Insights

IRS Issues Guidance Related to President Trump's Memorandum on Social Security Tax Deferral

September 1, 2020

By: Kendall A. Schnurpel

Background

In his "Memorandum for the Secretary of the Treasury," dated August 8, 2020 (the "Memorandum"), President Trump directed the Secretary to defer the withholding, deposit, and payment of the employee portion of the FICA tax (i.e., the 6.2% social security tax) paid during the period of September 1, 2020 through December 31, 2020 (the "Tax Deferral"). The Memorandum cited the significant disruptions to the U.S. economy experienced in connection with the 2019 novel coronavirus and the need to support those working Americans most in need in providing that the Tax Deferral was to apply to bi-weekly wages up to $4,000 and the eventual payment of such taxes should be permitted without penalties or interest. The President further instructed the Secretary to issue guidance to implement the memorandum and explore ways, including legislation, to eliminate the obligation to pay the deferred taxes.

IRS Guidance

On Friday, August 28, the IRS issued the guidance requested in the Memorandum related to the Tax Deferral in the form of Notice 2020-65 (the "Notice") and issued a draft Form 941, providing a line (13b) for "Deferred amount of social security tax," in anticipation of employers utilizing the Tax Deferral option. However, while the Notice addresses many issues implicated by the Memorandum, it does not answer all of the questions employers have been pondering since the Memorandum was released.

In accordance with the President's suggestion in the Memorandum, the Notice extends the due date for an employer to withhold and pay the employee's 6.2% social security tax for pay periods beginning September 1, 2020 and ending on December 31, 2020. By extending this due date, the Notice permits, but does not require, the Tax Deferral. Consistent with the Memorandum, the Notice provides that the Tax Deferral is only available for employees paid less than $4,000 for a bi-weekly pay period (or the equivalent amount for other pay periods), as calculated on a pay period-by-pay period basis. Amounts are deferred under the Tax Deferral until the period beginning on January 1, 2021 and ending on April 30, 2021. If any amounts deferred are not withheld and paid by April 30, 2021, interest and penalties will be imposed. The Notice concludes by providing that an employer "…may make arrangements to otherwise collect the [deferred taxes] from the employee.

Open Questions for Employers

Despite the guidance provided by the Notice, employers may be leery of the Tax Deferral due to the questions that were left unanswered. For example, the Notice does not require the consent of the employee for the Tax Deferral or the eventual payment of the deferred taxes. It is, therefore, unclear whether such consent is needed or whether it can be revoked, once given. Employers may need to consider applicable state wage law restrictions on withholding the deferred amounts in 2021. Furthermore, notwithstanding the President's suggestion in the Memorandum, there is still no guarantee that Congress will agree to permanently forgive any deferred tax liability. The Notice does not address what an employer should do where an employee is no longer employed on January 1, 2021 or leaves prior to April 30, 2021, other than providing that the employer "…may make arrangements to otherwise collect" the deferred amounts. Therefore, if the deferred amounts are not forgiven, employers may be liable for some portion of the deferred taxes of former employees.

If you have any questions regarding Notice 2020-65 or any other wage or employment tax issues, please contact **Kendall A. Schnurpel**, **Amy J. Adolay**, or your regular Krieg DeVault attorney.