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INSIGHT: 100 Payroll Tax and Fringe Benefit Questions for the IRS on Covid-19 Measures

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Congress, after much political dickering, passed Covid-19 relief legislation. Attorneys at the IRS and Treasury are working on guidance as fast as they can. Morgan Lewis & Bockius attorneys compiled a list of 100 yes/no questions that taxpayers and their advisers have been debating. Take the test! Compare your answers with your colleagues.

So far, nobody has come up with the same set of answers to these 100 questions—and that's the reason that the authors, their clients, and employers across America are hopeful that Treasury and the IRS provide answers fast. Until there are clear answers, employers are not yet willing to start providing leave, paying disaster assistance, allowing leave-sharing and charitable contributions, or other using all the CARES Act tax benefits- even though there clearly are millions of employees who are needing these benefits. Employers need to know answers before they start taking actions, because employers do not want to incur future liabilities in audits for allegedly underpaid payroll taxes (plus penalties), so they all hope Treasury and the IRS issue guidance soon.

Attorneys at the IRS and Treasury are issuing guidance under the Covid-19 legislation as fast as they can, but questions are being raised by taxpayers even faster—not only about the new statutory provisions, but also about many of the IRS news releases, announcements, notices, and "FAQs." Additional IRS guidance is urgently needed so that relief provisions can serve their intended purpose to provide enormous help both to workers and businesses affected by the Covid-19 disaster. One practical difficulty for the government attorneys drafting the guidance is that many of them (who presumably are working at home) may not have access to the normal wide range of questions raised by telephone calls and e-mails with taxpayers; indeed, according to postings on irs.gov, taxpayers are discouraged from calling the IRS at this time.

This article lists 100 questions that taxpayers are asking, with a focus on Covid-19 related payroll tax and fringe benefit provisions, with the authors' sincere hope that this list will help the guidance-drafters compile a comprehensive list, for use in issuing prompt (and hopefully taxpayer-favorable) responses to all of these questions. Many employers are delaying implementation of some of the Covid-19 tax relief provisions (including deferral of the 6.2%

employer-share of Social Security taxes (under Section 2302 of the Cares Act) and claims of either (a) medical leave and family leave credits (under Sections 7001 and 7003 of the Family First Coronavirus Response Act (the "FFCRA," Public Law 116-127)), or (b) the Employee Retention Credit (under Section 2301 of the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act", Public Law 116-136)). (These provisions are generally referred to below as "the 6.2% tax deferral" and "the credits".)

Taxpayer actions are being delayed first because the credit eligibility rules are not clear, and second because the interaction between the 6.2% tax deferral and the credits is also unclear, even after issuance of preliminary FAQs on April 10. (*See* "Deferral of employment tax deposits and payments through Dec. 31, 2020" on the IRS web site: IRS.gov/News/Topics in the News/Coronavirus Tax Relief (last updated April 10, 2020).) There have also been delays by businesses in implementing expanded leave-sharing rules, in adopting programs permitting employees to donate leave to charities, or in implementing broad-based charitable relief directly to employees, again because employers are waiting for more IRS guidance. All of these relief provisions have been designed by Congress to provide enormous help both to workers and businesses affected by the Covid-19 disaster, so our collective hope is that the IRS answers all of the questions below as quickly as possible.
The 100 questions in this article have been set up almost entirely so that answers of "Yes" or "No" could be provided by the IRS, probably supplemented by an explanation. They are organized into seven basic areas:

A. CARES Act Retention Credit
B. 6.2% Employer-Share Social Security Tax Deferral
C. Interaction between the 6.2 Percent Tax Deferral and the FFCRA and CARES Act Credits
D. Tax Code Section 139 Disaster Relief
E. Leave-Sharing and Employee Charitable Donations
F. Employee Debt-Forgiveness
G. Miscellaneous Issues

A. CARES Act Retention Credit

This refundable tax credit, capped at $5,000 per employee, is available to any employer that in any calendar quarter in 2020 had the operation of its trade or business fully or partially suspended due to orders from a government authority limiting commerce, travel or group meetings. (An alternative qualification test for this credit measures a decline in gross receipts of over 50%, compared to the correlative quarter in 2019.) The credit applies for any qualifying employer of over 100 employees if the employer-paid "wages… with respect to which an employee is not providing services due to [the same circumstances as those that triggered the employer's qualification for this credit]." For employers of 100 or fewer employees, the credit applies to all employees (even those providing services) during the period that the trade or business was partially suspended (or during the calendar quarter of gross receipts decline).

