

Monthly Minute Memo: *Deferring Payroll Tax Obligations*

On August 8, 2020, President Trump issued a Presidential Memorandum allowing the Secretary of the Treasury to defer the withholding, deposit, and payment of tax obligations under §3102(a) (OASDI) and §3201 (Railroad Retirement Act) of the Internal Revenue Code. This tax deferral applies to wages paid beginning on September 1, 2020 and ends on December 31, 2020. It is important to note, these payroll taxes are only deferred and must be paid back unless legislation is passed by Congress to eliminate the obligation to pay back the deferred taxes.

In accordance with the Presidential Memorandum, on August 28, 2020, the Internal Revenue Service issued guidance implementing the Presidential Memorandum, which contains some minimal information for employers on certain items contained in the Memorandum. However, this guidance fails to answer many questions facing employers regarding this tax deferral.

Are employers required to participate in this tax deferral?

The Office of Management and Budget stated the federal government will defer employee taxes for all eligible government workers. However, neither the Presidential Memorandum nor the IRS guidance specifically addresses whether employers are required to participate. The IRS press release indicates participation is optional for employers. For example, the press release states the Presidential Memorandum “allows” employers to defer withholding and payment of the payroll tax. Additionally, the press release also states that the guidance makes relief “available” for employers during the payroll tax deferral. There is no provision for penalties for employers that do not participate in the tax deferral. Thus, an employer may continue to withhold and deposit employees’ payroll taxes as normal. However, it is unclear whether the IRS may consider the withholding and payment of taxes before the end of the deferral period as an advance payment. Employers should contact their accountant for advice on the implications of advance payments.

Who is eligible for the deferral?

Under the Presidential Memorandum, the deferral is available to any employee whose amount of wages during a bi-weekly basis is “generally” less than \$4,000 calculated on a pre-tax basis. However, the IRS selected more precise language, eliminating “generally” and stating an employee making less than \$4,000 in bi-weekly payroll period qualifies for the deferral. However, employees with variable pay (commissions, overtime, or a bonus) could be eligible for deferral in one payroll period and not eligible in the next payroll period. This will require the employer’s payroll system to be able to turn on and off the deferral as employees rise above or drop below the threshold.

Can an employee opt-in or opt-out of the deferral?

The definition of “affected taxpayer” in the guidance only includes employers. The guidance does not designate an employee as an affected taxpayer. Thus, it is unclear whether an employee can request the employer to participate in the deferral or whether the employee may opt-out of the deferral if the employer participates.

At the end of the deferral period, how are the taxes paid?

The Presidential Memorandum mandates the Secretary of the Treasury to explore avenues, including legislation, to eliminate the obligation to pay the taxes deferred. However, the guidance only addresses payment of the taxes at the end of the deferral period. In particular, the guidance states that employers must withhold and pay any deferred payroll taxes from employee wages and compensation paid from January 1, 2021 through April 30, 2021 on a ratable basis. Taxes not paid will accrue penalties and interest on May 1, 2021.

Not addressed in the guidance is the situation in which the employee, who owes deferred taxes, terminates employment, has a leave of absence, or does not have sufficient wages in 2021 to cover the previously deferred employee taxes. The guidance only provides an employer may “make arrangements to otherwise collect the total applicable taxes from the employee.” However, employers need to be mindful of federal and state wage payment laws before attempting any deduction from a final paycheck or taking any action against an employee for the taxes owed.

As of the date of this publication, some senators and representatives recently challenged the Payroll Tax Deferral. We will continue to monitor this situation and will provide updates including any new guidance that may be issued by the Treasury Department. **Employers should work closely with their accountants to ensure compliance with the IRS guidelines regarding this tax deferral.**

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