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TREASURY ISSUES GUIDANCE ON DEFERRAL OF EMPLOYEE SOCIAL SECURITY CONTRIBUTIONS

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On Friday, the IRS released long-awaited guidance on President Trump's previous Executive Memorandum to Treasury Secretary Stephen Mnuchin directing him to defer the collection of the employee portion of Social Security employee payroll taxes.

In the weeks before the guidance, several groups including the U.S. Chamber of Commerce along with over 30 other organizations, and the American Institute of Certified Public Accountants had sent letters to the Treasury with multiple questions and concerns about the deferral. Given the lack of clarity and significant legal issues involved, a number of employers including UPS had announced that they would not be implementing the deferral. Unfortunately, the guidance still leaves many unanswered questions for employers.

Background

President Trump has long wanted to temporarily eliminate employee contributions to Social Security as a means of stimulating the economy; Congress has to this date resisted such a plan. Concerns have been expressed about how this will affect the already impaired solvency of Social Security. Using existing regulatory authority under IRC 7508A, Treasury will simply allow employers, at their option, to delay collecting the contributions from employees, in the hopes that Congress will eventually forgive payment of the contributions altogether.

As employers know, they are required to withhold employee contributions to Social Security, and pay those contributions over to the IRS. 26 USC 3102(a), 3201. Those contributions are ordinarily forwarded monthly or semiweekly, and reported to the IRS quarterly on the 941.

Notice 2020-65

Notice 2020-65, released August 28, 2020, and implementing Presidential Memorandum 8/8/20, allows a delay of payment of the contributions due from September 1, 2020 through December 31, 2020, until the period from January 1, 2021 until April 30, 2021. This essentially provides employers with the option of implementing a four month deferral of collection and remittance of employee social security contributions, if they choose to do so.

The deferral is applicable only to employees whose pay is less than $4000 for a biweekly pay period, and applies on a pay period basis. In other words, if an employee usually makes $8000 per pay period, the employer cannot defer withholding, but if the employee has a pay period where income dips below $4000, the employer can defer withholding on that check.

Notice 2020-65 underscores that **this program is not a forgiveness program but a four month deferral only**. It reiterates the employer's obligation to withhold and pay "ratably" the total taxes deferred in the first four months of 2021. In other words, during the period from January 1, 2021 through April 30, 2021, employers will need to deduct and pay in **both** the normal employee Social Security contributions for that time and the "make up" contributions. If the employer does not pay the deferred taxes owed (regardless of whether the amounts have been recouped from the employee), the Notice makes clear that interest, penalties, and additions to tax begin to accrue on May 1 regarding any taxes unpaid by the Employer.

The Notice is not clear about what an employer may do should an employee leave before the contributions have been made up. It simple states that if necessary, employers may make "arrangements" to "otherwise" collect the taxes from employees. No guidance exists on what those "arrangements" may be, or how an employer should collect from employees who leave employment prior to the "make up" period in first quarter 2021.

Employer Options

Given the continuing uncertainties and the clear liability for the taxes, many employers may choose to continue to withhold and deposit employee Social Security contributions as usual.

Employers who are considering implementing the deferral should consult with their counsel. At a minimum, any employee communication surrounding such deferrals should be carefully crafted so that employees understand that their liability to repay the deferred taxes during the first four months of 2021 in addition to the normal deductions, in other words, double contributions for those four months, absent Congressional action. Employers may want to make that in the form of a writing to be signed by the employee authorizing the additional withholding of up to twice the normal amount of social Security in the Jan – April 2021 period, and may also want written assurances that the employee will reimburse the employer if the employee leaves before it is all paid back.

The IRS guidance, Presidential memorandum and IRS press release can be found at:

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

https://www.irs.gov/newsroom/guidance-issued-to-implement-presidential-memorandum-deferring-certain-employee-social-security-tax-withholding

https://www.whitehouse.gov/presidential-actions/memorandum-deferring-payroll-tax-obligations-light-ongoing-covid-19-disaster/

This Alert was prepared by Cliff Rhodes and was reviewed with Katherine Hesse and Nan ONeill. If you have any questions, please contact the attorney responsible for your account, or call (617) 479-5000.

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