

IRS Issues Last-Minute Guidance on Deferral of Employees' Social Security Withholding

Key Points

- Employers can, but are not required to, delay withholding and paying the employee portion of Social Security taxes for certain employees until Jan. 1, 2021.
- The deferral only applies to Social Security taxes due from Sept. 1, 2020, to Dec. 31, 2020, by employees who earn less than \$4,000 in a bi-weekly pay period.
- From Jan. 1, 2021 through Apr. 30, 2021, in addition to the employee portion of Social Security taxes owed for that period, employers will withhold a pro-rata amount from affected employee wages to ensure all deferred employee Social Security taxes are repaid by affected employees by Apr. 30, 2021. To the extent not repaid, the employer would be liable for those unpaid employee taxes.

On Aug. 8, 2020, President Trump issued a Presidential Memorandum directing the IRS to allow the deferral of withholding, deposit, and payment of payroll tax obligations for certain employees effective Sept. 1, 2020, with respect to Social Security (and the railroad retirement equivalent tax). President Trump's directive left open a number of important questions for employers as to how to implement this deferral. Employers have been anxiously awaiting IRS guidance that was finally issued ([Notice 2020-65](#)) late Friday, Aug. 28, leaving little time for employers to make changes to their payroll systems if they wish to implement the deferral.

Notice 2020-65 says that the withholding and payment obligation for the employee portion of Social Security otherwise due on "Applicable Wages" paid to certain employees is deferred until the period beginning on Jan. 1, 2021, and ending on Apr. 30, 2021. Applicable Wages are defined to mean wages that would otherwise be subject to withholding for the employee portion of Social Security on a payroll date during the period beginning on Sept. 1, 2020, and ending on Dec. 31, 2020, but only if the amount paid to the employee for a bi-weekly pay period is less than \$4,000, or the equivalent amount for other payroll periods. The determination of whether an employee is being paid less than the equivalent of \$4,000 on a bi-weekly basis is made on a pay-period-by-pay-period basis. This means that if an employee otherwise is paid at a rate of \$4,000 or more on a bi-weekly basis

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(\$104,000 or more annually), but for some reason is paid less than that amount for a particular pay period, the obligation to withhold and pay employee Social Security amounts is deferred for that employee for that particular pay period.

If an employer chooses to suspend withholding of the employee portion of Social Security taxes on eligible employees, the employer must then be sure to withhold and deposit the employee portion of Social Security ratably from wages paid to eligible employees between Jan. 1, 2021, and Apr. 30, 2021, or interest, penalties, and additions to tax will begin to accrue starting May 1, 2021, with respect to any unpaid taxes. The IRS guidance notes that if necessary, the employer may make arrangements to collect the total amount of taxes that are due from the employee whose withholding was deferred. Presumably, this is a reference to permitting employers to withhold and deposit the deferred amounts from final pay if the employee were to leave employment prior to the repayment window established in the Notice. This language signals that the IRS intends to apply the general employment tax rules, which provide that an employer is liable for the employment taxes it fails to timely withhold from employee wages and deposit with the IRS. Notice 2020-65 makes clear that an employer's withholding and depositing obligations is simply being deferred until next year—the obligation is not being eliminated. Because the employer remains liable unless amounts are later paid by the employee, implementing this deferral process places some risk on the employer.

If employers wish to implement the deferral, we would recommend providing notice to employees who will be affected so that they understand that this is merely a deferral of their withholding obligation and the obligation will have to be repaid between January and April of 2021 (i.e., double withholding of the employee portion of Social Security taxes). Some employers may want to obtain approval from employees for the deferral before proceeding, but of course, this would greatly complicate the payroll process. Employers may also wish to obtain permission to withhold any outstanding Social Security taxes from final paychecks (to the extent possible under applicable laws) if the employee terminates employment prior to the full repayment of the deferred amounts. A similar mechanism would need to be agreed to for employees going on a leave without pay status. Without this ability, the employer would be liable for any unpaid catch-up taxes remaining unpaid next May.

Of course, if Congress were to adopt legislation at a later time exempting these amounts from any tax obligations, this would affect employer obligations. We will be watching carefully for any legislation in this area and will provide an update if any legislation is enacted.

If you have questions, please reach out to your contact in the [Hanson Bridgett Employee Benefits Group](#).

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