

AMERICAN PAYROLL ASSOCIATION

May 22, 2020

Forms and Publications
Internal Revenue Service
NPL Liaison: Joe Guillen - Joseph.M.Guillen@irs.gov

Re: Draft 2020 Form 941, *Employer's Federal Quarterly Tax Return*, and Instructions for Form 941 (Revised April 2020, 9501020, OMB No. 1545-0029)

Dear IRS Forms and Publications:

The American Payroll Association (APA) is submitting these comments and questions for your consideration regarding the April 2020 Draft Form 941 and Instructions.

ABOUT APA

APA is a nonprofit organization serving the interests of more than 20,000 payroll professionals across the United States, who are responsible for the administrative task of properly withholding and remitting federal and state taxes. APA's primary mission is to educate its members and the payroll industry about the best practices associated with paying America's workers while complying with applicable federal, state, and local laws and regulations. APA members are directly responsible for calculating wages and tax withholding for their employers.

COMMENTS AND QUESTIONS ON DRAFT 2020 FORM 941 AND INSTRUCTIONS

If an employer filed a Form 7200 to receive an advanced credit, but has not received the funds by the end of the quarter, how should the Form 941 be completed?

The draft 2020 Form 941 instructions state:

Employers that requested an advance of the sick and family leave credit and/or the employee retention credit would have filed a Form 7200, Advance Payment of Employer Credits Due to COVID-19, during the quarter. The amount of all advances **received** from Forms 7200 filed during the quarter is reported on line 13f. ["What's New," column 1, 4th bullet (emphasis added by APA)].

APA has two primary concerns:

1. Ensuring that an employer receives the credit either through advanced payments in the employer's physical possession after filing Form 7200 or accounting for the credit on Form 941.
2. The potential for error in double accounting of the credit by an employer. For example, an employer filed a Form 7200, but did not receive the payment, so the employer claimed the credit on the Form 941 filed with the IRS. Later, the employer receives the check and mistakenly deposits it. This could subject the employer to penalties.

In light of these concerns, APA is requesting that the instructions include guidance and examples on how to apply the credit when the employer has not yet received the payment. The guidance should be part of the Instructions for Form 941 and could be added to the IRS's online Frequently Asked Question.

APA also requests guidance on whether the employer should file a Form 7200 or report an overpayment on Form 941 and request a refund. For example, an employer with a payroll on June 30, 2020, calculates a sick and family leave credit and/or employee retention credit in excess of the employees' withheld income, social security, and Medicare taxes, and the employer's social security and Medicare taxes. In this situation, if the employer files Form 7200 claiming the remaining credit, the advance payment for the June 30 Form 7200 will not be received during the quarter.

In addition, the instructions should allow employers acting in good faith to correct errors in the next quarter without penalties. The IRS should consider whether to revise the Form 941-X and related instructions to correct an error related specifically to COVID-19 credits.

How should deferrals from the first quarter of 2020 be managed?

The instructions state, "Employers can defer the deposit and payment of the employer share of social security tax otherwise due during the calendar quarter" ["What's New," column 1, 3rd bullet]. Employers also are instructed to use the January 2020 Form 941 to report employment taxes for the first quarter of 2020. If the March 27-31, 2020, deferral is reported on the first quarter Form 941, which was due on April 30, 2020, APA requests instructions on how to account for deferrals from the first quarter of 2020. Will a Form 941-X be required?

If credits exceed the amount of an employer’s social security payment, is there a priority order for deducting the remaining taxes in the federal deposit?

APA requests guidance on the priority order of tax deductions. For example, is the order employer Medicare, employee social security, then employee Medicare followed by federal income taxes? If the total credit is based on comingled withheld and employer taxes, the IRS may decide not to establish a priority order for deducting the remaining taxes. Guidance indicating that there is or is not a priority order would be helpful.

When calculating the employee retention credit, how should an employer account for negative accruals of paid leave provided to employees who are furloughed because of COVID-19?

Employers may pay employees who are furloughed because of COVID-19 by allowing an employee’s leave account to have a negative balance of accrued paid time off (i.e., 80 hours of unearned leave). APA asks whether these payments are eligible wages for the employee retention credit.

If the employee retention credit is allowed in this situation, APA requests guidance on when an employer can take the credit and, accordingly, how to complete the Form 941 under the following situations:

- The employer expects the employee to return to work and the negative accrual recovered —
 - How should employers account and report after a Form 941 is filed?
 - Does the IRS plan to revise the Form 941-X to address negative accrual recovery?
- The employer expects the employee to return to work and does not expect to recover the negative accrual.
- The employee is later terminated because of the employer’s financial situation from COVID-19 and the employer does not seek recovery of the negative accrual.
- The employee is later terminated for reasons unrelated to COVID-19, such as company restructuring, and the employer does not seek recovery of the negative accrual.

How should employers account for benefits still provided to employees even when they are not working?

APA requests guidance on how to account for benefits provided to employees who are furloughed because of COVID-19. Normally, benefits are provided to employees who work a certain number of hours for an employer. Under COVID-19, when employees are furloughed or work below the hours threshold and they lose coverage, an employer may decide to continue coverage and pay some or all of the employees' costs. These benefits can include, but are not limited to, short and long-term disability insurance and life insurance.

For healthcare benefits in this COVID-19 situation, if an employer pays 100% of employees' benefits and then later the employees recompense the employer for the employees' portion, is this managed pre- or post-tax in 2020 and 2021 or later? For example, executives may ask an employer not to pay them their salary but to cover benefits in full. If a portion of the benefit payments are later returned to the employer by these executives, are these returned benefit payments pre-tax in 2020 and post-tax in 2021 or later?

The IRS with the U.S. Department of Labor issued a joint notice in May extending the timeframes for employee benefit plans for the declared COVID-19 outbreak. However, the notice did not provide Form 941 instructions for employers.

OTHER COMMENTS AND QUESTIONS

\$100,000 Next-Day Deposit Rule: During an IRS Monthly Payroll Industry Call, the IRS stated that the \$100,000 Next-Day Deposit Rule is still in effect. For COVID-19, there are refundable and nonrefundable credits reported on Form 941 (lines 11b and 11c). Should the employer account for the COVID-19 credits when determining compliance with the \$100,000 Next-Day Deposit Rule? For example, if an employer would otherwise have a \$125,000 tax payment, but takes a \$50,000 retention credit, leaving \$75,000 due to the IRS, how would the \$100,000 Next-Day Deposit Rule apply?

Public-Sector Employers: While the IRS's Frequently Asked Questions offers information regarding COVID-19 relief for public-sector entities, there is still confusion on eligibility for the sick and family leave credits and the employee retention credit. APA requests that the IRS add clear guidance to the Instructions for Form 941 for public-sector employers on their ability to take these credits. In addition, please consider reorganizing the information for the public sector in the Frequently Asked Questions such that the information for all types of public entities is in one place.

Employer Eligibility for COVID-19 Credits: APA requests that under “What’s New” the IRS add verbiage defining what employers are eligible to take the credit.

Thank you for consideration of APA’s recommendations and questions on the April 2020 Draft Form 941 and Instructions. To discuss these comments further, please contact Alice Jacobsohn at ajacobsohn@americanpayroll.org.

Sincerely,

A handwritten signature in black ink that reads "Alice P. Jacobsohn". The signature is written in a cursive style with a long, sweeping tail on the "h".

Alice P. Jacobsohn, Esq.
APA Senior Manager, Government Relations

Cc: IRS Issues Subcommittee Cochairs:

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