

IRS Guidance on the Payroll Tax Executive Order (US)

Article By:

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On August 8, 2020, President Trump issued an Executive Order titled “Memorandum on Deferring Payroll Tax Obligations in Light of the Ongoing COVID-19 Disaster” (the “Order”)^[1]. The Order directs the Secretary of the Treasury to permit deferral of employee Old Age, Survivors and Disability Insurance (“OASDI”) taxes for payroll dates on and after September 1, 2020 through December 31, 2020.

The Order was the subject of a prior Blogpost on August 11, 2020.^[2] That Post reviewed many legal and practical concerns associated with attempting to implement the Order. It also emphasized that the Secretary of Treasury was to issue guidance on how to implement the Order.

On August 28, 2020, the IRS issued Notice 2020-65 to provide long awaited guidance in relation to the Order. This Post summarizes the guidance in Notice 2020-65, and remaining legal and practical issues pertaining to the Order.

IRS Notice 2020-65

As an initial matter, it is important to understand that neither the Order, nor IRS Notice 2020-65, *require* an employer to defer the payment of employee OASDI taxes. *Thus, an employer may choose to continue to withhold and deposit employee OASDI taxes as usual.*

As is discussed below, Notice 2020-65 does not seem to alleviate any of the legal and practical concerns associated with implementation of the Order. Thus, we believe that most employers will choose to continue to withhold and deposit employee OASDI taxes as usual.

Tax Deferral, Not Forgiveness

First, the Order makes it clear that payment of the employee OASDI tax is only deferred, not forgiven. Thus, simply put, employees are still obligated to pay the taxes. Accordingly, if an employer does elect to defer payment of an employee’s OASDI taxes, Notice 2020-65 requires the employer to withhold and pay those deferred taxes later.

Subsequent Deduction and Payment of the Deferred Taxes

Notice 2020-65 states that from January 1, 2021 to April 30, 2021, the employer must “ratably” deduct any deferred employee OASDI taxes from the wages paid to the employee, and pay them over to the IRS. If those deductions and payments are not made, penalties and interest will begin to accrue on the unpaid taxes on May 1, 2021.

It is troubling to think that an employer may incur penalties and interest for failing to ratably deduct and pay over the deferred employee OASDI taxes in the first four months of 2021. Nothing in Notice 2020-65 provides any specific relief to an employer if there are circumstances that prevent the employer from doing so.

Specifically, Notice 2020-65 does not address what an employer should do if the employee terminates employment, has a leave of absence, or otherwise does not have sufficient wages in 2021 to accomplish the required deductions for the previously deferred employee OASDI taxes.

Notice 2020-65 simply states that, if it is necessary, the employer “may make arrangements to otherwise collect” the deferred taxes from the employee. Aside from the employee writing a check to the employer, it is not clear to us how an employer is supposed to otherwise arrange for the tax to be paid by a former employee, an employee on a leave of absence, or an employee with insufficient wages.

The Maximum Wage Limitation

The Order states that deferral of employee OASDI taxes is to be limited to employees with bi-weekly pay of less than \$4,000 on a pre-tax basis, with appropriate adjustments made for other payroll periods (the “Maximum Wage Limitation”). It is unclear in the Order how the deferral rule is supposed to work if an employee’s pay may be fluctuating above and below the Maximum Wage Limitation.

Notice 2020-65 definitively addresses this question. The Maximum Wage Limitation is separately determined for each employee in each payroll period. While it is nice to have clear guidance on this point, it may be difficult to implement that kind of fluctuating limit within an employer’s existing payroll system. Notice 2020-65 offers no options to an employer.

Other Legal Concerns

There are at least two other tax-related legal concerns that Notice 2020-65 does not address.

Internal Revenue Code (the “Code”) Section 3102 generally obligates an employer to withhold an employee’s social security taxes. If an employer fails to do so, the employer may be held liable for the taxes not withheld, as well various types of penalties. No relief is provided in Notice 2020-65 to an employer that defers payment of an employee’s OASDI tax, if the employer cannot collect the deferred taxes later. Presumably, if an employer finds itself in that bind, the employer is obligated to pay the tax.

Code Section 6672 has what is commonly called a “responsible person” penalty. This penalty can apply if an employer deducts amounts from an employee’s wages for employee social security taxes and/or income tax withholding, and the employer then fails to pay those amounts over to the IRS. In that case, the individual who is responsible (e.g., a CFO) can be held *personally* liable for the withheld taxes that were not paid over to the IRS. Notice 2020-65 does not provide any relief in

relation to the potential application of the responsible person penalty under Code Section 6672.

Resolution

Our August 11, 2020 Post reviewed many difficult legal and practical concerns that may arise if an employer should decide to try to implement the Order. As is discussed above, IRS Notice 2020-65 does nothing to alleviate those concerns. Thus, we anticipate that most employers will find the most practical and prudent course of action to be to continue to withhold and pay the employees' OASDI taxes in a timely fashion.

^[1] See <https://www.whitehouse.gov/presidential-actions/memorandum-deferring-payroll-tax-obligations-light-ongoing-covid-19-disaster/>)

^[2] See <https://www.employmentlawworldview.com/executive-order-regarding-payroll-taxes-us/>

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