

LEGAL UPDATES

More Payroll Tax Deferrals? Weighing the Risks and Benefits of Employers' Options in Light of the President's Executive Order

08/24/2020 | 3 minute read

On August 8, 2020, President Donald J. Trump issued a "[Memorandum on Deferring Payroll Tax Obligations in Light of the Ongoing COVID-19 Disaster](#)" (the "Executive Order^[1]") directing the Treasury Secretary to defer employer withholding, deposit and payment of the 6.2% employee share of Social Security tax on certain wages or compensation paid between September 1, 2020 and December 31, 2020.

The Executive Order states that the payroll tax deferral is only available for employees who receive generally less than \$4,000 in biweekly pretax income or an equivalent amount if paid on a different pay period, with the generally accepted annualized amount having the Executive Order to apply for employees making less than \$104,000.

The Treasury Secretary is directed to issue interpretive guidance, and the Executive Order requests the Treasury Secretary to "explore avenues, including legislation, to eliminate the obligation to pay the taxes deferred pursuant to the implementation of this memorandum." With the limited powers granted to the Treasury Department, it is likely congressional action will be necessary for the deferred payroll tax to be forgiven. We cannot know what the Treasury Secretary's guidance will provide and do not seek to speculate here. Further, we cannot know if Congress will pass measures to provide for forgiveness. Due to these uncertainties, analysis of the actions to take are based solely on the present state of the Executive Order.

The Executive Order does not affect the payroll tax provisions of the CARES Act by which employers may defer payment of the *employer* share of the Social Security tax on wages earned from the effective date of the CARES Act through the end of 2020. You may find Lathrop GPM's coverage analyzing the payroll tax provisions of the CARES Act [here](#).

Significant questions exist concerning the legality of the Executive Order as well as employer obligations with respect to the deferred taxes. Further, there are a number of administrative uncertainties, such as how the Executive Order applies to fluctuating salaries and bonuses and how the deferred tax is to be repaid if it

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is not forgiven. In deciding how to react to this Executive Order, employers have at least two options.

Option 1: Defer Payroll Tax and Increase Employee Paychecks

Employers could participate in the program and pay out the increased wages temporarily with an understanding that they may need to make larger payroll tax withholdings at the end of the year or otherwise seek repayment of such amounts from the employees. Since employers have a statutory obligation to withhold, deposit and pay payroll taxes, however, employers risk being liable for any deferred taxes not repaid by an employee if the obligation to repay the deferred taxes is not subsequently eliminated. Businesses have asked the Trump Administration to issue guidance that only employees are liable for any unpaid taxes. In the absence of such guidance, employers risk ultimate responsibility for any unpaid taxes.

Even aside from the employer's liability for any unpaid taxes, if employers adopt this approach, employees may be upset if their paychecks are significantly lower when their employer later withholds the deferred payroll tax or if they are asked to repay deferred taxes to the employer. And it may be particularly difficult for the employer to recover any deferred taxes from an employee who terminates employment before the end of the year.

Option 2: Normally Withhold Payroll Tax

Treasury Secretary Steven Mnuchin confirmed in an August 12 television interview that employer participation in this program is not mandatory. Given the uncertainty inherent with the Executive Order, and the possibility of Congress passing a comprehensive stimulus bill that may modify the Executive Order, employers may choose to not follow the Executive Order and continue withholding and depositing payroll tax. Indeed, many businesses have decided to take this course, at least until the Treasury Secretary provides additional guidance on the Executive Order, including on the employer's responsibility for any deferred taxes not repaid by the employee. A prudent employer may similarly want to wait to take immediate action to implement the deferral, at least until the Treasury Secretary issues additional guidance, given the practical and legal risks in the first option. This option, however, risks upsetting employees expecting immediately increased paychecks based on the President's Executive Order.

Because the Executive Order applies to wages or compensation paid beginning September 1, it is hoped that the Treasury Secretary's guidance will be issued before the end of August.

For more information, please contact Nicholas Anderson, [Business Transactions Practice Group Chair](#) [Mark Williamson](#) or your regular Lathrop GPM contact.

[1] Presidential memoranda have the same legal effect as executive orders; the only difference is that executive orders are published in the Congressional Record and presidential memoranda are not.