



DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 31

[TD 9978]

RIN 1545-BQ08

Recapture of Certain Excess Employment Tax Credits under COVID-19

Legislation

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations and removal of temporary regulations.

SUMMARY: This document sets forth the final regulations under sections 3111, 3131, 3132, 3134, and 3221 of the Internal Revenue Code (Code) issued under the authority granted by the Families First Coronavirus Response Act, the Coronavirus Aid, Relief, and Economic Security Act, and the American Rescue Plan Act of 2021. These final regulations authorize the assessment of any erroneous refund of the tax credits paid under sections 7001 and 7003 of the Families First Coronavirus Response Act (including any increases in those credits under section 7005 thereof), and section 2301 of the Coronavirus Aid, Relief, and Economic Security Act, as well as under sections 3131, 3132 (including any increases in those credits under section 3133), and 3134 of the Code.

DATES: *Effective date:* These final regulations are effective on July 24, 2023.

Applicability date: For date of applicability, see §§ 31.3111-6(e), 31.3131-1(d), 31.3132-1(d), 31.3134-1(d), and 31.3221-5(e).

FOR FURTHER INFORMATION CONTACT: NaLee Park at 202-317-6798 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document sets forth amendments to the Employment Tax Regulations (26 CFR part 31) under sections 3111, 3131, 3132, 3133, 3134, and 3221.

The Families First Coronavirus Response Act (Families First Act), Pub. L. 116-127, 134 Stat. 178 (March 18, 2020), as amended and extended by 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), and the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. 116-136, 134 Stat. 281 (March 27, 2020), as amended and extended by the Taxpayer Certainty and Disaster Tax Relief Act of 2020 (Relief Act), enacted as Division EE of the Consolidated Appropriations Act, 2021, provided relief to taxpayers from economic hardships resulting from the Coronavirus Disease 2019 (COVID-19), including paid sick and family leave credits to eligible employers with respect to qualified leave wages paid for a period of leave taken beginning April 1, 2020, and ending March 31, 2021, and an employee retention credit (ERC) with respect to qualified wages paid after March 12, 2020, and before July 1, 2021, respectively. The American Rescue Plan Act of 2021 (ARP), Pub. L. 117-2, 135 Stat. 4 (March 11, 2021), provided additional COVID-19 relief with similar paid leave credits under sections 3131 through 3133 of the Code, enacted by section 9641 of the ARP, with respect to qualified leave wages paid for a period of leave taken beginning April 1, 2021, and ending September 30, 2021, and a substantially similar ERC under section 3134 of the Code, enacted by section 9651 of the ARP, with respect to qualified wages paid after June 30, 2021, and before January 1, 2022.¹

¹ Section 80604 of the Infrastructure Investment and Jobs Act (Infrastructure Act), Pub. L. 117-68, 135 Stat. 429 (November 15, 2021) amended section 3134(n) of the Code to provide that the ERC under section 3134 applies only to wages paid after June 30, 2021, and before October 1, 2021 (or, in the case of wages paid by an eligible employer which is a recovery startup business, January 1, 2022). Therefore, the only type of employer eligible for

I. Paid Sick and Family Leave Credits²

A. Families First Act, as amended and extended by the Tax Relief Act

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 certain employers with fewer than 500 employees to provide up to 80 hours of paid sick leave for the care of the employees themselves or for others for certain COVID-related reasons specified in the statute, at specified daily and aggregate rates of pay, and 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 was unable to work or telework because the employee was caring for a son or daughter whose school or place of care was closed or whose child care provider was unavailable due to certain circumstances related to COVID-19.

