



DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 31

[TD 9953]

RIN 1545-BQ09

Recapture of Excess Employment Tax Credits under the American Relief Plan Act of 2021

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Temporary regulations.

SUMMARY: This document sets forth temporary regulations under sections 3131, 3132, and 3134 of the Internal Revenue Code (Code), added by sections 9641 and 9651 of the American Rescue Plan Act of 2021. These temporary regulations authorize the assessment of any erroneous refund of the tax credits paid under sections 3131, 3132 (including any increases in those credits under section 3133), and 3134 of the Code. The text of these temporary regulations also serves as the text of the proposed regulations (REG-109077-21) 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 **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

Applicability date: For date of applicability, see §§ 31.3131-1T, 31.3132-1T, and 31.3134-1T of these temporary regulations.

FOR FURTHER INFORMATION CONTACT: Concerning these temporary regulations, NaLee Park at 202-317-6798.

SUPPLEMENTARY INFORMATION:

Background

The Families First Coronavirus Response Act (Families First Act), Pub. L. 116-127, 134 Stat. 178 (March 18, 2020), the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. 116-136, 134 Stat. 281 (March 27, 2020), the COVID-related Tax Relief Act of 2020 (Tax Relief Act), enacted as Subtitle B of Title II of Division N of the Consolidated Appropriations Act, 2021, Pub. L. 116-260, 134 Stat. 1182 (December 27, 2020), the Taxpayer Certainty and Disaster Relief Tax Act of 2020 (Relief Act), enacted as Division EE of the Consolidated Appropriations Act, 2021, and the American Rescue Plan Act of 2021 (the ARP), Pub. L. 117-2, 135 Stat. 4 (March 11, 2021), provide relief to taxpayers from economic hardships resulting from the Coronavirus Disease 2019 (COVID-19). As described below, this relief includes employment tax credits for certain wages paid by employers.

I. Paid Sick and Family Leave Credits

The Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family and Medical Leave Expansion Act (EFMLEA), enacted as Divisions E and C of the Families First Act, respectively, generally required employers with fewer than 500 employees to provide paid leave due to certain circumstances related to COVID-19. Sections 7001 and 7003 of the Families First Act generally provided that non-governmental employers subject to the paid leave requirements under EPSLA and EFMLEA were entitled to fully refundable tax credits to cover the wages paid for leave taken for those periods of time during which employees are unable to work or telework for specified reasons related to COVID-19, plus allocable qualified health plan expenses.

Although the requirement to provide employees with paid leave under EPSLA and EFMLEA expired December 31, 2020, the tax credits for qualified leave wages paid for periods of leave taken beginning on April 1, 2020, and ending on December 31, 2020, were extended by the Tax Relief Act through March 31, 2021, for paid leave that would have satisfied the requirements of EPSLA and EFMLEA.

The ARP added sections 3131 through 3133 of the Code, which extend the refundable tax credits for paid leave to non-governmental employers with fewer than 500 employees, and certain governmental entities¹ without regard to the number of employees, that provide paid sick and family leave for specified reasons related to COVID-19 with respect to periods of leave beginning on April 1, 2021, through September 30, 2021. The paid sick leave credit and the paid family leave credit (collectively, “paid sick and family leave credits”) under sections 3131 through 3133 are available to eligible employers that provide employees with paid leave that would have satisfied the requirements of EPSLA and EFMLEA, with certain modifications made pursuant to the ARP.

Under section 3131, a credit is available to eligible employers who pay qualified sick leave wages to an employee for up to 80 hours leave provided during the period beginning April 1, 2021, and ending September 30, 2021, 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, is seeking or awaiting the results of a diagnostic test for, or a medical diagnosis of, COVID-19 and the employee has been exposed to COVID-19 or the employee’s employer has requested the test or diagnosis, or the employee is obtaining

¹ Section 9641 of the ARP added sections 3131(f)(5) and 3132(f)(5) to the Code, which extend paid sick and family leave credits to certain governmental employers (without regard to the number of employees). However, the credits are not allowed for the government of the United States, or any agency or instrumentality of the United States government, except for an organization described in section 501(c)(1) of the Code and exempt from tax under section 501(a) of the Code.

