

INTERNAL REVENUE BULLETIN



HIGHLIGHTS OF THIS ISSUE

These synopses are intended only as aids to the reader in identifying the subject matter covered. They may not be relied upon as authoritative interpretations.

ADMINISTRATIVE

T.D. 9952, page 428.

These final regulations modify regulations relating to IRS administrative proceedings to reflect limitations that are required by the enactment of the Taxpayer First Act of 2019. These final regulations implement new rules regarding the persons who may be provided books, papers, records, or other data obtained pursuant to section 7602 of the Internal Revenue Code (Code) for the sole purpose of providing expert evaluation and assistance to the IRS, and adopt further limitations on the types of non-governmental attorneys to whom, under the authority of section 6103(n) of the Code, any books, papers, records, or other data obtained pursuant to section 7602 may be provided. These final regulations also prohibit any IRS contractors from asking substantive questions of a summoned witness under oath or asking a summoned person's representative to clarify an objection or assertion of privilege. The regulations affect persons who are examined by the IRS and any persons who are questioned by the IRS under oath pursuant to section 7602.

EMPLOYMENT TAX

T.D. 9953, page 430.

Temporary and proposed regulations provide guidance on the recapture of excess employment tax credits under the American Rescue Plan Act of 2021 (ARP). Eligible employers may claim refundable paid sick and family leave and employee retention credits up to the total allowable amounts either on their employment tax returns or as an advance payment that is later reconciled on their employment tax returns. Any refund of these credits paid to a taxpayer that exceeds the credit amount the taxpayer is allowed is an er-

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roneous refund. These temporary regulations authorize the assessment and collection of any erroneous refund of the credits in the normal course of processing the applicable employment tax returns. This allows the IRS to efficiently recover any refund, while preserving administrative protections for taxpayers.

REG-109077-21, page 445.

Temporary and proposed regulations provide guidance on the recapture of excess employment tax credits under the American Rescue Plan Act of 2021 (ARP). Eligible employers may claim refundable paid sick and family leave and employee retention credits up to the total allowable amounts either on their employment tax returns or as an advance payment that is later reconciled on their employment tax returns. Any refund of these credits paid to a taxpayer that exceeds the credit amount the taxpayer is allowed is an erroneous refund. These temporary regulations authorize the assessment and collection of any erroneous refund of the credits in the normal course of processing the applicable employment tax returns. This allows the IRS to efficiently recover any refund, while preserving administrative protections for taxpayers.

EMPLOYMENT TAX, SELF-EMPLOYMENT TAX

Notice 2021-53, page 438.

Notice 2021-53 provides guidance to employers on the requirement to report the amount of qualified sick leave wages and qualified family leave wages paid to employees under the Families First Coronavirus Response Act (Families First Act), Pub. L. No. 116-127, 134 Stat. 178 (March 18, 2020), as amended by the COVID-Related Tax Relief Act of 2020, Pub. L. No. 116-260, 134 Stat. 1182 (December

27, 2020), and the American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4 (March 11, 2021). Employers will be required to report these amounts either on Form W-2, Box 14, or on a separate statement. This required reporting provides employees who are also self-employed with information necessary for properly claiming qualified sick leave equivalent or qualified family leave equivalent credits under the Families First Act, as amended by the COVID-Related Tax Relief Act of 2020, and the American Rescue Plan Act of 2021.

INCOME TAX

Rev. Proc. 2021-41, page 443.

Revenue Procedure 2021-41 provides domestic asset/liability percentages and domestic investment yields needed by foreign life insurance companies and foreign property and liability insurance companies to compute their minimum effectively connected net investment income under section 842(b) of the Internal Revenue Code for taxable years beginning after December 31, 2019.

The IRS Mission

Provide America's taxpayers top-quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all.

Introduction

The Internal Revenue Bulletin is the authoritative instrument of the Commissioner of Internal Revenue for announcing official rulings and procedures of the Internal Revenue Service and for publishing Treasury Decisions, Executive Orders, Tax Conventions, legislation, court decisions, and other items of general interest. It is published weekly.

It is the policy of the Service to publish in the Bulletin all substantive rulings necessary to promote a uniform application of the tax laws, including all rulings that supersede, revoke, modify, or amend any of those previously published in the Bulletin. All published rulings apply retroactively unless otherwise indicated. Procedures relating solely to matters of internal management are not published; however, statements of internal practices and procedures that affect the rights and duties of taxpayers are published.

Revenue rulings represent the conclusions of the Service on the application of the law to the pivotal facts stated in the revenue ruling. In those based on positions taken in rulings to taxpayers or technical advice to Service field offices, identifying details and information of a confidential nature are deleted to prevent unwarranted invasions of privacy and to comply with statutory requirements.

Rulings and procedures reported in the Bulletin do not have the force and effect of Treasury Department Regulations, but they may be used as precedents. Unpublished rulings will not be relied on, used, or cited as precedents by Service personnel in the disposition of other cases. In applying published rulings and procedures, the effect of subsequent legislation, regulations, court decisions, rulings, and procedures must be considered, and Service personnel and others concerned are cautioned

against reaching the same conclusions in other cases unless the facts and circumstances are substantially the same.

The Bulletin is divided into four parts as follows:

Part I.—1986 Code.

This part includes rulings and decisions based on provisions of the Internal Revenue Code of 1986.

Part II.—Treaties and Tax Legislation.

This part is divided into two subparts as follows: Subpart A, Tax Conventions and Other Related Items, and Subpart B, Legislation and Related Committee Reports.

Part III.—Administrative, Procedural, and Miscellaneous.

To the extent practicable, pertinent cross references to these subjects are contained in the other Parts and Subparts. Also included in this part are Bank Secrecy Act Administrative Rulings. Bank Secrecy Act Administrative Rulings are issued by the Department of the Treasury's Office of the Assistant Secretary (Enforcement).

Part IV.—Items of General Interest.

This part includes notices of proposed rulemakings, disbarment and suspension lists, and announcements.

The last Bulletin for each month includes a cumulative index for the matters published during the preceding months. These monthly indexes are cumulated on a semiannual basis, and are published in the last Bulletin of each semiannual period.

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Part I

26 CFR Part 301

T.D. 9952

DEPARTMENT OF THE TREASURY Internal Revenue Service 26 CFR Part 301

Certain Non-Government Persons Not Authorized to Participate in Examinations of Books and Witnesses as a Section 6103(n) Contractor

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTIONS: Final regulations.

SUMMARY: This document contains final regulations modifying regulations relating to IRS administrative proceedings to reflect limitations that are required by the enactment of the Taxpayer First Act of 2019. These final regulations implement new rules regarding the persons who may be provided books, papers, records, or other data obtained pursuant to section 7602 of the Internal Revenue Code (Code) for the sole purpose of providing expert evaluation and assistance to the IRS, and adopt further limitations on the types of non-governmental attorneys to whom, under the authority of section 6103(n) of the Code, any books, papers, records, or other data obtained pursuant to section 7602 may be provided. These final regulations also prohibit any IRS contractors from asking substantive questions of a summoned witness under oath or asking a summoned person's representative to clarify an objection or assertion of privilege. The regulations affect persons who are examined by the IRS and any persons who are questioned by the IRS under oath pursuant to section 7602.

