

PUBLICATION

Executive Order "Deferring" Taxes: What Are The Employer's Options?

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On August 8, 2020, President Trump issued the Memorandum on Deferring Payroll Tax Obligations in Light of the Ongoing COVID-19 Disaster (Order). The Order directs the Secretary of Treasury to defer the "withholding, deposit, and payment" of the employee's share of FICA taxes funding Social Security for the period of September 1, 2020, through December 31, 2020 (Deferral Period). Under the Order, that deferral "shall be made available with respect to any employee the amount of whose wages or compensation, as applicable, payable during any bi-weekly pay period generally is less than \$4,000, calculated on a pre-tax basis, or equivalent amount with respect to other pay periods."

The Order instructs Treasury to issue guidance as to the deferral, while also stating the intent to "explore avenues, including legislation" to forgive the deferred taxes.

Possible Employer Options

With only a couple of weeks before the beginning of the Deferral Period to assess and implement any payroll changes, employers are understandably struggling to determine their obligations and risks once the Order is implemented by the Secretary. While we await guidance from Treasury, as well as the outside possibility of Congressional action, employers need to now consider their response to the Order. Predicting the future is impossible, but our present expectations are that employers are faced with the following options in regard to the Order:

1. *Cease Withholding Social Security Taxes for the Deferral Period.* Treasury's guidance, when issued, may clarify that the deferral is mandatory rather than optional. If so, the employer may not have any choice but to cease withholding these taxes and hope that Congress will eventually pass legislation waiving the deferred taxes. If Congress fails to act, then the deferred taxes remain payable and the employer would either have to claw back money from employees or use its own assets to pay each employee's share of deferred taxes (on top of the gross pay for which other employment taxes have already been remitted). Compounding this analysis even further, any such taxes paid by an employer on behalf of the employee could very well be considered as taxable income to the employee.
2. *Withhold Social Security Taxes But Not Remit to the IRS.* This option is dangerous since withheld employment taxes are subject to trust fund responsibilities – one of which being that the employer must remit the withheld taxes or face various penalties. So, an employer withholding such taxes but not remitting those taxes to the IRS would not only be defeating the purpose of the Order as it would deny any current benefit to employees, but also would be exposed to enforcement actions by the Service. Separately, there is a risk that the withheld but unremitted amounts could inadvertently create a non-compliant ERISA benefit plan.
3. *Continue Withholding and Remitting All Employment Taxes.* Assuming the Treasury's guidance does not characterize the Order as mandating a deferral, an employer could continue to withhold the Social Security and other payroll taxes and remit those taxes as the employer is presently doing. Continuing the status quo would deny any benefit to employees and therefore defeat the purpose of the Order. However, the risks of enforcement by the Treasury would seem less threatening than the risks an

employer would undertake in following either of the options referenced above. Further, even if Congress acts to provide a tax holiday, the result of this option would only be an over-withholding of payroll taxes. Over-withheld employment taxes can be corrected by the employer filing a Form 941-X or by allowing the employee to handle his/her overpayment on an individual tax return or refund claim.

Other Issues

Aside from the above options, and as we await further clarity from Treasury (and an outside possibility of Congressional action), there are a number of other issues that need to be addressed if the employer decides to implement the deferral. Some of these issues include:

- How are eligible employees determined if wages are paid on non-bi-weekly periods?
- How are bonuses, overtime pay and other extraordinary wages/compensation to be considered in the \$4,000 per bi-weekly pay period analysis?
- How does the 2020 leap year – with an extra period of compensation – impact the compensation limits?
- What are the employer's obligations if an employee is not still employed at the end of the Deferral Period, no tax holiday has been authorized, and the employer cannot locate the employee who received the benefit of the deferral?

Conclusion

Many issues relating to the Order are very complex. Before acting upon or in regard to the Order, careful consideration must be given to your particular fact situation.

Baker Donelson stands ready to assist businesses of all sizes in understanding and complying with this Order. If you have any questions regarding this Order, please contact [Andrea Powers](#), [David Webb](#), [Carl Hartley](#) or any member of the [Firm's Tax Group](#). In addition, please visit our [Coronavirus \(COVID-19\): Navigating the Path Ahead](#) information page on our website.