immunization related to COVID-19 or recovering from any injury, disability, illness, or condition related to the immunization;

(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 the 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 (HHS) in consultation with the Secretaries of the Treasury and Labor. The Secretary of HHS has specified, after consultation with the Secretaries of Treasury and Labor, that a substantially similar condition is one in which the employee takes leave:

- to accompany an individual to obtain immunization related to COVID-19, or
- to care for an individual who is recovering from any injury, disability, illness, or condition related to the immunization.²

If an employee is unable to work or telework for reasons related to COVID-19 described in (1), (2), or (3) above, qualified sick leave wages are wages paid 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 a maximum of \$511 per day and \$5,110 in the aggregate. If an employee is unable to work or telework for reasons related to COVID-19 described in (4), (5), or (6) above, qualified sick leave wages are two-thirds

² For more information on the paid sick and family leave credits, including who is an "individual" for purposes of this "substantially similar" condition, see Tax Credits for Paid Leave Under the American Rescue Plan Act of 2021 for Leave After March 31, 2021 | Internal Revenue Service (irs.gov) at <https://www.irs.gov/newsroom/tax-credits-for-paid-leave-under-the-american-rescue-plan-act-of-2021-for-leave-after-march-31-2021>.

of the wages paid 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 a maximum of \$200 per day and \$2,000 in the aggregate.

Under section 3132, a credit is available to eligible employers who pay qualified family leave wages to an employee for up to 12 weeks of paid family leave provided during the period beginning April 1, 2021, and ending September 30, 2021, if the employee is unable to work or telework due to any of the conditions for which eligible employers may provide paid sick leave. Qualified family leave wages are two-thirds of the wages paid at the employee's regular rate of pay, up to a maximum of \$200 per day and \$12,000 in the aggregate.

An eligible employer may not receive the paid family leave credit for the same wages for which it received the paid sick leave credit. Further, an eligible employer that receives the credits for qualified sick leave wages under section 3131 of the Code and qualified family leave wages under section 3132 of the Code (collectively, "qualified leave wages") may not receive the employee retention credit allowed under section 2301 of the CARES Act or section 3134 of the Code based on the same wages. For the second calendar quarter of 2021, if an eligible employer receives the employee retention credit under section 2301 of the CARES Act based on wages paid that are also qualified leave wages on which the employer may claim the paid sick and family leave credits, the employer must reduce any paid sick and family leave credits by the amount of the credit allowed under section 2301 of the CARES Act that is attributable to those same wages. See sections 3131(f)(3) and 3132(f)(3). For the third and fourth calendar quarters of 2021, any qualified leave wages eligible employers take into account for purposes of the paid sick and family leave credits may not be taken into account for purposes of the employee retention credit under section 3134 of the Code. See section 3134(c)(3)(D).

The paid sick and family leave credits are also reduced by the amount of the credit allowed under section 41 (the credit for increasing research activities) with respect to wages taken into account for determining both the credit under section 41 and the paid sick and family leave credits. In addition, any wages taken into account in determining paid sick and family leave credits cannot be taken into account as wages for purposes of the credits under sections 45A, 45P, 45S, and 51. See sections 3131(f)(3) and 3132(f)(3).

Sections 3131(f)(2) and 3132(f)(2) provide that, for purposes of sections 3131 and 3132, respectively, the term “wages” means wages as defined in section 3121(a), determined without regard to paragraphs (1) through (22) of section 3121(b), and compensation as defined in section 3231(e), determined without regard to the sentence in section 3231(e)(1) that begins “Such term does not include remuneration”. Eligible employers are entitled to receive a credit equal to the amount of qualified leave wages paid under sections 3131 and 3132. Under sections 3131(d) and 3132(d), the credit is increased by the eligible employer’s cost of maintaining health insurance coverage allocable to the qualified leave wages (“allocable qualified health plan expenses”). Under sections 3131(e) and 3132(e), the credit is also increased by certain amounts paid under collectively bargained agreements by the eligible employer that are properly allocable to the qualified leave wages (“certain collectively bargained contributions”), subject to the daily and aggregate credit limitations. The credits for the qualified leave wages and the collectively bargained contributions combined cannot exceed the \$511 daily and \$5110 aggregate limitation or \$200 daily and \$2000 aggregate limitation for paid sick leave and the \$200 daily and \$12,000 aggregate limitation for paid family leave. However, the credit for the allocable qualified health expenses is in addition to the credit for the qualified leave wages and not subject to the daily and aggregate credit limitations.