DATES: *Effective date:* These regulations are effective on September 7, 2021.

Applicability date: For date of applicability, see §301.7602-1(d), which provides that the regulations promulgated by this Treasury decision are applicable to examinations begun or administrative summonses served by the IRS on or after August 6, 2020.

FOR FURTHER INFORMATION CONTACT: Kilsy T. Barnes at (202) 317-6215 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

These final regulations amend Procedure and Administration Regulations (26 CFR part 301) under section 7602(a) of the Code relating to participation by persons described in section 6103(n) of the Code and 26 CFR §301.6103(n)-1(a) of the Procedure and Administration Regulations in receiving and reviewing summoned books, papers, records, or other data and in interviewing a summoned witness under oath. These final regulations narrow the scope of the final regulations (TD 9778) published in the **Federal Register** (81 FR 45409) on July 14, 2016 (Summons Interview Regulations) by providing that certain non-government attorneys whom the IRS could previously have hired are no longer authorized to participate in an examination and by interpreting the requirements of section 7602(f), which was added to the Code by the Taxpayer First Act of 2019. A notice of proposed rulemaking (REG-132434-17) proposing these changes was published in the **Federal Register** (85 FR 47931) on August 7, 2020 (proposed regulations).

Summary of Comments

No public hearing was requested or held regarding the proposed regulations. Two responsive comments were received, both of which concerned only one portion of the proposed regulations – proposed §301.7602-1(b)(3)(C), titled “Hiring of certain non-government attorneys.”

The first commenter recommended modifying the proposed rules to allow

any outside contractors working for the IRS to examine, interview, and determine whether a taxpayer was a “tax cheat.” The Department of the Treasury (Treasury Department) and the IRS decline to adopt this comment. While the IRS may hire a contractor to assist the IRS in these processes, examining a taxpayer and determining whether that taxpayer is in compliance with Federal tax laws are core IRS functions that the IRS has never allowed a contractor to perform. In addition, section 7602(f) now prohibits the IRS from allowing an IRS contractor to ask substantive questions of a witness whose testimony is being taken under oath pursuant to section 7602.

The second commenter noted that the non-exclusive nature of the proposed regulations left open the possibility that the IRS could hire as a contractor in an IRS examination a certified public accountant (CPA), enrolled agent, or another non-attorney to provide the IRS with assistance in the application of Federal tax laws. This commenter asserted that the proposed regulations should be revised so as to prohibit the IRS from hiring as a contractor in an examination any person, whether or not an attorney, for that person's expertise with the Federal tax laws. The Treasury Department and the IRS decline to adopt this comment. The limitation on hiring attorneys as contractors in examinations for their expertise in applying the Federal tax laws is a measure that goes beyond what is required by section 7602(f). This hiring limitation was introduced as a matter of sound tax administration to address concerns expressed by a range of professional and business associations over the IRS's prior use of attorneys as contractors. While the previous commenters addressing the Summons Interview Regulations and Notice 2017-38, 2017-30 I.R.B. 147, noted the potential hazards that could arise from the IRS hiring attorney contractors for their expertise with Federal tax laws, the hiring of a CPA or other accountant by the IRS as a contractor has not been established as a widely held concern. Accordingly, the Treasury Department and the IRS have determined (1) that hiring outside CPAs and accountants as contrac-

tors in an examination does not pose the same potential risk to tax administration that prior commenters had identified for the IRS hiring of outside attorneys, who are trained at developing facts and taking testimony, and (2) that the IRS is justified in contracting for the resources and expertise of CPAs and accountants from outside of the IRS in certain large or complex cases.

Explanation of the Final Regulations

The preamble to proposed regulations explained the various provisions of the proposed regulations in detail. Because these final regulations adopt the proposed regulations without any modifications, any persons interested in understanding the provisions of these final regulations should consult the preamble discussion of these provisions in the proposed regulations.

Special Analyses

These regulations are not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Treasury Department and the Office of Management and Budget regarding review of tax regulations. Therefore, a regulatory impact assessment is not required.

Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that these regulations do not impose a significant economic impact on a substantial number of small entities. The final regulations mainly affect the IRS and do not impose requirements on small entities. Thus, no economic impact will result from these regulations on any small entity. Accordingly, the Secretary of the Treasury's delegate certifies that the rule will not have a significant economic impact on a substantial number of small entities.

Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these final regulations was submitted to the Chief Counsel for the Office of Advocacy of the Small Business Administration for comments on its impact on small business. No comments were received from the Chief Counsel for the

Office of Advocacy of the Small Business Administration.

Drafting Information

The principal author of these final regulations is William V. Spatz of the Office of Associate Chief Counsel (Procedure and Administration). However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 301 is amended as follows:

PART 301—PROCEDURE AND ADMINISTRATION

Paragraph 1. The general authority citation for part 301 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 301.7602-1 is amended:

1. In paragraph (b)(2), by adding "(Secretary)" at the end of the first sentence.

2. By revising paragraphs (b)(3) and (d).

The revisions read as follows:

§ 301.7602-1 Examination of books and witnesses.

* * * * *

(b) * * *

(3) *Participation of a person described in section 6103(n)*—(i) *IRS contractor access to books and records obtained by the IRS administratively*—(A) *In general.*

The Secretary may not, under the authority of section 6103(n), provide any books, papers, records, or other data obtained pursuant to section 7602 to any person authorized under section 6103(n), except when such person requires such information for the sole purpose of providing expert evaluation and assistance to the IRS.

(B) *Persons providing expert evaluation and assistance.* For the purposes of paragraph (b)(3)(i)(A) of this section, persons providing expert evaluation and assistance may include, but are not limited to, the following:

(1) Persons with specialized expertise in certain substantive areas, including, but not limited to, economists, engineers, attorneys specializing in an area relevant to an issue in the examination (such as patent law, property law, environmental law, or foreign, state, or local law (including foreign, state, or local tax law)), industry experts, or other subject-matter experts;

(2) Persons providing support as ancillary service contractors including, but not limited to, court reporters, translators or interpreters, photocopy services, providers of data processing programs or equipment, litigation support services, or other similar contractors; and

(3) Whistleblower-related contractors described in § 301.6103(n)-2.

(C) *Hiring of certain non-government attorneys.* The IRS may not hire an attorney as a contractor to assist in an examination under section 7602 unless the attorney is hired by the IRS as a specialist in foreign, state, or local law (including foreign, state, or local tax law), or in non-tax substantive law that is relevant to an issue in the examination, such as patent law, property law, or environmental law, or is hired for knowledge, skills, or abilities other than providing legal services as an attorney.

