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COVID-19

CORONAVIRUS: TAX AND EMPLOYEE BENEFIT CONSIDERATIONS

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Foulston has produced a series of issue alerts as we continue to monitor the evolving COVID-19 situation and provide additional guidance. Please find all updates and our latest resources available here.

News and guidance regarding measures to address the fallout from the coronavirus pandemic is evolving quickly, sometimes changing or expanding within the course of a single day. Federal legislation has already been enacted and more appears to be on the way. This alert will provide an update on recent changes affecting tax and employee benefits issues. Caution: We make no guarantee it won't be outdated within days, if not hours.

INCOME TAX DEADLINES EXTENDED

After some conflicting information and announcements, the IRS has confirmed in Notice 2020-18 that the due date for filing federal income tax returns and making federal income tax payments has been automatically postponed to July 15, 2020. There is no requirement to file an extension form (Form 4868 or Form 7004) to secure the delayed filing date.

Although prior announcements included a limit on the amount of federal income tax payments that could be postponed, the most recent guidance states there is no limitation on the amount of the payment that may be postponed.

The delayed deadline for making tax payments includes payments of tax on self-employment income and payments of estimated income tax otherwise due on April 15, 2020.

Any interest, penalties, or additions to tax with respect to postponed federal income tax filings and payments will begin to accrue on July 16, 2020.

The IRS's notice clarifies that the delayed deadline applies only to federal income taxes and income tax returns otherwise due on April 15, 2020. No extension is provided for the payment or deposit of any other type of federal tax or for the filing of any federal information return. Thus, for example, it appears the quarterly Form 941 for the

first quarter of 2020 remains due on April 30, 2020, and deposits of FICA, FUTA, and withheld federal income tax are due on their regular due dates. Employers required to file Forms 1094-C and 1095-C with the IRS must still file by March 31, 2020, if filing electronically.

The announcement from the IRS relates only to postponement of federal income tax filing and payment obligations. Deadlines for state income tax returns and payments will be determined on a state-by-state basis. No official announcement has yet been made by the Kansas Department of Revenue. The Missouri Department of Revenue has stated it will mirror the federal guidance, postponing the deadline to file Missouri income tax returns and pay Missouri income tax (including estimated tax) until July 15, 2020.

It remains an open question whether deadlines tied to the deadline for filing federal income tax returns are also postponed. For example, contributions to an individual retirement account (IRA) or health savings account (HSA) on account of a calendar year are required to be made prior to the time prescribed by law (without extensions) for filing the federal income tax return for that year. This would suggest that individuals eligible to contribute to an IRA or HSA for 2019 might have until July 15, 2020 to make their contributions. However, given the limited nature of the guidance in Notice 2020-18, it is recommended that such contributions be made by April 15, 2020 if possible, unless and until future guidance provides clarification. Additional guidance from the IRS on this and similar issues is anticipated.

PAYROLL TAX CREDITS TO FUND PAID LEAVE FOR EMPLOYEES

As detailed in a previous alert, the Families First Coronavirus Response Act (FFCRA), which was enacted on March 18, 2020, established two new categories of paid leave to assist workers needing time off for certain coronavirus-related purposes: (1) up to two weeks of paid sick leave, and (2) up to ten weeks of paid FMLA leave. These paid leave mandates apply to private sector employers with fewer than 500 employees and public sector employers of any size.

Although the FFCRA requires covered employers to provide these new types of paid leave to qualifying employees, it establishes a process for eligible employers to obtain reimbursement from the federal government for the cost of the paid leave through refundable credits against Social Security payroll taxes. The tax credit is available to all private sector employers that are subject to the FFCRA paid leave mandates, regardless of the type of entity (C corporation, S corporation, partnership, LLC, or sole proprietorship). Public sector employers are expressly excluded from eligibility for the tax credit, although they are subject to the paid leave mandates. Private sector employers with 500 or more employees also are not eligible for the credit, even if they voluntarily provide paid leave that mirrors the FFCRA requirements.

An eligible employer's payroll tax credit for each calendar quarter is an amount equal to 100% of the qualified sick leave wages and 100% of the qualified family leave wages paid by such employer for the quarter. The credit is limited to the maximum amount of the paid leave required to be paid under the FFCRA. Any paid leave provided in excess of the maximum requirement is not creditable.

