Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

# 5 Ways Tax Pros Want IRS To Respond To COVID-19

By **Amy Lee Rosen**

*Law360 (March 13, 2020, 8:41 PM EDT)* -- As much of the nation shifts to working remotely in response to the new coronavirus, also known as COVID-19, many tax attorneys hope the IRS will take decisive action to ease tax filing and payment burdens on their clients.

Here, Law360 explores some top recommendations for how the Internal Revenue Service should respond to COVID-19.

**Extend Filing, Payment Deadlines**

The worldwide breakout of coronavirus has prompted President Trump to declare a national emergency, and tax professionals hope the IRS will take action to ease filing burdens on taxpayers. (AP)

Extending the April 15 tax filing deadline will be helpful, but tax practitioners also hope the government considers extending the tax payment deadline as well because it is a separate provision under the tax code.

President Donald Trump on Wednesday said he instructed the U.S. Department of the Treasury to allow deferred tax payments by affected individuals and businesses without penalties or interest. Earlier that day, Treasury Secretary Steven Mnuchin said he won support from key lawmakers on a tax filing deadline extension.

Typically, tax payments are still due April 15, so the government would need to decide whether to also extend the payment deadline, Abbey B. Garber, a tax partner at Thompson & Knight LLP who worked in the IRS Office of Chief Counsel for more than 30 years, told Law360. That way, people don't accidentally owe penalties and interest because they incorrectly assumed the tax filing extension past April 15 meant they were exempt from paying taxes then too, he said.

"The IRS has broad authority to extend filing and payment of taxes," he said. "We typically see the six-month extension that taxpayers typically request and the kicker there is that extension is for filing and not for paying. So people can get caught up in that [because] I don't think the average taxpayer distinguishes the filing deadline and the payment deadline."

Under Section 6081 of the Internal Revenue Code, the treasury secretary can grant a reasonable extension of time for filing any tax return. The treasury secretary also has authority to extend paying taxes for no more than six months under Section 6161.

Normally someone can file for an extension through a Form 4868, but the IRS could decide to automatically waive the requirement and just grant everyone a six-month extension, Garber told Law360.

The IRS has provided similar relief in the past, said Jennifer E. Breen, a partner at Morgan Lewis & Bockius LLP. She cited Notice 2017-47 as an example in a letter she and Morgan Lewis partner Steven P. Johnson sent to IRS Chief Counsel Michael Desmond on Thursday.

Notice 2017-47 granted relief from the penalty for failure to timely file for certain partnerships and real estate mortgage investment conduits. The notice was superseded by Notice 2017-71, which granted similar penalty relief and extended filing deadlines for these business entities.

“I think just exercising a bit of leniency with folks who are late would be helpful,” Breen told Law360.

Extensions are also important because as people are dealing with the potential illness, this could result in a huge disruption in the tax preparation industry, she said. This would have ripple effects for the most vulnerable people who seek help from IRS Volunteer Income Tax Assistance organizations and at low-income taxpayer clinics. If those entities shut down, people will not get help to prepare their tax returns, she added.

“So we need to be cognizant that if they aren’t ill, resources may not be available to them to meet their deadlines,” Breen said.

**Explore Federally Declared Disaster Solutions**

Trump on Friday declared a national emergency, which means the IRS may not have authority to waive employee benefit plan deadlines in the same way it would have if there had been a federally declared disaster. However, depending on whether there is related legislation, the IRS may consider whether to issue similar notices it published under the Barack Obama administration during the 2014 Ebola crisis that permit employee vacation pooling and separately allow for-profit entities to tap into foundation funds.

When the president declares a federally declared disaster, under Section 7508A the IRS has broader authority in what it can do. Section 7508A only gives authority to postpone certain deadlines by reason of a presidentially declared disaster.

The IRS can possibly imitate two actions it took in 2014 during the Obama administration’s response to the Ebola virus, said David Whaley, a partner in the employee benefits and executive compensation practice group at Thompson Hine LLP.

“The first thing they did was they allowed for employers to allow banks for them to donate vacation time to help other employees in the organization that were harmed by the quarantine process of people coming from Ebola regions,” he said. “We don’t have the same thing going on, but we will have employees who are quarantined.”

People may be quarantined either because they tested positive themselves or because they interacted with someone who tested positive, but in either situation it would be helpful for the IRS to look to Notice 2014-68, which covers employers who may have adopted or thought about adopting leave-based donation programs to aid victims of Ebola.

In the notice, an employee can donate sick, vacation or personal days in exchange for employer cash payments that are made to qualified tax-exempt organizations that help victims of the Ebola outbreak.

The IRS could adopt a similar program that would let employees donate their vacation time to help victims of the coronavirus, Whaley said.

Dominic DeMatties, a partner in the employee benefits and executive compensation practice group at Thompson Hine, told Law360 the IRS could look to Notice 2014-65, which allows employer-sponsored private foundations to provide assistance to victims, and provide relief payments that are excludable from gross income.

Many corporations have their own foundations that are tax-exempt only if funds are used for certain charitable purposes, but this notice during the Ebola outbreak expanded the uses of foundation money outside the traditionally allowed uses.

