

EMPLOYEE'S DEFERRAL OF FICA TAX – 9/2/20

On August 8, 2020, President Trump issued a memorandum that will defer the employee's portion of Social Security tax from September 1, 2020 through December 31, 2020 and includes the following two conditions: (1) the deferral is available with respect to any employee, the amount of whose wages or compensation, as applicable, payable during any bi-weekly pay period generally is less than \$4,000, calculated on a pretax basis, or the equivalent amount with respect to other pay periods, and (2) amounts will be deferred without any penalties, interest, additional amount, or addition to the tax.

The memorandum is intended as a form of economic stimulus in response to the COVID-19 pandemic and was issued after talks of another COVID-19 stimulus bill broke down in early August 2020 between the House, Senate, and White House.

National Payroll Reporting Consortium (NPRC) and American Payroll Association (APA) offered help to both U.S. Treasury and IRS by listing some priorities the NPRC and APA believe should be considered regarding guidance for the recent memorandum deferring employee payroll taxes. The American Institute of Certified Public Accountants (AICPA) has requested guidance, clarification, and recommendations to the Treasury. The U.S. Chamber of Commerce sent a coalition letter to House Speaker Pelosi, Senate Majority Leader McConnell, and Treasury Secretary Mnuchin saying that many Commerce members will not defer the payroll taxes.

Some of the concerns:

- If it remains simply a deferral, employers will need to recover the deferred taxes later from the employee, but the order does not provide a repayment date or a suggested method of repayment.
- If an employee's obligation is deferred and his or her employment is terminated, is the employer responsible for the taxes, or does the obligation remain with the former employee?
- If an employee has more than one job, does the \$4,000 bi-weekly wage threshold apply to each employer?
- What responsibility does the employer have to confirm eligibility?
- Should employees be required to opt in or opt out of the deferral, and in what form?

The memorandum notes that the U.S. Treasury will issue guidance regarding the payroll tax deferral. Based on IRS Notice 2020-65 issued this past Friday, the deferral does not appear to be mandatory.

The option to defer the employee portion of FICA is only available if wages are less than \$4,000 on a bi-weekly payroll period. This equates to \$2,000 weekly, \$4,333.33 semi-monthly, and \$8,666.67 monthly. For wages per employee over this amount, no deferral is allowed during that pay period for that specific employee. The deferral maximum per employee is around \$2,150.

According to IRS notice 2020-65, the employer is ultimately responsible for remitting the deferred FICA tax. Remittance of the deferred FICA tax begins January 1, 2021 and ends April 30, 2021 through deduction out of the employee's paycheck.

If an employee leaves before the full amount of the deferred FICA is paid back, the employer can withhold the remaining balance from the last paycheck. If this does not cover the full deferral for that employee, it appears the employer must pay the remaining balance.

The advantage for the employee is more money between now and the end of the year, but then there is less money in their paycheck between January 1, 2021 and April 30, 2021. This is an interest free loan that comes due beginning January 1, 2021.

For the employer, there are only disadvantages, such as extra paperwork, owing unpaid FICA tax if an employee leaves early, and possible payroll tax penalties if not done correctly.

Due to these reasons, we do not believe deferring employee FICA and distributing the cash to the employee is in the best interest of employers.

POSSIBLE SOLUTION

There is a possibility that this deferral could be forgiven at some point down the road, depending on which way the political winds blow. If employers wish to reduce their risk for paying back the employee share of FICA in early 2021 but also leave open the possibility for forgiveness for its employees, they would withhold a like amount to FICA as other withholdings but not submit the funds to the government. It would be like a cafeteria plan where the employer holds money on behalf of its employees. If the funds must be paid back in 2021 pursuant to the current rules, then the employer already has the money. However, if Congress changes the deferral into forgiveness, then the employer simply writes checks to its employees for the dollars it withheld on their behalf. It holds open the possibility of the money being paid to employees if Congress forgives the last 4 months of 2020 FICA tax on employees. The IRS has not addressed this possible approach by employers. The IRS may not agree with employers holding the money and getting the tax-free loan instead of employees, so written agreement from employees to implement such arrangement might be required.

This article is for informational purposes only and not intended to be relied upon to make specific individual and business decisions. There is a new area of law which is changing, and further guidance from IRS is expected. Please seek professional guidance before proceeding forward.