The amount of the credit also includes the following:

- The employer's qualified health plan expenses that are properly allocable to the qualified sick leave wages and qualified family leave wages for which the credit is allowed. This generally refers to the amount of non-taxable health plan premiums paid by the employer for an affected employee, to the extent allocable to mandatory paid leave amounts. Guidance from the IRS is anticipated to help determine how health plan premiums are to be allocated among wages paid by an employer.
- The Medicare taxes paid by the employer with respect to the qualified sick leave wages and qualified family leave wages for which the credit is allowed. (Qualified sick leave wages and qualified family leave wages are exempt from Social Security taxes.)

The amount of the credit allowable for any quarter cannot exceed the amount of Social Security taxes owed by the employer for that quarter with respect to all employees. However, any credit in excess of this quarterly limit is treated as an overpayment that is eligible for refund to the employer.

To ensure there is no double tax benefit with respect to the payroll tax credit, the amount of the tax credit must be included in the employer's taxable income. This income generally will be offset by a deduction for the wages paid, although any employer that is unable to deduct the wages in the same year in which the credit is received (e.g., if they are required to capitalize some or all of the paid leave amounts) would experience a timing difference.

Wages for which this payroll tax credit is claimed are not also eligible for the separate tax credit under Internal Revenue Code Section 45S for paid family and medical leave.

Regarding the mechanics of claiming the tax credit, the IRS has announced an accelerated process. Eligible employers will be able to retain an amount of payroll taxes equal to the amount of qualifying paid leave that they provide, rather than deposit those payroll taxes with the IRS.

The payroll taxes that are available for retention include withheld federal income taxes, the employee share of Social Security and Medicare taxes (FICA taxes), and the employer share of FICA taxes with respect to all employees — not just employees for whom the paid leave was provided.

If there are not sufficient payroll taxes to cover the cost of all qualifying paid leave provided, employers will be able file a request for an accelerated payment from the IRS. The IRS has said it expects to process these requests in two weeks or less. The details of this expedited procedure, including a form to be used to request the accelerated payment, are expected to be announced soon.

The following examples illustrate how this process is intended to operate:

- Example 1: An eligible employer pays $5,000 in qualifying paid leave and is otherwise required to deposit $8,000 in payroll taxes (FICA taxes and withheld federal income tax) relating to all its employees. The employer may use up to $5,000 of the $8,000 of taxes it was going to deposit to fund the qualified leave payments. The employer would only be required to deposit the remaining $3,000 on its next regular deposit date.
- Example 2: An eligible employer pays $10,000 in sick leave and is required to deposit $8,000 in payroll taxes (FICA taxes and withheld federal income tax) relating to all its employees. The employer may use the entire $8,000 of payroll taxes to fund the qualified leave payments and file a request for an accelerated credit for the remaining $2,000.

Equivalent child care leave and sick leave credit amounts are available to self-employed individuals under similar circumstances. These credits will be claimed on their income tax returns and will reduce estimated tax payments.

GROUP HEALTH PLANS

Turning to employee benefit plans, employer-sponsored group health plans have drawn attention regarding coverage for certain coronavirus-related costs.

Under the FFCRA, all group health plans are now required to provide coverage for COVID-19 testing without imposing deductibles, copayments, or other cost sharing — and without requiring prior authorization or imposing other medical management standards. This coverage must include both the cost of the test and related services, such as charges for office, telehealth, urgent care, or ER visits and charges for the collection of testing samples. The testing mandate applies to all types of group health plans, including fully insured plans, self-insured plans, high deductible health plans (HDHPs), and plans that are otherwise "grandfathered" from certain ACA requirements. The mandate also applies to fully insured plans sold in the individual insurance market.

This mandate only applies to coverage of COVID-19 testing and related services. Coverage of treatment for COVID-19 remains subject to the terms of each plan, including applicable cost sharing requirements.

IRS Notice 2020-15 clarifies that an HDHP may provide benefits for COVID-19 testing or treatment prior to satisfaction of the minimum deductible without jeopardizing the plan's status as an HDHP. Individuals covered under an HDHP may receive no-deductible or low-deductible coverage for these costs and remain eligible to contribute to a health savings account (HSA).

