Current Federal Tax Developments

Week of September 13, 2021

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SECTION: ERC
DO TAXPAYERS NEED TO AMEND FORMS 941 OR FORMS 941-X THAT ARE AT ODDS WITH NOTICE 2021-49?

Citation: Notice 2021-49, 9/2/21

I've been asked a few times since Notice 2021-49 was published by the IRS what should be done about already filed Forms 941 or 941-X where an employee retention credit was claimed on the return in question for wages the Notice indicates are ineligible to be used to claim that credit.

For those who aren't up to speed on this issue, that Notice provided that controlling interest holders based on direct ownership of an interest of an employer who had any living relative in the following list would not be paid qualifying wages for the ERC by the controlled employer:

- Brother or sister;
- Ancestors (such as parents, grandparents, etc.); or
- Lineal descendant (such as a child, grandchild, etc.).[1]

This guidance was pretty much identical to the analysis we posted on April 3, 2021.[2] That article was inspired by a Twitter thread that was initiated by Dan Chodan, CPA on February 15, 2021,[3] where the matter was subject to a long discussion along with some private discussions I had with others earlier in February looking at this whole IRC §51(i)(1) issue and how it impacts the various employee retention credits.

Now that the IRS has weighed in, the question arises about whether clients that had filed returns and claims at odds with this position should be advised to file amended returns, as well as what exposure advisers may have if they advised for an alternative position. This article looks at these issues.

Is There a Duty to Amend?

The issue of whether a taxpayer is required to amend is not really one that is amenable to a simple yes/no answer (at least not without being a bit misleading), but the practical answer is much closer to no than yes.

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[1] Notice 2021-49, IRC §§267(c), 152(d)(2)(A)-(H)

[2] Ed Zollars, CPA, "Tax Advisers' Area 51 - Employee Retention Credit and Majority Shareholders," *Current Federal Developments* website, April 3, 2021, https://www.currentfederaltaxdevelopments.com/blog/2021/4/3/tax-advisers-area-51-employee-retention-credit-and-majority-shareholders

[3] Dan Chodan, Twitter, February 6, 2021, https://twitter.com/danchodan/status/1358072787987017729?s=20

Fundamentally the analysis depends on two factors:

- Did the taxpayer file the original return or claim for refund after reasonably attempting to determine the proper treatment under the law? *or*
- Was the taxpayer's initial position a supportable position based on the authorities we had at that time taking into account if the position was or was not disclosed on a Form 8275?

If the answer to either of these questions is yes then the taxpayer should not face any risk of penalties should the IRS examine the return in question. Thus, filing an amended return would not serve to reduce the risk of facing penalties under IRC §6662(b)(1) for negligence or a disregard of the rules or regulations. Note that the substantial understatement penalty of IRC §6662(b)(2) only applies to income taxes. However, the standards that apply in those cases (substantial authority or reasonable basis) do still apply to preparer penalties under IRC §6694 for payroll tax returns.

Note that if the taxpayer's initial position is determined ultimately to be the correct position, despite the IRS Notice, then the answer to the second question is yes. While I clearly have serious doubts about that result in a real world exam with any level of competence on the part of the examining agent, I'm not the party that would ultimately be making this ruling.

While the taxpayer does not have to amend, there are reasons why a taxpayer might want to do so. First, many taxpayers do not want to risk facing an IRS examination dispute in any form, considering not only the cost of representation in the exam but the time that it invariably takes the taxpayer away from the business in which he/she earns money. That second cost, even though no checks are written to pay it, often is more expensive than the first. And that ignores the stress the taxpayers will go through while facing the uncertainty of an exam.

Second, it eliminates the need to defend and then discover if the taxpayer will be able to persuade the ultimate decision maker in their case to remove the penalty, be that the agent, the agent's supervisor, the appellate conferee, a trial court judge, or a majority of the judges in an appellate setting. The deeper into the process the taxpayer must go before obtaining victory on the penalty issue, the more expensive the exam, in both representation fees and lost opportunity to earn money by paying attention to the business, it becomes.