(ii) *IRS contractor participation in an IRS summons interview*—(A) *In general.* No person other than an officer or employee of the IRS or its Office of Chief Counsel may, on behalf of the Secretary, question a witness under oath whose testimony was obtained pursuant to section 7602. Persons authorized by section 6103(n) and with whom the Secretary may provide books, papers, records, or other data obtained pursuant to section 7602 may also attend a summons interview and provide assistance to the IRS or Office of Chief Counsel employees in attendance, but may not question the summoned witness under oath or ask a summoned person's representative to clarify an objection or assertion of privilege.

(B) *Court reporters, translators, and interpreters are not barred from asking*

questions. Court reporters who are hired as contractors by the IRS to make a record of an IRS summons interview are permitted to ask typical housekeeping questions of a summoned witness. Examples of such questions include, but are not limited to, asking whether the witness swears to tell the truth, asking the witness to spell a word or phrase, and asking whether the witness can speak up or speak rather than gesture an answer. Translators and interpreters who are hired as contractors by the IRS to assist in the interview of a summoned witness are permitted to translate any of the questions that are asked of the witness by an IRS or Office of Chief Counsel officer or employee and to ask questions which may be necessary to clarify the translation.

(d) *Applicability date.* This section is applicable after September 3, 1982, except for paragraphs (b)(1) and (2) of this section, which are applicable on and after April 1, 2005, and paragraph (b)(3) of this section, which applies to examinations begun or administrative summonses served by the IRS on or after August 6, 2020. For rules under paragraphs (b)(1) and (2) of this section that are applicable to summonses issued on or after September 10, 2002 or under paragraph (b)(3) of this section that are applicable to summons interviews conducted on or after June 18, 2014 and before July 14, 2016, see 26 CFR 301.7602-1T (revised as of April 1, 2016). For rules under paragraph (b)(3) of this section that are applicable to administrative summonses served by the IRS before August 6, 2020, see 26 CFR 301.7602-1 (revised as of April 1, 2020).

Douglas W. O'Donnell,
*Deputy Commissioner for Services
and Enforcement.*

Approved: August 20, 2021

Mark J. Mazur,
Acting Assistant Secretary of the Treasury (Tax Policy).

(Filed by the Office of the Federal Register on September 2, 2021, 4:15 p.m., and published in the issue of the Federal Register for September 7, 2021, 86 FR 49923)

26 CFR 31.3131-1T, 26 CFR 31.3132-1T & 26 CFR 31.3134-1T: *Recapture of credits under the American Rescue Plan Act*

T.D. 9953

DEPARTMENT OF THE TREASURY Internal Revenue Service 26 CFR Part 31

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 **September 10, 2021**.

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 few-

er 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 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 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).

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.

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>.

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 government

tal 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 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 inter-

nal 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 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

³For 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).

⁴Section 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.

⁵As 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).

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 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 there-

under, 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 Fed-*

eral 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).

(Filed by the Office of the Federal Register on September 7, 2021, 8:45 a.m., and published in the issue of the Federal Register for September 8, 2021, 86 FR 50295)

Part III

Guidance on Reporting Qualified Sick Leave Wages and Qualified Family Leave Wages Paid For Leave Provided in 2021

Notice 2021-53

I. PURPOSE

This notice provides guidance to employers on the requirement to report the following qualified sick leave wages and qualified family leave wages (qualified leave wages)¹ paid to employees for leave provided in 2021:²

- Qualified leave wages under the Families First Coronavirus Response Act (Families First Act), Pub. L. No. 116-127, 134 Stat. 178 (March 18, 2020), as amended 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. No. 116-260, 134 Stat. 1182 (December 27, 2020), paid for leave provided to employees beginning January 1, 2021, through March 31, 2021.³
- Qualified leave wages under sections 3131, 3132, and 3133 of the Internal Revenue Code (Code), added by section 9641 of the American Rescue Plan Act of 2021 (ARP), Pub. L. No. 117-2, 135 Stat. 4 (March 11, 2021), paid for leave provided to employees beginning April 1, 2021, through September 30, 2021.

Employers are required to report qualified leave wages either on a 2021 Form W-2, Box 14, or on a separate statement. This reporting provides employees who are also self-employed with information necessary for properly claiming qualified

sick leave equivalent or qualified family leave equivalent credits for the 2021 taxable year under the Families First Act or the ARP.

II. BACKGROUND

In general

The Families First Act and sections 3131 and 3132 of the Code provide refundable tax credits to employers with fewer than 500 employees (eligible employers) to reimburse them for the cost of providing qualified leave wages. Sections 3131 and 3132 also permit certain governmental employers to claim these tax credits, without regard to the number of their employees.⁴ Accordingly, when this notice addresses the credits provided under these Code sections, the term “eligible employer” also includes these governmental employers.

Division E of the Families First Act, the Emergency Paid Sick Leave Act (EPSLA), and Division C of the Families First Act, the Emergency Family and Medical Leave Expansion Act (EFMLEA), generally required eligible employers to provide paid sick leave and expanded family and medical leave, respectively, beginning April 1, 2020, through December 31, 2020, up to specified limits, to employees unable to work or telework due to certain circumstances related to COVID-19. The EPSLA entitled workers to up to 80 hours of paid sick time and the EFMLEA entitled workers to up to 10 weeks of paid family and medical leave if they were unable to work for certain reasons related to COVID-19. The Families First Act also provided eligible employers with fully refundable tax credits to cover the cost of the leave required to be paid under the EPSLA and EFMLEA. The requirement that eligible employers provide leave under the EPSLA and EFMLEA does not

apply after December 31, 2020. However, the Tax Relief Act extended the availability of the tax credits under the Families First Act through March 31, 2021, for paid leave that would have satisfied the EPSLA or EFMLEA requirements.

Specifically, sections 7001 and 7003 of the Families First Act provide refundable tax credits against the tax imposed by section 3111(a) of the Code (referring to the eligible employer’s share of the social security portion of the Federal Insurance Contributions Act (FICA) tax), and so much of the Railroad Retirement Tax Act (RRTA) Tier 1 tax as is attributable to the rate in effect under section 3111(a), on all wages or compensation paid to all employees for each calendar quarter in an amount equal to the qualified leave wages paid by the eligible employer, plus allocable qualified health plan expenses, with respect to leave provided to employees beginning April 1, 2020, through March 31, 2021. 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 (referring to the eligible employer’s share of Medicare tax) and so much of the RRTA Tier 1 tax imposed as is attributable to the rate in effect under section 3111(b) on qualified leave wages. See section 7005(b)(1) of the Families First Act.

Section 9641 of the ARP added sections 3131 through 3133 to the Code, which extend the availability of the credits for paid leave through September 30, 2021. Section 3131 provides the credit for paid sick leave, section 3132 provides the credit for paid family leave, and section 3133 provides that the credits allowed under sections 3131 and 3132 are increased by the eligible employer’s share of both the social security and Medicare portions of FICA tax (and the eligible employer’s share of the RRTA Tier 1 tax) imposed on

¹For the definition of “qualified sick leave wages,” see sections 7001(c) of the Families First Act and 3131(c) of the Code. For the definition of “qualified family leave wages,” see sections 7003(c) of the Families First Act and 3132(c) of the Code.

