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IRS Issues Guidance on Presidential Memorandum Payroll Tax Deferral Opportunity

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Hinshaw Alert

President Trump issued a Presidential Memorandum on August 8, 2020, directing the U.S. Secretary of the Treasury to use his authority to defer the "withholding, deposit and payment of certain tax obligations." This includes the employee share of certain payroll taxes—employee Social Security taxes and Medicare taxes—on wages or compensation paid from September 1, 2020, through December 31, 2020.

In an effort to provide guidance regarding the Memorandum, on August 28, 2020, the IRS issued Notice 2020-65.

Highlights of the Notice:

1. Employers may defer the withholding, deposit, and payment of the employee share of payroll taxes, which is 6.2% of applicable wages paid from September 1 to December 31, 2020. The due date for withholding, as well as payment of the deferred employee payroll taxes, is postponed until the period beginning January 1, 2021, and ending on April 30, 2021. If employers decide NOT to defer, they must continue to withhold the employee payroll taxes and deposit such taxes as currently set forth in IRS regulations. There are no penalties for an employer that opts out of the deferral, indicating that the program is optional, not mandatory.
2. The Notice confirms that the deferral opportunity applies to wages paid to an employee on a pay date from September 1, 2020 to December 31, 2020. Further, the Notice clarifies that this deferral opportunity only applies to wages that are LESS than $4,000 bi-weekly, or the equivalent amount with respect to other pay periods. Amounts excludable from wages generally are not included when determining applicable wages. The determination of applicable wages is to be made on a pay-period by pay-period basis. Employers will need to track wages to ensure compliance.
3. The Notice requires employers to withhold and pay the deferred taxes from future wages paid during the period between January 1, 2021 and April 30, 2021. Interest, penalties, and additions to tax will begin to accrue on unpaid taxes starting May 1, 2021. The Notice clearly places the liability for the deferred amounts on the employer, stating that if necessary, the employer may make arrangements to otherwise collect the total deferred taxes from an employee (for example, in the case of an employee who terminates employment, the employer must make collection arrangements as it remains liable for the deferred taxes). Employers who decide to implement

Attorneys

Anthony E. Antognoli

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this payroll tax deferral need to consider that employees' net pay in the first third of 2021 will be reduced, because of the past and current employee portion payroll taxes that will need to be withheld. Employees should be made aware of such consequences.

The Notice does not, however, address the following questions relevant to employers:

1. What if some employees desire deferral and some do not? Do employers really want to implement changes that some of their employees do not want?
2. Should employers ask employees if they want to participate? How would such participation be tracked?
3. What if an employer's payroll or bookkeeping system is not set up for the issues related to the deferral? Payroll system changes will be convoluted as taxes are generally set up for a year based on a wage base, and changes in the middle of the year may be confusing to implement. Further, if an employee goes over the $4,000 threshold, the calculations and record-keeping can also get muddled.
4. How should employers reflect the deferral on Forms 941 and W-2?

While the benefits of the deferral intended by the IRS are clear—employees will have more cash in their pockets during these uncertain times—it comes with conditions that may make the new program undesirable for both employers and employees.