Finally, while penalties may be off the table, interest will continue to run on the unpaid taxes. So there will at least be that cost to delaying recognizing the amount due should the IRS come calling before the statute expires.

Offsetting this is the possibility, or likely probability, that the return will never be examined. While the adviser cannot consider this when advising the client of whether a position can be taken, it is a valid topic to discuss once the adviser is comfortable that the original position was proper at the time the return was filed.

But, in the final analysis, your client is probably not "required" to amend the return in most cases so long as the initial filing was made in good faith after taking reasonable steps by the client to determine the proper tax result. Although that somewhat depends on what you or your client would see as a requirement.

Aside from paying additional interest during the time such tax remains unpaid if the client does not amend but the IRS later comes in assesses the tax, there are most likely no other consequences in the nature of a penalty. While some clients might see the additional interest as requiring the amended return, those that understand the time value of money may likely agree that there does not appear to be a severe consequence for not having filed an amended return.

But the client may still decide, reasonably, that the client wishes to have the amendment prepared and filed.

The Potential Conflict with the Adviser

Under IRC §6694(a), the adviser is subject to penalties for a return he/she is treated as a preparer of in relation to a position on a tax return where tax is assessed related to that position if the position is deemed unreasonable. The position is unreasonable unless there was (at the time the return is filed) or is (at the time of the exam) substantial authority for a position[4] or, if the position was disclosed at the time the return was filed, there was a reasonable basis for the position.[5] However, if the position relates to a tax shelter (as defined at IRC §6662(d)(2)(C)(ii)), the position is treated as unreasonable unless it was reasonable to believe the position was more than likely to be sustained on its merits if the position was challenged.[6]

The taxpayer does not face those standards and, in fact, the adviser must remember the taxpayer will escape penalties if the taxpayer, lacking the expertise personally to determine the proper tax treatment, in good faith relies on the advice of a tax professional that was given all information the taxpayer believed was necessary or was asked to provide by the professional, possesses the stated qualifications to be relied upon to give such advice and was engaged to provide such advice. Note that the taxpayer escapes penalties in these conditions *even if the advice is found to be erroneous, including failing to meet the substantial authority or reasonable basis standards* so long as the taxpayer had no reason to suspect the advice was deficient.

What should be obvious is that, while the taxpayer may no longer need to worry about the support for the position to avoid penalties, the same is not true for the adviser who both gave the original advice and is now representing the taxpayer facing an IRS challenge. This sets up a potential conflict of interest where the adviser has an incentive to have the client keep challenging the penalty based on factors other than reliance on the advice of the adviser/preparer, or to continue to challenge the underlying assessment despite the fact that, once penalties no longer apply to the taxpayer, it may be more cost effective on an overall basis (including those costs of stress and distraction from the business) to pay the tax and penalty. Such a concession could leave the adviser to later have to defend against IRS preparer penalties at the professional's own expense.

An adviser must consider this conflict if the IRS begins an examination on the issue, as well as if it impacts the advisers' advice related to the impact of filing an amended tax return. The conflict between the interests of the taxpayer and the interests of the

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[4] IRC §6694(a)(2)(A)

[5] IRC §6694(a)(2)(B)

[6] IRC §6694(a)(2)(C)

advisers may require having the client obtain a new adviser to deal with the IRS exam. Failure to do so may expose the adviser to a charge of having had an undisclosed conflict of interest in the examination engagement, something that can come back to haunt the adviser in a civil claim filed by the client against the adviser or a complaint filed against the adviser with a licensing agency.

Risks to the Adviser Aside from the IRS

Even if the IRS does not pursue preparer penalties (and, frankly, most often the agency will not do this except in egregious cases), there is still a level of risk to the preparer if the client is unhappy that he/she had to face an IRS examination. The client may decide to either file a civil court action for damages against the professional, or could file a complaint with the agency licensing the preparer.

