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Department of Education Extends Federal Student Loan Relief

On April 6, the U.S. Department of Education announced it will extend the federal student loan relief until August 31 [U.S. Department of Education, [Press Release](#), 4-6-22].

During this extension of relief for federal student loan borrowers, repayments, interest, and collections are still halted, and any borrower with defaulted federally held loans

whose employer continues to garnish their wages will receive a refund of those garnishments. The relief had been set to expire on May 1 (see [PAYROLL CURRENTLY, Issue 1, Vol. 30](#)). The Department of Education will release information about the payment restart as the end of the pause approaches. ■

Treasury Proposes Clarifications for On-Demand Pay

In its annual *General Explanations of the Administration's Fiscal Year 2023 Revenue Proposals*, the U.S. Department of the Treasury proposed to clarify the tax treatment of "on-demand pay arrangements" (also known as earned wage access (EWA) programs) by providing a standard definition and a standard payroll period for them. The proposal also clarifies that on-demand pay arrangements are not loans.

The proposals should be included with the fiscal year 2023 budget when Congress considers it later this year. If the measures are passed, they would be effective for calendar years beginning after December 31, 2022.

While only a proposal at this stage, the explanation section provides insight into how the U.S. Department of the Treasury views the current state of the law, how employers are complying with current laws, and how the law might be changed to provide uniformity and certainty for employees, employers, EWA pay service providers, and the IRS.

Current state of the law

For purposes of employment taxes, wages are defined in IRC §3401(a) as "all remuneration for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash."

Employers withhold and pay employment taxes based on payroll periods. IRC §3401(b) defines a payroll period as “a period for which a payment of wages is ordinarily made to the employee by his employer,” and a miscellaneous payroll period is defined as “a payroll period other than a daily, weekly, biweekly, semimonthly, monthly, quarterly, semiannual, or annual payroll period.”

Tax regulations providing wages are considered paid when they are actually or constructively received by an employee. An employee is in constructive receipt of wages when an amount is set apart or otherwise made available so that an employee may draw upon that amount at any time. When employees have control over the date on which they actually receive their wages, they are typically considered to be in “constructive receipt” of those wages.

Proposed changes

The proposal would amend:

- IRC §7701 to define “an on-demand pay arrangement as an arrangement that allows employees to withdraw earned wages before their regularly scheduled pay dates.”
- IRC §3401(b) to treat the payroll period for on-demand pay arrangements as a weekly payroll period, even if employees have access to their wages during the week.
- IRC §§3102, 3111, and 3301 to clarify that on-demand pay arrangements are not loans.
- IRC §6302 to provide special payroll deposit rules for on-demand pay arrangements.

In addition, the Secretary of the Treasury would be provided authority to issue regulations to implement changes to the tax law.

Why change the law?

Employers and third-party payors are increasingly

allowing employees to enter into “on-demand pay arrangements” where the workers receive payment of earned wages before their regularly scheduled pay periods. Although on-demand pay arrangements vary, the general setup allows employees to use mobile applications to access their accrued wages before the end of their regular pay cycle. These accrued wages are transferred (almost instantaneously) to a bank account, prepaid debit card, or payroll card. Employees who have access to an on-demand pay arrangement may be in constant constructive receipt of their wages as soon as they are earned.

Under the current law, employers that offer on-demand pay arrangements should be maintaining either a daily or a miscellaneous payroll period and should be withholding and paying employment taxes on these employees’ earned wages on a daily basis.

In its proposal, the Department of the Treasury acknowledged: “It is unlikely that many, if any, employers or third-party payors treat employees with access to on-demand pay arrangements as being in constructive receipt of their wages because it would be a significant financial and administrative burden on the employers or third-party payors to configure their payroll systems and make payroll deposits on a daily basis.”

The proposal also states that to avoid treating employees as being in constant constructive receipt of wages, some employers and third-party payors ignore the constructive receipt issue entirely or treat the arrangement as a loan from the employer to the employee. In either case, the wages are treated as paid on their regularly scheduled pay dates, rather than on the day the wages are constructively received by the employees. ■

DHS Further Extends Temporary Requirements for Form I-9 Compliance

The Department of Homeland Security (DHS) and the U.S. Immigration and Customs Enforcement (ICE) announced another extension of the temporary requirements allowing flexibility of the physical presence requirements associated with the Form I-9, *Employment Eligibility Verification*. The temporary requirements, which would have expired on April 30, have been extended to October 31 [E-Verify, *DHS Extends Form I-9 Requirement Flexibility*, 4-25-22].

The policy was extended due to continued precautions

related to COVID-19, and the extension still only applies to employers and workplaces that are operating remotely.

The agencies encourage employers to begin in-person verification of identity and employment eligibility documentation for employees hired on or after March 20, 2020, who presented documents remotely.

