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EMPLOYMENT LAWSCENE ALERT: EMPLOYERS MUST IMMEDIATELY DECIDE WHETHER TO IMPLEMENT SEPTEMBER 1, 2020 PAYROLL TAX DEFERRAL

On August 8, 2020, President Trump issued an Executive Memorandum directing the Secretary of the Treasury to defer the withholding, deposit, and payment of the employee portion of the Social Security tax (6.2% of wages) for the period beginning on September 1 and ending on December 31, 2020. The deferral applies for employees whose pre-tax bi-weekly wages or compensation is less than $4,000. On an annualized basis, this equates to a salary not exceeding $104,000.

The IRS recently issued limited guidance on the implementation of the deferral. Open issues and takeaways are summarized below.

Additional Detail

In addition to calling for the deferral of the payroll tax, the Memorandum directs the Secretary to explore avenues for eliminating the taxpayers' obligation to repay the deferred taxes in the future. It should be noted that only Congress, not the Secretary, has the authority to waive taxes.

The Memorandum does not provide detail on how the payroll tax deferral will be implemented. In related interviews, the Secretary commented that, while he hoped that many companies would participate, he couldn't force employers to stop collecting and remitting payroll taxes. In other words, he suggested that the payroll tax deferral would be voluntary—a proposition not included in the Executive Memorandum.

Requests for Clarification

Uncertainty surrounding how to implement the payroll tax deferral resulted in requests from multiple trade groups for clarification, including an August 18 letter signed by 33 trade groups, including the U.S. Chamber of Commerce. The letter, submitted to the Secretary and to the respective leader of the U.S. Senate and of the U.S. House of Representatives, notes that under current law, the Memorandum creates a substantial tax liability for employees at

the end of the deferral period.

While the stated purpose of the Memorandum was to provide wage earners with additional available spending money, unless Congress later acts to forgive liability for the deferred payroll tax, the affected earners will owe an increased tax bill next year. As the U.S. Chamber of Commerce letter maintains, the deferral "threatens to impose hardship on employees who will face a tax bill" in an amount of double the usual payroll deduction for Social Security (amounting to 12.4% of employee wages) in the first four months of 2021.

The following chart illustrates the U.S. Chamber of Commerce's assessment of the magnitude of the potential tax bill for employees compared to the immediate benefit of the deferral:

Annual Income	Bi-Weekly Pay	Increase in Take-Home Pay by Pay Period	Tax Bill Due in 2021 (based on 9 pay periods)
$35,000	$1,346.15	$83.46	$751.15
$50,000	$1,923.08	$119.23	$1,073.08
$75,000	$2,884.62	$178.85	$1,609.62
$104,000	$4,000	$248.00	$2,232.00

The U.S. Chamber of Commerce letter further states that many of its employer members would likely decline to implement the deferral, choosing instead to continue to withhold and remit to the government the payroll taxes required by law.

IRS Notice 2020-65

Late in the afternoon on August 28, 2020, the IRS issued Notice 2020-65 to provide guidance regarding the payroll tax deferral. The Notice clarifies that any deferred amounts must be recouped by being collected from employee wages and repaid during the period between January 1, 2021 and April 30, 2021. Interest and penalties begin to accrue May 1, 2021 on any unpaid amounts. While the Notice is silent on the issue, it is presumed, because of the normal operation of payroll tax law, that employers would be responsible for paying any interest and penalties that accrue, in addition to paying any underlying deferred amounts that cannot be collected from employees.

Some questions about how to implement the deferral remain unanswered by the IRS guidance. Specifically, the guidance addresses neither self-employed individuals nor the method for reporting the deferral of taxes on IRS Forms 941 or W2. The guidance is also silent on how to collect deferred tax for an individual who is no longer employed for all or part of the 2021 repayment period. Staffing agencies, in particular, are concerned about employer exposure to the repayment cost in the event that employees for whom taxes were deferred

are no longer employed during the repayment period. It is not clear that deducting the amount owed from an employee's final paycheck would be specifically permitted under either federal or state law, or any applicable bargaining agreements.

Decisions, Decisions

While some employers may welcome the ability to offer the payroll tax deferral to employees as a current relief measure, others may view with some reluctance the prospect of exposure to additional payroll tax costs coupled with the need to re-code payroll software effective September 1, 2020, January 1, 2021, and May 1, 2021. Implementing the current deferral and future double collection would also require careful and accurate communication to employees.

The IRS guidance leaves the door open for employers to avoid, rather than to implement the deferral, and to proceed, instead, to process payroll according the normal procedures. In the language of the guidance, an employer may, "if necessary, . . . make arrangements to otherwise collect the total Applicable Taxes from the employee."

O'Neil, Cannon, Hollman, DeJong and Laing remains open and ready to assist you. To discuss how the Memorandum, IRS guidance, and practical considerations relevant to the payroll tax deferral may apply to your business objectives and circumstances, please speak to your regular OCHDL contact.