The civil complaint would argue that the preparer breached their professional responsibility to the client by failing to properly appraise the taxpayer of the risk of an examination on the position and the time and costs involved that would be involved with such a challenge to the return. Note that the issuance of Notice 2021-49 likely has changed the calculus on the cost of any exam on this position, making it far less likely the IRS will accept that the law allows for an ERC on wages of the controlling shareholder who has at least one living relative, thus forcing the client to possibly have to take the matter to court before first obtaining any realistic possibility of carrying the issue.

Clients that may seem very much in favor of staking out an aggressive position when discussing options initially may not remember being so much in favor of taking risks when an actual exam notice arrives on their doorstep. The best way to deal with such lapses of memory on behalf of clients is to have documented, in writing, the advice given to the client and confirm in writing the fact the client was informed of the risks and that the client had decided to move forward despite any such risks.

However, sometimes advisers prefer to simply give clients "the answer" to a proper tax position rather than communicating the uncertainty inherent in a large number of more than trivial tax issues. Such confident assertions of what the rules are, especially when they result in a taxpayer friendly tax result, often is initially seen by clients as demonstrating competence compared to having received nuanced answers. In such a case, the client may truly be blindsided by the exam and justifiably upset with the preparer who will be painted as using such answers merely to assure clients didn't balk at paying for the preparer's work.

Some clients who are upset may realize that litigation is expensive, but still may want to extract a pound of flesh for being put in the position of facing an examination. In that case the client may file a complaint with a licensing board. For CPAs, this normally would be the state Board of Accountancy that granted the CPA's license.

In most states, CPAs in tax practice are expected to follow the AICPA *Statements of Standards on Tax Services*. Specifically, AICPA *Statement of Standards on Tax Services* No. 1 requires a CPA to comply with the more stringent of the AICPA standards (a position has a reasonable basis 1 in 3 chance of success) or the taxing authority standards (substantial authority), or at least a reasonable basis for a position where the position is disclosed when:

- Recommending a tax return position,
- Preparing a tax return or
- Signing a tax return.[7]

If a CPA is unable to show that the proper level of support existed for the position taken or advised, the CPA will generally be either presumed to have violated or be deemed as having violated the ethical standards for a CPA in a tax engagement. Such a determination may lead to sanctions against the CPA by the state Board in question.

State Board investigations are often time consuming for the CPA, very stressful and take time away from time spent in the practice that leads to billable work.

A similar set of issues would face an enrolled agent (EA) with the taxpayer filing a complaint against the EA based on the similar provisions in Circular 230.[8]

Even if the client decides to go the civil claim route only and not file a complaint with the licensing agency, the plaintiff's counsel and experts will make much of the fact that the adviser failed to follow the rules he/she was required to follow.

What to Do?

So what is a tax adviser to do if the adviser was involved in the initial filing of a Form 941 or a Form 941-X that claimed employee retention credit on wages paid to a controlling interest holder or their spouse, and there were living relatives that, under the holding of Notice 2021-49, would have served to bar the employer from claiming the credit on those wages?

I would suggest that the adviser take the following steps:

- Determine what level of authority existed for the position claimed on the Form 941 or Form 941-X at the time it was filed, as well as what exists now that Notice 2021-49 has been released. While the substantial authority (or reasonable basis with disclosure) rule does not apply to client for paying penalties, those standards will apply to the preparer for the purpose of preparer penalties under IRC §6694 and, most likely, under professional standards related to tax return preparation discussed earlier. Similarly, if the advice meets those standards, it's unlikely the IRS could

[7] AICPA Statement on Standards for Tax Services No. 1, *Tax Return Positions*, ¶5 and 9