This credit, where triggered, equals 50% of "Qualified Wages" paid on and after March 13, 2020 (including both taxable "wages" (as defined for Federal Insurance Contributions Act (FICA) tax purposes in tax code Section 3121(a)), or taxable "compensation" (as defined for Railroad Retirement Tax Act (RRTA) purposes in tax code Section 3231(e), as well as tax-free "Qualified Health Plan Expenses" paid or incurred for the employer's group health plan). The credit can start to be claimed on the Form 941 for the second quarter of 2020. (Per Section 2301(j) of the CARES Act, the retention credit is not available to any employer that obtains a Paycheck Protection Program (PPP) Loan under CARES Act Section 1102.)

1.

1. Can the "government order" that triggers a full or partial suspension of the trade or business be simply an order by a state or local government for persons to "shelter in place" (which in turn can affect both whether employees can come to work, and whether customers can visit the business), and thus effectively triggers either complete business closure, or limited operations (e.g., "curbside pickup" or "take-out orders")?

2. If there are qualifying government orders in some states, but in other states there have not been such orders, can an employer (which presumably has a "partial suspension" at least in the states with government orders) claim the credit in all states for wages paid to its workers not providing services (or, for all wages, for employers of 100 or fewer employees)?

3. For qualifying employers of over 100 employees, is the credit available for 100% of the wages paid to employees who simply cannot do their regular jobs because of the "government order" triggering the full or partial business closure (e.g., security guards, store clerks, receptionists and waiters)?

4. If so, can the employer prove qualification for the credit simply by showing the employee's job title (similar to the titles suggested above)?

5. Is the credit available to qualifying employers of over 100 employees for part of the wages paid to employees who have difficulties performing their jobs in light of the partial or full suspension of business operations and the challenges and limitations of remote working (e.g., employees working from home with poor phone and internet connections, employees who simply have less work due to fewer requests from clients and customers, or employees who may have family responsibilities causing more workday interruptions)?

6. Is the credit available to qualifying employers of over 100 employees with respect to employees who are on leave due to sickness of the employee, sickness of a family member, or to care for children in districts where schools have closed? (Stated differently, will the criteria that mandates leave payments and FFCRA credits for employers of under 500 employees also qualify under the CARES Act credit as time when the employee is not working "due to" the employer's business being fully or partially suspended?)

7. Can an employer with over 100 employees substantiate the reduced work hours for hourly employees simply by showing hours not worked?

8. Does proof of "not working" for employers of over 100 employees have to encompass full days of not working, or is it sufficient for the employer claiming the credit to show a reduction of work hours for the workweek?

9. Can an employer of over 100 employees substantiate reduced work hours for salaried employees simply by announcing to employees that they will not be required to work part of the time, but they will nevertheless be paid their unreduced salaries?

10. What if an employer of over 100 employees announces to salaried employees that they are NOT expected to work more than 80% of their pre-Covid-19-crisis hours, but will be paid 95% of the prior wages? Will a credit apply to 20% of the 95% reduced wages (i.e., 19% of the wages)? Or, will it apply only to 15% of the wages (i.e.—by assuming that the salary reduction of 5% was "a non-payment of wages" for the part of that 20% of the time not worked)?

11. Can such an employer show, instead of (or in addition to) such an announcement, that its business revenues have been reduced by a proven percentage, and then apply that percentage of revenue reduction as presumptive evidence of reduction in employees' work hours (following similar procedures for proving qualifications for government-provided Covid-19 relief that have been adopted in other countries)?

12. If such an hours-reduction announcement (or proof of business revenue reduction) is not sufficient, can the employer prove hours not worked by collecting e-mail surveys of its employees?

13. If surveys are required in addition to an hours-reduction announcement (or proof of business revenue-reduction), will the surveys be required only from a sampling of the employees affected by the hours-reduction policy?

