

**Alert | Health Emergency Preparedness Task Force:
Business Continuity Amid COVID-19**



November 2021

Late Payment of Deferred Payroll Taxes Under CARES Act Could Result in Harsh Consequences

Companies that took advantage of the payroll tax deferral under the Coronavirus Aid, Relief, and Economic Security (CARES) Act should be aware of an IRS position regarding repayment of the deferred taxes. If repayment is delinquent, even by just one day, a harsh consequence could ensue.

Section 2302 of the CARES Act allowed businesses to elect to defer the employer's share of Social Security tax on wages paid to employees between April 1 and Dec. 31, 2020. This provided cash flow relief to businesses struggling to cope with the pandemic, since the business was not required to deposit its 6.2% share of Social Security taxes when wages were paid. The deferred taxes are to be repaid in two installments: 50% due by Dec. 31, 2021, and 50% due by Dec. 31, 2022. Companies small and large have taken advantage of what is essentially an interest-free loan from the government.

IRS legal memorandum [PMTA 2021-07](#) states that a late payment of the CARES Act deferred tax would *make the entire amount deferred* subject to a 10% failure to deposit penalty – not just on the first installment due by year-end 2021. In other words, a late payment of the first installment of the deferred tax due by the end of 2021 accelerates the payment of the second installment that otherwise would not be due until Dec. 31, 2022, and the 10% penalty would be due on the entire amount. In such a situation, if the IRS demands payment of the entire amount of deferred taxes, and they are not paid within 10 days, the penalty is increased to 15%.

For example, if a company with a quarterly payroll of \$1 million took advantage of the deferral for the second, third, and fourth quarters of 2020, it would have deferred a total of \$186,000 (62,000 per quarter). The company would be required to pay \$93,000 – half of the deferred tax – no later than Dec. 31, 2021. If the company was late in paying this first installment, it would be subject to a 10% penalty on the entire \$186,000 in deferred taxes, for a penalty of \$18,600, even though the second installment would not otherwise be due until Dec. 31, 2022. If the IRS made a demand for payment of the deferred tax, and it was not paid within 10 days, the penalty would increase to 15% (\$27,900 in this example).

Although the legal memorandum does not address interest, it appears from the memorandum's rationale that the IRS would assess interest on the deferred taxes accruing from the date the taxes should have been deposited. What began as an interest-free loan could turn into an expensive one.

Further, businesses that had budgeted to pay the deferred tax with the 70% employee retention tax credit for wages paid in the fourth quarter of 2021 have just learned that this tax credit has **been retroactively terminated by the infrastructure bill** back to Oct. 1. If such businesses were retaining taxes withheld from the employees as an advance of this now repealed credit, they will need to pay those amounts back as well, causing a cash crunch just when they need to repay the first installment of the deferred Social Security taxes.

It is possible the IRS could reconsider this result, or Congress could allow certain businesses a grace period, but for now, a company that has deferred its share of Social Security taxes under the CARES Act and that might not have the cash to pay the 50% installment of deferred tax by Dec. 31 should do its best to borrow the funds necessary to do so in time to meet the Dec. 31 deadline, rather than having to pay the 10% or 15% penalty, plus interest.

For more information and updates on the developing situation, visit [GT's Health Emergency Preparedness Task Force: Coronavirus Disease 2019](#) or [GT's COVID-19 Economic Stimulus Team](#).

Author

This GT Alert was prepared by:

- [Marvin A. Kirsner](#) | +1 954.768.8224 | kirsnerm@gtlaw.com

Albany. Amsterdam. Atlanta. Austin. Boston. Chicago. Dallas. Delaware. Denver. Fort Lauderdale. Germany.⁷ Houston. Las Vegas. London.* Los Angeles. Mexico City.+ Miami. Milan.» Minneapolis. New Jersey. New York. Northern Virginia. Orange County. Orlando. Philadelphia. Phoenix. Sacramento. Salt Lake City. San Francisco. Seoul.∞ Shanghai. Silicon Valley. Tallahassee. Tampa. Tel Aviv.^ Tokyo.* Warsaw.^ Washington, D.C.. West Palm Beach. Westchester County.

*This Greenberg Traurig Alert is issued for informational purposes only and is not intended to be construed or used as general legal advice nor as a solicitation of any type. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer's legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. ~Greenberg Traurig's Berlin office is operated by Greenberg Traurig Germany, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. *Operates as a separate UK registered legal entity. +Greenberg Traurig's Mexico City office is operated by Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. »Greenberg Traurig's Milan office is operated by Greenberg Traurig Santa Maria, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ∞Operates as Greenberg Traurig LLP Foreign Legal Consultant Office. ^Greenberg Traurig's Tel Aviv office is a branch of Greenberg Traurig, P.A., Florida, USA. »Greenberg Traurig's Tokyo Office is operated by GT Tokyo Horitsu Jimusho and Greenberg Traurig Gaikokuhojimbengoshi Jimusho, affiliates of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ~Greenberg Traurig's Warsaw office is operated by GREENBERG TRAUIG Nowakowska-Zimoch Wysokiński sp.k., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. Certain partners in GREENBERG TRAUIG Nowakowska-Zimoch Wysokiński sp.k. are also shareholders*

in Greenberg Traurig, P.A. Images in this advertisement do not depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2021 Greenberg Traurig, LLP. All rights reserved.