

PRESIDENTIAL PAYROLL DEFERRAL PROGRAM

Pursuant to the Presidential Memorandum issued Aug. 8, 2020, a payroll tax deferral program (program) is available for employers that are required to withhold and pay the 6.2% employee portion of Social Security tax. Deferral is allowed for wages or compensation paid (generally all amounts paid for employment) from Sept. 1, through Dec. 31, 2020. Only employees earning, on a pre-tax basis, less than \$4,000 biweekly are eligible for the program, with eligibility determined on a payroll-to-payroll-period basis. The deferral is optional, not mandatory for employers. If an employer does choose to participate in the program, existing guidance is unclear whether an eligible employee may choose to opt out.

Deferred taxes must be withheld and paid between Jan. 1, and April 30, 2021. In other words, double withholding of the 6.2% employee portion of Social Security tax will be required next year. In addition, interest and penalties will begin on May 1, 2021, for amounts not repaid by that date. An employer, however, “may make arrangements to otherwise collect” the deferred tax from its employees, though no specifics have been provided with respect to this option for an employer.

Some members of Congress have expressed an intention to challenge the legality of the Presidential Memorandum.

Recent Internal Revenue Service (IRS) guidance does not address what should be done if an employee ceases to be employed by an employer participating in the program before the deferred taxes have been repaid in 2021. One possibility would be to recoup all the deferred taxes from a former employee’s final paycheck. Yet, it is unclear whether this action would be permitted.

In light of the IRS’s limited guidance, before signing on for the program, an employer should consider a number of pertinent questions. First, will the payroll tax deferral provide a meaningful economic benefit to employees? Since deferred taxes will have to be repaid in January through April 2021 by withholding twice the normal amount, employees could face financial hardship next year. What administrative challenges would be involved in implementing the program? For instance, would implementation require reprogramming payroll systems and notifying employees of the impact of these changes for the remainder of 2020 and early in 2021? Can employees opt out of program participation at any time during the remainder of 2020?

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Given the significant ambiguity involved from the employer's perspective, we therefore recommend that most employers SHOULD NOT participate in the program at this time. If you, as an employer, choose not to participate in the program and continue collecting and remitting all payroll taxes as usual, we recommend that you ensure that your employees understand that due to questions regarding the legality of the Presidential Memorandum, the lack of clarity in implementing, and the fact that the deferred taxes MUST be repaid, your payroll practices have not changed.

Please contact us if you should have additional questions about the program.