

IRS Releases Guidance for Deferral of Employee Social Security Tax Withholding

On August 28, 2020, the Department of Treasury and IRS issued [Notice 2020-65](#), implementing President Trump's August 8 Executive Order, regarding the deferral of withholding and payment of the employee portion of the Social Security tax ([see our article on the Executive Orders](#)). The Executive Order applies beginning September 1, 2020 through December 31, 2020, for employees earning less than \$4,000 during a bi-weekly period.

There is some confusion regarding whether this Order *permits* or *mandates* employers to defer (not withhold) these taxes for employees under the threshold. The IRS' August 28 news release **implies it is optional for employers to comply with the Order.**



Per the Notice, any payroll taxes that are deferred through the end of the year must be repaid "ratably from wages and compensation paid" during the period between January 1, 2021 and April 30, 2021. Otherwise, interest, penalties, and additions to tax will begin to accrue on May 1, 2021. It **appears** that because the employer is defined as the "Affected Taxpayer" in the Notice, **the tax liability could fall on the employer.**

The primary concerns with permitting employees to defer taxes for the remainder of the year are:

1. Employees may forget that this is a deferral - essentially a loan - that must be repaid next year (unless Congress acts to make it an exemption, or otherwise forgivable), and be upset that they are essentially receiving a pay cut next year.
2. Employees could leave employment prior to the end of 2020, potentially leaving the employer on the hook for their tax liability. However the employer may "make arrangements to otherwise collect the total Applicable Taxes from the employee", presumably in the form of a written contract (but note that may not be practical).

On the other hand, if the employer continues to withhold as usual and Congress eventually decides to forgive those taxes, employees will certainly be upset they missed the savings.

We recommend speaking to a qualified attorney for specific guidance before changing any current withholding from employees' paychecks.

This memo is intended only as a summary and general overview. If you have any questions or would like legal advice regarding the above or any other employment issue, please contact [David Lawrence](#) or [Stacey DiDomenico](#).