E-Verify employers that choose the remote inspection option should continue to follow current guidance and create cases for new hires within three business days from the date of hire. ■

IRS Announces HSA Limits for 2023

The IRS announced the 2023 maximum contribution levels for health savings accounts (HSAs) and out-of-pocket spending limits and deductible minimums for high deductible health plans (HDHPs) that must be used in conjunction with HSAs [Rev. Proc. 2022-24, 4-29-22]. In addition, the IRS announced the maximum amount that may be made newly available for excepted benefit health reimbursement arrangements (HRAs). The annual cost-of-living adjustments are released by June 1 for the

following year.

2023 annual contribution levels for HSAs:

- The maximum annual HSA contribution for an eligible individual with self-only coverage is \$3,850 (\$3,650 in 2022).
- For family coverage, the maximum annual HSA contribution is \$7,750 (\$7,300 in 2022).
- The catch-up contribution for an individual age 55 or older is \$1,000 (no longer adjusted for inflation).

An individual who is an eligible individual on the first

day of the last month of the taxable year (December for most taxpayers) is allowed the full annual contribution (plus catch-up contribution, if age 55 or older by year-end), regardless of the number of months the individual was an eligible individual in the year. For individuals who are no longer eligible individuals on that date, both the HSA contribution and catch-up contribution apply pro rata based on the number of months of the year a taxpayer is an eligible individual.

2023 amounts for out-of-pocket spending on HSA-compatible HDHPs:

- The maximum annual out-of-pocket amount for HDHP self-only coverage is \$7,500 (\$7,050 in 2022), and the maximum annual out-of-pocket amount for HDHP family

coverage is twice that, \$15,000 (\$14,100 in 2022).

2023 minimum deductible amounts for HSA-compatible HDHPs:

- The minimum deductible for HDHPs is \$1,500 (\$1,400 in 2022) for self-only coverage and \$3,000 (\$2,800 in 2022) for family coverage.

A fiscal year plan that satisfies the requirements for an HDHP on the first day of the first month of its fiscal year may apply that deductible for the entire fiscal year.

2023 maximum amount available under an excepted benefit HRA:

- The maximum amount that may be made available for an excepted benefit HRA is \$1,950 (\$1,800 in 2022). ■

IRS Proposes Changes to Fix ACA Affordability 'Family Glitch'

The IRS issued proposed regulations to amend existing regulations for the Affordable Care Act (ACA) to provide that affordability of employer-sponsored minimum essential coverage (MEC) for family members of an employee would be determined based on the employee's share of the cost of covering the employee and those family members, not the cost of covering the employee only [87 F.R. 20354, 4-7-22; 2022-17 IRB 1030]. The proposed regulations also would add a minimum-value rule for family coverage based on the benefits provided to those family members.

According to a White House [Fact Sheet](#), the proposed rules would allow family members of employees who are offered affordable self-only coverage but unaffordable family coverage to qualify for premium tax credits to purchase health insurance (Fact Sheet, *Biden Harris Administration Proposes Rule to Fix 'Family Glitch' and Lower Health Care Costs*, 4-5-22).

The affordability percentage

The ACA's employer mandate requires applicable large employers to offer MEC that provides minimum value and is affordable to all of its full-time employees. Affordability is determined as a certain percentage of an employee's household income, which is adjusted annually for inflation. For example, for plan years beginning in 2022, the percentage of household income is 9.61% (Rev. Proc. 2021-36, 2021-35 IRB 357; see [PAYROLL CURRENTLY](#), Issue 9, Vol. 29). If the required employee premium contribution does not exceed 9.61% of the employee's household income for 2022, the coverage is affordable under the ACA.

Under the current regulations, if employee-only coverage is affordable for the employee, family coverage is also deemed affordable, regardless of the amount the employee must pay to cover family members.

The proposed regulations

The proposed regulations provide an eligible employer-sponsored plan would be affordable for related individuals if the portion of the annual premium the employee must pay for family coverage does not exceed the affordability percentage. Family coverage refers to all employer plans that cover any related individual other than the employee, including a self plus-one plan for an employee enrolling one other family member in coverage. The employee's required contribution for family coverage would be the portion of the annual premium the employee must pay for coverage of the employee and all other individuals included in the employee's family who are offered the coverage.

The proposed regulations would make changes only to the affordability rule for related individuals; they would make no changes to the affordability rule for employees. Employees would continue to have an offer of affordable employer coverage if the employee's required contribution for self-only coverage of the employee does not exceed the required contribution percentage of household income.

Under the proposed regulations, an employee's spouse or dependent may have an offer of employer coverage that is unaffordable even though the employee has an affordable offer of self-only coverage. The proposed regulations do not amend the ACA's employer shared responsibility provisions, which means there should not be any additional liability for employers. Any penalties will continue to be based on the affordability of an offer of self-only coverage.

