

TaxNewsFlash

United States



No. 2020-467
July 27, 2020

Regulations: Refundable employment tax credits; assessment for erroneous refundable credits (COVID-19)

The U.S. Treasury Department and IRS on Friday afternoon, July 24, 2020 released for publication in the Federal Register temporary regulations (T.D. 9904) and, by cross-reference, proposed regulations (REG-111879-20) as rules for reconciling advance payments of refundable employment tax credits, as provided under legislation enacted earlier in 2020 as relief in response to the coronavirus (COVID-19) pandemic.

The *Families First Coronavirus Response Act* and the *Coronavirus Aid, Relief, and Economic Security Act* (CARES Act) include a mandate for regulations to address the reconciliation of advance refundable employment tax credits provided under these acts and the recapture of the benefit of the credits (when necessary).

Read the [temporary regulations](#) [PDF 253 KB] and the [proposed regulations](#) [PDF 170 KB]

These regulations will be published in the Federal Register on July 29, 2020.

- In general, provisions of the Families First Act provide that if the amount of the paid sick and family leave credits exceeds the taxes imposed by Code section 3111(a) or 3221(a) for any calendar quarter, that excess amount is to be treated as an overpayment that is to be refunded pursuant to the rules under sections 6402(a) and 6413(b).
- A provision 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)) for any calendar quarter, that excess amount is treated as an overpayment that is to be refunded under sections 6402(a) and 6413(b).

Read a related IRS release: [IR-2020-169](#) (July 27, 2020).

Assessment for errors in refundable credits

Section 6201 allows the assessment of liabilities including interest, additional amounts, additions to the tax, and assessment of penalties. Section 6201 does not allow the assessment of any non-rebate portion (the portion that exceeds the tax liability) of an erroneous refundable credit. Non-rebate refunds are usually recovered through voluntary payment or litigation, and the IRS could bring a civil action. However, the Families First Act and CARES Act allow administrative recovery of erroneously refunded credits by authorizing regulations.

Accordingly, the temporary regulations and corresponding proposed regulations provide that any credits claimed that exceed the amount to which an employer is entitled and are actually credited and paid are considered to be an erroneous refund of the credits and treated as an underpayment of the taxes imposed under section 3111(a) or 3221(a). Therefore, these regulations authorize the IRS to assess any portion of the credits erroneously credited, paid or refunded. This mechanism allows the IRS to recover amounts and provides taxpayers with administrative protections, but avoids litigation.

These temporary regulations apply to all credits under provisions of the Families First Act (Act sections 7001 and 7003) refunded on or after April 1, 2020, as well as credits under a provision of the CARES Act (Act section 2301) that are refunded on or after March 13, 2020.

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