Under sections 3131 and 3132, qualified leave wages are subject to the taxes imposed on employers by sections 3111(a) (employer's share of social security tax), 3111(b), and 3221(a), but section 3133(a) provides that the paid sick and family leave credits under sections 3131 and 3132 are increased by the amount of the taxes imposed by sections 3111(a), 3111(b), and 3221(a) on qualified leave wages.

The paid sick and family leave credits under sections 3131 and 3132 are allowed against the taxes imposed on employers under section 3111(b) (the Hospital Insurance tax (Medicare tax)), and against so much of the taxes imposed under section 3221(a) (the Railroad Retirement Tax Act Tier 1 tax) as are attributable to the rate in effect under section 3111(b), as applicable, on all wages and compensation paid to all employees, and any credit amounts in excess of these taxes are treated as an overpayment to be refunded under sections 6402(a) and 6413(b) of the Code. See sections 3131(b)(4)(A), 3131(f)(1), 3132(b)(3)(A), and 3132(f)(1).

II. Employee Retention Credit

Section 2301 of the CARES Act, as originally enacted, provides for an employee retention credit for eligible employers, including tax-exempt organizations, that pay qualified wages, including certain health plan expenses, to some or all employees after March 12, 2020, and before January 1, 2021. Section 206 of the Relief Act adopted amendments and technical changes to section 2301 of the CARES Act for qualified wages paid after March 12, 2020, and before January 1, 2021, primarily expanding eligibility for certain employers to claim the credit. Section 206 of the Relief Act is effective retroactive to the effective date of section 2301 of the CARES Act. Section 207 of the Relief Act, which is effective for calendar quarters beginning after December 31, 2020, further amends section 2301 of the CARES Act to extend the application of the employee retention credit to qualified wages paid after December 31, 2020, and before July 1, 2021, and to modify the calculation of the credit amount for qualified

wages paid during that time. Section 9651 of the ARP enacted section 3134 of the Code, effective for calendar quarters beginning after June 30, 2021, to provide an employee retention credit for qualified wages paid after June 30, 2021, and before January 1, 2022. The Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) will continue to monitor potential legislation related to the employee retention credit that may impact certain rules described in this preamble.

The employee retention credit is available to any employer carrying on a trade or business during a calendar quarter that meets the requirements to be an eligible employer under section 3134, which include experiencing a full or partial suspension of business operations due to orders from an appropriate governmental authority limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to COVID-19, experiencing a decline in gross receipts, or qualifying as a recovery startup business.

For eligible employers that averaged more than 500 full-time employees (within the meaning of section 4980H) during 2019 (large eligible employers), qualified wages are wages and compensation (including allocable qualified health plan expenses), up to \$10,000 per employee per calendar quarter, paid to employees for the time during which they are not providing services due to a full or partial suspension of business operations or a decline in gross receipts. For eligible employers that averaged 500 full-time employees or fewer during 2019 (small eligible employers), and for severely financially distressed employers as defined in section 3134(c)(3)(C)(ii) that are also large eligible employers, qualified wages are the wages and compensation (including allocable qualified health plan expenses), up to \$10,000 per employee per calendar quarter, paid with respect to an employee (regardless of whether the employee is performing services) during any period in the calendar quarter in which the business operations are fully or partially suspended due to a governmental order or during any

calendar quarter in which the employer is experiencing a decline in gross receipts. If an employer was not in existence in 2019, an employer may use the average number of full-time employees in 2020 rather than 2019. If an employer is an eligible employer due to being a recovery startup business, the maximum aggregate employee retention credit the employer may claim in a calendar quarter is \$50,000. In the third and fourth calendar quarters of 2021, a recovery startup business that is a small eligible employer may treat all wages paid with respect to an employee during the quarter as qualified wages. See Notice 2021-49.

