7001(b)(4)(A)(ii) and 7003(b)(3)(B) of the Families First Act, as modified by section 3606 of the CARES Act, and section 2301(l)(1) of the CARES Act.

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(d) *Third party payors.* For purposes of this section, employers against whom an erroneous refund of the credits under sections 7001 and 7003 of the Families First Act (including any increases in those credits under section 7005 of the Families First Act), as modified by section 3606 of the CARES Act, and the credits under section 2301 of the CARES Act can be assessed as an underpayment of the taxes imposed by section 3111(a) include persons treated as the employer under sections 3401(d), 3504, and 3511 of the Code, consistent with their liability for the section 3111(a) taxes against which the credit applied.

(e) *Applicability date.* This regulation applies to all credit refunds under sections 7001 and 7003 of the Families First Act (including any increases in those credits under section 7005 of the Families First Act), as modified by section 3606 of the CARES Act, advanced or paid on or after April 1, 2020 and all credit refunds under section 2301 of the CARES Act advanced or paid on or after March 13, 2020.

Par. 3. Section 31.3221-5T is added to read as follows:

§ 31.3221-5T Recapture of credits under the Families First Coronavirus Response Act and the Coronavirus Aid, Relief, and Economic Security Act.

(a) *Recapture of erroneously refunded credits under the Families First Coronavirus Response Act.* Any amount of credits for qualified sick leave wages or qualified family leave wages under sections 7001 and 7003, respectively, of the Families First Coronavirus Response Act (Families First Act), [Public Law 116-127](#), 134 Stat. 178 (2020), as modified by section 3606 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), [Public Law 116-136](#), 134 Stat. 281 (2020), plus any amount of credits for qualified health plan expenses under sections 7001 and 7003, that are treated as overpayments and refunded or credited to an employer under section 6402(a) or section 6413(b) of the Internal Revenue Code (Code) and to which the employer is not entitled, resulting in an erroneous refund to the employer, shall be treated as an underpayment of the taxes imposed by section 3221(a) of the Code and may be assessed and collected by the Secretary in the same manner as the taxes.

(b) *Recapture of erroneously refunded credits under the Coronavirus Aid, Relief, and Economic Security Act.* Any amount of credits for qualified wages under section 2301 of the CARES Act that is treated as an overpayment and refunded or credited to an employer under section 6402(a) or section 6413(b) of the Code and to which the employer is not entitled, resulting in an erroneous refund to the employer, shall be treated as an underpayment of the taxes imposed by section 3221(a) of the Code and may be assessed and collected by the Secretary in the same manner as the taxes.

(c) *Advance credit amounts erroneously refunded.* The determination of any amount of credits erroneously refunded as described in paragraphs (a) and (b) of this section must take into account any amount of credits advanced to an employer under the process established by the Internal Revenue Service in accordance with sections 7001(b)(4)(A)(ii) and 7003(b)(3)(B) of the Families First Act, as modified by section 3606 of the CARES Act, and section 2301(l)(1) of the CARES Act.

(d) *Third party payors.* For purposes of this section, employers against whom an erroneous refund of the credits under sections 7001 and 7003 of the Families First Act, as modified by section 3606 of the CARES Act, and the credits under section 2301 of the CARES Act can be assessed as an underpayment of the taxes imposed by section 3221(a) include persons treated as the employer under sections 3401(d), 3504, and 3511 of the Code, consistent with their liability for the section 3221(a) taxes against which the credit applied.

(e) *Applicability date.* This regulation applies to all credit refunds under sections 7001 and 7003 of the Families First Act, as modified by section 3606 of the CARES Act, advanced or paid on or after April 1, 2020, and all credit refunds under section 2301 of the CARES Act advanced or paid on or after March 13, 2020.

Sunita Lough,

Deputy Commissioner for Services and Enforcement.

Approved: July 14, 2020.

David J. Kautter,

Assistant Secretary of the Treasury (Tax Policy).

Footnotes

1. *The U.S. Department of Health and Human Services has not yet specified any other such conditions as of July 29, 2020.*

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2. *Under sections 7001(d)(4) and 7003(d)(4) of the Families First Act, these credits do not apply to the government of the United States, the government of any State or political subdivision thereof, or any agency or instrumentality of any of the foregoing.*

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3. *The credit for the employer's share of Medicare tax does not apply to eligible employers that are subject to Railroad Retirement Tax Act (RRTA) because under section 7005(a) of the Families First Act qualified leave wages are not subject to Medicare tax under RRTA due to that section's reference to section 3221(a) of the Code, which includes both social security tax and Medicare tax.*

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4. *Section 6413(a) addresses interest-free adjustments of overpayments. The section provides that if more than the correct amount of employment tax imposed by section 3101, 3111, 3201, 3221, or 3402 is paid with respect to any payment of remuneration, proper adjustments with respect to both the tax and the amount to be deducted, shall be made, without interest, in such manner and at such times as the Secretary may by regulations prescribe.*

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5. *Employment tax returns have also been revised to provide for reporting of any deferral of employment taxes under the CARES Act. Section 2302 of the CARES Act provides that employers may defer the deposit and payment of the employer's share of social security tax for the payroll tax deferral period of March 27, 2020 through December 31, 2020. The deferral applies in addition to the credits claimed on an employment tax return, but the deferral does not reduce the amount of the employer's share of social security tax against which the credits are applied.*

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6. "Non-rebate" refers to the portion of any refund of a credit that exceeds the IRS's determination of the recipient's tax liability (i.e., the remaining portion of the refund that is paid to the recipient after the refund has been applied to the recipient's tax liability).

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