²Separate reporting requirements apply for calendar year 2020. Notice 2020-54, 2020-31 I.R.B. 226, provides guidance to employers on the requirement to report the amount of qualified sick leave wages and qualified family leave wages for leave provided to employees beginning April 1, 2020, through December 31, 2020.

³The amendments made by section 288 of the Tax Relief Act apply as if included in the provisions of the Families First Act to which they relate. Therefore, references to the Families First Act throughout this notice should be read as the Families First Act, as amended by the Tax Relief Act.

⁴For purposes of the Families First Act, these credits do not apply to the government of the United States, the government of any State or political subdivision thereof, or any agency or instrumentality of any of the foregoing. See sections 7001(e)(4) and 7003(e)(4) of the Families First Act. For purposes of the ARP, these credits do not apply to the government of the United States or any agency or instrumentality thereof that is not an organization described in section 501(c)(1) of the Code. See sections 3131(f)(5) and 3132(f)(5).

the qualified leave wages. Sections 3131 and 3132 of the Code provide that eligible employers are entitled to claim refundable tax credits with respect to leave provided voluntarily to employees beginning April 1, 2021, through September 30, 2021, if the leave would have satisfied the EPSLA or EFMLEA requirements.⁵ Specifically, sections 3131 and 3132 of the Code provide refundable tax credits against the tax imposed by section 3111(b) (referring to an eligible employer's share of Medicare tax), and so much of the RRTA Tier 1 tax as is attributable to the rate in effect under section 3111(b), on all wages or compensation paid to all employees for each calendar quarter in an amount equal to the qualified leave wages paid by the eligible employer plus (i) the allocable qualified health plan expenses and (ii) certain collectively bargained contributions allocable to qualified leave wages. See sections 3131(d), 3131(e), 3132(d), and 3132(e).

Sections 7001(c) and 7003(c) of the Families First Act and sections 3131(f) (2) and 3132(f)(2) of the Code define the terms wages and compensation to mean "wages" as defined in section 3121(a), but without regard to section 3121(b) (1) through (22), and "compensation" as defined in section 3231(e), but without regard to the exclusions under section 3231(e)(1).⁶

A self-employed individual carrying on a trade or business in 2021 within the meaning of section 1402 who would have received qualified leave wages if the individual were treated as an employee of an employer (other than himself or herself) may claim refundable tax credits if the individual is unable to work or telework (eligible self-employed individual). Specifically, sections 7002 and 7004 of the Families First Act permit an eligible self-employed individual to claim refundable tax credits for qualified sick leave equivalent amounts and qualified family leave equivalent amounts (qualified leave equivalent amounts) if the individual is unable to work or telework during the period beginning April 1, 2020, through March 31, 2021, due to certain circumstan-

es related to COVID-19. Sections 9642 and 9643 of the ARP permit an eligible self-employed individual to claim refundable tax credits for qualified leave equivalent amounts if the individual is unable to work or telework during the period beginning April 1, 2021, through September 30, 2021, due to certain circumstances related to COVID-19. An eligible self-employed individual may have to reduce qualified leave equivalent amounts by some or all of the qualified leave wages the individual received from an employer. See sections 7002 and 7004 of the Families First Act and sections 9642 and 9643 of the ARP.

Sections 7002(g) and 7004(e) of the Families First Act provide that the Secretary of the Treasury will prescribe such regulations or other guidance as may be necessary to carry out the purposes of sections 7002 and 7004 of the Families First Act, respectively. Section 9642(h) and section 9643(h) of the ARP provide that the Secretary of the Treasury will prescribe such regulations or other guidance as may be necessary to carry out the purposes of sections 9642 and 9643 of the ARP, respectively.

Qualified leave wages paid for leave beginning January 1, 2021, through March 31, 2021

With respect to paid leave provided under the Families First Act to employees beginning January 1, 2021, through March 31, 2021, qualified sick leave wages are wages and compensation, as defined under section 7001(c), paid for leave that would have satisfied the requirements of the EPSLA. In general, eligible employers are permitted to claim refundable tax credits if they provide employees with up to 80 hours of paid sick leave due to the employee being 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;
- (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 such 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 in consultation with the Secretaries of the Treasury and Labor.⁷

An employee who receives paid sick leave due to the inability to work or telework for reasons related to COVID-19 described in (1), (2), or (3) above must be paid sick leave wages 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 \$511 per day and \$5,110 in the aggregate, for the eligible employer to claim the credit for leave provided to that employee during the period beginning April 1, 2020, through March 31, 2021. An employee who receives paid sick leave due to the inability to work or telework for reasons related to COVID-19 described in (4), (5), or (6) above must be paid sick leave wages at two-thirds the employee's regular rate of pay or, if higher, the Federal minimum wage or any applicable State or local minimum wage, up to \$200 per day and \$2,000 in the aggregate. Because the sick leave wage cap is not increased for the period beginning January 1, 2021, and ending March 31, 2021, no more than \$5,110 (or \$2,000 for absences described in (4), (5), and (6) above) in the aggregate may be claimed by an employer with respect to leave provided to an employee during the period beginning April 1, 2020, through March 31, 2021.

With respect to paid leave provided to employees during the period beginning

⁵ When this notice addresses the credits provided under the ARP, references to EPSLA should be read as EPSLA, with certain modifications pursuant to the ARP. Similarly, references to EFMLEA should be read as EFMLEA, with certain modifications pursuant to the ARP.

⁶ Qualified leave wages under the Families First Act are also determined without regard to section 7005(a) of the Families First Act.

⁷ The U.S. Department of Health and Human Services has not specified any other conditions for credits available under the Families First Act, but see the discussion regarding the additional conditions specified that apply for credits available under the ARP.

January 1, 2021, through March 31, 2021, qualified family leave wages are wages and compensation, as defined under section 7003(c) of the Families First Act, paid for leave that would have satisfied the requirements of the EFMLEA. In general, eligible employers are permitted to claim refundable tax credits if they provide employees with up to 10 weeks of paid family leave due to the employee being unable to work or telework because the employee is caring for a son or daughter whose school or place of care is closed or whose child care provider is unavailable for reasons related to COVID-19. To receive the credit, the eligible employer must pay the employee family leave wages at two-thirds the employee's regular rate of pay, up to \$200 per day and \$10,000 in the aggregate. Because the family leave wage cap is not increased for the period beginning January 1, 2021, and ending March 31, 2021, no more than \$10,000 in the aggregate may be claimed by an employer with respect to leave provided to an employee during the period beginning April 1, 2020, through March 31, 2021.