Sections 7001 and 7003 of the Families First Act generally provide that non-governmental employers subject to the paid leave requirements under EPSLA and EFMLEA are entitled to fully refundable tax credits to cover the wages paid for leave taken for those periods of time between April 1, 2020, and December 31, 2020, during which employees were unable to work or telework for specified reasons related to COVID-19, plus allocable qualified health plan expenses. These paid sick leave credits and paid family leave credits (collectively, paid sick and family leave credits) are allowed against the taxes imposed on employers by section 3111(a) of the Code (the Old-Age,

the ERC for wages paid after September 30, 2021, and before January 1, 2022, is an employer that meets the definition of a recovery startup business under section 3134(c)(5). See Notice 2021-65, 2021-51 IRB 880, for guidance for employers that received an advance payment of the ERC or reduced tax deposits in anticipation of the credit for the fourth quarter of 2021 prior to the amendments made by the Infrastructure Act.

² Detailed information on the paid sick leave credits and paid family leave credits under the Families First Act, as amended by the Tax Relief Act, and under the ARP is provided in TD 9904, 85 FR 45514, and TD 9953, 86 FR 50637, respectively. Also see the IRS.gov website at: *Coronavirus Tax Relief for Businesses and Tax-Exempt Entities* | Internal Revenue Service ([irs.gov](https://www.irs.gov)).

Survivors, and Disability Insurance tax (social security tax)), first reduced by any credits claimed under section 3111(e) and (f), and section 3221(a) (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 for which the credits are claimed 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 the Hospital Insurance tax (Medicare tax)) on qualified leave wages.³

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

B. ARP

The ARP added sections 3131 through 3133 of the Code, which provide refundable paid sick and family leave credits similar to those provided under the Families First Act. Sections 3131 through 3133 extend the paid sick and family leave credits to non-governmental employers with fewer than 500 employees and certain governmental entities⁴ without regard to the number of employees that provided paid sick and family leave for specified reasons related to COVID-19 with respect to periods

³ The credit for the employer's share of Medicare tax does not apply to eligible employers that are subject to the 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, that refers to both social security tax and Medicare tax.

⁴ Section 9641 of the ARP added sections 3131(f)(5) and 3132(f)(5) to the Code that extends 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 leave beginning on April 1, 2021, through September 30, 2021. The paid sick and family leave credits under sections 3131 through 3133 are available to eligible employers that provided 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 that paid qualified sick leave wages to an employee for up to 80 hours of leave provided during the period beginning April 1, 2021, and ending September 30, 2021, if the employee was unable to work or telework due to any of the COVID-related reasons specified in the statute.

Under section 3132, a credit is available to eligible employers that paid 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 was unable to work or telework due to any of the conditions for which eligible employers may provide COVID-related 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.

The paid sick and family leave credits under sections 3131 and 3132 are allowed against the taxes imposed on employers under section 3111(b) 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, 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). See sections 3131(b)(4)(A), 3131(f)(1), 3132(b)(3)(A), and 3132(f)(1).

II. Employee Retention Credit⁵

⁵ Detailed information about the ERC under the CARES Act, as amended by the Relief Act, and under the ARP is provided in TD 9904 and TD 9953, respectively. For more information, see Notice 2021-20, 2021-11 IRB 922,

A. CARES, as amended and extended by the Relief Act

Section 2301 of the CARES Act, as originally enacted, provides for the ERC for eligible employers, including tax-exempt organizations, that paid qualified wages, including certain health plan expenses, to some or all of their employees after March 12, 2020, and before January 1, 2021. The ERC, as originally enacted, is a fully refundable tax credit for employers equal to 50 percent of qualified wages. Section 2301(b)(1) of the CARES Act limits the amount of qualified wages with respect to any employee that may be taken into account to \$10,000 for all calendar quarters in 2020. Therefore, the maximum credit amount with respect to each employee for all four calendar quarters in 2020 is \$5,000. For employers that averaged more than 100 full-time employees during 2019, qualified wages are wages and compensation (including allocable qualified health plan expenses) paid to employees who were not providing services because operations were fully or partially suspended 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 or due to a significant decline in gross receipts. For employers that averaged 100 full-time employees or fewer during 2019, qualified wages are wages and compensation (including allocable qualified health plan expenses) paid to any employee during the period operations were fully or partially suspended 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 or due to a significant decline in gross receipts, regardless of whether their employees were providing services.