If Congress grants tax relief in exchange for giving paid time off to employees, this may help for-profit companies, but it may create a gap for nonprofits such as universities, he said. So being able to tap into a university-related foundation to extract funds may help schools use that funding to help professors and staff members get paid time off that they otherwise don't get a tax break for because the university is tax-exempt itself, DeMatties said.

In addition, Revenue Procedure 2018-58 provides an updated list of time-sensitive deadlines for certain acts that can be extended under Section 7508A.

If a federally declared disaster is announced, then the next step would be for the IRS to issue a news release indicating which deadlines set forth in the revenue procedure will be postponed and thereafter issue a notice related to the other deadlines, DeMatties said. To date, however, it does not appear there has been a federally declared disaster and therefore it is not clear that the IRS has authority to extend any of these deadlines, he said.

**Address Other Deadlines, Collections**

While many are concerned with tax filing and payment deadlines, it is also important to consider extending other deadlines related to examinations and appeals and explore suspending automatic collections because people may not be able to respond to deadlines or make payments if they are sick.

Kendall C. Jones, senior counsel at Eversheds Sutherland, told Law360 that major law firms and accounting firms are telling people not to come into work, but is unclear whether they have extensions on examination and appeals deadlines, or what happens if a client has an installment payment plan but fails to make a payment.

Under IRC Section 6502, the IRS has 10 years to collect tax after it has been assessed, which means there is some leeway in when the government decides to collect levies, he said.

But deadlines for examination or appeals are administrative decisions, so the IRS could just decide to automatically extend a deadline if the agency chooses to, which would be helpful if offices are closed, Jones said.

Automatic collection also needs to be addressed because if someone does not make a payment the IRS could automatically file a lien against someone or a business, which may not be operating because of the virus, he said.

“It may make sense," Jones said, "to take some sort of action now rather than having thousands and thousands of situations with this crisis where people have to go to their accountant or lawyer and say: ‘Help me. The IRS is now imposing penalties, they filed a lien on my business and I’m going to go out of business.’”

**Clarify Recent HSA Guidance**

The IRS recently provided guidance on health savings accounts, known as HSAs, by finding that high-deductible health plans can provide coverage for testing and treatment. However, more clarity is needed on the definition of treatment, according to Brian M. Johnston, a principal at Jackson Lewis PC.

HSAs were created in 2003 and come from IRC Section 223 to allow employees or individuals to contribute eligible pretax dollars annually to an HSA, which works like a bank account.

If the contributions are deemed to be eligible, then money in the account can be invested and grow tax-free as long as those amounts are used for qualified medical expenses, which can be co-pays, deductibles or prescription drug costs. But an HSA plan is eligible only if the individual participates in a high-deductible health plan, which requires paying for all medical care expenses except for items deemed “preventive care.”

The recent guidance by the IRS, on Wednesday, was helpful because the government said that both the testing and treatment of COVID-19 count as preventive care, which means employees do not have to pay for those costs as a deductible and therefore withdraw from their HSA funds for testing and treatment, Johnston said.

“Thank you for helping to partly address the COVID-19 question and allow people to be tested, but we need more clarification on what you mean by ‘treatment’ for COVID-19,” he said.

For example, it is unclear what happens if someone thinks they have COVID-19 and seeks treatment from a telehealth provider for testing or treatment because that person wants to avoid leaving the house.

“Up until this week, telework services under high-deductible plans typically [require paying] the cost of that service to not invalidate the HSA rules,” he said.

However, it isn't known whether telehealth services fall under “treatment” within the new guidance, he said.

What’s even more confusing is if someone visits a regular doctor or seeks treatment at urgent care and then tests negative for COVID-19, Johnston said.

“If I go to urgent care and be tested for COVID-19 and you don’t have it or I just have the flu, does it mean that the costs are paid by the deductible, or it is treated [as] preventive care?” he asked.

Right now, employers are deciding whether testing and treatment are covered under their health care plans and need to know what “treatment” actually means, Johnston said.

**Permit Business Entity E-Filing**

There is uncertainty about whether a business can use and attach e-signatures to e-filings of taxes, but because many offices could be shutting down, the IRS may be inclined to allow for such signatures.

As more people work from home and avoid the office, businesses may want to be able to attach applicable signatures to tax returns electronically, said Glenn Dance, a tax partner at Holthouse Carlin & Van Trigt LLP.

“Being able to attach your signature by e-signature is the only practical way to e-file a business entity tax return; otherwise someone will have to go into an office to sign something, and that’s not consistent with what people are trying to do, which is shut down the office, work from home and get things filed remotely,” Dance said.

While it may be easier for individuals to file electronically or simply print, sign and mail a return, it is more complicated for other business entities, he said.

For example, if Dance’s firm is preparing a tax return, then someone has to open the office, go inside, print the return, sign it as a preparer and get that return bundled up and sent to a client, which involves a lot of potential face-to-face human interaction.

“E-filing is the way to avoid doing that [because it] allows you to move a tax return electronically from the preparer’s desk to the client’s desk,” he said. “It’s the only way to avoid people touching the paper [and] going into offices they otherwise wouldn’t want to go into.”

--Editing by Tim Ruel and John Oudens.