Reduction to qualified leave equivalent amounts for qualified leave wages paid beginning January 1, 2021, through March 31, 2021

If a self-employed individual is entitled to a refundable tax credit for a qualified sick leave equivalent amount under section 7002(a) of the Families First Act and also receives qualified sick leave wages as an employee, section 7002(d) (3) of the Families First Act reduces the qualified sick leave equivalent amount for which the eligible self-employed individual may claim a credit to the extent that the sum of the qualified sick leave equivalent amount described in section 7002(c) of the Families First Act and any qualified sick leave wages under section 7001(b)(1) of the Families First Act exceeds \$2,000 (or \$5,110 in the case of any day any portion of which is paid sick time described in paragraphs (1), (2), or (3) of section

5102(a) of the EPSLA). Similarly, if a self-employed individual is entitled to a refundable tax credit for a qualified family leave equivalent amount under section 7004(a) of the Families First Act and also receives qualified family leave wages as an employee, section 7004(d)(3) of the Families First Act reduces the qualified family leave equivalent amount for which the self-employed individual may claim a credit to the extent that the sum of the qualified family leave equivalent amount described in section 7004(c) of the Families First Act and the qualified family leave wages under section 7003(b)(1) of the Families First Act exceeds \$10,000.

Under the Families First Act, the requirement to reduce qualified leave equivalent amounts is not applied separately for 2020 and 2021. Instead, the reduction to the qualified leave equivalent amounts in each case is figured using the sum of the qualified leave equivalent amounts and the qualified leave wages for the entire period beginning April 1, 2020, through March 31, 2021. As a result, if an eligible self-employed individual reduced a qualified sick leave equivalent amount for 2020 because the sum of the qualified sick leave equivalent amount and the qualified sick leave wages exceeded \$5,110, then no credit under section 7002 of the Families First Act will be available for 2021. Likewise, if an eligible self-employed individual reduced a qualified family leave equivalent amount for 2020 because the sum of the qualified family leave equivalent amount and the qualified family leave wages exceeded \$10,000, then no credit under section 7004 of the Families First Act will be available for 2021.

Qualified leave wages paid for leave beginning April 1, 2021, through September 30, 2021

With respect to leave provided under sections 3131 and 3132 of the Code to employees beginning April 1, 2021, through September 30, 2021, qualified sick leave wages are wages and compensation, as de-

finer under section 3131(f)(2), paid with respect to leave that would have satisfied the requirements of the EPSLA. In general, eligible employers are permitted to claim refundable tax credits under section 3131 if they provide employees with up to 80 hours of paid sick leave due to the employee being 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 is seeking a medical diagnosis; or is seeking or awaiting the results of a diagnostic test for, or a medical diagnosis of, COVID-19 and has been exposed to COVID-19, or the employer has requested such test or diagnosis, or is obtaining immunization related to COVID-19 or is recovering from any injury, disability, illness, or condition related to such immunization;⁸
- (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 such 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 in consultation with the Secretaries of the Treasury and Labor, including if the employee is accompanying an individual to obtain immunization related to COVID-19, or is caring for an individual who is recovering from any injury, disability, illness, or condition related to the immunization.⁹

⁸For purposes of the ARP, paragraph (3) of section 5102(a) of the EPSLA was modified to include certain absences related to receiving or recovering from vaccinations (see section 3131(c) (2) of the Code).

⁹As of the date of this notice, the IRS has posted FAQs titled "Tax Credits for Paid Leave Under the American Rescue Plan Act of 2021 for Leave After March 31, 2021," on IRS.gov, which reflect the substantially similar conditions designated by the Secretary of Health and Human Services in consultation with the Secretaries of Labor and the Treasury. The FAQs will be periodically updated with new information as necessary. See <https://www.irs.gov/newsroom/tax-credits-for-paid-leave-under-the-american-rescue-plan-act-of-2021-specific-provisions-related-to-self-employed-individuals>.

An employee who receives paid sick leave due to the inability to work or telework for reasons related to COVID-19 described in paragraphs (1), (2), or (3) above after March 31, 2021, and before October 1, 2021, must be paid sick leave wages 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 \$511 per day and \$5,110 in the aggregate for the eligible employer to claim the credit for leave provided to that employee beginning April 1, 2021, through September 30, 2021. An employee who receives paid sick leave due to the inability to work or telework for reasons related to COVID-19 described in paragraphs (4), (5), or (6) above after March 31, 2021, and before October 1, 2021, must be paid sick leave wages at two-thirds of the employee's regular rate of pay or, if higher, the Federal minimum wage or any applicable State or local minimum wage, up to \$200 per day and \$2,000 in the aggregate for the eligible employer to claim the credit for leave provided to that employee beginning April 1, 2021, through September 30, 2021.

With respect to leave provided to employees during the period beginning April 1, 2021, through September 30, 2021, qualified family leave wages are wages and compensation, as defined under section 3132(f)(2) of the Code, paid with respect to leave that would have satisfied the requirements of the EFMLEA. In general, eligible employers are permitted to claim refundable tax credits under section 3132 if they provide employees with up to 12 weeks of paid family leave due to the employee being unable to work or telework for any of the same reasons for which an employee can take paid sick leave. To receive the credit, the eligible employer must pay the employee family leave wages at two-thirds of the employee's regular rate of pay, up to \$200 per day and \$12,000 in the aggregate, with respect to leave provided to that employee during the period beginning April 1, 2021, through September 30, 2021.

Reduction to qualified leave equivalent amounts for qualified leave wages paid beginning April 1, 2021, through September 30, 2021

If a self-employed individual is entitled to a refundable tax credit for a qualified sick leave equivalent amount under section 9642(a) of the ARP and also receives qualified sick leave wages as an employee, section 9642(e)(2) of the ARP reduces the qualified sick leave equivalent amount for which the eligible self-employed individual may claim a credit to the extent that the sum of the qualified sick leave equivalent amount described in section 9642(c) of the ARP and any qualified sick leave wages under section 3131(b)(1) of the Code exceeds \$2,000 (or \$5,110 in the case of any day any portion of which is paid sick time described in paragraph (1), (2), or (3) of section 5102(a) of the EPSLA). Similarly, if a self-employed individual is entitled to a refundable tax credit for a qualified family leave equivalent amount under section 9643(a) of the ARP, and also receives qualified family leave wages that meet the requirements of the EFMLEA, section 9643(e)(2) of the ARP reduces the qualified family leave equivalent amount for which the self-employed individual may claim a credit to the extent that the sum of the qualified family leave equivalent amount described in section 9643(c) of the ARP and the qualified family leave wages under section 3132(b)(1) of the Code exceeds \$12,000.

