



Payroll Tax Deferral Starting September 1

On August 8, 2020, President Trump issued a Presidential Memorandum directing the Secretary of the Treasury to defer the withholding, deposit, and payment of certain payroll tax obligations. On August 28, 2020, Treasury issued Notice 2020-65 pursuant to the Presidential Memorandum. Notice 2020-65 requires the immediate attention of employers.

The Notice postpones the due date for withholding, deposit and payment of employee-side taxes imposed under Section 3101(a) (FICA) and corresponding taxes under Section 3201 (RRT). The Notice applies to taxes that among other things meet the following criteria:

- Are incurred during a pay period in which the employee earned less than the equivalent of a \$4,000 bi-weekly paycheck on a pre-tax basis
- Are incurred for pay periods September 1, 2020 through December 31, 2020

The withholding and payment of these taxes is deferred until 2021 and, unless forgiven under future legislation (which the Presidential Memorandum contemplates as a possibility but cannot technically implement without Congressional involvement), the deferred amounts must be paid ratably between January 1, 2021 and April 30, 2021. The Notice also authorizes employers “if necessary” to “make arrangements to otherwise collect the total Applicable Taxes from the employee.”

The Notice raises several important questions for employers, including the following:

- What happens if the employment relationship terminates before the deferred amounts are paid?
- Is the employer still responsible for the taxes?
- What “other arrangements” may the employer make to collect the taxes?
- What employment law questions arise in terms of what the employer can do to recover the deferred amounts against a former employer?
- May an employer permit taxpayers to opt out of the deferral program?
- May an employer require that employees opt-out, i.e., withhold and remit as usual, either as to all employees that qualify for deferral or to certain such employees?
- If an employee asks to opt-out of the deferral program, may an employer decline?
- What types of wages and compensation qualify for deferral and for meeting the \$4,000 bi-weekly equivalent cap?
- Are there ways to reduce the burden of implementing the Notice?
- May the validity of the Notice be challenged, either due to the authority exercised in the announcement and implementation of Notice 2020-65, or the breadth of the Notice’s application to employers?

In the coming days – and surely the months leading up to the elections – there will be debate about the effectiveness, administrative burden, and wisdom of the payroll tax deferral. In the very short-term (the next 4 months), it should increase the amount of the paycheck that certain employees receive. Longer-term, the impact and burden of the deferral depends largely on whether the deferred amounts are forgiven.

Without forgiveness, employees who received the deferral will likely face double-withholding for the first quarter of 2021, and questions will arise whether the employer is left holding the bag if an employment relationship terminates prior to repayment. There are other micro and macro-economic effects, and politics at play.

Setting aside the tax policy and political debates that will inevitably surround the payroll tax deferral, there are very real and immediate practical issues that most employers need to address. This Client Alert only scratches the surface of questions the Notice raises. Attorneys at Chamberlain Hrdlicka welcome the opportunity to assist clients in

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