Updates
September 04, 2020

Summary of Notice 2020-65: Deferral of Employee's Portion of Social Security Taxes

In response to the ongoing coronavirus (COVID-19) pandemic, the U.S. Congress, the executive branch, and the Internal Revenue Service (IRS) have taken several actions intended to provide immediate relief to taxpayers. In prior updates, we summarized some of the actions taken in the last several months, including the tax provisions contained in the Families First Coronavirus Response Act (FFCRA) and the Coronavirus Aid, Relief, and Economic Security Act (CARES Act).

On August 28, 2020, the IRS issued Notice 2020-65 (the Notice), providing some basic terms for allowing the deferral of withholding, deposit, and payment of the employee's portion of Social Security taxes (the 6.2% tax on employee wages generally required to be withheld by employers) on certain qualifying wages, as directed by the presidential memorandum (the Memorandum) issued by President Donald Trump on August 8, 2020. The Notice postpones the due date for the withholding, deposit, and payment of such taxes on qualifying wages paid between September 1, 2020, and December 31, 2020, with such deferred taxes to be repaid between January 1, 2021, and April 30, 2021.

Qualifying Wages

Under the Memorandum, wages qualifying for deferral are those paid to employees whose amount of biweekly pretax wages generally is less than $4,000, or the equivalent amount with respect to other pay periods (the Threshold). By contrast, the Notice provides that wages (generally defined for this purpose as wages subject to Social Security taxes) qualify for deferral so long as the amount of such wages paid to an employee in a given pay period is below the Threshold, determined on a pay period-by-pay period basis and irrespective of the amount of wages paid to the employee in other pay periods.

Subsequent Withholding, Deposit, and Payment

The Notice only provides for deferral, not forgiveness, of the applicable taxes—employers who have deferred such taxes must withhold and pay such taxes ratably from wages paid between January 1, 2021, and April 30, 2021. Absent additional regulatory or legislative measures, the withholding of such deferred taxes would be in addition to the normal withholding of Social Security taxes for wages paid between January 1, 2021, and April 30, 2021. The Notice allows employers to "make arrangements to otherwise collect [such taxes] from the employee," if necessary. Accordingly, employers who apply the deferral should prepare for scenarios in which relevant employees terminate employment before the deferred taxes can be collected. If such deferred taxes are not withheld and paid by April 30, 2021, the employer could become subject to penalties and interest.

Mandatory or Optional?

The Memorandum appeared to be vague on whether the deferral would be optional or mandatory for employers. The Notice also did not explicitly clarify that the deferral is optional. However, the Notice technically postpones the due date for the withholding, deposit, and payment of the applicable taxes, without requiring that employers adhere to the new due date. The IRS press release accompanying the Notice states the Notice is "allowing employers to defer" and "makes relief available for employers," appearing to suggest that deferral is optional.

Unresolved Issues Remain

The Notice leaves unanswered many questions and considerations that will be relevant to employers in deciding whether to implement the deferral. Among others, employers should consider:

- As noted above, how to address deferred taxes for employees who may be terminated or otherwise end their employment prior to April 30, 2021.
- If the employer elects to pay the deferred tax to relieve the employee of double withholding, that would likely result in additional compensation income to the employee, resulting in the employer potentially having to pay a tax gross up to cover that additional income as well as further reporting and withholding obligations for the employer.
- How to communicate with employees that the increase in take-home pay in 2020 from the deferral will be offset by a decrease in 2021 and how to implement the additional withholdings without causing undue hardship to those employees.
- Whether the "responsible party" rules apply and therefore whether the risk of liability to the employers' officers is worth the benefit to employees of the optional deferral under the Memorandum and the Notice. The "responsible party" rules provide that an individual decision maker at the employer can be personally liable for the employer's failure to remit payroll taxes. How such rules would apply if the tax was never withheld is unclear.
- Effects of any further legislative changes or regulatory guidance that may be issued.

We will continue to monitor further developments with respect to the deferral program described in this update, as well as other federal income tax developments related to COVID-19. Members of Perkins Coie's federal income tax group welcome any questions regarding these new provisions and initiatives.

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