III. REPORTING REQUIREMENTS

In order to provide eligible self-employed individuals who also receive wages or compensation as employees with the information they need to properly claim any qualified sick leave equivalent or qualified family leave equivalent credits for the 2021 taxable year, this notice requires eligible employers to report to employees the amount of qualified sick leave wages and qualified family leave wages paid to the employees under (i) sections

7001 or 7003 of the Families First Act for leave provided during the period beginning January 1, 2021, through March 31, 2021, and (ii) sections 3131 and 3132 of the Code for leave provided during the period beginning April 1, 2021, through September 30, 2021. Furthermore, since qualified leave wages are defined under both the Families First Act and sections 3131 and 3132 of the Code as wages defined in section 3121(a) without regard to the exclusions from employment under section 3121(b)(1) through (22) and compensation defined in section 3231(e) without regard to the exclusions from compensation under section 3231(e)(1), eligible employers must determine the amount of qualified leave wages to report without regard to the exclusions from employment under section 3121(b)(1) through (22) and without regard to the exclusions from compensation under section 3231(e)(1).¹⁰

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

Eligible employers have separate reporting requirements for (i) leave provided to employees during the period beginning January 1, 2021, through March 31, 2021, under the Families First Act; and (ii) leave provided to employees during the period beginning April 1, 2021, through September 30, 2021, under sections 3131 and 3132 of the Code. With respect to leave provided to employees during the period

¹⁰ For purposes of determining qualified leave wages under the Families First Act, employers must also disregard section 7005(a). For more information about the definition of wages for purposes of sections 3131 and 3132 of the Code, see Tax Credits for Paid Leave Under the American Rescue Plan Act of 2021 for Leave After March 31, 2021: Special Issues for Employers—Other Issues, FAQ 93 for examples, which may be found at <https://www.irs.gov/newsroom/tax-credits-for-paid-leave-under-the-american-rescue-plan-act-of-2021-special-issues-for-employers-other-issues>.

beginning January 1, 2021, through March 31, 2021, eligible employers claiming a credit under sections 7001 or 7003 of the Families First Act must separately state the total amount of qualified sick leave wages paid under the provisions of paragraphs (1), (2), or (3) of section 5102(a) of the EPSLA, qualified sick leave wages paid under the provisions of paragraphs (4), (5), or (6) of section 5102(a) of the EPSLA, and qualified family leave wages paid under the provisions of section 3102(b) of the EFMLEA. With respect to leave provided to employees during the period beginning April 1, 2021, through September 30, 2021, eligible employers claiming a credit under sections 3131 or 3132 of the Code must separately state the total amount of qualified sick leave wages paid under the provisions of paragraphs (1), (2), or (3) of section 5102(a) of the EPSLA, qualified sick leave wages paid under the provisions of paragraphs (4), (5), or (6) of section 5102(a) of the EPSLA, and qualified family leave wages paid under the EFMLEA.

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

Specific Reporting Instructions

Qualified leave wages paid in 2021 under the Families First Act and sections 3131 and 3132 of the Code are to be reported in Box 1 of Form W-2. To the extent that qualified leave wages are social security wages or Medicare wages, they

must also be included in Box 3 (up to the social security wage base) and Box 5, respectively. To the extent qualified leave wages are compensation subject to the RRTA, they must also be included in Box 14 under the appropriate RRTA reporting label(s).¹¹

In addition to the regular reporting requirements, employers must report to the employee the following types and amounts of the wages that were paid, with each amount separately reported either in Box 14 of Form W-2 or on a separate statement:¹²

- The total amount of qualified sick leave wages paid for reasons described in paragraphs (1), (2), or (3) of section 5102(a) of the EPSLA with respect to leave provided to employees during the period beginning on January 1, 2021, through March 31, 2021. In labeling this amount, employers must use the following, or similar language: “sick leave wages subject to the \$511 per day limit paid for leave taken after December 31, 2020, and before April 1, 2021.”
- The total amount of qualified sick leave wages paid for reasons described in paragraphs (4), (5), or (6) of section 5102(a) of the EPSLA with respect to leave provided to employees during the period beginning on January 1, 2021, through March 31, 2021. In labeling this amount, employers must use the following, or similar language: “sick leave wages subject to the \$200 per day limit paid for leave taken after December 31, 2020, and before April 1, 2021.”
- The total amount of qualified family leave wages paid to the employee under the EFMLEA with respect to leave provided to employees during the period beginning on January 1, 2021, through March 31, 2021. In labeling this amount, employers must use the following, or similar language: “emergency family leave wages paid for leave taken after December 31, 2020, and before April 1, 2021.”

- The total amount of qualified sick leave wages paid for reasons described in paragraphs (1), (2), or (3) of section 5102(a) of the EPSLA with respect to leave provided to employees during the period beginning on April 1, 2021, through September 30, 2021. In labeling this amount, employers must use the following, or similar language: “sick leave wages subject to the \$511 per day limit paid for leave taken after March 31, 2021, and before October 1, 2021.”
- The total amount of qualified sick leave wages paid for reasons described in paragraphs (4), (5), or (6) of section 5102(a) of the EPSLA with respect to leave provided to employees during the period beginning on April 1, 2021, through September 30, 2021. In labeling this amount, employers must use the following, or similar language: “sick leave wages subject to the \$200 per day limit paid for leave taken after March 31, 2021, and before October 1, 2021.”
- The total amount of qualified family leave wages paid to the employee under the EFMLEA with respect to leave provided to employees during the period beginning on April 1, 2021, through September 30, 2021. In labeling this amount, employers must use the following, or similar language: “emergency family leave wages paid for leave taken after March 31, 2021, and before October 1, 2021.”

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

If an employer that does not claim credits under these provisions or an employer that is prohibited from claiming those credits erroneously reports sick leave wages or family leave wages to an employee on Form W-2, Box 14, or on a separate statement, the employer must

¹¹ Railroad employers are directed by the instructions to Form W-2 to report certain specified amounts in Box 14. Other employers are directed to use Box 14 “for any other information that you want to give to your employee. Label each item.” This notice directs all employers to use Box 14 to report qualified sick leave wages and qualified family leave wages, unless a separate statement is used instead.

¹² Qualified leave wages for leave provided to employees beginning April 1, 2020, through December 31, 2020, should be separately reported on a 2020 Form W-2 or separate statement as described in Notice 2020-54.

either furnish a Form W-2c, *Corrected Wage and Tax Statement*, or provide a corrected statement to the employee correcting the erroneous reporting. The Form W-2c or corrected statement should be sent only to the employee. The employer should not file Form W-2c with the Social Security Administration solely to correct the amount in Box 14.

Model language for employee instructions

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

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

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

tober 1, 2021, because of care you provided to another.

- Emergency family leave wages paid for leave taken after March 31, 2021, and before October 1, 2021.

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

IV. PAPERWORK REDUCTION ACT

Any collection of information associated with this notice has been submitted to the Office of Management and Budget for review under OMB control number 1545-0008 in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a valid OMB control number.

V. DRAFTING INFORMATION

The principal authors of this notice are Michael Gitlin and Jason Healey. For further information on the provisions of this notice, please contact Mr. Gitlin or Mr. Healey at 202-317-6798 (not a toll-free number).

26 CFR 601.105: Examination of returns and claims for refund, credit or abatement; determination of tax liability (Also: 842(b))

Rev. Proc. 2021-41

SECTION 1. PURPOSE

This revenue procedure provides the domestic asset/liability percentages and

domestic investment yields needed by foreign life insurance companies and foreign property and liability insurance companies to compute their minimum effectively connected net investment income under section 842(b) of the Internal Revenue Code for taxable years beginning after December 31, 2019. Instructions are provided for computing foreign insurance companies' liabilities for the estimated tax and installment payments of estimated tax for taxable years beginning after December 31, 2019. For more specific guidance regarding the computation of the amount of net investment income to be included by a foreign insurance company on its U.S. income tax return, see Notice 89-96, 1989-2 C.B. 417. For the domestic asset/liability percentage and domestic investment yield, as well as instructions for computing foreign insurance companies' liabilities for estimated tax and installment payments of estimated tax for taxable years beginning after December 31, 2018, see Rev. Proc. 2020-41, 2020-40 I.R.B. 793.

