akerman

Blog Post

Employers Not Racing to Implement Employee Payroll Tax Deferral

September 14, 2020

By S. Montaye Sigmon

Offering eligible workers the option to suspend the *employee* share of Social Security payroll taxes through year-end may sound good at the moment, but concerns about next year are leaving many employers wary. Indeed, the *Wall Street Journal* reported that some of the nation's largest employers have rejected the President's payroll tax deferral plan, and *Bloomberg* reported that no major private employer has stepped forward to take advantage of the plan. Under guidance issued by the IRS on August 28, 2020, employees would need to repay those deferred taxes in the first four months of 2021.

This optional COVID-19-related payroll tax relief applies only to the *employee* portion of federal Social Security tax, which is 6.2% of an employee's wages up to wages of $137,700 in 2020. The 1.45% Medicare tax paid by employees on their wages is not eligible for deferral. Typically, an employer is required to withhold both the 6.2% Social Security tax and the 1.45% Medicare tax from an employee's wages and deposit those amounts (along with the employer's matching amounts) with the IRS on a regular schedule.

The President's executive order and the IRS's related guidance, intended to provide additional relief during COVID-19, allows employers to suspend

Related People

S. Montaye Sigmon

Related Work

Employee Benefits and Executive Compensation

Labor and Employment

Tax

Wage and Hour

Related Offices

Tampa

West Palm Beach

HR Defense

Akerman Perspectives on the Latest Developments in Labor and Employment Law

Visit this Akerman blog

Coronavirus Resource Center

withholding the employee portion of Social Security taxes for employees making less than $4,000 per biweekly pay period ($104,000 annually). However, employers would then have to collect those deferred taxes from worker paychecks from January 1 through April 30, 2021 and deposit them with the IRS.

On August 28, 2020 the IRS issued Notice 2020-65, offering minimal guidance. The Notice says the employer's obligation to withhold the taxes is deferred and mandates that any such deferred taxes must be paid early next year. Employers are not required to offer employees the option and there are no penalties for not doing so.

The confusion is compounded for employers by the mechanics of instituting the change. Payroll systems would have to be reconfigured, which could take time, and the determination of whether an employee is eligible for deferral must be done on a paycheck-by-paycheck basis.

And what happens when an employer does elect to defer the Social Security payroll tax deductions, but a particular employee does not want to do so? The IRS Notice offers no guidance; indeed, it does not include any provision allowing employees to opt out of the deferral.

It is also unclear whether a worker's additional take-home pay as a result of the deferral would be subject to additional garnishment for IRS levies, child support payments, or similar obligations.

There are other potential complications as well.

Let's say an employer suspends collection of an employee's share of Social Security tax (6.2% of the employee's pay) from now through year-end, with the intention of doubling that tax to 12.4% during the first four months of 2021. It seems likely that employees will suffer a hardship from the doubled-up taxation following the holiday season, when household funds tend to be even more strapped, especially for many of the lower wage earners who would qualify for the program.

And what happens if the employee leaves at the end of 2020 or at any time before the employer can collect the deferred taxes? The IRS Notice says that employers in such circumstances "may make arrangements to otherwise collect the total applicable taxes from the employee." Trying to collect sums from a departed employee are likely to prove challenging at best. And if the employer's efforts are not successful? The employer remains liable for the employee's share of Social Security taxes, together with any applicable penalties and interest, which begin to accrue as of May 1, 2021 on any deferred taxes that are not paid to the IRS.

While employees would no doubt appreciate the deferral now, they won't appreciate the double tax later or the potential penalties and interest if the deferred tax is not repaid in a timely manner. Even so, employer who want to offer the deferral option should make clear to their employees that this is only a deferral of taxes due. Absent relief from Congress, they will have to repay the amount deferred early next year.

Separately, the Coronavirus Aid, Relief, and Economic Security (CARES) Act, enacted in March and implemented through IRS Notice 2020-22 and a series of IRS FAQs, allows eligible employers to defer depositing the *employer's* 6.2% share of Social Security taxes from March 27, 2020, through December 31, 2020. Half of all deferred employer Social Security taxes must be deposited with the IRS by December 31, 2021, and the remaining half by December 31, 2022.

The CARES Act provision (section 2302) and related guidance from the IRS did not apply to *employees'* share of Social Security taxes, which is the focus of this new, optional deferral program and the new IRS guidance issued on August 28.

If you need guidance on this new payroll tax deferral program, contact your Akerman attorney.