14. If an employer of over 100 employees pays no taxable wages to employees for hours not worked (e.g., "unpaid leave"), but it continues to provide tax-free health insurance, will the credit apply to the health care costs allocable to the periods not worked?

15. If the answer to the question #14 is "No," does the answer change to "Yes" if the employer makes any taxable wage payment at all to the employees on leave?

16. If the employer has laid off its employees (so they qualify for unemployment), but pays them severance, will the severance (which is fully FICA-taxable) qualify for credit as a "wage"?

17. Does the answer to question #16 change for a large employer as opposed to an employer of 100 or fewer employees?

18. If the answer to question #16 is "No," does the answer change if the employer first pays an employee for leave (so the employee does not qualify for unemployment), and then severs the employee at the end of the leave period?

19. If the employer has furloughed employees (and they qualify for unemployment), and pays them any wages during the furlough, will the credit apply to the furlough wages plus qualified health benefits?

20. If the answer to question #19 is "No," does the answer change if the employer first pays an employee for leave (with no qualification for unemployment), and then furloughs the employee at the end of the leave period?

21. If an employer has furloughed employees, but in that state a furloughed employee does not qualify for unemployment, and the employer pays the furloughed employees any amount of taxable wages during the furlough, will the credit apply to the furlough wages plus the qualified health benefits?

22. If an employer has laid off or furloughed employees, but supplements their unemployment through a supplemental unemployment benefit plan (SUB-Plan) that qualifies for a FICA and Federal Unemployment Tax Act (FUTA) tax exemption for the wage payments, will these SUB-Plan payments qualify for the credit?

23. If, in addition to the SUB-Plan payments above, an employer continues to provide the employees with Qualified Health Benefits, will 50% of these group health plan costs qualify for the credit?

24. Is the credit lost (or subject to clawback) if an employer has paid an employee for two weeks while the employee was on leave, but then the employee is brought back to work part-time with part-time pay?

25. Since only 50% of the Qualified Retention Wages are eligible for the credit, does the IRS intend to amend the statement in Notice 2020-22, Section (b), that employers are exempted from the deposit penalty under tax code Section 6656 with respect to "the amount of Qualified Retention Wages"?

26. Although Notice 2020-22 waives only the deposit penalty imposable under tax code Section 6656 if the employer reasonably believes it is entitled to claim FFCRA credits or CARES Act credits, is the employer also exempted from the penalty for failure to collect tax or attempt to evade tax under tax code Section 6672, if the IRS determines in the future that credits were overstated and claimed against any employee-share payroll taxes? (The employer share of FICA taxes is exempted from any penalty under tax code Section 6672 by Treasury Regulation 301.6672-1.)

B. 6.2% Employer-Share Social Security Tax Deferral.

The CARES Act (Section 2302) delays the payment date for the 6.2% employer-share of Social Security taxes (and the equivalent employer-share of TIER 1 RRTA taxes) that are required to be paid for the period between March 27 and Dec. 31, 2020. All deposits for such taxes are deemed to be timely if they are paid in two installments, half by Dec. 31, 2021, and half by Dec. 31, 2022. This provision "shall not apply" to any employer that receives a PPP loan and has that loan forgiven. (*See* CARES Act Section 2302(a)(3). This blocker (referencing "forgiveness" of a PPP loan) is worded differently from the warning under the retention credit that warns that an employer is completely ineligible for the retention credit if it obtains a PPP loan. Notably, there is no statutory blocker in the CARES Act for claiming both the 6.2% tax deferral and the retention credit, although the FAQs issued on April 10 (in contrast with Notice 2020-22) imply that the credits must be applied *first* against the 6.2% tax, which would thus be automatically converted from a "tax deferral" into a "tax paid with an advanced credit.")

In the event that an employer qualifying for the 6.2% tax deferral directs either a "pay agent" (under tax code Section 3504) or a "certified professional employer organization" (under tax code Section 3511) to defer the payments, the CARES Act places sole liability for any deferred taxes on the employer customer. (CARES Act Section 2301(c)(1) and (2).) No special election is necessary by any employer to qualify for this deferral (according to the FAQs issued on April 10).

