

Tax Practice**To Defer or Not to Defer—Efficacy of President Trump’s Payroll Tax Memorandum**

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Introduction:

Employers, payroll processors, and their advisors are essentially ignoring the President’s payroll tax deferral [memo](#), and Treasury’s limited [guidance](#), as unworkable. One employer, however, seems undeterred by the concerns plaguing private employers—the federal government. Senior federal officials announced that the federal government, as an employer, will implement the President’s payroll tax deferral. See <https://federalnewsnetwork.com/pay/2020/08/trump-aiming-for-late-september-launch-of-payroll-tax-deferral-for-federal-employees/>.

For now, the federal government appears to be an outlier in plans to adopt the deferral. News outlets report that employer groups and employers are, in general, not planning to implement the deferral despite Treasury’s recent guidance. See e.g., US Chamber of Commerce, <https://www.uschamber.com/letters-congress/coalition-letter-the-executive-order-deferring-payroll-tax-obligations> (given the burdens on employees and employers under current guidance “many of our members will likely decline to implement deferral, choosing instead to continue to withhold and remit to the government the payroll taxes required by law”); <https://www.wsj.com/articles/trump-payroll-tax-deferral-leaves-employers-wary-as-plan-starts-11598958000> (“many employers are unlikely to adopt the policy”).

The payroll tax deferral memo would give employees a short-term boost in take-home pay; one that will be required to be paid back next year—effectively resulting in a short-term interest free loan to employees. In a political sense, the payroll tax deferral appears to be an attempt to break a legislative logjam and probably intended to boost the President’s approval in the months before the November election. So far, the deferral is not likely to benefit many private employers and employees. The obligation to repay deferred payroll taxes, administrative and implementation burdens, and employers’ ultimate risk of repayment have made the program unpalatable. And the potential political benefits appear to be muted by a general sense that the payroll tax deferral is unworkable and will not be widely implemented.

In this Alert, we summarize the memorandum and Treasury guidance, answer some basic questions about the program, and describe the reasons why employers are wary and are unlikely to implement the deferral.

President’s Memorandum:

President Trump’s memorandum (not an executive order) of August 8, 2020, directed the Secretary of the Treasury to issue guidance for the deferral of the “withholding, deposit, and payment” of the employee’s portion of the Social Security tax (imposed by 26 U.S.C. 3101(a)) and Railroad Retirement Tax (imposed by 26 U.S.C. 3201) and to “explore avenues, including legislation, to eliminate the obligation to pay the taxes deferred pursuant to the implementation of this memorandum.” Presidential Memorandum, <https://www.whitehouse.gov/presidential-actions/memorandum-deferring-payroll-tax-obligations-light-ongoing-covid-19-disaster/>. The employee tax at issue is the 6.2% tax imposed on and

withheld from employee wages up to \$137,700 in 2020. Employers pay a matching 6.2% tax on employee wages and the CARES Act provided a different deferral opportunity for those taxes.

The deferral is to be “[made] available” without penalties, interest, or additional amounts for any employee whose:

- wages or compensation payable during any bi-weekly pay period is generally not more than \$4,000, calculated on a pre-tax basis, or the equivalent amount with respect to other pay periods (generally less than \$104,000 annually), and
- paid during the period of September 1, 2020, through December 31, 2020.

The memorandum states that it does not create, in law or equity, any private right of action against the government “or any other person.” *Id.*

Treasury Guidance:

On Friday afternoon, August 28, 2020, just one business day before the deferral period start date, Treasury issued Notice 2020-65 purporting to implement the deferral as ordered in the memorandum.

Under the Notice:

- The due date for employers to withhold and pay the employee’s portion of Social Security taxes (and related Railroad Retirement Tax) on wages paid from September 1, 2020, through December 31, 2020, is “postponed” to the period beginning January 1, 2021 to April 30, 2021;
- Employers are instructed that they “must” withhold and pay any postponed taxes “ratably from wages and compensation paid between January 1, 2021, and April 30, 2021, or interest, penalties, and additions to tax will begin to accrue on May 1, 2021”; and
- Employers are held liable for any deferred amounts not paid in full by May 1, 2021.

The Notice also allows employers to “make arrangement to otherwise collect the [taxes] from the employee,” but it provides no guidance on what those alternative arrangements can be and there is no integration with wage and hour requirements that might make recovery complicated or difficult.

Practical Application of the Deferral Guidance:

Deferral: As currently formulated, employers may, *but are not required to*, defer the withholding, deposit and thus payment of the employee’s portion of the Social Security tax (6.2% of wages) or related Railroad Retirement Tax for their employees making less than \$104,000 annually starting with wages paid on September 1, 2020, and through the rest of 2020 to December 31, 2020. At the maximum wage deferral threshold of \$4,000 for a bi-weekly pay period, the deferral amount is about \$248 per bi-weekly pay period ($.062 \times \$4,000$) for a total of about \$1,984 to the end of 2020 assuming eight remaining pay periods.

