

New Guidance on the Employee Payroll Tax Deferral

Late on August 28th, the IRS issued much-anticipated guidance on the “payroll tax holiday” that was ordered in a presidential memorandum on August 8th under Notice 2020-65. The payroll tax deferral allows employers to defer qualified employees portion of FICA (OASDI) tax, which is 6.2%, starting September 1st, 2020 through December 31st, 2020. The deferred due date for withholding and payment of these taxes is postponed and scheduled to be repaid ratably over the period starting January 1st, 2021 through April 30th, 2021. Interest, penalties, or additions to tax will accrue on any unpaid amounts starting May 1st, 2021.

The notice does not address whether individual employees can opt out of the program. Therefore, in early 2021, the employees eligible for the deferral will be subject to **double** withholding of the 6.2% Social Security tax. They will be subject to the regular 6.2% social security withholding on their 2021 actual wages and the catch-up social security withholding for the deferred payroll taxes from the last four months of 2020.

The deferral can apply to any employee whose pretax wages or compensation during any biweekly pay period during the last four months of 2020 is less than the threshold amount of \$4,000. An equivalent threshold applies to other pay period types; for example, employers utilizing weekly paychecks would instead use a \$2,000 threshold. The wage threshold is to be analyzed on a bi-weekly to bi-weekly basis, which means that if the employee’s compensation for a particular bi-weekly pay period is less than \$4,000, then the payroll tax deferral applies to that pay period, even if in the prior pay period the employee’s compensation exceeded the threshold. All employers must continue to withhold FICA taxes for employees that exceed this threshold. Those employees will not qualify for the payroll deferral.

While the Payroll Tax Holiday allows a deferral of the employee’s FICA tax, it does not appear to make the deferral mandatory. Therefore, it seems employers can decide if they want to continue collecting and remitting payroll taxes and not utilize the deferral period. However, if employers continue to withhold payroll taxes, the due date remains the same for remitting those tax payments and they are not eligible for deferral of the payment. In summary, employers cannot withhold the taxes from the employees and then also utilize the deferral of payment for those taxes.

Something to consider when deciding whether to implement the payroll tax deferral is there is no guidance yet as to the specifics on how the employer should collect the deferred payroll taxes in 2021. The guidance only states that the deferred taxes have to be collected and remitted by April 30, 2021. This provision seems to make the employer responsible to decide on a method in which to collect the deferred taxes from any departing employees. Therefore, if an employee quits during the first four months of 2021, unless the employer has made an arrangement to collect the taxes prior to the employee’s departure, it would appear the employer will have to absorb the cost at their own expense for all the deferred tax the employee still owes.

As more guidance becomes available on this topic we will continue to keep you informed.

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