27. If the 6.2% tax deferral is made by a "statutory employer" under tax code Section 3401(d)(1), is the common law employer solely liable for the deferred payment (as is true for agents)?

28. Is the 6.2% tax deferral applicable to employer-share tax deposits that were due on March 27, 2020, even though the wages relating to those deposits were paid prior to March 27?

29. Is the 6.2% tax deferral applicable to employer-share tax deposits relating to wages paid on or before Dec. 31, 2020 (which will be reported on Forms W-2 for 2020, with all related tax withholdings), even though the payroll tax deposits may not be due until Jan. 2, 2021 (one business day after Dec. 31, 2020)?

30. Can employers that acted immediately after enactment of the CARES Act and did not deposit employer-share FICA taxes on and after March 27, 2020, simply file a Form 941 for the first quarter of 2020 reflecting that these taxes were deferred by showing no deposits were due on Schedule B attached to the Form 941?

31. Will the IRS require some reconciliation on the Form 941 for the second quarter of 2020 to reflect the 6.2% employer-share Social Security taxes that were not deposited from March 27 to March 31, 2020 (so as to keep track of the total amount of 6.2% tax deferrals)?

32. If any employer had, in fact, deposited employer-share FICA taxes on and after March 27, 2020 (although such deposits were not required), will the employer be entitled to file its Form 941 for the first quarter of 2020 to reduce the "liability" shown on Schedule B for the dates of

over-deposit, thereby generating a credit that could be carried into the second quarter of 2020 for the 6.2% employer-share FICA taxes that it had not deferred in the first quarter?

33. As an alternative to question #32, if any employer had in fact deposited employer-share FICA taxes on and after March 27, 2020, will it be entitled to claim a credit in the second quarter of 2020 for the employer-share FICA taxes that were not deferred in the first quarter of 2020?

34. Since Dec. 31, 2022 is a Saturday, will the repayment date for the 6.2% tax deferral amount be automatically extended to until Jan. 2, 2023 (pursuant to the automatic extensions for due dates that fall on Saturdays, Sundays or legal holidays under tax code Section 7503)?

C. Interaction Between the 6.2% Tax Deferral, the FFCRA, and CARES Act Credits.

Although the CARES Act allows the credit to be claimed only against the 6.2% employer-share of Social Security Taxes, the CARES Act (Section 2301(l)(1) and (2)) authorizes the IRS to issue guidance allowing the "advance payment" of this credit. (The CARES Act (Section 3606) authorized a similar "advance payment" of the FFCRA credit, which provided support retroactively for the issuance of IR 2020-57 (issued March 20, 2020), entitled "Treasury, IRS and Labor announce plan to implement Coronavirus-related paid leave for workers and tax credits for small and midsize businesses to swiftly recover the cost of providing Coronavirus-related leave.") In Notice 2020-22, the IRS provided that the CARES Act retention credit (and also the FFCRA leave credits) may be claimed against "Employment Taxes that would otherwise be required to be deposited" without incurring a failure to deposit penalty. Notice 2020-22 does not indicate that the credits had to be claimed first against the 6.2% tax deferral.

In the FAQs issued on April 10, the IRS announced that:

- Employers who apply for, are granted, and are ultimately forgiven either part or all of a PPP loan can use the 6.2% deferral "prior to" being notified that the PPP loan is being forgiven.
- The IRS plans to issue additional instructions as to how employers should reflect first quarter deferrals (March 27 through March 31). A revised Form 941 will be available to reflect post-first quarter deferrals (second through fourth quarter deferrals).
- Employers can defer the 6.2% employer-portion Social Security tax "prior to" determining/claiming the FFCRA or CARES credits.

This last point was a surprise to many employers, who had believed that they were entitled BOTH to defer the entire 6.2% employer-share taxes owed from March 27 through Dec. 31, 2020, and claim the FFCRA and CARES Act credits against other employment taxes, that were not deferred. The FAQ advice announced above implies that the deferral can be elected only to the extent that it EXCEEDS the claimed credits, but the FAQs also imply that deferrals may need to stop completely if the credits are claimed. This seems contrary to the CARES Act statute, which does not indicate that a claim of any credit would block, or even limit, the deferral.