The ERC available under section 2301 of the CARES Act for a calendar quarter is allowed against the taxes imposed on employers by section 3111(a) of the Code, first

reduced by any credits allowed under section 3111(e) and (f) 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), first reduced by any credits allowed under sections 7001 and 7003 of the Families First Act, on the wages and compensation paid with respect to the employment of all the employees of the eligible employer for that calendar quarter.

Section 2301 of the CARES Act was subsequently amended by sections 206 and 207 of the Relief Act. Section 206 of the Relief Act adopted retroactive 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 207 of the Relief Act further amended section 2301 of the CARES Act to extend the application of the ERC to qualified wages paid after December 31, 2020, and before July 1, 2021, to modify the gross receipts test for calendar quarters in 2021, and to modify the calculation of the credit amount for qualified wages paid during that time. Under section 2301 of the CARES Act, as amended by section 207 of the Relief Act, the ERC is equal to 70 percent of qualified wages. The Relief Act also increased the amount of qualified wages that could be taken into account per employee to \$10,000 per employee per calendar quarter in 2021. Therefore, the maximum credit amount with respect to each employee for any calendar quarter in 2021 is \$7,000. Additionally, the threshold distinguishing small employers from large employers for purposes of applying certain criteria to determine eligibility for the credit was increased from 100 employees to 500 employees.

B. ARP and Infrastructure Act

Section 9651 of the ARP enacted section 3134 of the Code, effective for calendar quarters beginning after June 30, 2021, to provide an ERC for qualified wages paid after June 30, 2021, and before January 1, 2022. The ERC under section 3134 is

substantially similar to the ERC under section 2301 of the CARES Act, though the ARP made some modifications including expanding the definition of eligible employer and the definition of qualified wages.⁶ Additionally, the ERC available under section 3134 of the Code for a calendar quarter is allowed against the taxes imposed on employers under section 3111(b), first reduced by any credits allowed under sections 3131 and 3132, and the taxes imposed under section 3221(a) that are attributable to the rate in effect under section 3111(b), first reduced by any credits allowed under sections 3131 and 3132, on the wages and compensation paid with respect to the employment of all the employees of the eligible employer for that calendar quarter. Any credit amounts in excess of these taxes are treated as an overpayment to be refunded under sections 6402(a) and 6413(b). See section 3134(b)(3), 3134(c)(1).

The ERC is available to any employer that carried on a trade or business during a calendar quarter between June 30, 2021, and January 1, 2022, that met the requirements to be an eligible employer under section 3134(c)(2), 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. See Notice 2021-49. Section 80604 of the Infrastructure Act amended section 3134(n) to provide that the ERC applies only to wages paid after June 30, 2021, and before October 1, 2021 (or, in the case of wages paid by an eligible employer that was a recovery startup business in the fourth quarter of 2021, January 1, 2022).⁷

⁶ For more information on the changes made to the ERC when section 3134 was added to the Code, see Notice 2021-49.

⁷ Employers that qualify because they are recovery startup businesses may claim the ERC for wages paid after September 30, 2021, and before January 1, 2022. For more information, see Notice 2021-65 for amendments made by the Infrastructure Act. Notice 2021-65 explains the retroactive termination of the ERC and provides instructions for employers that became ineligible and must repay any advance payment of ERC or seek to avoid failure to deposit penalties for the fourth quarter of 2021.

III. 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 (including any increases in the credits under section 7005) for the period of leave taken from April 1, 2020 through March 31, 2021, exceeds the taxes imposed by section 3111(a) of the Code, first reduced by any credits claimed under section 3111(e) and (f), or section 3221(a) for any calendar quarter, the excess shall be treated as an overpayment that shall be refunded under sections 6402(a) and 6413(b). For the period after March 12, 2020, and before July 1, 2021, section 2301(b)(3) of the CARES Act provides that if the amount of the ERC exceeds the applicable employment taxes⁸ (first reduced by any credits allowed under section 3111(e) and (f) of the Code, sections 7001 and 7003 of the Families First Act, and section 303(d) of the Relief Act), the excess shall be treated as an overpayment that shall be refunded under sections 6402(a) and 6413(b) of the Code.

