

IRS Guidance on President's Decision to Allow Social Security Tax Deferral: Client Alert Digest

A Practical Guidance® Client Alert Digest

This client alert digest discusses I.R.S. Notice 2020-65 which provides guidance on President Trump's decision to allow an employer's deferral of withholding on the employee portion of Social Security taxes owing for the remainder of 2020 for employees earning up to \$104,000 per year. [White House, Memorandum on Deferring Payroll Tax Obligations in Light of the Ongoing COVID-19 Disaster](#). 85 Fed. Reg. 49,587 (Aug. 14, 2020).

The Notice does not appear to require the employer's postponement of tax withholding, leaving the decision to defer withholding to the employer's discretion. It also appears to allow the "employer" not the "employee" to make this decision. The IRS News Release 2020-165, which accompanied the Notice, refers to the guidance as "allowing employers" to defer withholding. 2020 IRB LEXIS 369. Further, the Notice provides that employers are the "affected taxpayers."

The authority to defer the withholding rests on I.R.C. Section 7508A which allows the Secretary of the Treasury to postpone up to one year, for a "taxpayer," certain tax-related amounts that include "the amount of any interest, penalty, additional amount, or addition to the tax" related to a taxpayer affected by a federally declared disaster. The President declared on March 13, 2020 that the COVID-19 pandemic was of sufficient severity that it warranted an emergency declaration. [FEMA, COVID-19 Emergency Declaration](#), and see [FEMA, Disaster Declarations](#).

Action Items

As the Notice prescribes, the Secretary has determined that employers that are affected by the COVID-19 emergency that are required to withhold and pay the **employee share**

of social security tax under I.R.C. section 3102(a) or the railroad retirement tax equivalent under I.R.C. section 3202(a) may postpone their collection and payment of the employee share of these taxes for the period from **September 1 through December 31 of 2020** until the first quarter of 2021, i.e., January 1 through April 30. The employer must withhold and pay the deferred amounts from wages paid between January 1 and April 30, 2021. If that amount is unpaid, interest, penalties and additions to tax will begin to accrue on May 1, 2021. Wages for this purpose are defined under I.R.C. Sections 3121(a) and 3231(e) (i.e., respectively, FICA-Social Security wages and Railroad Retirement Tax Act compensation).

Choosing not to withhold for the remainder of 2020 and withholding that amount in the first quarter of 2021, instead, creates obvious payroll administration issues, and may foster employee discontent when employees' first quarter 2021 wages are withheld at a double-Social Security rate. Additional issues arise where employees are no longer on the payroll in 2021. As Daniel Morgan, partner at Blank Rome LLP, states in his article referenced below titled *Payroll Tax Deferral Won't Help Employees or Employers*, "[a]lthough an employee is individually liable for the deferred Social Security taxes, the employer is liable as well, and the IRS will almost assuredly be looking to the employer, and not to the employer's employees, if the deferred taxes are not paid." This alone should cause employers to pause before making the decision not to withhold.

Related Legislation

In a late-breaking development, representative Kevin Brady (R-TX), has introduced the Support for Workers, Families and Social Security Act, which would forgive the employee

portion of payroll taxes that are deferred between the beginning of September and the end of December, 2020. See [Press Release](#).

Lexis and Lexis Tax

- I.R.S. Notice 2020-65
- I.R.S. News Release 2020-165 (2020 IRB LEXIS 369)

Client Alerts

- [IRS Issues Guidance Clarifying President Trump's Payroll Tax Deferral \(Thompson Coburn, Sept. 1, 2020\)](#)
- [Questions Remain After Treasury Guidance Implementing President Trump's Payroll Tax Deferral \(Seyfarth Shaw, Aug. 31, 2020\)](#)
- [Treasury Issues Guidance on President's "Payroll Tax Holiday" \(Crowell & Moring, Sept. 1, 2020\)](#)
- [New Guidance Issued on President Trump's Payroll Deferral Executive Order \(BKD CPAs and Advisors, Aug. 31, 2020\)](#)
- [What It Means: President Trumps Executive Order on Deferring Payroll Tax Obligations \(Jackson Lewis, Aug. 11, 2020\)](#)

Related Practical Guidance Content

Practice Notes

- [Payroll Tax Deferral Won't Help Employees Or Employers](#)
- [Payroll Taxes: Overview](#)
- [Withholding and Estimated Taxes](#)

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