[8] While CPAs are covered by Circular 230's language, in *Ridgely v. Lew*, 55 F. Supp. 3d 89 (D.D.C. 2014) the United States District Court for the District of Columbia found that the IRS Office of Professional Responsibility did not have authority under the IRC to regulate the tax preparation activities of CPAs, as federal law granted the IRS only the right to regulate a CPA's practice before the IRS. However, EAs are a special category of individuals who do not automatically qualify to represent taxpayers by being licensed by their state as a CPA or an attorney. The law grants the IRS the authority to determine who may be part of that category and it appears the IRS believes that this authority gives the IRS the right to look at and regulate the conduct of individuals it licenses as enrolled agents in this area. The IRS announced shortly after the *Ridgely* case was decided that they would not seek to appeal the court's decision and no appeal was filed.

prevail arguing that the taxpayer either was negligent or ignored rules and regulations, thus negating the imposition of an accuracy related negligence penalty. If the adviser finds that authority wanting upon further review, the adviser should likely consult their liability carrier and their own counsel on how to proceed.

- The client should be advised regarding the IRS release of Notice 2021-49 in the Internal Revenue Bulletin, outlining the IRS position on this issue. The client needs to be told that the IRS position is at odds with the position taken on the Form 941 or Form 941-X and the potential consequences that may arise from that, as well as the taxpayers' ability to file a Form 941-X to mitigate some of the consequences. This information is required to be provided under *AICPA Statements on Standards for Tax Services* No. 6 and under Circular 230 when an error exists on a return and is strongly advised if there is the potential the IRS may view this as an error given this new ruling. The client is to be offered the option to decide whether or not to amend the return(s) after considering these issues—that decision is the client's decision to make.

- If the adviser is going forward and dealing with future Forms 941 or 941-X, regardless of the client's decision on amending previously filed returns, the adviser will need to take Notice 2021-49 into consideration as an authority when determining for which positions there exists either substantial authority or a reasonable basis for these returns/claims prepared following the issuance of Notice 2021-49. The mere fact that the adviser signed a Form 941 or Form 941-X as preparer or advised a client to file such a form claiming these wages prior to the issuance of Notice 2021-49 does not automatically mean the adviser may continue to sign such a return or give such advice. It is strongly recommended that an adviser consider requiring the client to consent to attaching a Form 8275 disclosing taking a position contrary to Notice 2021-49 if the adviser is to sign the return or, if the adviser is merely advising the client but not preparing the form, advising the client to attach such a Form 8275 to the return. Doing so makes it nearly impossible for the IRS to prevail in attempting to assert a penalty on this issue, as the client did not appear to hide what he/she was doing from the IRS (though, honestly, the IRS may very well not read the form on the initial processing, which really creates the best of all worlds as they are still stuck with having been told what the taxpayer was doing).

If the adviser is planning to continue to sign returns claiming such wages or recommend clients take such positions on Forms 941 or 941-X they plan to file, the adviser should prepare a full analysis using authorities listed in Reg. §1.6662-4(d)(3)(iii) and an analysis under the full Reg. §1.6662-4(d) to determine if substantial authority exists. Generally substantial authority requires showing the following per Reg. §1.6662-4(d)(3)(i):

> There is substantial authority for the tax treatment of an item only if the weight of the authorities supporting the treatment is substantial in relation to the weight of authorities supporting contrary treatment. All authorities relevant to the tax treatment of an item, including the authorities contrary to the treatment, are taken into account in determining whether substantial authority exists. The weight of authorities is determined in light of the pertinent facts and circumstances in the manner prescribed by paragraph (d)(3)(ii) of this section. There may be substantial authority for more than one position

> with respect to the same item. Because the substantial authority standard is an objective standard, the taxpayer's belief that there is substantial authority for the tax treatment of an item is not relevant in determining whether there is substantial authority for that treatment.