The same wages or compensation cannot be counted for both the paid sick and family leave credits under sections 3131 and 3132 and the employee retention credit under section 3134. Qualified wages for the employee retention credit also do not include any wages taken into account under sections 41, 45A, 45P, 45S, 51, and 1396 of the Code. See section 3134(c)(3)(D). Additionally, qualified wages do not include amounts taken into account as payroll costs for Paycheck Protection Program loan forgiveness and certain grants. See section 3134(h).

Section 3134(c)(4)(A) provides that, for purposes of section 3134, the term “wages” means wages as defined in section 3121(a)³ and compensation as defined in section 3231(e).

The employee retention credit under section 3134 is equal to 70 percent of qualified wages paid. The credit is allowed against the taxes imposed on employers under section 3111(b), first reduced by any tax credits allowed under sections 3131 and 3132, and against so much of the taxes imposed under section 3221(a) as are attributable to the rate in effect under section 3111(b), as applicable, first reduced by any credits allowed under sections 3131 and 3132, on all wages and compensation paid

³ For purposes of certain governmental organizations or entities as described in section 3134(f)(2) of the Code, wages as defined in section 3121(a) are determined without regard to paragraphs (5), (6), (7), (10), and (13) of section 3121(b) (except with respect to services performed in a penal institution by an inmate thereof).

to all employees. Any credit amounts in excess of these taxes are treated as an overpayment that shall be refunded under sections 6402(a) and 6413(b) of the Code.

III. Refundability of Credits

Sections 3131(b)(4)(A), 3132(b)(3)(A), and 3134(b)(3) provide that if the amount of the paid sick and family leave credits (which would include any increases in the credits under section 3133(a)) and employee retention credit exceeds the taxes imposed under section 3111(b) and so much of the taxes imposed under section 3221(a) as are attributable to the rate in effect under section 3111(b), as applicable, for any calendar quarter, after application of the other credits previously applied, such excess shall be treated as an overpayment that shall be refunded under sections 6402(a) and 6413(b).

Section 6402(a) generally 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 revised Form 941, *Employer's Quarterly Federal Tax Return*, 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

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.

and family leave credits under sections 3131 through 3133 and the employee retention credit under section 3134. The revised employment tax returns allow for any of these credits in excess of the taxes imposed under section 3111(b) and so much of the taxes imposed under section 3221(a) as are attributable to the rate in effect under section 3111(b), as applicable, to be credited against other employment taxes and then for any remaining balance to be credited or refunded to the employer in accordance with section 6402(a) or section 6413(b).

IV. Advance Payment of Credits and Erroneous Refunds

Sections 3131(b)(4)(B) and 3132(b)(3)(B) provide that, in anticipation of the paid sick and family leave credits under these sections (which would include any increases in the credits under section 3133(a)), including any refundable portions, these credits are to be advanced, according to forms and instructions provided by the Secretary, up to the total allowable amount of the credits and subject to applicable limits for the calendar quarter. Section 3134(j)(2) provides that eligible employers for which the average number of full-time employees (within the meaning of section 4980H) employed by the eligible employer during 2019 was not greater than 500 may elect for any calendar quarter to receive an advance payment of the employee retention credit for the quarter in an amount not to exceed 70 percent of the average quarterly wages paid in calendar year 2019.

To implement the advance payment provisions, employers that are eligible to receive an advance of the tax credits may use IRS Form 7200, *Advance Payment of Employer Credits Due To COVID-19*, to request an advance of the paid sick and family leave credits and the employee retention credit. 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 or credit of any portion of these tax credits, regardless of whether they are advanced, to a taxpayer in excess of the amount to which the taxpayer is entitled is an erroneous refund that the employer must repay.