Indeed, employers who claim PPP loans are favored by the FAQs because they are allowed to use both the 6.2% tax deferral and the PPP loan (up until the point the loan is forgiven). By contrast, the FAQs surprise and disfavor employers that use credits since any employer that has credits at least equal to its 6.2% employer-share of Social Security tax would effectively be denied the benefit of the 6.2% tax deferral altogether.

Accordingly, the following new questions have arisen since the issuance of the FAQs:

35. If a PPP loan is not forgiven until after the end of the deferral period (e.g., after Dec. 31, 2020), can an employer defer the 6.2% tax owed from March 27 through Dec. 31 of 2020?

36. Since FAQ 6 states that an employer is entitled to defer deposit and payment of the employer-portion of Social Security tax "prior to determining whether the employer is entitled to" FFCRA/CARES credits, does the IRS intend for deferrals to stop completely after any credits are claimed?

37. If the answer to question #36 is "No," can the employer resume deferrals starting with weeks after wages generating the credits are paid?

38. If the answer to question #37 is "No," must an employer simply file a Form 7200 and claim a credit for that quarter if its total employment taxes exceed the credits in that quarter?

39. If the answer to question #37 is "No," and the answer to question #38 is "Yes," can the employer resume deferrals starting with the calendar quarter after the wages generating the credits are paid?

40. If the answer to question #36 is "Yes," wouldn't an employer defer its claims of the CARES and FFCRA credits as long as possible in order to try to maximize its use of the 6.2% tax deferral?

41. Was FAQ 6 intended to require an employer to use any CARES and FFCRA credits that it calculates for the second quarter of 2020 first against any 6.2% tax that would otherwise have been deferrable in the second quarter of 2020?

42. If the answer to question #41 is "Yes," is the employer also required to use any CARES and FFCRA credits that it calculates for the second quarter of 2020 not only against any 6.2% tax in the second quarter of 2020 tax, but also against any 6.2% tax that was deferred (or deferrable) in the first quarter of 2020, before the credits are applied to other employment taxes in the second quarter of 2020 that were not subject to the deferral?

43. If the answer to question #42 is "No," will the amounts deferred for the first quarter of 2020 simply be added to the total deferrals required to be repaid at the end of 2021 and 2022?

44. Has the IRS considered that, because any employers with credits exceeding the 6.2% tax in any quarter will effectively be denied the benefit of the 6.2% tax deferral, more employers may consider PPP loans instead of the credits?

D. Tax Code Section 139 Disaster Relief

Tax code Section 139 (enacted in 2008 by Public Law 110-343, effective for disasters declared in tax years after 2007), provides an exclusion for any amounts provided "to or for the benefit of an individual" to reimburse or pay that individual for "reasonable and necessary personal, family, living, or funeral expenses as incurred as a result of a qualified disaster." (The exclusion is not limited to payments only by employers, or only to employees. The only benefit recipients who cannot use the exclusion are terrorists, per tax code Section 139(e).) The IRS has issued general guidance in Revenue Ruling 2003-12 about the types of payments that may qualify for this exclusion, and has repeatedly invoked application of the exclusion in a number of "disaster relief" notices and press releases directed to specific disasters, like hurricanes, tornadoes, floods, and the Ebola crisis. (*See* Notice 2005-23 (Indian Ocean tsunamis); Notice 2010-16 (Haitian earthquake); Notice 2011-32 (Japanese earthquake and tsunami); IR 2012-84, 11/2/2012 (Hurricane Sandy); and Notice 2014-65 (Ebola virus disease outbreak in Guinea, Liberia, and Sierra Leone.) No recent guidance has been issued under tax code Section 139, although some questions are answered by the Code itself (e.g., that the expenses must be "incurred as a result of a qualified disaster" and that "payments otherwise compensated by insurance" are not covered).