With respect to the paid sick and family leave credits and ERC enacted by the ARP, sections 3131(b)(4)(A), 3132(b)(3)(A), and 3134(b)(3) of the Code provide that if the amount of the paid sick and family leave credits under these sections (including any increases in the credits under section 3133(a)) and ERC 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, the excess shall be treated as an overpayment that shall be refunded under sections 6402(a) and 6413(b).

⁸ “Applicable employment taxes” are defined in section 2301(c)(1) of the CARES Act as the taxes imposed by section 3111(a) of the Code or so much of the taxes imposed under section 3221(a) of the Code as are attributable to the rate in effect under section 3111(a) of the Code.

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 that 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)⁹, 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*, several times in calendar years 2020 through 2022 so that employers could use these returns to claim the paid sick and family leave credits under the Families First Act and under sections 3131 through 3133 of the Code and the ERC under the CARES Act and under section 3134 of the Code (collectively, COVID-19 credits). The revised employment tax returns allowed for any of these credits in excess of the taxes imposed under section 3111(a) or 3111(b), as applicable, and so much of the taxes imposed under section 3221(a) as are attributable to the rate in effect under section 3111(a) or 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). Form 941-X, *Adjusted Employer's Quarterly Federal Tax Return or Claim for Refund*, Form 943-X, *Adjusted Employer's Annual Federal Tax Return for Agricultural Employees or Claim for Refund*, Form 944,

⁹ 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 the manner and at the times as the Secretary may prescribe in regulations.

Adjusted Employer's Annual Federal Tax Return or Claim for Refund, and Form CT-1 X, *Adjusted Employer's Annual Railroad Retirement Tax Return or Claim for Refund* were also revised so that employers can use these returns to amend previous employment tax returns to adjust or claim COVID-19 credits for prior periods.

IV. Advance Payment of Credits and Erroneous Refunds

Section 3606 of the CARES Act amended 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 (including 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 ERC under section 2301, subject to the limitations provided in section 2301 and based on such information as the Secretary shall require. Section 2301(j)(2)(A) of the CARES Act, as amended by section 207(g)(1) of the Relief Act, provides that, under rules provided by the Secretary, eligible employers for which the average number of full-time employees (within the meaning of section 4980H of the Code) employed by the eligible employer during 2019 was not greater than 500 may elect, for calendar quarters in 2021, to receive an advance payment of the ERC for the quarter in an amount not to exceed 70 percent of the average quarterly wages paid in calendar year 2019.

Similarly, 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 (including any increases in the credits under section 3133(a)) and 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)(A) provides that, under rules provided by the Secretary, 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 calendar quarters in 2021, to receive an advance payment of the ERC 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 were eligible to receive an advance of the tax credits used IRS Form 7200, *Advance Payment of Employer Credits Due To COVID-19*, to request an advance of the COVID-19 credits.¹⁰ Employers were required to reconcile any advance payments claimed on Form 7200 with total credits claimed and total taxes due on their employment tax returns, including amended tax returns.

A refund or credit of any portion of the COVID-19 credits, regardless of whether they were advanced, claimed by 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 and requires the Secretary to determine and assess tax liabilities, including interest, additional amounts, additions to the tax, and assessable penalties. The Code or other statutory authority provides for the administrative recapture of certain erroneous refunds of the COVID-19 credits either by directly authorizing the assessment of the erroneous refunds or by authorizing the promulgation of regulations or other guidance to do so.

Specifically, with regard to paid sick and family leave credits, sections 7001(f) and 7003(f) of the Families First Act and sections 3131(g) and 3132(g) of the Code

¹⁰ Employers are no longer able to request an advance payment of any credit on Form 7200. The advance payment of COVID-19 credits ended on January 31, 2022.