SECTION 2. PERCENTAGES AND YIELDS

.01 DOMESTIC ASSET/LIABILITY PERCENTAGES FOR 2020. The Secretary determines the domestic asset/liability percentage separately for life insurance companies and property and liability insurance companies. For the first taxable year beginning after December 31, 2019, the relevant domestic asset/liability percentages are:

- 130.9 percent for foreign life insurance companies, and
- 217.3 percent for foreign property and liability insurance companies.

.02 DOMESTIC INVESTMENT YIELDS FOR 2020. The Secretary prescribes separate domestic investment yields for foreign life insurance companies and for foreign property and liability insurance companies. For the first taxable year beginning after December 31, 2019, the relevant domestic investment yields are:

- 3.3 percent for foreign life insurance companies, and
- 2.6 percent for foreign property and liability insurance companies.

.03 SOURCE OF DATA FOR 2020. The section 842(b) percentages to be used

for the 2020 taxable year are based on tax return data from the 2018 taxable year.

SECTION 3. ESTIMATED TAXES

To compute estimated tax and the installment payments of estimated tax due for taxable years beginning after December 31, 2019, a foreign insurance company must compute its estimated tax payments by adding to its income other than net investment income the greater of (i) its net investment income as determined under section 842(b)(5) that is actually effectively connected with the conduct of a trade or business within the United States for the relevant period, or (ii) the minimum effectively connected net investment income under section 842(b)

that would result from using the most recently available domestic asset/liability percentage and domestic investment yield. Thus, for installment payments due after the publication of this revenue procedure, the domestic asset/liability percentages and the domestic investment yields provided in this revenue procedure must be used to compute the minimum effectively connected net investment income. However, if the due date of an installment is less than 20 days after the date this revenue procedure is published in the Internal Revenue Bulletin, the asset/liability percentages and domestic investment yields provided in Rev. Proc. 2020-41 may be used to compute the minimum effectively connected net investment income for such installment.

For further guidance in computing estimated tax, see Notice 89-96.

SECTION 4. EFFECTIVE DATE

This revenue procedure is effective for taxable years beginning after December 31, 2019.

SECTION 5. DRAFTING INFORMATION

The principal author of this revenue procedure is Sheila Ramaswamy of the Office of Associate Chief Counsel (International). For further information regarding this revenue procedure contact Sheila Ramaswamy at (202) 317-6938 (not a toll-free number).

Part IV

Notice of Proposed Rulemaking

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

REG-109077-21

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of Proposed Rulemaking by cross-reference to temporary regulations.

SUMMARY: In the Rules and Regulations section of this issue of the **Federal Register**, the IRS is issuing temporary regulations pursuant to the regulatory authority granted under sections 3131, 3132, and 3134 of the Internal Revenue Code, added by sections 9641 and 9651 of the American Rescue Plan Act of 2021, to prescribe regulations as may be necessary for recapturing the benefit of the employment tax credits provided under these sections when necessary and to prevent the avoidance of the purposes of the limitations under these sections. These proposed regulations affect businesses and tax-exempt organizations, as well as certain governmental entities, that claim the paid sick leave credit and the paid family leave credit under sections 3131 and 3132, respectively, and that claim the employee retention credit under section 3134. The text of those temporary regulations serves as the text of these proposed regulations.

DATES: Written or electronic comments and requests for a public hearing must be received by **November 09, 2021**. Requests for a public hearing must be submitted as prescribed in the “**Comments and Requests for a Public Hearing**” section.

ADDRESSES: Commenters are strongly encouraged to submit public comments

electronically. Submit electronic submissions via the Federal eRulemaking Portal at www.regulations.gov (indicate IRS and REG-109077-21) by following the online instructions for submitting comments. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The IRS expects to have limited personnel available to process public comments that are submitted on paper through the mail. Until further notice, any comments submitted on paper will be considered to the extent practicable. The Department of the Treasury (Treasury Department) and the IRS will publish for public availability any comment submitted electronically, and to the extent practicable on paper, to its public docket. Send paper submissions to: CC:PA:LP-D:PR (REG-109077-21), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, D.C. 20044.

FOR FURTHER INFORMATION

CONTACT: Concerning the proposed regulations, NaLee Park at (202) 317-6879; concerning submissions of comments and/or requests for a public hearing, Regina Johnson at (202) 317-5177 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

Temporary regulations in the Rules and Regulations section of this issue of the **Federal Register** amend the Employment Taxes and Collection of Income at the Source Regulations (26 CFR part 31) under sections 3131, 3132, and 3134 of the Internal Revenue Code (Code) pursuant to the regulatory authority granted under these sections to prescribe regulations as may be necessary for recapturing the benefit of the employment tax credits provided under these sections when necessary and to prevent the avoidance of the purposes of the limitations under these sections. Consistent with this authority, these proposed regulations authorize the assessment of erroneous refunds of the

credits paid under sections 3131, 3132 (including any increases in those credits under section 3133), and 3134. The text of those temporary regulations also serves as the text of these proposed regulations. The preamble to the temporary regulations explains the amendments.

Special Analyses

The Office of Management and Budget’s Office of Information and Regulatory Analysis has determined that these 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 proposed regulations will not have a significant economic impact on a substantial number of small entities because these proposed regulations impose no compliance burden on any business entities, including small entities. Although these proposed regulations will apply to all employers eligible for the credits under sections 3131, 3132, and 3134, including small businesses and tax-exempt organizations with fewer than 500 employees as well as certain governmental employers, and therefore are likely to affect a substantial number of small entities, the economic impact will not be significant. These proposed regulations do not affect the employer’s employment tax reporting or the necessary information to substantiate entitlement to the credits. Rather, these proposed regulations merely implement the statutory authority granted under sections 3131(g), 3132 (g), 3134(j), and 3134(m) that authorize the Service to assess, reconcile, and recapture any portion of the credits erroneously paid or refunded in excess of the actual amount allowed as if those amounts were taxes imposed under section 3111(b) (the Hospital Insurance tax (Medicare tax)), and 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, subject to assessment and administrative collection procedures. Notwithstanding this certification, the Treasury Department and the

IRS invite comments on any impact these regulations would have on small entities.

Pursuant to section 7805(f), this notice of proposed rulemaking has been submitted to the Chief Counsel of the Office of Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are timely submitted to the IRS as prescribed in the preamble under the “ADDRESS-ES” section. The Treasury Department and the IRS request comments on all aspects of these proposed regulations. Any electronic comments submitted, and to the extent practicable any paper comments submitted, will be made available at www.regulations.gov or upon request.

