

Blog Post

IRS Issues Limited Guidance on Employee Payroll Tax Deferral and Puts Onus on Employers

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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. Employers and payroll processors have eagerly awaited guidance from the IRS to address significant questions regarding implementation of the deferral.

Late Friday, just days in advance of the September 1st implementation date, the IRS released Notice 2020-65, 2020-38 IRB 1, implementing the deferral set forth in the Memorandum. The Notice officially defers the due date for payroll taxes for certain employees, but provides that the deferred taxes must be repaid ratably between January 1 and April 30, 2021. Further, if any of the deferred tax remains unpaid on May 1, 2021, interest, penalties, and additions to tax will begin to accrue. The Notice provides that each employee's deferral eligibility is determined separately for each pay period – if an employee's pay is not consistent throughout the year, the employee may be eligible for deferral for certain pay periods and not others.

Notably, the guidance places the burden on employers either to collect the tax from employees' paychecks or pay it themselves in early 2021. The

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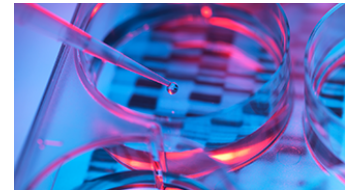
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guidance is silent as to what employers should do if an employee ceases employment before April 30, 2021. Presumably, the employer remains on the hook for repaying the deferred taxes, and must pay the taxes if it cannot collect the funds from the employee.

While Treasury Secretary Steven Mnuchin had previously announced that the payroll tax deferral would be elective, the guidance does not address any opt-out right on the part of employers or employees. The Notice does state that if necessary, the employer may make arrangements to otherwise collect the total taxes from the employee. It seems likely that, without further guidance, many employers will use this language as permission to disregard this guidance and “make arrangements” to continue collecting and remitting payroll taxes from their employees as usual.

Overall, this guidance will not be welcome news for most employers or employees. For employees, a brief respite from payroll taxes only to pay double the amount in early 2021 will not offer much financial benefit. For employers, the guidance is scant on details, and will be difficult for employers to implement, absent of further guidance. Further, the deferral could prove costly for employers, who may end up being liable for deferred employee payroll taxes of employees who are no longer with the company.

Thus, after waiting three weeks for guidance, employers are largely left in the same state of confusion they were in when the Memorandum was first issued. Unless Congress acts to eliminate the payroll tax repayment obligation, this deferral will likely have limited impact on most taxpayers.

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