Repayment: The deferred amount must be repaid in full on or before May 1, 2021. The Notice requires employers to withhold the postponed taxes ratably from their employees’ wages and compensation starting January 1, 2021, through April 30, 2021.

Repayment is made by withholding the deferred amount ratable from the employee’s wages in the first four months of 2021, effectively resulting in double tax withholding starting January 1, 2021—the repayment of the 2020 deferred amount and the required withholding for the 2021 pay period. Assuming the deferral of \$248 per pay period starting September 1, 2020, an employee could have \$496 withheld every pay period in the first four months of 2021 in Social Security tax or Railroad Retirement Tax, to repay the deferral and make their current tax payments.

The President stated an intention to forgive taxes deferred under the memo if he is re-elected, though he would presumably need Congress to accomplish that result.

Alternative Repayment Authorized: Employers are legally liable for the deferred taxes, as well as interest and penalties for late payments and non-payment. Inability to collect from employees, whether due to a separation from service, inability to afford the additional withholding in 2021, or otherwise, will not excuse the employer's payment obligation. Employers are allowed to implement an alternative to double withholding, but no alternative has been suggested by Treasury.

New Payroll System May Be Required: Because the wage limitations applicable to the deferral are not the same as those applicable to the Social Security wage base limits, employers and payroll service providers will likely have to create a separate withholding system for their employees making less than \$104,000 annually if they want to implement the deferral. That separate scheme would have to include an override or exclusion for employees making more than the deferral maximum. We understand the payroll system requirements alone are enough to cause large employers to opt out of the deferral program.

Employees Likely Unable to Make Participation Elective: A decision made by the employer will impact all employees who receive wages eligible for the deferral. Given the intricacies of implementing a new payroll system, large employers may not be able to allow individual employees to opt in or out of deferral. The Treasury Notice allows for deferral but is silent on the decision process (though the IRS confirmed the program was optional through one of its lawyers in a conference call on September 3, 2020) and the withholding obligation is, by law, one imposed on the employer so the employer is the ultimate decider on whether to implement the deferral. In the federal government's implementation of the deferral for federal employees, the deferral applies to all employees at an eligible wage level. Federal employees do not have a choice. It should be noted that some federal employees, those in the Civil Service Retirement System (CSRS), will presumably not be impacted because they generally do not withhold Social Security taxes.

Wait and See: Experience with the PPP and other COVID-related programs this year and intermittently released guidance from Treasury may cause some employers to take a "wait and see" approach to implementing the deferral. Some may even consider continuing to make withholdings but to hold on to the money until near the end of 2020 to decide whether to formally defer the withholding.

We do not advise that employers withhold from their employees *and* hold on to that money while they await further guidance. Although the date to withhold and pay has been deferred, there is a risk that the two cannot be separated—that withholding starts the clock for a payment obligation. By law, withheld amounts are "a special fund in trust for the United States." Treas. Reg. §31.3202-1(e). Timing requirements arise and penalties for the failure to deposit can be imposed under section 7501 of the Internal Revenue Code when deposits are not made timely. Without further guidance from Treasury, withholding and not immediately paying employee-side Social Security tax is not advisable and could subject the employer to interest and penalty charges.

Federal and State Wage and Hour Consideration in Adopting Alternative Repayment Mechanism: Employers might want to explore alternative repayment plans. It is important to recognize that any alternate plan will be considered a loan from the employer to the employee in 2020 and repayment of a debt in 2021, subject to repayment restrictions under wage and hour laws. Wage and hour law impact, and tax issues raised by any forgiveness of a debt by the employer that can create additional tax issues for employers and employees, are issues that are beyond the scope of this alert. Our employment and tax teams are able to discuss these issues in depth for any employer considering an alternative repayment plan. Please feel free to reach out to anyone listed below for additional guidance.

Conclusion:

Each practical concern described above is a reason why employers have so far chosen not to implement the payroll tax deferral set out in the President's memorandum. There is a significant administrative burden, employees will be burdened by double tax withholding in 2021, and employers ultimately remain liable for repayment.

Conscious of the human, operational and financial strain that coronavirus is placing on businesses and organizations worldwide, Jenner & Block has assembled a multi-disciplinary Task Force to support clients as they navigate the legal and strategic challenges of the COVID-19 / Coronavirus situation.

For additional information and materials, please visit our COVID-19 / Coronavirus Resource Center.

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