A new package of proposed federal legislation, currently called the CARES Act, would provide additional flexibility with respect to HDHPs and HSAs:

- An HDHP could provide for coverage of telemedicine visits even if the HDHP deductible has not been met.
- A qualifying direct primary care arrangement costing less than $150 per month ($300 for a family) could be used in connection with an HDHP without impairing the ability to contribute to an HSA. The cost of the qualifying direct primary care membership could be paid from an HSA.
- HSAs and other account-based plans (HRAs and health FSAs) could reimburse the cost of over-the-counter drugs without a prescription and could treat expenses for menstrual care products as reimbursable expenses.

The CARES Act remains proposed at this point, so these items are subject to change, but they indicate the types of additional things Congress is thinking about.

Employers taking steps to manage workforce needs in light of economic changes resulting from the coronavirus pandemic, such as through reduced work schedules, furloughs, or layoffs, will want to remain mindful of the impact on eligibility for health plan coverage (and other employee benefits).

Most plans and policies provide that eligibility is lost when an employee ceases working or reduces his or her hours of work below the minimum threshold for eligibility. Even if a reduced work schedule or layoff is expected to be temporary, eligibility may still be impacted.

For group health plans, COBRA would be available to continue coverage when eligibility is lost due to a termination of employment or reduction in hours. An employer could choose to subsidize COBRA coverage, although that is not required.

Employers wanting to temporarily extend coverage beyond the date it otherwise would be lost may be able to do so, but only if the governing plan documents are amended to provided for extended coverage and approval is obtained from any insurance carrier providing insurance coverage in connection with the plan (including a stop-loss insurer in the case of a self-insured plan).

RETIREMENT PLANS

To date, no specific relief or changes with respect to qualified retirement plans has been provided, although various types of relief are being considered. This may include permitting individuals to withdraw up to $100,000 from a 401(k) or 403(b) account without paying the 10% excise tax on early withdrawals. There has also been a proposal to expand from $50,000 to $100,000 the maximum loan that may be obtained from a qualified retirement plan. Whether these and other changes will occur will depend on the status of the federal legislation that would be needed to implement the changes.

In the absence of changes, 401(k) and 403(b) plans continue to have the ability to allow for loans (up to $50,000), hardship withdrawals (for qualifying hardship events, including medical expenses), and in-service withdrawals after age 59.5, which may provide some assistance to employees who find themselves in a financial hardship. For plans that do not currently offer one or more of these options but want to do so, an amendment to the plan document will be required to implement the new option.

Employers facing their own economic challenges may be considering a reduction or suspension in employer contributions (e.g., matching or profit-sharing contributions) under their retirement plans. This is generally

permissible, if done on a prospective basis and with an appropriate plan amendment. However, there can be nuances to consider, such as whether employees have already met the accrual conditions for an employer contribution and thus have an earned right to receive the contribution.

Employers with “safe harbor” 401(k) plans must follow a specific process to reduce or suspend safe harbor contributions, which includes providing at least 30 days' advance notice and a reasonable opportunity for employees to change their deferral elections. Plans that give up safe harbor status during a plan year by reducing or suspending safe harbor contributions must perform ADP and ACP nondiscrimination testing for the entire plan year and may become subject to “top heavy” requirements for the plan year.

MORE TO COME

We are continuing to monitor developments in these areas. We anticipate there will be guidance from federal and state, agencies and possibly additional legislation, so anticipate more changes and clarifications to come.

FOR MORE INFORMATION

If you have questions or want more information regarding essential service providers affected by COVID-19, contact your legal counsel. If you do not have regular counsel for such matters, Foulston Siefkin LLP would welcome the opportunity to work with you to meet your specific business needs. Foulston's lawyers maintain a high level of expertise regarding federal and state regulations affecting businesses. Foulston's practice groups, including the taxation, general business, employment and labor, healthcare, and litigation groups enhance our ability to consider the legal ramifications of these situations. For more information, contact **Jason Lacey** at 316.291.9756 or jlacey@foulston.com, **Chris Hurst** at 316.291.9507 or churst@foulston.com, or **Andrew Nolan** at 316.291.9542 or anolan@foulston.com. For more information on the firm, please visit our website at **www.foulston.com**.

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