

Treasury Answers Payroll Tax Deferral Questions But Leaves More Unanswered

September 1, 2020

On Friday, Aug. 28, 2020, the Department of the Treasury released Notice 2020-65 (the "Notice") which provides some long-awaited guidance for the payroll tax deferral announced in the Presidential Memorandum issued by President Trump **on August 8**. However, the Notice still leaves critical questions related to administering the deferral unanswered.

The Presidential Memorandum directed the Secretary of the Treasury to defer the withholding, deposit, and payment of the employee's portion of the 6.2% Social Security tax for certain compensation paid from Sept. 1, 2020, through Dec. 31, 2020.

The Notice provides some clarifications regarding the payroll tax deferral. The Social Security taxes on employees are deferred only for employees making roughly \$104,000 annually. The Notice clarifies that the determination of whether an employee exceeds the threshold is made on a pay period-by-pay period basis (roughly \$4,000 for a biweekly pay period). The Notice does not directly address whether bonuses and commissions are included in determining the threshold in only the pay period in which they are received or whether such amounts are attributable to a separate pay period.

To the extent that Social Security taxes are deferred, employers must withhold and pay such taxes ratably from compensation paid between January 1, 2021 and April 30, 2021. The time period for paying the deferred taxes is equal in length to the time period for deferral; thus, the amount of deferral for each pay period should be approximately equal to the amount that must be repaid in a subsequent 2021 pay period. Employers may make other arrangements to collect the deferred taxes if necessary.

A number of material questions are left unanswered by the Notice:

Can employers decide not to defer the Social Security taxes? The Notice does not explicitly answer the question. There seems to be no penalty owed to the IRS if an employer chooses not to defer the taxes.

Can an employee take action to require the employer to defer the taxes? The Notice does not provide relief to employees' for their obligation to pay the tax. Employers may be wary of withholding tax prior to its due date from an employee's wages.

Can an employer permit employees to opt-out of the deferral? Implementing such a program may be administratively difficult. May an employee change a decision to opt-out?

What happens when an employee ceases working for a company prior to collection of all payroll taxes deferred? The Notice obliquely provides that the employer "may make arrangements to collect the total [taxes] from the employee." This suggests the employer may be responsible if it is unable to withhold the deferred taxes from wages paid to an employee during 2021.

May an employer withhold the remaining amount of deferred taxes from an employee's final paycheck? State wage payment laws affect the ability of an employer to do so.

Continued

Employers uncertain about the payroll tax deferral or looking to implement the payroll tax deferral in a manner that should reduce risk are advised to contact the authors of this article or their Miller Canfield attorney.