Submitting comments

Comments can be submitted [electronically](#) (include IRS and REG-114339-21) or by mail to: Internal Revenue Service, Attn: CC:PA:LPD:PR (REG-114339-21), Room 5203, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Comments must be received by June 6. ■

IRS Posts Drafts of Form 941 and Schedule R With June Revision Date

In mid-April, the IRS posted early release drafts of [Form 941](#), *Employer's Quarterly Federal Tax Return*, and its [Schedule R](#), *Allocation Schedule for Aggregate Form 941*

Filers, with a June revision date, that will be used starting with second quarter filings.

In late April, the IRS posted early release drafts of [Form](#)

941-X, Adjusted Employer's Quarterly Federal Tax Return or Claim for Refund, and its **instructions**. On May 4, the IRS removed the drafts of the Form 941-X and its instructions. Both cover pages were updated to state that an updated revision is being finalized and will be posted on the draft page soon.

Potential changes on Form 941

Form 941. The draft Form 941 is essentially the same as the current March revision except any lines referring to the COBRA premium assistance credit (Lines 11e, 11f, and 13f) are reserved for future use.

Form 941, Schedule R. Schedule R will include columns that had been reserved for future use:

- Column m will be for Form 941, Line 11d.
- Column s will be for Form 941, Line 20.
- Column t will be for Form 941, Line 23.
- Column v will be for Form 941, Line 25.

Other line changes for Schedule R:

- Column l will change from Form 941, Lines 11b and 13c, total, to Line 11b only.
- Column n will change from Form 941, Lines 11d and 13e, total, to Line 12.
- Column o will change from Form 941, Lines 11e and 13f, total, to Line 13a.
- Column p will change from Form 941, Line 11f to Line 13c.

- Column q will change from Form 941, Line 12 to Line 13e.
- Column r will change from Form 941, Line 13a to Line 19.
- Column u will change from Form 941, Lines 19 and 20, total, to Line 24.
- Column w will change from Form 941, Lines 23 and 25, total, to Line 26.
- Column x will change from Form 941, Lines 24 and 27, total, to Line 27.
- Column y will change from Form 941, Lines 26 and 28, total, to Line 28.

Potential changes on Form 941-X

Form 941-X should be updated to match changes to Form 941. The Form 941-X instructions should allow employers to use them with the newest revision of Form 941-X when it is released for all years for which the statute of limitations on corrections has not expired. The IRS recommended obtaining a copy of the Form 941 instructions for the quarter being corrected on the Form 941-X because the Form 941-X instructions do not repeat all of the information included in the Form 941 instructions. Prior revisions of the instructions are available at <https://www.irs.gov/forms-pubs/about-form-941> (select the link for All Form 941 Revisions under Other Items You May Find Useful). ■

IRS Announces ERC-Related Penalty Relief, Provides Processing Update

The IRS issued guidance for employers that received failure to deposit or pay penalties because they claimed the employee retention credit (ERC) retroactively [IR-2022-89, 4-18-22]. The IRS said it has received requests from employers for relief from penalties arising when they owe additional tax because they deducted a retroactively claimed ERC from qualified wages and they are unable to pay since they have not received the ERC refunds from the IRS.

Backlog causes issues

The IRS said it is aware this situation may arise, in part, due to its backlog in processing Forms 941-X, *Adjusted Employer's Quarterly Federal Tax Return or Claim for Refund*, on which employers claimed the ERC retroactively.

IRS guidance states that employers must reduce their income tax deduction for ERC qualified wages by the amount of the ERC for the tax year in which such wages were paid or incurred. Employers that claimed the ERC retroactively and filed an amended return reducing their deduction for the ERC qualified wages paid or incurred in the tax year for which the ERC is retroactively claimed have increased tax liability, but they may not yet have received the corresponding ERC refund.

The IRS reminded employers that, consistent with the relief from penalties for failure to timely pay in Notice 2021-49, they may be eligible for relief from penalties for failing to pay their taxes if they can show reasonable cause and not willful neglect for the failure to pay (see **PAYROLL**

CURRENTLY, Issue 9, Vol. 29).

In general, the IRS said employers may also qualify for administrative relief from penalties for failing to pay on time under the IRS's First Time Penalty Abatement program if the employer:

- (1) Did not previously have to file a return or had no penalties for the prior three tax years,
- (2) Filed all required returns or filed an extension of time to file, and
- (3) Paid, or arranged to pay, any taxes due.

IRS updates status of processing Forms 941

As of April 27, the IRS said it is still opening mail within normal timeframes, and it has made some progress in processing Forms 941, *Employer's Quarterly Federal Tax Return* [IRS Newsroom, *What You Can Expect*, 4-29-22].

As of April 27, the agency had 1.9 million unprocessed Forms 941 and 300,000 unprocessed Forms 941-X. Forms 941-X generally cannot be processed until the related Forms 941 are processed. The agency said not all of these returns involve a COVID-19 credit, and the backlog is being worked at two sites with trained staff to work possible COVID-19 credits.

No further action needed

Employers that filed electronically and received an acknowledgement do not need to take any further action other than responding to any requests for information.

The IRS requested that employers do not file a second tax return or contact the IRS about the return's status. ■