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 these provisions and to recapture the benefit of the credit where there is a subsequent adjustment to the credit. See sections 7001(f) and 7003(f) of the Families First Act, and sections 3131(g)(1), 3131(g)(4), 3132(g)(1), and 3132(g)(4) of the Code.

With regard to the ERC, 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 reconcile an advance payment of the ERC with the amount determined at the time of filing the employment tax return for the applicable calendar quarter or taxable year. Section 2301(j)(3)(B) of the CARES Act, as amended by section 207 of the Relief Act, allows for the direct assessment of certain erroneous refunds of advanced portions of the ERC by providing that if a small eligible employer specified in section 2301(j)(2) of the CARES Act receives excess advance payments of the credit, then the taxes imposed by chapter 21 or 22 of the Code (whichever is applicable) for the calendar quarter are increased by the amount of the excess. Section 2301(l) of the CARES Act generally, as amended by sections 206 and 207 of the Relief Act, further provides that the Secretary shall issue such forms, instructions, regulations, and other guidance as are necessary to prevent the avoidance of the purposes of the limitations under section 2301 of the CARES Act. Correspondingly, section 3134(j)(3)(B) of the Code allows for the direct assessment of certain erroneous refunds of 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.

VI. Temporary Regulations

On July 29, 2020, temporary regulations (TD 9904, 2020-34 IRB 413 (August 17, 2020)) 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 ERC 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). The text of the temporary regulations served as the text of the proposed regulations. No public hearing was requested or held. Two comments responding to the notice of proposed rulemaking were received. All comments were considered and are available for public inspection and copying at <https://www.regulations.gov> or upon request. After consideration of the comments, the proposed regulations are adopted by this Treasury decision with a minor modification, and the corresponding temporary regulations are removed. The public comments are discussed under “Summary of Comments and Explanation of Provisions.”

On September 10, 2021, temporary regulations (TD 9953, 2021-39 IRB 430 (September 27, 2021)) amending the Employment Tax Regulations under sections 3131 through 3134 to provide for the recapture of erroneous refunds of the paid sick and family leave credits and ERC under the ARP, pursuant to the authority granted under that act to prescribe those regulations, were published in the **Federal Register** (86 FR 50637). A notice of proposed rulemaking (REG-109077-21) cross-referencing

the temporary regulations was published in the **Federal Register** on the same day (86 FR 50687). The text of the temporary regulations served as the text of the proposed regulations. No public hearing was requested or held, and no comments were received on the proposed regulations. The proposed regulations are adopted by this Treasury decision with a minor modification, and the corresponding temporary regulations are removed.

Accordingly, this document amends the Employment Tax Regulations (26 CFR part 31) by finalizing the regulations under sections 3111, 3131, 3132, 3134, and 3221 of the Code.

Summary of Comments and Explanation of Revisions

The Department of the Treasury (Treasury Department) and the IRS received two comments in response to the proposed regulations under sections 3111 and 3221 but no comments in response to the proposed regulations under sections 3131 through 3134. Neither comment received addressed the assessment and recapture of erroneous refunds of credits under the Families First Act and the CARES Act. One commenter said that the CARES Act should not fund businesses that primarily or exclusively employ non-citizen and temporary visa workers. The second commenter requested that the Treasury Department and the IRS consider providing additional guidance on potential reporting issues, including for certain retirement-related provisions in the CARES Act. These issues are outside the scope of these regulations. For this reason, these final regulations do not address these comments and adopt the proposed regulations with a minor modification. The corresponding temporary regulations are removed.

These final regulations provide that erroneous refunds of COVID-19 credits are treated as underpayments of the taxes imposed under section 3111(a) or 3111(b), as applicable, and so much of the taxes imposed under section 3221(a) as are attributable

to the rate in effect under section 3111(a) or 3111(b), as applicable, and are, therefore, 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 both in the processing of employment tax returns and in examining returns for excess claimed credits. These assessment and administrative collection procedures are not intended to be exclusive and therefore do not replace the existing recapture methods but rather represent an alternative method available to the IRS. These final regulations also 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, as modified by section 3606 of the CARES Act, and section 2301(l)(1) of the CARES Act.