The authorities that may be considered are found at Reg. §1.6662-4(d)(3)(iii):

> Except in cases described in paragraph (d)(3)(iv) of this section concerning written determinations, only the following are authority for purposes of determining whether there is substantial authority for the tax treatment of an item: applicable provisions of the Internal Revenue Code and other statutory provisions; proposed, temporary and final regulations construing such statutes; revenue rulings and revenue procedures; tax treaties and regulations thereunder, and Treasury Department and other official explanations of such treaties; court cases; congressional intent as reflected in committee reports, joint explanatory statements of managers included in conference committee reports, and floor statements made prior to enactment by one of a bill's managers; General Explanations of tax legislation prepared by the Joint Committee on Taxation (the Blue Book); private letter rulings and technical advice memoranda issued after October 31, 1976; actions on decisions and general counsel memoranda issued after March 12, 1981 (as well as general counsel memoranda published in pre-1955 volumes of the Cumulative Bulletin); Internal Revenue Service information or press releases; and notices, announcements and other administrative pronouncements published by the Service in the Internal Revenue Bulletin.

The regulation goes on to tell the advisers what does not establish substantial authority (editorial documents such as articles, CPE course materials, tax research service commentary paragraphs, etc.) but how such documents can be used to help uncover authority.

> Conclusions reached in treatises, legal periodicals, legal opinions or opinions rendered by tax professionals are not authority. The authorities underlying such expressions of opinion where applicable to the facts of a particular case, however, may give rise to substantial authority for the tax treatment of an item.

As well, you must check to see if any authority you are looking to rely upon has been later overridden per the regulation.

> Notwithstanding the preceding list of authorities, an authority does not continue to be an authority to the extent it is overruled or modified, implicitly or explicitly, by a body with the power to overrule or modify the earlier authority. In the case of court decisions, for example, a district court opinion on an issue is not an authority if overruled or reversed by the United States Court of Appeals for such district. However, a Tax Court opinion is not considered to be overruled or modified by a court of appeals to which a taxpayer does not have a right of appeal, unless the Tax Court adopts the holding of the court of appeals. Similarly, a private letter ruling is not authority if

> revoked or if inconsistent with a subsequent proposed regulation, revenue ruling or other administrative pronouncement published in the Internal Revenue Bulletin.

If you determine there is not substantial authority in support of this position,[9] then you must determine if the reasonable basis standard under Reg. §1.6662-3(b)(3) can be met. For reasonable basis, the regulation provides in general:

> Reasonable basis is a relatively high standard of tax reporting, that is, significantly higher than not frivolous or not patently improper. The reasonable basis standard is not satisfied by a return position that is merely arguable or that is merely a colorable claim.

The regulation does provide a safe harbor of sorts that can be relied upon. The regulation provides:

> If a return position is reasonably based on one or more of the authorities set forth in section 1.6662-4(d)(3)(iii) (taking into account the relevance and persuasiveness of the authorities, and subsequent developments), the return position will generally satisfy the reasonable basis standard even though it may not satisfy the substantial authority standard as defined in section 1.6662-4(d)(2). (See section 1.6662-4(d)(3)(ii) for rules with respect to relevance, persuasiveness, subsequent developments, and use of a well- reasoned construction of an applicable statutory provision for purposes of the substantial understatement penalty.)

As a final attempt to avoid a penalty, the adviser could look to reasonable cause and good faith even if it is eventually determined there was no reasonable basis for the position.

> In addition, the reasonable cause and good faith exception in section 1.6664-4 may provide relief from the penalty for negligence or disregard of rules or regulations, even if a return position does not satisfy the reasonable basis standard.

However, asserting this position could be a problem for the client, since the best defense under this is that the adviser's experience and background clearly rendered him/her as not capable of determining the proper answer to this matter, which could bring into question the issue of whether the client acted reasonably relying upon the adviser's advice on the matter.

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[9] To be clear, I have made it clear I did not believe that substantial authority existed for taking the employee retention credit on the wages of majority owners and spouses of the same with any living relatives even before Notice 2021-49 came out, but it is up to each professional to independently make this determination and accept the consequences of defending that position.

