

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

September 3, 2020

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.

On August 28, 2020, Notice 2020-65 (the "Notice") was issued to provide guidance on the implementation of the deferral under the Executive Order. As previously expected, with the limited powers granted to the Treasury Department, no overreach is made to provide forgiveness for the deferred payroll tax. We cannot know if Congress will pass measures to provide for forgiveness. Due to the uncertainty, our analysis of the actions to take are based solely on the present state of the Executive Order and the Notice.

The Notice does provide a process for collection of the deferred payroll tax, namely that employers should withhold the amounts from employees' pay during the period from January 1, 2021 through April 30, 2021. Employers are responsible for ensuring the payroll tax payments are made, so in the event an employee were to leave their position prior to recovery of the deferred payroll taxes, the employer must still make the deferred payments. The Notice further provides that the eligibility is determined on a pay period by pay period basis, so for employees that have fluctuating pay, for example an hourly employee, they may be eligible for deferral in one pay period, but not in all pay periods.

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.

The Notice does not explicitly address whether employers may opt out of the deferral of payroll taxes. Previously, however, Treasury Secretary Mnuchin stated that the program would not be mandatory for employers. Further, the Notice relies upon the authority granted under Section 7508A of the Internal Revenue Code of 1986, as amended, under which the IRS does not have the authority to prohibit an employer from making timely payment of payroll taxes, reinforcing that deferral is voluntary. Given the continuing uncertainty inherent with the Executive Order and the fact that employers retain liability for any deferred taxes not collected from employees, employers could choose not to exercise the deferral under the Executive Order, and instead continue withholding and depositing payroll tax according to their standard schedule. Indeed, many businesses have decided to take this course. If an employer chooses not to defer payroll taxes, it should communicate to its employees why it is not participating in the deferral program.

Alternatively, employers could participate in the deferral program and then make higher than usual withholdings from employee paychecks during the January 1 through April 30, 2021 timeframe. Since employers have a statutory obligation to withhold, deposit, and pay payroll taxes, however, employers will be liable for any deferred taxes that are not able to be withheld from future paychecks or are not repaid by employees if the obligation to repay the deferred taxes is not subsequently eliminated.

If employers participate in the deferral program, an employer should clearly communicate that, absent future legislation to waive the taxes, this is merely deferral of the payroll tax and that the deferred payroll tax will need to be paid by the employee through additional withholding for the first four months of 2021, or, if the employee terminates employment prior to that date, by the employee paying the deferred taxes to the employer. Absent an agreement requiring it, though, employers may find it difficult to recover any deferred taxes from an employee whose employment terminates before April 30, 2021.

A compromise position would be for an employer to offer its employees the option to participate in the deferral, but default on an organizational basis to maintaining regular withholding. This would necessitate educating any electing employee to make sure they understand that the deferred amounts will be collected from their paychecks between January 1, 2021 through April 30, 2021. This may be administratively difficult to implement.

Additionally, employers should consider entering into agreements with electing employees providing that in the event the employee should leave or be terminated prior to April 30, 2021, the outstanding withholding taxes due and/or deferred but unpaid will either be (a) collectable from the final paycheck for the employee, or (b) if the final paycheck does not cover the outstanding amount, covered by a payment by the employee for the shortfall. Such agreement will require evaluation under applicable state laws, including to ensure it does not violate minimum wage laws in the event the shortfall amount causes the employee's final paycheck



to be less than the applicable minimum wage. Further, the evaluation should include examining whether the agreement could impact the employer's position that it is entitled to withhold payroll taxes by law due to limitations imposed by some states on the nature of such agreements.

Our previous guidance on the Executive Order, prior to the release of the Notice, can be found [here](#).

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.