Although President Trump's declaration of a "National Emergency" on March 13 was technically not a declaration of a "national disaster," the IRS has officially announced that tax code Section 139 applies. (*See* Q&A 58 of https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs), stating "officially" that the Covid-19 crisis is a "disaster" for purposes of tax code Section 139. The IRS had previously and separately conceded that this crisis is a disaster, for purposes of extending income tax filings, stating specifically in Notice 2020-18 (supplemented by Notice 2020-23) that the President's announcement of a "National Emergency" triggered tax code Section 165(i)(5)(A).) However, particularly in light of the dramatic differences between a global pandemic and the geographically limited disasters covered by the prior noticed, many questions have arisen as to exactly what qualifies for exclusion under tax code Section 139, as is shown below.

45. Are the "individuals" eligible to receive payments limited only to persons who are sick, who are caring for the sick, or people with kids out of school?

46. Are "individuals" covered if they are simply required to work at home due to government "social distancing" requirements, and orders to "shelter in place"?

47. Are "individuals" covered who are struggling to get to work and incur substantially larger than normal expenses (including commuting expenses, possible child care expenses, and meal expenses)?

48. Are payments for Covid-19-related medical expenses covered?

49. Would the employee or other recipient of the medical expense payments need to prove that there was no insurance reimbursement for those expenses?

50. Are payments for face masks, cleansers, rubber gloves, and large increases in uses of paper products covered?

51. Are payments for childcare automatically covered, where schools are closed?

52. Does the answer to question #51 change if the Covid-19 socializing and travel restrictions continue into the summer, when schools were closed anyway?

53. Would the recipient need to prove a need for the childcare other than schools being closed (e.g., a need to go to work)?

54. Are all food expenses covered?

55. If the answer to question #54 is "No," are food expenses automatically excluded under tax code Section 139 if the employee shows that the employee has always been entitled to receive free food at the employee's regular place of business (so food costs have increased accordingly)?

56. If the answer to question #55 is "No," are food expenses (including order-in meals) excluded under tax code Section 139 if the employee shows that the employee has always been entitled to receive free food at the employee's regular place of business, and has never learned to cook, and thus must incur substantial expenses of ordering in food?

57. Are food expenses excluded under tax code Section 139 (as opposed to being excluded as meals furnished for the convenience of the employer under tax code Section 119) if an employer buys lunches for employees who are continuing to work at an employer workplace (e.g., employees deemed "essential" workers), but are unable to eat in the vicinity of their workplace because all (or most) of the restaurants are closed?

58. Under the example above, are daily reimbursements for food expenses excluded under tax code Section 139 (e.g., $20.00 per day) if an employer reimburses employees instead of ordering delivery of the food (particularly since cash reimbursements are not covered under tax code Section 119)?

59. If the tax code Section 139 exclusion applies to these meals and/or meal reimbursements, will it be presumed to apply for the balance of 2020 (similar to the "payroll tax deferral period" under the 6.2% tax deferral)?

60. Does the tax code Section 139 exclusion cover payments for home office and telecommuting costs covered (e.g., equipment, computers, peripheral equipment, replacements for cell phones, increased home internet expenses and increased phone expenses) (or are these expenses still "business expenses" covered by tax code Section 132(d))?

61. If there is no business expense substantiation collected for the expenses listed in question #62, then do those expenses automatically become covered by the tax code Section 139 exclusion, since the lack of substantiation means they are not "business expenses" but instead

are "personal expenses"? (Note tax code Section 132(l), providing that tax code Section 132 (excepting tax code Section 132(e) for de minimis fringes) "shall not apply to any fringe benefits of a type the tax treatment of which is expressly provided for in any other section of this chapter." In other words, if tax code Section 139 applies, then it could subsume any exclusion for what the employer might try to be providing by way of business expense reimbursements that might also be described as "personal, living, or family expenses.")

62. If an employee has paid for parking at the office (either on a pre-tax or after-tax basis), but cannot use the parking because the office is closed, can the employer reimburse the parking costs as a tax code Section 139 excludable expense?

63. If the parking in question #62 was paid for on a pre-tax basis through salary-reduction, is the tax code Section 139 exclusion limited only to the net costs of the parking (disregarding the amount of taxes saved per the salary reduction)?

64. If, in order to avoid public transportation, employees are commuting to and from work by taking taxis, Ubers, Lyft, or other ride-share cars (that typically seat under six passengers other than the driver), are these trips excludable under tax code Section 139?