SECTION: 274
HIGH-LOW AND OTHER SPECIAL PER DIEM RATES FOR 2021/2022 FISCAL YEAR PUBLISHED BY THE IRS

Citation: Notice 2021-52, 9/3/21

The special per-diem rates for the fiscal year running from October 1, 2021 to September 30, 2022 has been released in Notice 2021-52.[10] The special rates governed by this Notice are:

- The special transportation industry meal and incidental expenses (M&IE) rates,
- The rate for the incidental expenses only deduction, and
- The rates and list of high-cost localities for purposes of the high-low substantiation method.[11]

The special meals and incidental expense rates for the transportation industry for the period from October 1, 2021 to September 30, 2022 are $69 for any locality of travel in the continental United States (CONUS) and $74 for any locality outside the continental United States (OCONUS).[12]

The rate for incidental expenses for the period from October 1, 2021 to September 30, 2022 for the incidental expenses only deduction is $5 per day.[13]

For those using the high-low substantiation method, the rates will be $296 for any high cost locality and $202 to any other location within CONUS (which is a decrease from the prior year). Of that amount, $74 is treated as paid for meals and incidentals to a high cost locality and $64 for travel to any other locality within CONUS.[14]

The list of high cost localities can be found at Section 5.2 of the Notice.

The notice indicates that Hilton Head, South Carolina has been added to the list of high cost localities for the 2021/2022 fiscal year.[15]

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[10] Notice 2021-52, September 3, 2021, https://www.taxnotes.com/research/federal/irs-guidance/notices/irs-publishes-special-per-diem-rates-for-2021-2022/783b3 (retrieved September 7, 2021)

[11] Notice 2021-52, Section 1

[12] Notice 2021-52, Section 3

[13] Notice 2021-52, Section 4

[14] Notice 2021-52, Section 5.1

[15] Notice 2021-52, Section 5.3.a

As well, the following locations are having modifications made to the portion of the year they qualify for high cost status for the 2021/2022 fiscal year:

> Sedona, Arizona[16] and Jamestown/Middletown/Newport, Rhode Island.[17]

Gulf Breeze, Florida has been removed from the high cost list for 2021/2022.[18]

SECTION: 3131
EMPLOYER GUIDANCE ISSUED FOR REPORTING COVID SICK AND FAMILY LEAVE PAY ON 2021 W-2S

Citation: Notice 2021-53, 9/7/21

In Notice 2021-53[19] the IRS has issued guidance to employers for reporting qualified leave wages for 2021. The Notice serves to update the guidance provided for reporting such items on 2020 W-2s to take into account changes made in the qualified leave wage provisions for 2021.

General Reporting Requirements

The overall reporting requirements are described as follows by the Notice:

> In order to provide eligible self-employed individuals who also receive wages or compensation as employees with the information they need to properly claim any qualified sick leave equivalent or qualified family leave equivalent credits for the 2021 taxable year, this notice requires eligible employers to report to employees the amount of qualified sick leave wages and qualified family leave wages paid to the employees under (i) sections 7001 or 7003 of the Families First Act for leave provided during the period beginning January 1, 2021, through March 31, 2021, and (ii) sections 3131 and 3132 of the Code for leave provided during the period beginning April 1, 2021, through September 30, 2021. Furthermore, since qualified leave wages are defined under both the Families First Act and sections 3131 and 3132 of the Code as wages defined in section 3121(a) without regard to the exclusions from employment under section 3121(b)(1) through (22) and compensation defined in section 3231(e) without regard to the exclusions from compensation under section 3231(e)(1), eligible employers must determine the amount of qualified leave wages to report without regard to the exclusions from employment under

[16] The change to Sedona, Arizona is effective for allowances paid to any employee on or after October 1, 2020, for travel away from home on or after October 1, 2020 (Notice 2021-52, Section 6)

[17] Notice 2021-52, Section 5.3.b and Section 6

[18] Notice 2021-52, Section 5.3.c

[19] Notice 2021-53, September 7, 2021, https://www.taxnotes.com/research/federal/irs-guidance/notices/guidance-prescribes-reporting-requirements-for-qualified-leave-wages/783k8 (retrieved September 10, 2021)