In certain circumstances, third-party payors claim tax credits on behalf of their common law employer clients. These final regulations clarify 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. In addition, these final regulations clarify the proposed regulations by expressly stating that the common law employer clients of these third-party payors that remain subject to all provisions of law applicable to employers with respect to the payment of wages or compensation, as applicable, may also be assessed for an erroneous refund of credits. This clarification makes clear to employers what had been implicit in the proposed

regulations, that the existing rules in sections 3504 and 3511(c) concerning the liability of common law employer clients of third-party payors remain applicable in this situation. Specifically, section 3504 provides that where a fiduciary, agent, or other person is acting for an employer in performing acts required of the employer under the Code, “the employer for whom such fiduciary, agent, or other person acts shall remain subject to the provisions of law (including penalties) applicable in respect of employers.” See also §§ 31.3504-1(a) and 31.3504-2(c)(2). Similarly, section 3511(c) and § 31.3511-1(a)(3) provide that, for third-party payors that are Certified Professional Employer Organizations (CPEO), an employer client of a CPEO is treated as an employer (and therefore subject to all applicable provisions of law) for purposes of Federal employment taxes imposed on remuneration paid by the CPEO to *non-worksite* employees.¹¹ While sections 3504 and 3511 applied in the same manner as a matter of law under the proposed regulations, the final regulations expressly state these rules to avoid any confusion and help employers better understand their legal responsibilities stemming from sections 3504 and 3511.

Section 7805(b)(1)(A) and (B) of the Code generally provide that no temporary, proposed, or final regulation relating to the Internal Revenue laws may apply to any taxable period ending before the earliest of (A) the date on which the regulation is filed with the **Federal Register**, or (B) in the case of a final regulation, the date on which a proposed or temporary regulation to which the final regulation relates was filed with the **Federal Register**.

Consistent with the authority provided by section 7805(b)(1)(B), §§ 31.3111-6,

¹¹ Section 3511(a) provides that the CPEO is treated as the sole employer (i.e., solely subject to all provisions of law applicable to employers) for purposes of Federal employment taxes imposed on remuneration paid to *worksite employees*, as defined in section 7705(e). Therefore, for remuneration paid by a CPEO to worksite employees, the employer client is not subject to any provisions of law applicable to employers with respect to the payment of this remuneration. For this reason, the clarification in these final regulations concerning the assessment against employer clients of a third-party payor for an erroneous refund of credits does not apply to erroneous refunds of credits that were claimed based on remuneration paid by a CPEO to worksite employees.

31.3131-1, 31.3132-1, 31.3134-1, and 31.3221-5 are applicable to credits paid on or after the date on which the related proposed and temporary regulations were filed with the **Federal Register**.

Special Analyses

Pursuant to the Memorandum of Agreement, Review of Treasury Regulations under Executive Order 12866 (June 9, 2023), tax regulatory actions issued by the IRS are not subject to the requirements of section 6 of Executive Order 12866, as amended. Therefore, a regulatory impact assessment is not required.

Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), the Secretary certifies that these final regulations will not have a significant economic impact on a substantial number of small entities because these final regulations impose no compliance burden on any business entities, including small entities. Although these final regulations will apply to all employers eligible for the employment tax credits under the Families First Act, the CARES Act, and sections 3131, 3132, and 3134 of the Code, 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 final regulations do not affect the employer's employment tax reporting or the necessary information to substantiate entitlement to the credits. Rather, these final regulations merely implement the statutory authority granted under sections 7001(f) and 7003(f) of the Families First Act, section 2301(l) of the CARES Act, and sections 3131(g), 3132(g), and 3134(m) of the Code 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(a) or 3111(b), whichever is applicable, and so much of the taxes imposed under section 3221(a) as are attributable to the rate in effect under section 3111(a) or 3111(b), as applicable, subject to

assessment and administrative collection procedures. Notwithstanding this certification, the Treasury Department and the IRS did not receive any comments on any impact these regulations would have on small entities.

