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Employee Benefits Update

October 2, 2020

Deferral of Employee Social Security Taxes – Q&A

Executive Summary

Acting under the emergency authority granted to the Department of Treasury in a Presidential Memorandum, the Internal Revenue Service (the “IRS”) published [Notice 2020-65](#) (the “Notice”), which allows (but does not require) employers to defer the withholding of the employee portion of Social Security taxes, for wages paid to certain qualifying employees, between September 1 through December 31, 2020. This Update provides answers to some common questions from employers about this optional deferral of the employees’ share of Social Security taxes.



Q1. Which payroll taxes are eligible for the Social Security withholding deferral under Notice 2020-65?

Employers may elect to defer withholding the 6.2% employee portion of the Social Security tax for wages paid to an employee between September 1, 2020 and December 31, 2020 (up to the annual Social Security wage base limit of \$137,700). However, this optional deferral of the employee’s share of Social Security taxes is only available for employees whose wages are less than \$4,000 per biweekly pay period (or the equivalent amount with respect to other pay periods). If wage payments for an employee equal or exceed \$4,000 for any biweekly pay period, then no portion of the payments is eligible for the Social Security withholding deferral.

This optional deferral of withholding for the employee’s share of Social Security taxes does not extend to income or other payroll taxes. Specifically, employers must continue to withhold and deposit Federal, state, and local income taxes on all wages paid to employees, as well as the 1.45% employee portion of Medicare taxes, plus the additional 0.9% of Medicare taxes applicable to annual wages over \$200,000.

Q2. What about the employer portion of Social Security taxes?

Separately, the Coronavirus Aid, Relief and Economic Security Act (the “CARES Act”) allows employers to defer payment of the employer portion of Social Security taxes that would otherwise be due on wages paid for the period between March 31 through December 31, 2020. Under the CARES Act provision, employers who choose to take advantage of the ability to defer their share of Social Security taxes must pay 50% of the deferred amounts by December 31, 2021, and the remainder by the end of 2022.

Q3. Are employers required to defer withholding or payment of payroll taxes?

No. The CARES Act, the Presidential Memorandum, and the Notice allow employers the option to defer withholding and payment of the employer portion and/or the employee portion of Social Security taxes, but employers are not required to defer withholding and payment of either portion.

Q4. Are employers required to allow employees to opt-out of the deferral of the employee portion of Social Security taxes permitted under the Notice?

No. Employers can unilaterally decide whether or not to defer withholding of the employee share of Social Security taxes permitted under the Notice. While the government is considering allowing individual Federal employees to opt-out of the deferral, current guidance suggests that private-sector employers do not have to allow employees to opt-out, or to affirmatively opt-in, before they implement the deferral.

Q5. When are the deferred employee Social Security taxes due?

To avoid liability for additional tax, penalties and interest, employers who defer withholding the employee portion of Social Security taxes from employee paychecks must withhold and pay the deferred taxes, ratably, from wages and compensation paid to the affected employees between January 1, 2021 and April 30, 2021. Effectively, this means that affected employees whose share of Social Security taxes was deferred will experience a “doubling up” of their share of Social Security taxes during the first four months of 2021, thereby further reducing their take-home pay.

Despite the fact that the withholding and deposit of the employee’s share of Social Security taxes can be deferred, the employer remains responsible for collecting and paying the full amount of the deferred taxes to the Federal government. Because the deferred Social Security taxes are merely being postponed, and not forgiven, the Notice provides that employers can make alternative arrangements to collect the taxes from affected employees. However, this is likely to create logistical and legal challenges if the employment of an affected employee ends before re-paying the deferred amount, because the employer may be constrained by wage and hour laws in its ability to recoup the deferred taxes from an employee’s final paycheck.



To discuss the guidance addressed in this Employee Benefits Update, or any other employee benefits matters, please contact any member of our Employee Benefits and Executive Compensation Group below.

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