Monday, August 31, 2020

On August 8, 2020, President Trump issued an executive order calling for a deferral of the employees’ portion of the payroll tax (the 6.2% Social Security tax only) from September 1, 2020 through December 31, 2020 (the “Order”). At the time the President issued the Order, he called on the Secretary of Treasury to “explore avenues” including Congressional legislation, to “eliminate the obligation to pay the taxes deferred” (i.e., forgive the amounts). Congress has not yet done so.

Since the release of the Order, accounting firms and employers have been asking the Treasury Department for guidance on implementation of this deferral. On August 28, 2020, four days before the deferral becomes effective, the Internal Revenue Service and Treasury Department released scant guidance on this deferral (the “Guidance”).

As set forth in the Guidance, employers are responsible for both the deferral and future collection of the deferred taxes. Employers are authorized to defer withholding the Social Security tax portion of FICA for employees for pay dates occurring between September 1, 2020 and December 31, 2020 (the “Deferral Period”) but are still required to withhold and remit the employee portion of the Medicare tax. Only employees who earn less than the threshold amount of $4,000 for a bi-weekly pay period are eligible for the deferral for that pay period. The Internal Revenue Service (“IRS”) recognizes that the deferral may apply to an employee...
during some but not all pay periods in the Deferral Period. The amounts deferred pursuant to the Guidance are to be withheld and remitted by the employer ratably from the affected employee’s pay during the period between January 1, 2021 and April 30, 2021 (the “Repayment Period”). After April 30, 2021, the employer will be subject to penalties and interest with respect to any unpaid, deferred taxes.

Unfortunately, the Guidance leaves significant questions unanswered. For example:

- Can employers opt-out of the deferral entirely? Presumably, the answer is yes. The Guidance delayed the employer’s deadline for paying the Social Security taxes, but did not mandate that employers adopt the deferral. In addition, the Secretary of the Treasury Steven Mnuchin said that the deferral would be optional for employers in an interview in mid-August.

- If an employer implements the deferral, can employees opt-out of the deferral?

- What arrangements can an employer make to collect the deferred taxes from employees on the payroll?

- What arrangements can an employer make to collect the deferred taxes from employees who are no longer on the payroll during the entirety of the Repayment Period in 2021? The Guidance somewhat cryptically states that “If necessary, the [employer] may make arrangements to otherwise collect the total [deferred taxes] from the employee,” implying that the cumulative deferred taxes could be taken from the employee’s final paycheck, if permitted by state wage payment laws.

Additionally, on Friday, the National Finance Center, which handles payroll for more than 600,000 federal workers, said that it will begin deferring taxes for employees who are eligible for the deferral without giving them the option of opting out. Despite this signal from the federal government about its own interpretation of the Guidance, most tax experts are advising employers against implementing the deferrals. Additionally, employers (and third-party payroll providers) have not had time to implement software changes to payroll systems required to handle this change in withholdings. Therefore, at this time, without any guarantee that the deferred amounts will be forgiven, and based on the burden that the Guidance places on the affected employers to collect the deferred amounts in the future, employers who implement the deferral may be liable to the IRS for such amounts.

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