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Treasury Issues Guidance on Elective Deferral of Employee Social Security Tax Withholding

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On August 8, 2020, President Trump issued a memorandum directing the Treasury Department to enable employers to defer withholding and payment of employees' share of social security taxes. (See our August 11 *Alert*: Deferring Social Security Tax Withholding.) On August 28, 2020, Treasury released Notice 2020-65 (the **Notice**) implementing this directive.

The Notice confirms that employers can defer withholding and payment of an employee's share of social security tax on eligible compensation paid between September 1, 2020 and December 31, 2020. Compensation is eligible for this deferral if the amount paid for a bi-weekly period is less than $4,000 (or the equivalent amount with respect to other pay periods).

Although not expressly stated in the Notice, employers are not required to allow employees to take advantage of the deferrals. For employers who allow their employees to take advantage of this deferral, the deferred taxes are generally required to be withheld and paid from compensation paid to the employee between January 1, 2021 and April 30, 2021, or else interest, penalties, and additions to tax will accrue beginning on May 1, 2021. Under this default process, no social security taxes would be withheld from electing employees for the remainder of 2020, the aggregate amount of deferred taxes would then be divided by the number of pay periods for that employee between January 1, 2021 and April 30, 2021 and that calculated amount would be withheld from the amount otherwise payable for each of those pay periods. Despite this default process to collect the deferred taxes, employers may make alternative arrangements to collect the deferred taxes from an employee.

As we addressed in our prior alert, under current law employers are ultimately responsible for payment of the deferred tax liability. The Notice does not alter this employer liability. Therefore, an employer that offers this deferral option to an employee is assuming the risk that the employer will be required to pay the deferred taxes but will not be able to collect them from the employee (for example, because the employee terminates their employment prior to payment of the deferred tax). Under the Notice, an employer is able to mitigate this risk by entering into an agreement with an electing employee authorizing the employer to withhold the taxes from other compensation, such as the employee's final paycheck in the event of employment termination, or a year-end bonus payment. While such an arrangement may reduce an employer's risk, it would not eliminate the risk in all cases. For example, an employee who quits without notice may receive his or her final paycheck before the employer realizes it had paid the final check for the employee.

We are continuing to monitor developments on deferral of employee social security taxes. Please contact your Vorys attorney with any questions.