65. If employees are required to "work at home" but are at a location far from the office, will their expenses of working at home be treated as tax code Section 132(d) business expenses for travel away from home, instead of being excludable under tax code Section 139?

66. If the answer to question #65 is "Yes," can the employer automatically offer meals and incidental expense reimbursements (of $60 in most locations and $71 in high cost locations), and treat those reimbursements as excludable under tax code Section 132(d) instead of tax code Section 139?

67. If the employee had purchased tickets for a flight to a business conference that was cancelled, is the reimbursement for those lost costs covered by a tax code Section 139 exclusion?

68. Must there be any offset to that reimbursement if the employee has retained a voucher or other credit from the airline for use on a future flight?

69. Even though Revenue Ruling 2003-12 indicates that detailed substantiation is not required, is an employer required to provide some proof of its "reasonable expectation" that the payments were covered by tax code Section 139?

70. Will the IRS provide minimum amounts below which substantiation will not be required (similar to the $60/$71 daily rates for meals and incidental expenses per diems)?

71. If minimum reimbursements exempt from substantiation are provided, will such reimbursement amounts be deemed to be only for non-meal expenses (and thus exempt from the 50% meal expense deduction disallowance in tax code Section 274(n))?

72. Does the tax code Section 139 exclusion apply to the per diem payments that continue to be paid to thousands of employees in the "travel nursing" industry who are laboring long hours away from their tax homes, but may have been in the travel location for more than a year on account of Covid-19 restrictions and needs (and thus the per diem would normally have to be treated as a taxable personal expense)?

73. If the tax code Section 139 exclusion applies to these traveling nurses' per diem expenses, are half of the meals and incidental expenses disallowed as a deduction?

74. If an employer reimburses for food and beverage expenses that are excludable under tax code Section 139, does the 50% meal expense deduction disallowance of tax code Section 274(n) apply to those food and beverage costs?

75. If an employer reimburses for additional television and internet expenses for employees sheltering in place, does the 100% disallowance for "entertainment expenses" under tax code Section 274(a) apply to those costs?

76. Since Revenue Ruling 2003-12 (which assumes that an employer pays "reasonable and necessary medical, temporary housing, and transportation expenses") does not say that the employer bought the house, or bought the furniture for the housing, or bought a car, can the tax code Section 139 exclusion cover buying furniture (like desks or computers), or an additional television, or a cell phone that has a useful life beyond the period of the disaster?

77. If tax code Section 139 covers only use of property and not the property itself, must the employee return to the employer any property purchased for Covid-19 related reasons, described above?

78. As an alternative to the return of property purchased for the employee's use, can the employer simply tax the employee on the value of the property if the employee keeps the property at the end of the Covid-19 disaster period?

79. Given that the wage exclusions in tax code Sections 3401(a) and 3121(a) provide that many different benefits are excluded from wages if there is a "reasonable belief" that the exclusion applies, without listing tax code Section 139 benefits (which are separately excludable from employment taxes by tax code Section 139(d)), is the "reasonable expectation test" discussed in Revenue Ruling 2003-12 intended to operate identically to the statutory "reasonable belief" test?

80. Is there any "maximum" limit on tax code Section 139 excludable expenses (or, alternatively, does the IRS intend to audit any reimbursements to any employees exceeding some specific dollar limit, such as $100,000)?

81. Will information reporting on any form be required (particularly for expenses above a certain dollar limit)?

E. Leave-Sharing and Employee Charitable Donations

The IRS has issued considerable historic guidance on leave-sharing, not only in Revenue Ruling 90-29 (providing general leave-sharing rules) and in Notice 2006-59 (providing rules for leave-sharing in "disasters"), but also in a number of notices and announcements following identified "disasters." Here again, many questions have been raised about leave-sharing.

82. So far the IRS has admitted that a "disaster" exists under tax code Section 165(i)(5)(A) for certain purposes (e.g., for tax code Section 139 (by press release) and for deferring deadlines between April 1 and July 14 (per Notice 2020-23, referring to the list in Revenue Procedure 2018-58), but must the IRS formally declare that a "disaster" exists for purposes of triggering the leave-sharing rules of Notice 2006-59?