V. Assessment Authority

Section 6201 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 provide for the assessment of any non-rebate⁵ portion of an erroneous refund of a refundable tax credit, which may include a portion of the credits available under sections 3131, 3132, and 3134, if the refund exceeds the amounts to which an employer is properly entitled. While these types of erroneous refunds are generally recovered or recaptured through agreed upon voluntary repayments, setoff, or through litigation, the Code in some instances, such as in sections 3131, 3132, and 3134, provides for the administrative recapture of these non-rebate refunds either by directly authorizing assessment of the erroneous non-rebate refunds or by authorizing the promulgation of regulations or other guidance to do so.

Specifically, with regard to the paid sick and family leave credits, sections 3131(g) and 3132(g) provide, in relevant part, that the Secretary will provide such regulations or other guidance as may be necessary to carry out the purposes of the credits, including regulations or other guidance to prevent the avoidance of the purposes of the limitations under this provision and to recapture the benefit of the credit in cases where there is a subsequent adjustment to the credit. See sections 3131(g)(1), 3131(g)(4), 3132(g)(1), and 3132(g)(4). With regard to the employee retention credit, section 3134(j)(3)(B) allows for the direct assessment of certain erroneous refunds of

⁵ As a general matter, "non-rebate" refers to the portion of any refund of a tax 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).

advanced portions of the credit by providing that if a small eligible employer specified in section 3134(j)(2) receives excess advance payments of the credit, then the taxes imposed under section 3111(b) or so much of the taxes imposed under section 3221(a) as are attributable to the rate in effect under section 3111(b), as applicable, for the calendar quarter are increased by the amount of the excess. Section 3134(m)(3) further provides that the Secretary will issue such forms, instructions, regulations, and other guidance as are necessary to prevent the avoidance of the purposes of the limitations under section 3134.

On July 29, 2020, temporary regulations (TD 9904) amending the Employment Tax Regulations under sections 3111 and 3221 to provide for the recapture of erroneous refunds of the paid sick and family leave credits under the Families First Act and erroneous refunds of the employee retention credit under the CARES Act, pursuant to the authority granted under these acts to prescribe those regulations, were published in the Federal Register (85 FR 45514). A notice of proposed rulemaking (REG-111879-20) cross-referencing the temporary regulations was published in the Federal Register on the same day (85 FR 45551). Because the ARP did not amend the Families First Act or CARES Act to extend the paid leave credits and employee retention credit provided thereunder, but rather enacted new Code sections that provide for similar credits, the temporary regulations in TD 9904 do not apply to the credits under the ARP. Therefore, separate regulations are required to provide for the recapture of the erroneous refund of these credits pursuant to the authority granted under sections 3131, 3132, and 3134.

Accordingly, this document amends the Employment Tax Regulations (26 CFR part 31) by adding temporary regulations under new sections 3131, 3132, and 3134 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-109077-21) 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-109077-21 for information on submitting public comments or requesting a public hearing on the proposed regulations.

Explanation of Provisions

Sections 3131(b)(3), 3131(b)(4)(A), 3131(f)(1), 3132(b)(2), 3132(b)(3)(A), 3132(f)(1), 3134(b)(2), 3134(b)(3), and 3134(c)(1) provide that the credits described in these sections are taken against the taxes imposed under section 3111(b) and so much of the taxes imposed under section 3221(a) as are attributable to the rate in effect under section 3111(b), as applicable, (although for the employee retention credit, the taxes are first reduced by any paid sick and family leave credits). Additionally, if the amount of the credits exceeds these taxes for any calendar quarter, then the excess shall be treated as an overpayment to be refunded or credited under sections 6402(a) and 6413(b). Any credits claimed that exceed the amount to which the employer is entitled and that are actually credited or refunded by the IRS are considered to be erroneous refunds of these credits. Section 3134(j)(3)(B) provides that if a small eligible employer specified in section 3134(j)(2) receives excess advance payments of the credit, then the taxes imposed under section 3111(b) or so much of the taxes imposed under section 3221(a) as are attributable to the rate in effect under section 3111(b), as applicable, for the calendar quarter are increased by the amount of the excess.

