

IRS Notice on Presidential Order Deferring Payroll Tax Obligations Creates Additional Uncertainty

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The Internal Revenue Service has issued [Notice 2020-65](#) to provide guidance on the employment tax deferral that is the subject of President Donald Trump's August 8, 2020, [Memorandum on Deferring Payroll Tax Obligations in Light of the Ongoing COVID-19 Disaster](#).

Pursuant to the Notice, the due date for the withholding and payment of the employee share of Social Security taxes on certain wages is postponed until the period beginning on January 1, 2021, and ending on April 30, 2021. While the Notice provides additional details as to how to determine which wages are subject to the deferral and when the deferred taxes must be repaid, it leaves many questions unanswered and creates potential liability for employers.

What are Applicable Wages?

Pursuant to the President's Memorandum, the deferral may be applied only on wages or compensation paid to an employee during the period beginning on September 1, 2020, and ending on December 31, 2020, where the amount of such wages or compensation paid for a bi-weekly pay period is less than the threshold amount of \$4,000, or the equivalent threshold amount with respect to other pay periods (defined in the Notice as "Applicable Wages").

The Notice clarifies that the determination of whether wages are Applicable Wages is made on a pay period-by-pay period basis. As a result, if the amount of wages or compensation payable to an employee for a bi-weekly pay period is less than \$4,000 (or the corresponding pay period threshold amount for pay periods other than bi-weekly), then that amount is considered Applicable Wages for the pay period and Social Security tax may be deferred on those wages *regardless of the amount of wages or compensation paid to the employee for other pay periods*.

When Do Deferred Social Security Taxes Need to be Repaid?

The Notice provides that an employer must withhold and pay the deferred Social Security taxes "ratably from wages and compensation paid between January 1, 2021 and April 30, 2021" or interest, penalties, and additions to tax will apply. The Notice further provides, "If necessary, the [employer] may make arrangements to otherwise collect the total [deferred taxes] from the employee."

Issues Raised by the Notice

While the Notice does not require employers to defer withholding the employer portion of Social Security taxes on Applicable Wages of all employees to comply with the Notice, it does not address whether employers must honor requests by employees to have their Social Security taxes deferred in accordance with the Notice. [Update: [Bloomberg Tax](#) reported on September 3, 2020, that an IRS representative confirmed during its monthly payroll industry teleconference that employers do not need to

implement the deferral at the request of employees.]

Additionally, the Notice does not release employers from liability for the deferred Social Security taxes if they are unable to collect the deferred Social Security taxes from employees. For example, if an employer is unable to repay the Social Security taxes deferred pursuant to the Notice because the employee is no longer employed by the employer in January 2021, it appears that the employer will need to repay the deferred Social Security taxes from its own funds. While the employer may make other “arrangements” to collect the deferred Social Security taxes from terminated employees, this will not be a practical solution in most cases. Additionally, even where employees remain employed by the employer, employers may face backlash from employees experiencing a potential double deduction in Social Security taxes, particularly during a pandemic.

Employers should work with legal counsel to determine how and when it should implement the guidance in the Notice. Please contact your Jackson Lewis attorney with any questions.

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