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 <https://www.irs.gov>.

Drafting Information

The principal author of these final 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 regulations.

List of Subjects in 26 CFR Part 31

Employment taxes, Fishing vessels, Gambling, 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:

- a. Removing the entry for § 31.3111-6T;
- b. Adding an entry in numerical order for § 31.3111-6;
- c. Removing the entries for §§ 31.3131-1T, 31.3132-1T, 31.3134-1T, and

31.3221-5T

d. Adding entries in numerical order for §§ 31.3131-1, 31.3132-1, 31.3134-1. and 31.3221-5.

The general authority and additions read, in part, as follows:

Authority: 26 U.S.C. 7805.

Section 31.3111-6 also issued under secs. 7001 and 7003, Pub. L. 116-127, 134 Stat. 178, and sec. 2301, Pub. L. 116-136, 134 Stat. 281.

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

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

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

Section 31.3221-5 also issued under secs. 7001 and 7003, Pub. L. 116-127, 134 Stat. 178, and sec. 2301, Pub. L. 116-136, 134 Stat. 281.

* * * * *

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

§31.3111-6 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), Pub. L. 116-127, 134 Stat. 178 (2020), as modified by section 3606 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. 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 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 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.

(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, and also include those persons' common law employer clients that remain subject to all provisions of law applicable to employers with respect to the payment of wages.

(e) *Applicability date.* This section 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 July 24, 2020, and all credit refunds under section 2301 of the CARES Act advanced or paid on or after July 24, 2020.

§31.3111-6T [Removed]

Par. 3. Section 31.3111-6T is removed.

Par. 4. Section 31.3131-1 is added to read as follows:

§31.3131-1 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 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 section 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 3221(a) taxes against which the credit applied, and also include those persons' common law employer clients that remain subject to all provisions of law applicable to employers with respect to the payment of wages or compensation, as applicable.

(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 September 8, 2021.

§31.3131-1T [Removed]

Par. 5. Section 31.3131-1T is removed.

Par. 6. Section 31.3132-1 is added to read as follows:

§31.3132-1 Recapture of credits.

(a) *Recapture of erroneously refunded credits.* Any amount of credits for qualified family leave wages under section 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 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 section 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 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 3221(a) taxes against which the credit applied, and also include those persons' common law employer clients that remain subject to all provisions of law applicable to employers with respect to the payment of wages or compensation, as applicable.

(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 September 8, 2021.

§31.3132-1T [Removed]

Par. 7. Section 31.3132-1T is removed.

Par. 8. Section 31.3134-1 is added to read as follows:

§31.3134-1 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 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 section 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 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 3221(a) taxes against which the credit applied, and also include those persons' common law employer clients that remain subject to all provisions of law applicable to employers with respect to the payment of wages or compensation, as applicable.

(d) *Applicability date.* This section applies to all credit refunds under section 3134 advanced or paid on or after September 8, 2021.

§31.3134-1T [Removed]

Par. 9. Section 31.3134-1T is removed.

Par. 10. Section 31.3221-5 is added to read as follows:

§31.3221-5 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), Pub. L. 116-127, 134 Stat. 178 (2020), as modified by section 3606 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. 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 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 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, and also include those persons' common law employer clients that remain subject to all provisions of law applicable to employers with respect to the payment of compensation.

(e) *Applicability date.* This section 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 July 24, 2020, and all credit refunds under section 2301 of the CARES Act advanced or paid on or after July 24, 2020.

§31.3221-5T [Removed]

Par. 11. Section 31.3221-5T is removed.

Douglas W. O'Donnell,

Deputy Commissioner for Services and Enforcement.

Approved: July 10, 2023

Lily L. Batchelder,

Assistant Secretary of the Treasury (Tax Policy).