Late in the afternoon of August 28, 2020, the Internal Revenue Service (IRS) issued Notice 2020-65 (the Notice) implementing the deferral of employers’ obligation to withhold and deposit with the IRS the employee portion of certain social security (and related railroad retirement) taxes imposed under Sections 3101(a) and 3201(a) (FICA Withholding Taxes) of the U.S. Internal Revenue Code of 1986, as amended (the Code). The Notice follows President Trump’s August 8, 2020, executive memorandum (the Memo) directing the IRS to issue such guidance, and the deferral period begins on September 1. While the Notice specifies how FICA Withholding Tax deferral is to be effected and how deferred amounts are to be collected, a number of significant questions remain unanswered just days before employers are to implement it.

In particular, consistent with the Memo, the Notice defers an employer’s withholding and deposit obligations with respect to FICA Withholding Taxes otherwise due on amounts paid during the period between September 1 and December 31, 2020, to
employees who receive less than $4,000 of wages and other taxable compensation for a particular bi-weekly pay period (Applicable Wages). Determining whether payments made to an employee will constitute Applicable Wages (and, if so, how much) is made on a period-by-period basis.

In what may be a significant (and unwelcome) surprise to many given that Treasury Secretary Mnuchin reportedly said on August 12 that any FICA Withholding Tax deferral would be at the employer’s option, the Notice does not explicitly provide for employer discretion regarding its implementation. Instead, the Notice solely stipulates that the due date for withholding and payment of applicable FICA Withholding Taxes is postponed for all employers and does not clearly authorize employers to unilaterally decide to forego such deferral by continuing to withhold such amounts from Applicable Wages.

Absent further action, any FICA Withholding Taxes deferred under the Notice will be due by April 30, 2021, with interest, penalties and additions to tax accruing on unpaid amounts from May 1, 2021. Moreover, the Notice establishes that employers (and not employees) will be primarily responsible for the payment of any FICA Withholding Taxes deferred under the Notice. While the Notice provides that such liability should generally be satisfied via ratable withholding from wages and other taxable compensation paid between January 1 and April 30, 2021, it authorizes employers to “make arrangements to otherwise collect [such amounts] from the employee.”

**Next Steps for Employers to Consider Now**

The questions and concerns raised by the Notice, and the practical implications associated with implementation of the FICA Withholding Tax deferral apparently required for pay periods starting September 1, will ultimately depend on an employer’s particular facts and circumstances. However, given the absence of any clear authority under the Notice (or the Code) for an employer to disregard the FICA Withholding Tax deferral, the more prudent course of action for employers at this time may be to:

1. Provide eligible employees the opportunity to elect to have any FICA Withholding Taxes on Applicable Wages deferred until the period beginning January 1, 2021

2. Clearly inform such employees that any deferred amounts will be collected via increased withholding from applicable paychecks between January 1 and April 30, 2021

3. Require any employee that opts into such deferral to agree that, if the employee’s employment with the employer terminates before April 30, 2021, the employer will be entitled to recover from the employee any deferred FICA Withholding Tax amounts that remain unpaid at the time of such employee’s departure through (a) withholding of the entire unpaid amount from the employee’s final paycheck and (b) if the final paycheck amount is insufficient to cover the remaining unpaid amount in full, obtaining a payment of that shortfall from the employee.
Of course, given the compressed time frame, there may be practical obstacles to the implementation of these steps. It is also possible that further guidance may be forthcoming from the Department of the Treasury on the subject, because it seems likely that this Notice – issued at the eleventh hour – will trigger significant comments and questions from payroll providers and other interested parties.

Although time is short, employers should discuss the considerations associated with any course of action being considered in light of the Notice with their tax advisors prior to effecting any deferral.

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