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Very recently we alerted our readers to the August 8, 2020 Presidential Memorandum, executed as part of an effort to provide COVID-19 relief, which permits employers to defer the withholding, deposit, and payment of certain payroll tax obligations.[1] Now, we can report that on August 28, 2020, the IRS issued guidance in Notice 2020-65[2] (Notice) to implement that Presidential Memorandum, providing that employers may "defer withholding and payment of the employee's portion of the Social Security tax if the employee's wages are below a certain amount."[3] Significantly, while employers are purportedly being provided a temporary "tax holiday" for relief purposes, the reality is that the Notice provides very minimal guidance and still leaves taxpayers and practitioners with questions that may only be answered with additional guidance.

Payroll Tax Deferral: What You Need To Know From The Latest IRS Notice

What the Notice Says

First, the Notice clarifies that all employers that are required to withhold and pay employee shares of social security and railroad retirement taxes (collectively, Applicable Taxes) are "affected by the COVID0-19 emergency for purposes of the relief described in the Presidential Memorandum and this notice (Affected Taxpayers)."[4] The IRS then explains that the employers' due date for withholding and payment of Affected Taxpayers' Applicable Taxes on Applicable Wages (defined below) is postponed until the period beginning January 1, 2021, and ending April 30, 2021.

According to the IRS, "Applicable Wages" are wages defined in Internal Revenue Code (IRC) §3121(a) or compensation as defined in IRC §3231(e):

"paid to an employee on a pay date during the period beginning on September 1, 2020, and ending on December 31, 2020, but only if the amount of such wages or compensation paid for a bi-weekly pay period is less than the threshold amount of $4,000, or the equivalent threshold amount with respect to other pay periods.[5]"

Furthermore, the IRS noted that one determines if wages or compensation are Applicable Wages using a "pay period-by-pay period basis." Thus, if the wages or compensation for a pay period falls below the threshold amount, then that amount is the Applicable Wages for the pay period. Only those wages or that compensation paid to the employee for that pay period qualify for the relief provided in the Notice, stated the IRS. And this is the case irrespective of the amount paid in other pay periods.

Finally, the Notice explains Affected Taxpayers that used this relief to defer Applicable taxes are required to withhold and pay those Applicable Taxes:

"... ratably from wages and compensation paid between January 1, 2021 and April 30, 2021 or interest, penalties, and additions to tax will begin to accrue on May 1, 2021, with respect to any unpaid Applicable Taxes. If necessary, the Affected Taxpayer may make arrangements to otherwise collect the total Applicable Taxes from the employee.[6]"

What the Notice Doesn't Say

Overall, the Notice leaves many questions to be answered.

Although we can say *when* those employers who use the deferral relief must subsequently collect the payroll taxes from employees' paychecks—during the period between January 1, 2021 through April 30, 2021—no guidance exists for how so many employers will actually suspend collection of social security taxes; nor are there instructions for when those employers may later readjust payroll systems to stop the withholding. Those employers using payroll firms need further guidance—in many cases the September payrolls were processed just before the Notice came out. In those cases, it won't be until sometime after September before the Social Security tax withholding can be deferred. And for those employers that don't use payroll firms—they may require significantly longer periods of time to make the technical changes.

And what actually happens when employers who implement deferral later must repay those deferred taxes? Well, after April 30, 2021—absent new legislation forgiving the uncollected amounts—those employers will begin to feel the pain of penalties and interest for amounts that they haven't repaid yet. And it doesn't take much imagination to picture a scenario where employees leave employment—resulting in a predicament for the employer who must "ratably" withhold taxes from them over that four-month period. Employers may need to consider implementing precise repayment terms with employees, such as providing that the amount owed will be deducted in full from their final paycheck.

If you have questions about how payroll tax deferrals could work for you, please contact our tax attorneys at 410-862-3957 or fill out [our online form] for any questions

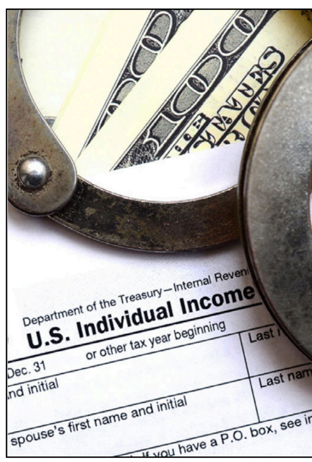
Footnotes

1. For more background information leading up to this development, see our previous post at: https://askfrost.com/presidents-payroll-tax-memorandum-creates-temporary-deferral-leaves-taxpayers-with-uncertainty/.
2. 2020-38 I.R.B. __ (Sept. 14, 2020).
3. IR-2020-195 (Aug. 28, 2020).
4. Notice 2020-65 at 1.
5. *Id.* at 2.
6. *Id.* at 3.

Additional Resources

President's Payroll Tax Memorandum Creates Temporary Deferral; Leaves Taxpayers with Uncertainty

A critical component of the overall federal budget is made up of "payroll taxes." The two primary payroll taxes that the IRS ...



Even Post-Tax Evasion Conviction Tax Court Requires IRS to Produce Evidence of Initial Penalty Determination

Typically, a taxpayer convicted of Internal Revenue Code (IRC) §7201 tax evasion can fully expect to also incur the IRC §6663 ...