UPDATE: CARES Act Assistance for Nonprofit Employers: Retention Credits and Tax Deferral

April 13, 2020

On March 27, the Coronavirus Aid, Relief, and Economic Security ("CARES") Act was signed into law. A previous Alert discussed CARES Act programs tied to payroll taxes. This Alert incorporates new information released by the IRS on April 10 on how these programs will be implemented, which should be helpful to nonprofits as they integrate payroll tax deferral and employee retention tax credits into their COVID-19 planning.

This new information clarifies that employers can begin deferring payroll taxes even if they plan to apply for forgiveness of a Paycheck Protection Program (PPP) loan. Once a lender decides to forgive a PPP loan, organizations may no longer continue to defer payroll taxes. However, payment of deferred taxes is not accelerated; they will still be due in two equal parts at the end of 2021 and 2022. Additionally, organizations may defer deposits of the employer payroll taxes in addition to receiving paid leave tax credits and the employee retention tax credit.

We will continue to update our guidance as new information becomes available from the IRS.

Employee Retention Tax Credit for Employers Subject to Closure Due to Covid-19[1]

- Who is eligible? All nonprofit employers that, in any quarter between March 12 and December 31, 2020, fully or partially suspended operations due to a government order concerning COVID-19 or had a significant decline in gross receipts when compared to the same quarter in 2019.

- What benefits are available? A credit against federal employment taxes equal to 50% of eligible wages with respect to each employee up to a total of $10,000 (a $5,000 maximum credit per employee). Eligible wages are those paid to employees who are not providing services due to a COVID-19 order. In addition, eligible wages include all wages paid by employers with no more than 100 full-time employees that have a significant decline in gross receipts.

- How does this program relate to the PPP? Recipients of PPP loans are not eligible for the tax credit. The Treasury Department is charged with providing for recapture of the credit if it is allowed to an employer that subsequently receives a PPP loan, but it has not released guidance on this issue.

- How do eligible organizations qualify? Eligible organizations can be immediately reimbursed for the credit by reducing the amount of withheld payroll taxes that they are required to deposit with the Treasury. Organizations can complete IRS Form 7200 to request an advance payment of the employee retention tax credit as well as tax credits for qualified sick and qualified family leave wages that they

[1] CARES Act § 2301.

will claim on their employer tax returns. See https://www.irs.gov/forms-pubs/about-form-7200 for more information.

Delay of Payment of Employer Payroll Tax[2]

- Who is eligible? All employers.

- What benefits are available? Nonprofits may defer payment of the employer share of OASDI taxes (6.2% of employee compensation) normally due for the period from March 27, 2020 to December 31, 2020. Payment of the deferred amounts will be due in two equal parts by the end of 2021 and 2022, respectively.

- How does this program relate to the PPP program? Organizations that have received a PPP loan may defer payroll taxes through the date the lender issues a decision on loan forgiveness. Employers must resume making payroll tax contributions on the date after the lender forgives the loan. Any payroll tax that was deferred prior to the date a PPP loan is forgiven continues to be deferred and will still be due in two equal parts by the end of 2021 and 2022.

- How does this program relate to the Employee Retention Tax Credit? Employers may begin delaying payment of the employer payroll tax prior to determining eligibility for the employee retention tax credit and prior to calculating the amount of employment tax deposits they may retain in anticipation of the credit.

- How do employers qualify? Employers are not required to make a special election to be able to defer deposits and payments of employer payroll taxes. The Form 941 will be revised for the second calendar quarter of 2020. Information will be provided on how to reflect the deferred deposits and payments for the first quarter of 2020.

For more information on this Alert or other CARES Act provisions, please contact a member of Caplin & Drysdale's Exempt Organizations team.

Meghan R. Biss
202.862.7866
mbiss@capdale.com

William D. Fournier
202.862.5079
wfournier@capdale.com

William M. Klimon
202.862.5022
wklimon@capdale.com

Amanda Reed
202.862.7851
areed@capdale.com

Douglas N. Varley
202.862.7818
dvarley@capdale.com

Sharon P. Want
202.862.7849
swant@capdale.com

[2] CARES Act § 2302.

Caplin & Drysdale
ATTORNEYS

About Caplin & Drysdale
Having celebrated our 50th Anniversary in 2014, Caplin & Drysdale continues to be a leading provider of legal services to corporations, individuals, and nonprofits throughout the United States and around the world. We are also privileged to serve as legal advisors to accounting firms, financial institutions, law firms, and other professional services organizations.

The firm's reputation over the years has earned us the trust and respect of clients, industry peers, and government agencies. Moreover, clients rely on our broad knowledge of the law and our keen insights into their business concerns and personal interests. Our lawyers' strong tactical and problem-solving skills - combined with substantial experience handling a variety of complex, high-stakes, matters in a boutique environment - make us one the nation's most distinctive law firms.

With offices in New York City and Washington, D.C., Caplin & Drysdale's core practice areas include:

-Bankruptcy
-Business, Investment & Transactional Tax
-Complex Litigation
-Corporate Law
-Employee Benefits
-Exempt Organizations
-International Tax
-Political Law
-Private Client
-Tax Controversies
-Tax Litigation
-White Collar Defense

For more information, please visit us at www.caplindrysdale.com.

Washington, DC Office:
One Thomas Circle, NW
Suite 1100
Washington, DC 20005
202.862.5000

New York, NY Office:
600 Lexington Avenue
21st Floor
New York, NY 10022
212.379.6000