

IRS Issues Guidance on President Trump's Payroll Tax Deferral Executive Order

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On August 8, 2020, President Trump issued an Executive Order to the Secretary of Treasury directing the Department to defer the obligation of employers to withhold, deposit, and pay the employee share of Social Security payroll taxes with respect to certain qualifying employees from September 1, 2020, through December 31, 2020 earning below a threshold amount: \$4,000 per bi-weekly pay period or the equivalent amount with respect to other pay periods. The IRS recently responded by issuing Notice 2020-65 providing limited guidance on implementing the Order.

In its guidance, the IRS explained that the due date for Social Security tax withholding from affected employee wages and payment of those withholdings was postponed until the period from January 1, 2021, through April 30, 2021. During that period, employers would need to ratably withhold additional amounts from employees whose Social Security tax was deferred in 2020 in order to account for the deferral. If the deferred amounts are not paid by May 1, 2021, interest and penalties will begin to accrue. In short, employees may find themselves paying twice the amount of payroll tax during the first four months of 2021.

The question most employers have had regarding this guidance is whether such deferrals are mandatory or permissive. And while neither the Executive Order nor the IRS Notice were explicit in this regard, the consensus among tax professionals is that this is an optional change that an employer may choose to implement based on comments from Secretary of the Treasury Mnuchin shortly after the release of the guidance.

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Although some employers may be interested in implementing this change, the trend we are seeing is that most employers are deciding against it so as to protect employees from incurring the debt and to avoid the administrative burden of adjusting payroll systems to not only defer the Social Security taxes in 2020, but then to recoup those taxes ratably over the first four months of 2021. Finally, both the employer and employee remain liable for the payment of employment taxes and that liability is not extinguished by the deferred due date for the 2020 payroll taxes. As such, employers considering implementing this payroll tax deferral option should consult with their legal counsel and payroll tax professionals so as to determine the feasibility and legalities of such implementation.