83. Is any other action other than an IRS declaration necessary to trigger Notice 2006-59?

84. If Notice 2006-59 has not been triggered, are the only leave-sharing rules applicable those under Revenue Ruling 90-29?

85. If Notice 2006-59 is triggered, are employees able to make leave donations to charities?

86. If Notice 2006-59 is triggered, are employers required to monitor all the leave donations, and return unused leave to the donors?

87. If Notice 2006-59 is triggered, must recipient employees be taxed on the donated leave they receive?

88. Will the IRS issue more generous rules (as has been done historically), to allow employees to donate their leave to charitable organizations (or back to the employer, which could use the leave donations for tax code Section 139 relief payments to qualifying employees)? (*See, e.g.*, Notice 2001-69, (setting employer-sponsored leave-sharing program standards in response to Sept. 11, 2001, terrorist attacks), Notice 2005-68 (Hurricane Katrina), Notice 2012-69 (Hurricane Sandy), and Notice 2014-68 (Ebola victims in Guinea, Liberia, and Sierra Leone), Notice 2017-48, (Hurricane Harvey and Tropical Storm Harvey), Notice 2017-52 (Hurricane Irma), and Notice 2017-70 (California wildfires that began on October 8, 2017).)

89. If employees donate leave days, how is the "value" of the leave day calculated for purposes of any charitable donations that are made (e.g., annual Form W-2 wages (divided by hours), annual salary (divided by hours), or, for salaried employees, simply the promised amount of hourly wage payments), or some other method?

90. If the converted leave donations are given to charities, are the donations to charities deductible by employers as trade or business expenses under tax code Section 162 (instead of as charitable contributions under tax code Section 170), as has been announced by the IRS in historic leave-sharing, post-disaster announcements?

91. If the funds from converted leave days are not entirely distributed, must the funds be returned to the leave-donors?

F. Employee Debt-Forgiveness

The CARES Act (Section 2206) allows an income exclusion under amended tax code Section 127(c)(1) for any payments made by employers to cover certain pre-existing student loan debt (principal and interest), whether paid directly to employees or to lenders, if the payments are made between March 27, 2020 and Dec. 31, 2020, and if the debt repayments plus any other education assistance benefits covered under tax code Section 127 do not exceed $5,250 in 2020. Qualifying student loans are limited to higher education expenses that an employee incurred within a reasonable period of time of taking classes, and provided that the employee carried at least a half-time course load. The repayments do not extend to loans from any qualified employer plan (such as a 401(k) loan).

92. Can the "separate written plan" requirement of tax code Section 127(b)(1) be satisfied simply by a provision in an employee handbook or manual explaining the basic program terms?

93. Must the employee provide substantiation of the amount of the current outstanding loans by presenting current proof of student loan balances?

94. Can the loan forgiveness cover student debt that has been outstanding for many years?

95. Can the employer choose the employees for whom debt will be forgiven (so long as the employer follows a nondiscriminatory selection process)?

96. Can employees for whom debt is forgiven under this new exclusion include not just "laid-off" employees (who are treated as employees by Treasury Regulation 1.127-2(h)(1)), but also former employees who have terminated employment voluntarily (as was described in Revenue Ruling 96-41)?

97. Can employees whose debt is forgiven include persons who were hired for the summer of 2020, but have not been able to work due to the Covid-19 pandemic (who are generally treated as employees by Revenue Ruling 2004-109)?

98. Although "taxable cash options" cannot be offered instead of excludable debt forgiveness, can an employer offer an employee a choice between a tax-free charitable contribution and tax-free debt forgiveness?

99. Even though generally there is no special reporting for tax code Section 127 expenses, will any special information reporting (on Form W-2 in an information box, or on Form 941) be required for this special 2020 debt-forgiveness?

G. Miscellaneous Covid-19 Related Questions.

Questions also have arisen under the fringe benefit provisions unrelated to the CARES Act, including the following:

100. Will the periods of time provided in the "accountable plan" regulations within which employees are required to provide an employer with substantiation of employee business expenses (including expenses incurred in 2020 before the Covid-19 crisis) be extended, in light of the Covid-19 crisis?

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