

Treasury and IRS Issue Guidance About Deferring Certain Payroll Tax Obligations That Raises More Questions Than It Answers

As promised, we are updating our [last](#) communication now that the U.S. Department of the Treasury (“Treasury”) issued [guidance](#) about the Executive Order permitting employers to defer employee social security tax withholding. The Executive Order goes into effect on September 1, 2020.

From an organizational perspective and since the program is voluntary for employers, we still do not see any compelling reason to participate. We think most employers will choose not to participate due to substantial administrative burdens that are likely to result. We also question whether third party payroll services will be able to support participation in the near future.

Burdens That Employers May Face From Deferral Are Obvious; The Solutions, Not So Much.

The main reason for concern is that employers must recoup (and pay to the Internal Revenue Service (IRS)) amounts that are not withheld in 2020 from employees’ pay in 2021. A participating employer could functionally increase employee net pay in 2020, only to need to reduce employee pay in 2021 below the net pay amount in effect prior to the withholding decrease. It may help employees in 2020, but then arguably harms them in 2021.

Participation in the program could also result in significant compliance burdens. For example, if an employee works in excess of 40 hours per week in 2020, but then later works only 30 hours per week in 2021, the employer would need to increase the withholding amount each pay period in order to stay in compliance with withholding rules. For non-exempt hourly workers whose hours vary week to week, recalculating withholding each pay period could cause an administrative nightmare not to mention increasing risk for wage and hour violations.

Moreover, the guidance does not explain how employers could actually collect the deferred amounts in 2021; rather, it provides that the employer can “make arrangements” to collect the taxes from the employees. What kind of arrangements? How would that work? What about current and former employees who may not have the money to pay back the deferred payroll tax? We can see this getting nasty. And, all a former employee has to do is change their contact information to make it infinitely more difficult for an employer to be able to collect these taxes. What about requiring employees to enter into a written agreement to recover the taxes? Is that even lawful?

The bottom line is that employers may be left holding the bag for a big tax bill.

Employers Who Opt to Withhold Should Do So With Care

For employers considering or opting to withhold, we suggest the following:

- Note that the deferral applies on a bi-weekly basis to earnings under \$4,001; if an employee normally falls under such threshold but exceeds it in any given pay period because of a bonus, commission, overtime, or otherwise, regular withholding is required for that pay period;
- While employers should not provide tax advice to employees, since the deferred amounts are recouped from employee earnings in early 2021, advise employees in writing of this obligation and suggest they consult with their own tax advisors. Get written confirmation of employees' receipt of your communication;
- While employer rights and obligations in this situation are not yet clear, consult with counsel if an employee for whom deferral made exits the company for any reason 2020;
- Discuss the appropriate financial statement treatment for deferred amounts with your own accounting team; and
- Work with your own accounting department and any third party payroll service that you use to determine how you'll handle the recoupment in 2021.

Ultimately, employers want to bear in mind that the obligations *and* relief offered by the Executive Order rest with employers.

For additional information, please contact any of the following: Jess Bahs at jess.bahs@fisherbroyles.com, Gordon Berger at gordon.berger@fisherbroyles.com, Paul Economon at paul.economon@fisherbroyles.com, Amy Epstein Gluck at amy.epsteingluck@fisherbroyles.com, Martin Robins at martin.robins@fisherbroyles.com with any questions or more specific situations.

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