

IRS Provides Guidance on Payroll Tax Deferral

On August 8, 2020, President Trump issued a Memorandum on Deferring Payroll Tax Obligations in Light of the Ongoing COVID-19 Disaster (the Memo). The Memo generally provided that employers could defer payment of the employee's portion of Social Security taxes (currently 6.2%) if certain requirements were satisfied. This deferral is in addition to the deferral of payroll taxes provided in the CARES Act for the employer's portion of these same taxes. See our recent client alert discussing this deferral and other tax changes included in the CARES Act [here](#).

Specifically, the Memo provided the deferral applies to wages paid between September 1, 2020 and December 31, 2020 if the applicable employee's wages are less than \$4,000 bi-weekly (calculated on a pre-tax basis). Unfortunately, the Memo left employers with many questions and waiting for guidance. Most notably, employers were uncertain whether the deferral was mandatory, how and when the deferred taxes would be repaid and who would ultimately be responsible for payment. On Friday, August 28 some guidance was provided by the Treasury in the form of [Notice 2020-65](#) (the Notice).

Most notably, employers have the option to defer taxes. As discussed below, we expect that many employers will continue to withhold these taxes as usual because the employer will ultimately remain liable for payment to the Internal Revenue Service (IRS). Those employers that choose to participate must test each period to determine whether an employee qualifies for deferral, meaning an employee may qualify in one period but not in a subsequent period if their bi-weekly earnings equal or exceed \$4,000.

Although there was some conjecture that the deferred taxes would be forgiven, the Notice confirmed this will not be the case. The taxes deferred during the eligible period must be paid ratably between January 1, 2021 and April 30, 2021. Participating employers will be obligated to deposit taxes with the IRS in the ordinary course. This means employers can't withhold the tax and not deposit even if they expect Congress could repeal the tax. In fact, the Notice specifically states that penalties and interest will apply to unpaid taxes commencing on May 1, 2021.

As noted above, the obligation and liability for any deferred payroll taxes remains with the employer. Therefore, even though the employer could withhold the taxes from the employee for whom it deferred the payroll taxes over the repayment period, if that person is no longer employed during that period the IRS would look to the employer for payment. Given this liability for employers, there is likely to be a disconnect between what employees and employers want. Since the employer remains liable, they take the risk that should an employee leave their employment they will be left without wages to withhold on and be out of pocket for the tax.

Although the Notice says employers can "make arrangements to otherwise collect the applicable taxes from the employee" this would leave the employer in the difficult position of trying to recover money from a former employee. Employers will also need to confirm whether state/local law and/or union contracts could limit their ability to seek repayment.

If you have any questions or concerns regarding your tax obligations, please contact [Erika Wood](#), [Frank Mayer](#), any of the [attorneys](#) in our [Tax Law practice](#), or the attorney in the firm with whom you are regularly in contact.



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