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New Executive Order on Payroll Tax Deferral Leaves Many Open Questions

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On August 8, 2020, the President issued an executive order directing the US Department of the Treasury to use its authority to provide a grace period for the employee portion of Social Security taxes on certain wages paid beginning September 1, 2020, through the end of the year.

The Treasury has not yet issued guidance leaving employers wondering how the order impacts their business and with only a few weeks to potentially implement changes to their payroll reporting systems.

We try to address some of the open questions below.

The Order

As noted above, the order directs the Treasury Secretary Steven Mnuchin to defer the “withholding, deposit, and payment” of the employee portion of Social Security taxes paid on certain wages during the four-month period starting September 1, 2020, through December 31, 2020.

The Social Security taxes are the old age, survivors, and disability insurance (OASDI) tax component, not the Medicare component, and amount to 6.2% on the employee’s gross wages. The grace period only applies to an employee whose wages or compensation “payable during any bi-weekly pay period generally is less than \$4,000”—or the equivalent amount over other pay periods—on a pre-tax basis. The equates to roughly \$104,000 a year.

The order instructs Treasury Secretary Mnuchin to explore opportunities to eliminate the taxes deferred. Also, the order does not apply to the employer’s obligation or to self-employed individuals that pay self-employment (SECA) taxes, though the Coronavirus Aid, Relief, and Economic Security (CARES) Act separately provides a deferral of the employer portion of Social Security taxes for employers and self-employed individuals.

Employer Considerations and Open Questions

With only a couple of weeks before the deferral period is supposed to begin and no official guidance from the Treasury, employers are left to grapple with the implications of the order.

Here are just a few of the items employers will need to consider:

- Informally, Secretary Mnuchin indicated the order will not be mandatory for employers, though official guidance is needed to confirm.
- Secretary Mnuchin has also acknowledged that Congress would likely need to provide funding for the deferred taxes to ultimately be forgiven. To date, a payroll tax cut has generally not been supported by either party in Congress so it's unclear if Congress would provide funds to forgive the taxes deferred.
- If it remains simply a deferral, employers would need to recover the deferred taxes at a later date from the employee, potentially creating a financial hardship for the employee at that time. The order does not provide a repayment date or a suggested method of repayment.
- If an employee's obligation is deferred and his or her employment is terminated, is the employer responsible for the taxes or does the obligation remain with the former employee?
- If an employee has more than one job, does the \$4,000 bi-weekly wage threshold apply to each employer? What responsibility does the employer have to confirm eligibility?
- Is the \$4,000 bi-weekly wage threshold a hard ceiling or is there a phase-down?
- What is meant by "generally is less than \$4,000?" Does this mean bonuses or overtime pay would or would not be included when applying the threshold?

Absent clear guidance from Treasury, employers will need to determine how they wish to proceed given the uncertainties. If the order remains voluntary, employers will need to consider if they want to implement the order, assuming there is time to modify their payroll reporting systems to comply with the official guidelines.

Further, even if an employer decides to implement the deferral, it's possible some employees would not want to defer their obligation for fear of a big bill down the line. Consequently, employers may want to consider implementing a process to determine if an employee actually wants their withholding obligation deferred.

We're Here to Help

If you have questions about what these changes mean for you or your organization, please contact your Moss Adams professional.

Note on COVID-19

During this unparalleled time, we're closely monitoring the COVID-19 situation as it evolves so we can provide up-to-date guidance and support to help you combat uncertainty. For regulatory updates, strategies to help cope with subsequent risk, and possible steps to bolster your workforce and organization, please see the following resources:

- [COVID-19 Implications resource page \(/covid-19-implications\)](#)

- [COVID-19 Implications: A Complete Content Map \(/covid-19-implications/sitemap\)](/covid-19-implications/sitemap)

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