These temporary regulations provide that erroneous refunds of these credits are treated as underpayments of the taxes imposed under section 3111(b) and so much of the taxes imposed under section 3221(a) as are attributable to the rate in effect under section 3111(b), as applicable. These temporary regulations authorize the IRS to assess any credits erroneously credited, paid, or refunded in excess of the amount

allowed as if those amounts were taxes imposed under section 3111(b) and so much of the taxes imposed under section 3221(a) as are attributable to the rate in effect under section 3111(b), as applicable, subject to assessment and administrative collection procedures. This allows the IRS to prevent the avoidance of the purposes of the limitations under the credit provisions and to recover the erroneous refund amounts efficiently, 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 may apply in the normal course in processing employment tax returns that include advances in excess of claimed credits and in examining returns for excess claimed credits. These assessment and administrative collection procedures do not replace the existing recapture methods, but rather represent an alternative method available to the IRS.

Specifically, these temporary regulations provide that any amount of the credits for qualified leave wages and certain collectively bargained contributions under sections 3131 and 3132, plus any amount of credits for qualified health plan expenses under sections 3131(d) and 3132(d), and including any increases in these credits under section 3133, and any amount of the employee retention credit for qualified wages under section 3134 of the Code that are erroneously refunded or credited to an employer shall be treated as underpayments of the taxes imposed under section 3111(b) and so much of the taxes imposed under section 3221(a) as are attributable to the rate in effect under section 3111(b), 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

3131(b)(4)(B), 3132(b)(3)(B) and 3134(j)(2).

In certain situations, third-party payors claim tax credits on behalf of their common law employer clients. These temporary regulations address this situation by providing that employers against which an erroneous refund of credits may be assessed as an underpayment include persons treated as the employer under sections 3401(d), 3504, and 3511, consistent with their liability for the employment taxes against which the credits applied.

Sections 3131(h) and 3132(h) provide that the paid sick and family leave credits apply to wages paid with respect to a period of leave taken beginning on April 1, 2021 and ending on September 30, 2021. Section 3134(n) provides that the employee retention tax credit applies to wages paid after June 30, 2021, and before January 1, 2022.

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. Accordingly, these temporary regulations apply to all credits under sections 3131 and 3132, including any increases to the credits under section 3133, credited or refunded on or after April 1, 2021, including advanced refunds, as well as all credits under section 3134 that are credited or refunded on or after July 1, 2021, including advanced refunds. 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 recapture of erroneous refunds of these credits.

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 tax credits under sections 3131, 3132, and 3134, 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 3131(g), 3132(g), and 3134(m) 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 taxes imposed under section 3111(b) and so much of the taxes imposed under section 3221(a) as are attributable to the rate in effect under section 3111(b), as applicable, 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 there is good cause to issue these regulations as temporary regulations. Employers were required to file Form 941, *Employer's Quarterly Federal Tax Return*, for the second quarter of calendar year 2021 by July 31, 2021, as required by section 6071 of the Code and Treas. Reg. § 31.6071(a)-1. Employers use Form 941 to claim paid sick and family leave credits and the employee retention credit, as well as to report any advance of these credits they received during the calendar quarter. In filing their second quarter 2021 Form 941, some employers may have already received, as an advance, refund amounts in excess of the credits to which they are entitled. In addition to the statutory authority provided by section 3134(j)(3) with regard to erroneous advance refunds of the employee retention credit, these temporary regulations authorize the assessment of any erroneous refunds of the credits. Without these temporary regulations, in some instances the IRS may not be able to avoid bringing costly and burdensome litigation to recover the 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 Part 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 §§31.3131-1T, 31.3132-1T, and 31.3134-1T in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805.

* * * * *

Section 31.3131-1T also issued under 26 U.S.C. 3131(g).

Section 31.3132-1T also issued under 26 U.S.C. 3132(g).

Section 31.3134-1T also issued under 26 U.S.C. 3134(m)(3).

* * * * *

Par. 2. Section 31.3131-1T is added to read as follows:

§31.3131-1T Recapture of credits.