> section 3121(b)(1) through (22) and without regard to the exclusions from compensation under section 3231(e)(1).[20]

These special reporting rules are only required for employers that have claimed the credits involved—if the employer did not claim such credits, no extra reporting is required:

> Only eligible employers who claim credits under the Families First Act or sections 3131 and 3132 of the Code are required to separately report qualified sick leave wages and qualified family leave wages to their employees. Eligible employers who forego claiming refundable tax credits under the Families First Act or sections 3131 and 3132 of the Code for qualified leave wages are not required to separately report qualified sick leave wages or qualified family leave wages paid to employees to the extent those wages are not claimed as a credit. Furthermore, governmental employers that are prohibited from claiming credits for qualified leave wages are not required to separately report any qualified sick leave wages or qualified family leave wages paid to employees.[21]

Specific Reporting Instructions

Because of the differing rules that apply to the credit for different time periods in 2021, an employer must separately report:

- Leave provided to employees during the period beginning January 1, 2021, through March 31, 2021 (under the Families First Act as extended by the Comprehensive Appropriations Act, 2021); and

- Leave provided to employees during the period beginning April 1, 2021, through September 30, 2021, (under sections 3131and 3132 of the Code as provided by the American Rescue Plan Act of 2021).[22]

Employers have two options for this reporting:

> Employers must separately state each of these wage amounts either on the 2021 Form W-2, Box 14, or on a separate statement included with each employee's Form W-2, Wage and Tax Statement. Self-employed individuals claiming a credit for a qualified sick leave equivalent amount or qualified family leave equivalent amount must report these qualified sick leave wages and qualified family leave wages on Form 7202, Credits for Sick Leave and Family Leave for Certain Self-Employed Individuals, included with their 2021 income tax returns, and may have to reduce (but not below zero) any qualified sick leave

[20] Notice 2021-53, September 7, 2021

[21] Notice 2021-53, September 7, 2021

[22] Notice 2021-53, September 7, 2021

or qualified family leave equivalent amounts by these qualified leave wages.[23]

The employer is required to report the following to the employee. Each item must be reported separately either in Box 14 or on a separate statement to each employee:

- The total amount of qualified sick leave wages paid for reasons described in paragraphs (1), (2), or (3) of section 5102(a) of the EPSLA with respect to leave provided to employees during the period beginning on January 1, 2021, through March 31, 2021. In labeling this amount, employers must use the following, or similar language: "sick leave wages subject to the $511 per day limit paid for leave taken after December 31, 2020, and before April 1, 2021."

- The total amount of qualified sick leave wages paid for reasons described in paragraphs (4), (5), or (6) of section 5102(a) of the EPSLA with respect to leave provided to employees during the period beginning on January 1, 2021, through March 31, 2021. In labeling this amount, employers must use the following, or similar language: "sick leave wages subject to the $200 per day limit paid for leave taken after December 31, 2020, and before April 1, 2021."

- The total amount of qualified family leave wages paid to the employee under the EFMLEA with respect to leave provided to employees during the period beginning on January 1, 2021, through March 31, 2021. In labeling this amount, employers must use the following or similar language: "emergency family leave wages paid for leave taken after December 31, 2020, and before April 1, 2021."

- The total amount of qualified sick leave wages paid for reasons described in paragraphs (1), (2), or (3) of section 5102(a) of the EPSLA with respect to leave provided to employees during the period beginning on April 1, 2021, through September 30, 2021. In labeling this amount, employers must use the following, or similar language: "sick leave wages subject to the $511 per day limit paid for leave taken after March 31, 2021, and before October 1, 2021."

- The total amount of qualified sick leave wages paid for reasons described in paragraphs (4), (5), and (6) of section 5102(a) of the EPSLA with respect to leave provided to employees during the period beginning on April 1, 2021, through September 30, 2021. In labeling this amount, employers must use the following, or similar language: "sick leave wages subject to the $200 per day limit paid for leave taken after March 31, 2021, and before October 1, 2021."