A public hearing will be scheduled if requested in writing by any person who timely submits electronic or written comments. Requests for a hearing are strongly encouraged to be submitted electronically. If a public hearing is scheduled, notice of the date and time for the public hearing will be published in the **Federal Register**. Announcement 2020-4, 2020-17 IRB 1, provides that until further notice, public hearings conducted by the IRS will be held telephonically. Any telephonic hearing will be made accessible to people with disabilities.

Statement of Availability of IRS Documents

IRS notices and other guidance cited in this preamble are published in the In-

ternal 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 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 31

Employment taxes, Income taxes, Penalties, Pensions, Railroad retirement, Reporting and recordkeeping requirements, Social security, Unemployment compensation.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 31 is proposed to be 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 §§31.3131-1, 31.3132-1, and 31.3134-1 in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805.

* * * * *

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).

* * * * *

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

§31.3131-1 Recapture of credits.

[The text of proposed §31.3131-1 is the same as the text of §31.3131-1T published elsewhere in this issue of the **Federal Register**].

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

§31.3132-1 Recapture of credits.

[The text of proposed §31.3132-1 is the same as the text of §31.3132-1T published elsewhere in this issue of the **Federal Register**].

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

§31.3134-1 Recapture of credits.

[The text of proposed §31.3134-1 is the same as the text of §31.3134-1T published elsewhere in this issue of the **Federal Register**].

Douglas W. O'Donnell,
*Deputy Commissioner for Services
and Enforcement.*

(Filed by the Office of the Federal Register on September 7, 2021, 8:45 a.m., and published in the issue of the Federal Register for September 8, 2021, 86 FR 50295)

Definition of Terms

Revenue rulings and revenue procedures (hereinafter referred to as “rulings”) that have an effect on previous rulings use the following defined terms to describe the effect:

Amplified describes a situation where no change is being made in a prior published position, but the prior position is being extended to apply to a variation of the fact situation set forth therein. Thus, if an earlier ruling held that a principle applied to A, and the new ruling holds that the same principle also applies to B, the earlier ruling is amplified. (Compare with *modified*, below).

Clarified is used in those instances where the language in a prior ruling is being made clear because the language has caused, or may cause, some confusion. It is not used where a position in a prior ruling is being changed.

Distinguished describes a situation where a ruling mentions a previously published ruling and points out an essential difference between them.

Modified is used where the substance of a previously published position is being changed. Thus, if a prior ruling held that a principle applied to A but not to B, and the

new ruling holds that it applies to both A and B, the prior ruling is modified because it corrects a published position. (Compare with *amplified* and *clarified*, above).

Obsoleted describes a previously published ruling that is not considered determinative with respect to future transactions. This term is most commonly used in a ruling that lists previously published rulings that are obsoleted because of changes in laws or regulations. A ruling may also be obsoleted because the substance has been included in regulations subsequently adopted.

Revoked describes situations where the position in the previously published ruling is not correct and the correct position is being stated in a new ruling.

Superseded describes a situation where the new ruling does nothing more than restate the substance and situation of a previously published ruling (or rulings). Thus, the term is used to republish under the 1986 Code and regulations the same position published under the 1939 Code and regulations. The term is also used when it is desired to republish in a single ruling a series of situations, names, etc., that were previously published over a period of time in separate rulings. If the

new ruling does more than restate the substance of a prior ruling, a combination of terms is used. For example, *modified* and *superseded* describes a situation where the substance of a previously published ruling is being changed in part and is continued without change in part and it is desired to restate the valid portion of the previously published ruling in a new ruling that is self contained. In this case, the previously published ruling is first modified and then, as modified, is superseded.

Supplemented is used in situations in which a list, such as a list of the names of countries, is published in a ruling and that list is expanded by adding further names in subsequent rulings. After the original ruling has been supplemented several times, a new ruling may be published that includes the list in the original ruling and the additions, and supersedes all prior rulings in the series.

Suspended is used in rare situations to show that the previous published rulings will not be applied pending some future action such as the issuance of new or amended regulations, the outcome of cases in litigation, or the outcome of a Service study.

Abbreviations

The following abbreviations in current use and formerly used will appear in material published in the Bulletin.

A—Individual.
Acq.—Acquiescence.
B—Individual.
BE—Beneficiary.
BK—Bank.
B.T.A.—Board of Tax Appeals.
C—Individual.
C.B.—Cumulative Bulletin.
CFR—Code of Federal Regulations.
CI—City.
COOP—Cooperative.
Ct.D.—Court Decision.
CY—County.
D—Decedent.
DC—Dummy Corporation.
DE—Donee.
Del. Order—Delegation Order.
DISC—Domestic International Sales Corporation.
DR—Donor.
E—Estate.
EE—Employee.
E.O.—Executive Order.
ER—Employer.

ERISA—Employee Retirement Income Security Act.
EX—Executor.
F—Fiduciary.
FC—Foreign Country.
FICA—Federal Insurance Contributions Act.
FISC—Foreign International Sales Company.
FPH—Foreign Personal Holding Company.
FR.—Federal Register.
FUTA—Federal Unemployment Tax Act.
FX—Foreign corporation.
G.C.M.—Chief Counsel’s Memorandum.
GE—Grantee.
GP—General Partner.
GR—Grantor.
IC—Insurance Company.
I.R.B.—Internal Revenue Bulletin.
LE—Lessee.
LP—Limited Partner.
LR—Lessor.
M—Minor.
Nonacq.—Nonacquiescence.
O—Organization.
P—Parent Corporation.
PHC—Personal Holding Company.
PO—Possession of the U.S.
PR—Partner.
PRS—Partnership.

PTE—Prohibited Transaction Exemption.
Pub. L.—Public Law.
REIT—Real Estate Investment Trust.
Rev. Proc.—Revenue Procedure.
Rev. Rul.—Revenue Ruling.
S—Subsidiary.
S.P.R.—Statement of Procedural Rules.
Stat.—Statutes at Large.
T—Target Corporation.
T.C.—Tax Court.
T.D.—Treasury Decision.
TFE—Transferee.
TFR—Transferor.
T.I.R.—Technical Information Release.
TP—Taxpayer.
TR—Trust.
TT—Trustee.
U.S.C.—United States Code.
X—Corporation.
Y—Corporation.
Z—Corporation.

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¹ A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 2021–27 through 2021–52 is in Internal Revenue Bulletin 2021–52, dated December 27, 2021.

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¹ A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 2021–27 through 2021–52 is in Internal Revenue Bulletin 2021–52, dated December 27, 2021.

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The Introduction at the beginning of this issue describes the purpose and content of this publication. The weekly Internal Revenue Bulletins are available at www.irs.gov/irb/.

We Welcome Comments About the Internal Revenue Bulletin

If you have comments concerning the format or production of the Internal Revenue Bulletin or suggestions for improving it, we would be pleased to hear from you. You can email us your suggestions or comments through the IRS Internet Home Page (www.irs.gov) or write to the Internal Revenue Service, Publishing Division, IRB Publishing Program Desk, 1111 Constitution Ave. NW, IR-6230 Washington, DC 20224.