

Blog Post

# Impact of White House Memorandum Deferring Payroll Taxes For Certain Workers

August 13, 2020

By [Stefi N. George](#)

On August 8, 2020, President Trump issued a Memorandum to the Secretary of the Treasury authorizing the deferral of payroll taxes for certain employees from September 1, 2020 through December 31, 2020. This issuance is in the form of a Memorandum rather than an Executive Order, and since any modification to taxes falls within the authority of Congress, it is possible that there may be legal challenges to this action.

In addition, it is unclear whether the Treasury Department is bound by the Memorandum and whether the IRS could assess interest and penalties for the amounts actually deferred (although the argument for penalty waiver under the IRS regulations would be strong). Moreover, if the deferral is elective (as Treasury Secretary Steven Mnuchin recently announced), the IRS will need to clarify whether an employer would have liability to employees for failing to make the deferral available.

The Memorandum directs the Secretary of the Treasury to use his authority to *defer but not eliminate* the payroll tax obligations of certain employees. Thus, this relief action temporarily increases some worker's take-home pay, but with an obligation to repay the tax in the future. By its terms,

---

## Related People

[Stefi N. George](#)

---

## Related Work

[Federal Tax Litigation and Controversy Tax](#)

---

## Related Offices

[New York](#)

---

## SALT Insights

[Akerman Perspectives on the State of Taxation](#)

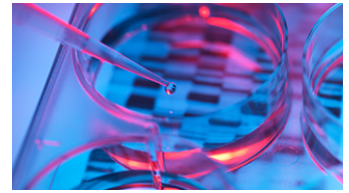
[Visit this Akerman blog](#)

---

## Coronavirus Resource Center

[Visit the Resource Center](#)

the Memorandum applies only to the employee's portion of Social Security tax, and not Medicare tax.



The language of the Memorandum is ambiguous as to eligibility for deferral. The Memorandum provides:

The deferral shall be made available with respect to any employee the amount of whose wages or compensation, as applicable, payable during any bi-weekly pay period generally is less than \$4,000, calculated on a pre-tax basis, or the equivalent amount with respect to other pay periods.

It is uncertain how the employer should determine whether an employee's wages or compensation "generally is less than \$4,000." The deferral also appears to be all or nothing – any employee whose bi-weekly paycheck is "generally" \$4,001 is entirely ineligible for deferral. Guidance will need to clarify how this determination will be made for employees with unlevel income throughout the year.

In addition to clarifying how to determine whether an employee's wages meet this test, further guidance is necessary on the following issues:

- *The Memorandum provides that the deferral "shall be made available" to such eligible employees.* While the Memorandum's language implies that deferral is mandatory, Treasury has confirmed that employers will not be required to comply with the Memorandum. Will there be an official process for employers to opt in or out? Further, this raises the possibility that an employee may be able to opt out of deferral. Is it possible to implement an opt-out for employees without causing an administrative headache for employers and payroll companies?
- *The Memorandum confirms that there will be no penalties or interest imposed on amounts deferred pursuant to this Memorandum.* Does this also protect an employer from penalties for improperly deferring payroll tax on an employee

whose wages are ultimately determined ineligible for deferral?

- *The Memorandum is silent as to the employer's obligation to track and report taxes with respect to this deferral.* The IRS may need to amend reporting forms, such as Form W-2, to track and report the employee's deferred payroll taxes. The IRS will also have to provide guidance on the process for repayment of the deferred taxes. If there is no opt-out for employees, it is possible the IRS could instead allow for prepayment of the deferred taxes.

Finally, the Memorandum directs the Secretary of the Treasury to "explore avenues, including legislation, to eliminate the obligation to pay the taxes deferred pursuant to the implementation of this memorandum." This language appears to be asking Congress to enact legislation eliminating the payroll tax for this period, turning the deferral into a payroll tax cut. However, this is currently speculative, and the uncertainty of this repayment obligation could limit the effectiveness of this relief.

Thus, there are many open questions surrounding this payroll tax deferral, and employers and employees will be looking to the IRS to provide immediate answers so that payroll can be set up before deferral takes effect.

---

This information is intended to inform clients and friends about legal developments, including recent decisions of various courts and administrative bodies. This should not be construed as legal advice or a legal opinion, and readers should not act upon the information contained in this email without seeking the advice of legal counsel.