

Preliminary Summary of Notice 2020-65, IRS Guidance on Payroll Tax Deferral

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This evening (August 28), the IRS released the attached Notice 2020-65 pursuant to the President's Memorandum of August 8, 2020. As expected, the Notice announces the delay of the due date for the withholding and payment obligations of employers with respect to the 6.2% employee portion of Social Security payroll tax for applicable employees. The delay applies to wages paid on a pay date during the period September 1, 2020 through December 31, 2020. By lifting the withholding obligation, the Notice points out that the employer's deposit obligation is also delayed.

Consistent with the President's Memorandum, the Notice provides that the delay will only be available to employees if the amount of such wages or compensation paid for a bi-weekly pay period is less than the threshold amount of \$4,000, or the equivalent threshold amount with respect to other pay periods. The Notice confirms that the determination of Applicable Wages is made on a pay period-by-pay period basis (i.e., an employee with \$3,500 of wages in one bi-weekly pay period would be eligible for the deferral for that pay period, but if the employee had \$4,000 of wages in another pay period then he or she would not be eligible for that second pay period).

The only significant piece of new information in the Notice is that an employer (or responsible PEO) must withhold and pay the total taxes deferred under this Notice ratably from wages paid between January 1, 2021 and April 30, 2021. Otherwise, interest, penalties, and additions to tax will begin to accrue on May 1, 2021 with respect to unpaid deferred taxes. The Notice does not indicate what the employer should do if the employee is no longer employed in 2021, other than to say that the employer "may make arrangements to otherwise collect" the deferred taxes from the employee.

In essence, the Notice would appear to make clear that an employer that takes advantage of the deferral in the Notice and thus pays wages without withholding the 6.2% employee portion of Social Security tax would remain liable for those deferred taxes even if they could not be recouped from the employee. By delaying the due date, the Notice would not appear to specifically preclude an employer from withholding the 6.2% from employee wages, essentially paying the tax early. That reading would be consistent with past statements by Secretary Mnuchin that these deferrals are optional. However, that reading is not entirely clear.