

Client Alert: COVID-19 Optional Payroll Tax Deferral

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Barack Ferrazzano Client Alert

Presidential Memorandum

On August 8, 2020, President Trump issued the *Memorandum on Deferring Payroll Tax Obligations in Light of the Ongoing COVID-19 Disaster*¹ (the "Presidential Memorandum"). The Presidential Memorandum directs the Secretary of the Treasury to **defer the withholding, deposit, and payment of the employee's portion of the Social Security tax on wages or compensation paid during the period of September 1, 2020 through December 31, 2020**, so long as the employee's wages or compensation, as applicable, is generally less than \$4,000, calculated on a pre-tax basis (roughly \$104,000 per year). Amounts deferred pursuant to the Presidential Memorandum will be deferred without penalties, interest, or additions to tax. The Presidential Memorandum further instructs the Secretary of the Treasury to issue guidance in order to implement the Presidential Memorandum.

IRS Guidance - Notice 2020-65

In response to the Presidential Memorandum, on August 28, 2020, the Internal Revenue Service issued Notice 2020-65² to provide additional guidance to employers. Pursuant to Notice 2020-65, employers may defer the withholding and payment of the employee portion of Social Security tax on compensation and wages paid during the period of September 1, 2020 through December 31, 2020, but only if the employee's wages payable during a bi-weekly payroll period are less than \$4,000 or the equivalent amount for other pay periods.

Importantly, Notice 2020-65, **provides that deferral is not an elimination of the deferred tax and obligates the employer to repay the deferred tax in early 2021**. Specifically, an employer that defers the tax must withhold and pay all of the deferred taxes ratably from wages and compensation paid between January 1, 2021 and April 30, 2021. Practically speaking, this means that while employees may see slightly larger paychecks for the remainder of 2020, such employees will see a reduction in pay for the first

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four months of 2021 due to the repayment requirement. If such amounts are not repaid, interest, penalties and additions to tax will begin to accrue on May 1, 2021 with respect to any deferred and unpaid taxes. Note that Notice 2020-65 does allow an employer to make other arrangements to otherwise collect the deferred taxes from the employee, however additional guidance on this point has not been issued.

Employers May Choose To Participate In This Payroll Tax Deferral

Neither the Presidential Memorandum nor Notice 2020-65 specifically address whether participation in this payroll tax deferral is mandatory for employers. **However, on September 3, 2020, the Internal Revenue Service confirmed that employers may, but are not required to, participate in the payroll tax deferral.** The decision to participate or not participate in such payroll tax deferral rests solely with employers (*i.e.*, an employer is not obligated to implement the deferral at the request of an employee).

What You Should Know

At this time, **additional guidance has not yet been released** which leaves significant questions unanswered.

- Because an employer is liable for the repayment of any deferred tax, how can an employer collect or recoup the deferred tax from a separated employee?
- How does this payroll tax deferral interact with state and local laws?
- Will it be administratively burdensome for employers or third-party payroll providers to implement software changes to payroll systems to defer this tax for a four month period?
- How does this payroll tax deferral impact an employer's reporting obligations to the Internal Revenue Service?
- Will deferred amounts ultimately be forgiven through acts of Congress?

Due to the many uncertainties surrounding the repayment obligation, many employers have chosen not to participate in this payroll tax deferral, but in any event you should stay tuned for further developments.

COVID-19 Resources

We recommend reviewing the following pandemic-related business and legal considerations we have been discussing with our clients:

- **Barack Ferrazzano's COVID-19 Resource Center**

We Can Help You

Contact us with any questions. We are here to assist you with evaluating the payroll tax deferral as it pertains to your organization.

¹NO LONGER AVAILABLE

²<https://www.irs.gov/pub/irs-drop/n-20-65.pdf>