

## Payroll Tax Holiday Guidance Leaves Employers Guessing

Alert

09.01.2020

By Mark Wilkins and Phil McKnight

On August 28, 2020, the Internal Revenue Service issued [Notice 2020-65](#) in response to President Trump's memorandum directing the Department of Treasury to defer certain payroll tax obligations through December 31, 2020. While the additional clarity provided is helpful, many employers may not find the payroll tax deferral program desirable enough to implement without additional guidance or legislation allowing for forgiveness of the deferred taxes. No such additional guidance or legislation has been issued or proposed as of the date of this publication.

What do we know today about the payroll tax holiday option?

Based on the notice, we know that an employer can postpone the withholding of the employee's portion of the OASDI (Social Security) payroll tax (6.2% of wages up to the Social Security wage base) on "applicable wages" until the end of this year. Beginning on January 1, 2021 and ending on April 30, 2021, the employer would have to catch up any deferred payroll taxes in addition to the normal 2021 FICA taxes. The relief is not applicable to the Medicare portion of FICA (which is 1.45% of eligible wages). Similar relief is available for employers subject to the Railroad Retirement Tax Act (RTTA).

Although the notice itself is silent on whether the postponement is elective or mandatory, Code Section 7508A, the statutory authority relied upon in postponing the deadline, only allows the Secretary of Treasury to extend the due date. It does not permit the Secretary to prohibit the collection of the payroll tax. The Department of Treasury press release accompanying the notice also indicates that the payroll tax holiday is elective. Accordingly, we believe that employers are not required to cease withholding the Social Security payroll tax (or RTTA) under the guidance.

## Payroll Tax Holiday Guidance Leaves Employers Guessing

We also know which wages the notice applies to if an employer elects to take advantage of the relief. The relief is available for a payroll period only if the payroll period is between September 1, 2020 and December 31, 2020, and the amount paid during the payroll period is less than \$4,000 (assuming a bi-weekly pay period). Accordingly, the applicable wage limitation could apply in one payroll period if that payroll amount is less than \$4,000 but would not be applicable if the same employee's next payroll wages were \$4,000 or more (due to the payment of a bonus, for example). Employers wishing to implement the payroll tax deferral program will therefore need to closely track whether the limitation is exceeded in any pay period as a result of variable compensation paid.

The notice only applies to employers that are required to withhold and pay the payroll tax; it does not apply to employees. In other words, employees do not have an independent right to demand that the withholding and payment of the payroll tax be deferred. That being said, if an employer elects to take advantage of the relief, nothing in the notice would prohibit an employer from allowing each employee to choose whether or not they wish to participate in the payroll tax deferral program.

What questions are still outstanding and what do we think most employers are going to do at the present time?

Key questions still remain relating to how to treat an employee who terminates employment before full repayment. The notice does include language that employers may make arrangements to collect the total deferred taxes. Employers therefore appear to be able to recover the deferred amount from an employee's final paycheck. But additional guidance would certainly be helpful. Based on internal discussions with our clients, there does not appear to be broad appetite among employers at this time to implement the payroll tax deferral. Some of the concerns are as follows:

- The notice merely postpones the payroll tax until the first trimester of 2021. To make up for the payroll tax deferred, the employer would need to withhold the deferred payroll taxes from wages paid in 2021. The additional taxes withheld in 2021 would be a financial burden for those employees that live paycheck-to-paycheck.
- As discussed above, employers will need to carefully track whether the wages paid in the payroll period are below the \$4,000 wage limitation. Implementing procedures and coordinating with the payroll provider is an additional administrative burden, especially for a relatively short three-month window.

Employers that wish to implement the payroll tax deferral should carefully consider how to communicate the potential savings and repayment obligations to employees. Employers should also coordinate how to implement the terms of the notice with their payroll providers.

For more information on the payroll tax deferral program and to evaluate implementing this, please contact Jeff Cairns, [Tom Dowling](#), [Audrey Fenske](#), [Phil McKnight](#), [Mark Wilkins](#) or the Stinson LLP contact with whom you regularly work.

# Payroll Tax Holiday Guidance Leaves Employers Guessing

## CONTACTS

Philip C. McKnight

Mark P. Wilkins

## RELATED CAPABILITIES

Employee Benefits

Labor, Employment & Benefits

STINSON

STINSON LLP \ STINSON.COM