(a) Recapture of erroneously refunded credits. Any amount of credits for qualified sick leave wages under section 3131(a), including any increase to the amount of the credits under sections 3131(d), 3131(e), and 3133, that are treated as overpayments and refunded or credited to an employer under section 6402(a) or section 6413(b) 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 under section 3111(b) and so much of the taxes imposed under section 3221(a) as are attributable to

the rate in effect under section 3111(b), as applicable, and may be assessed and collected by the Secretary in the same manner as the taxes.

(b) Advance credit amounts erroneously refunded. The determination of any amount of credits erroneously refunded as described in paragraph (a) 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 3131(b)(4)(B) and 3131(g)(6).

(c) Third party payors. For purposes of this section, employers against whom an erroneous refund of the credits under section 3131 (including any increases in those credits under section 3133), can be assessed as an underpayment of the taxes imposed under section 3111(b) and so much of the taxes imposed under section 3221(a) as are attributable to the rate in effect under section 3111(b), as applicable, include persons treated as the employer under sections 3401(d), 3504, and 3511, consistent with their liability for the section 3111(b) or 3121(a) taxes against which the credit applied.

(d) Applicability date. This section applies to all credit refunds under section 3131 (including any increases in those credits under section 3133), advanced or paid on or after April 1, 2021.

Par. 3. Section 31.3132-1T is added to read as follows:

§31.3132-1T Recapture of credits.

(a) Recapture of erroneously refunded credits. Any amount of credits for qualified family leave wages under sections 3132, including any increase to the amount of the credits under sections 3132(d), 3132(e), and 3133, that are treated as overpayments and refunded or credited to an employer under section 6402(a) or section 6413(b) 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 under section

3111(b) and so much of the taxes imposed under section 3221(a) as are attributable to the rate in effect under section 3111(b), as applicable, and may be assessed and collected by the Secretary in the same manner as the taxes.

(b) Advance credit amounts erroneously refunded. The determination of any amount of credits erroneously refunded as described in paragraph (a) 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 3132(b)(3)(B) and 3132(g)(6).

(c) Third party payors. For purposes of this section, employers against whom an erroneous refund of the credits under section 3132 (including any increases in those credits under section 3133), can be assessed as an underpayment of the taxes imposed under section 3111(b) and so much of the taxes imposed under section 3121(a) as are attributable to the rate in effect under section 3111(b), as applicable, include persons treated as the employer under sections 3401(d), 3504, and 3511, consistent with their liability for the section 3111(b) or 3121(a) taxes against which the credit applied.

(d) Applicability date. This section applies to all credit refunds under section 3132 (including any increases in those credits under section 3133) advanced or paid on or after April 1, 2021.

Par. 4. Section 31.3134-1T is added to read as follows:

§31.3134-1T Recapture of credits.

(a) Recapture of erroneously refunded credits. Any amount of credits for qualified wages under section 3134 of the Code 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 under section

3111(b) and so much of the taxes imposed under section 3221(a) as are attributable to the rate in effect under section 3111(b), as applicable, and may be assessed and collected by the Secretary in the same manner as the taxes.

(b) Advance credit amounts erroneously refunded. The determination of any amount of credits erroneously refunded as described in paragraph (a) 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 3134(j) and 3134(m).

(c) Third party payors. For purposes of this section, employers against whom an erroneous refund of the credits under section 3134 can be assessed as an underpayment of the taxes imposed under section 3111(b) and so much of the taxes imposed under section 3121(a) as are attributable to the rate in effect under section 3111(b), as applicable, include persons treated as the employer under sections 3401(d), 3504, and 3511, consistent with their liability for the section 3111(b) or 3121(a) taxes against which the credit applied.

(d) Applicability date. This section applies to all credit refunds under section 3134 advanced or paid on or after July 1, 2021.

Douglas W. O'Donnell,

Deputy Commissioner for Services and Enforcement.

Approved: August 18, 2021.

Mark J. Mazur,

Acting Assistant Secretary of the Treasury (Tax Policy).

