



Coates' Canons Blog: IRS Issues Guidance on the Employee Social Security Tax Deferral

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On August 8, 2020, President Trump issued an Executive Order as part of an effort to put more spending money in consumers' pockets and stimulate the economy. The Order authorized employers to defer the withholding and deposit of the employee portion of the social security tax. To be technical about it, the President directed the Secretary of the Treasury to authorize the deferral, as only the Secretary has the authority to do so under the Internal Revenue Code. For most of August, employers were left wondering about some basic questions. Would the deferral be voluntary or required? When, if ever, would the money have to be recouped and deposited with the IRS? Secretary Mnuchin made a few comments in television interviews, but most employers wanted something a little more substantial in the way of guidance. On Friday, August 28, 2020, the IRS issued Notice 2020-65, which answered basic questions about how the deferral will work.

Background

The Internal Revenue Code requires both employers and employees to pay social security and Medicare taxes (FICA taxes) on the wages of employees. The social security portion of these payroll taxes is referred to by the acronym OASDI (26 U.S.C. § 3111(a) refers to this as Old Age, Survivors and Disability Insurance). The Medicare portion is called "hospital insurance" in the relevant portions of the Internal Revenue Code (see, for example, here).

The Internal Revenue Code requires employers to withhold the employee portion of social security and Medicare taxes from the employee's paycheck. For the social security tax, the amount to be withheld is 6.2% of wages and for the Medicare tax it is 1.45%. Employers pay FICA taxes in an amount identical to what they withhold from the employee's paycheck.

The President's August 8th Executive Order and the IRS Guidance on Its Implementation

The Order directed the Secretary of the Treasury to authorize employers *to defer* the withholding and deposit of *the employee portion of the social security tax*. The Order does *not* affect the employer social security tax contribution and it does not affect either the employer or the employee contribution to Medicare.

Notice 2020-65 is brief – only three pages long – and likely does not answer all of the questions employers may have about the payroll tax deferral. Here is what it says:

- **The program is voluntary.** Employers may voluntarily elect to defer the employee portion of the social security tax (6.2% of wages) for wages paid between September 1, 2020 and December 31, 2020. There is no requirement that employers do so and there is no penalty if employers choose not to do so. There is no requirement that employers give employees a choice about whether to defer the social security tax. The employer chooses.
- **The deferral applies only to employees making less than \$4,000 on a bi-weekly pay period.** That is the equivalent of \$104,000 on an annualized basis, \$2,000 on a weekly basis, and \$8,666.67 on a monthly basis. The determination of whether an employee's wages are less the \$4,000 bi-weekly threshold must be made each pay period. An employee whose wages are on the cusp of the \$4,000 threshold and who earns overtime or other extra compensation in some weeks may qualify for the deferral in some pay periods but not in others.

These amounts are gross income, of course, before any taxes are deducted. Exempt from the calculation are any amounts excluded from the definition of wages by the Internal Revenue Code at 26 U.S.C. 3121(a). I understand the amounts excluded to include employee contributions to health insurance premiums, deductions made pursuant to a Section 125 cafeteria plan, and retirement contributions (in other words, deductions made pre-tax), but I am



not a tax lawyer. *Local government employers should consult with their attorneys, auditors or payroll tax advisors before implementing the deferral.*

- **This is a deferral, not a waiver.** If an employer chooses to defer the employee portion of the social security tax, the entire amount deferred will have to be collected from the employee and paid to the IRS no later than April 30, 2021. Interest and penalties will begin to accrue on May 1, 2020. In essence, the payroll tax deferral is like a loan to employees.

Participating employers may start recouping the deferred social security contributions from employees in January 2021 by deducting the amount of deferred contributions from employees' pay. The practical effect will be that for the four-month period beginning in January 2021 and ending April 30, 2021, employees will have approximately double the amount of social security tax deducted from their paychecks (in other words, for each paycheck, both the current social security tax contribution and an amount reflecting the deferred contribution will be deducted from each employee's paycheck).

- **Employers are ultimately on the hook for repaying the employee's deferred contributions.** Although it is the employee who will owe the deferred social security tax, it will be the employer's responsibility to collect it. ***If the employer cannot collect it, the employer will be responsible for the paying the amount owed by the employee.***

Conclusion

IRS Notice 2020-65 may not answer all of the questions that employers have about the payroll tax deferral program, but it is the only guidance available to date. ***I have no further information or insights about the payroll deferral program. Please do not ask me questions about it, because I do not have any answers.*** If the IRS issues any additional guidance, this blog post will be updated and an update date will be displayed under the blog post title. **No local government employer should implement the employee social security tax deferral without first consulting with its attorney and auditor.**

Links

- www.law.cornell.edu/uscode/text/26/3111
- www.law.cornell.edu/uscode/text/26/3101
- www.law.cornell.edu/uscode/text/26/3121