- The total amount of qualified family leave wages paid to the employee under the EFMLEA with respect to leave provided to employees during the period beginning on April 1, 2021, through September 30, 2021. In labeling this amount, employers must use the following or similar language: "emergency family leave wages paid for leave taken after March 31, 2021, and before October 1, 2021."[24]

[23] Notice 2021-53, September 7, 2021

[24] Notice 2021-53, September 7, 2021

The following special rules apply to using a separate statement rather than reporting the amounts on Form W-2:

> If a separate statement is provided and the employee receives a paper Form W-2, then the statement must be included with the Form W-2 sent to the employee, and if the employee receives an electronic Form W-2, then the statement must be provided in the same manner and at the same time as the Form W-2.[25]

The Notice also provides the following requirements for an employer that erroneously reported such sick pay but did not (or was not eligible to) claim the credit:

> If an employer that does not claim credits under these provisions or an employer that is prohibited from claiming those credits erroneously reports sick leave wages or family leave wages to an employee on Form W-2, Box 14, or on a separate statement, the employer must either furnish a W-2c, Corrected Wage and Tax Statement, or provide a corrected statement to the employee correcting the erroneous reporting. The Form W-2c or corrected statement should be sent only to the employee. The employer should not file Form W-2c with the Social Security Administration solely to correct the amount in Box 14.[26]

The employer must also provide an explanation of the implications of these amounts to the employee. The Notice states:

> As part of the Instructions for Employee, under the instructions for Box 14, for the Forms W-2, or in a separate statement sent to the employee, the employer may provide additional information about qualified sick leave wages and qualified family leave wages and explain that these wages may limit the amount of the qualified sick leave equivalent or qualified family leave equivalent credits to which the employee may be entitled with respect to any self-employment income. The following model language (modified as necessary) may be used. <u>Please note that this language has been modified from that suggested in Notice 2020-54. (emphasis added)</u>[27]

As that last sentence notes, it would be a mistake for employers to simply continue to use the employee instruction text the organization used for 2020 W-2s.

The model 2021 language is provided below:

> Included in Box 14, if applicable, are amounts paid to you as qualified sick leave wages or qualified family leave wages under the Families First Coronavirus Response Act and/or sections 3131 and 3132 of the Internal Revenue Code. Specifically, up to six types of paid qualified

[25] Notice 2021-53, September 7, 2021

[26] Notice 2021-53, September 7, 2021

[27] Notice 2021-53, September 7, 2021

sick leave wages or qualified family leave wages may be reported in Box 14:

> Sick leave wages subject to the $511 per day limit paid for leave taken after December 31, 2020, and before April 1, 2021, because of care you required.
>
> Sick leave wages subject to the $200 per day limit paid for leave taken after December 31, 2020, and before April 1, 2021, because of care you provided to another.
>
> Emergency family leave wages paid for leave taken after December 31, 2020, and before April 1, 2021.
>
> Sick leave wages subject to the $511 per day limit paid for leave taken after March 31, 2021, and before October 1, 2021, because of care you required.
>
> Sick leave wages subject to the $200 per day limit paid for leave taken after March 31, 2021, and before October 1, 2021, because of care you provided to another.
>
> Emergency family leave wages paid for leave taken after March 31, 2021, and before October 1, 2021.

If you have self-employment income in addition to wages paid by your employer, and you intend to claim any qualified sick leave or qualified family leave equivalent credits, you must report the qualified sick leave or qualified family leave wages on Form 7202, Credits for Sick Leave and Family Leave for Certain Self-Employed Individuals, included with your income tax return, and may have to reduce (but not below zero) any qualified sick leave or qualified family leave equivalent credits by the amount of these qualified leave wages. If you have self-employment income, you should refer to the instructions for your individual income tax return for more information.[28]

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