President’s Memorandum on Deferring Payroll Tax – Employers Should Proceed with Much Caution

By Ann P. Buscaglia, CPA, Partner

Early last month, President Trump signed an Executive Order in the form of a Memorandum calling for the deferral of the withholding, deposit and payment of the employees’ share of the 6.2% Social Security tax. The period covered by the deferral is September 1, 2020 through December 31, 2020. The deferral is “available” to employees whose bi-weekly compensation is less than $4,000. The Memorandum instructed the Secretary of the Treasury to “…explore avenues, including legislation, to eliminate the obligation to pay the taxes…” However, the Memorandum provided little detail and raised many questions. For example, when would the deferred tax be paid? How would the tax be paid? Who would ultimately be responsible for paying the tax? We now have ***some*** of those answers.

IRS Guidance

The IRS finally provided some guidance (Notice 2020-65) late Friday, August 28 – four days before the deferral period was set to begin. The following are some of the key takeaways from the Memorandum and Notice 2020-65:

- The Memorandum and the Notice **do not require** the employer to defer the taxes.
- The employer has the ultimate responsibility for paying the deferred taxes.
- The employer must “ratably” withhold any deferred tax from the employee’s wages from January 1, 2021 to April 30, 2021. This effectively doubles the employee’s Social Security tax for the period.
- The Notice states that “if necessary” the employer can “make arrangements to otherwise collect” the applicable taxes from the employee.
- The $4,000 threshold mentioned above is determined on a pay-period by pay-period basis.

Remaining Questions

There are still many open questions. One of the main concerns is: what happens if the tax is deferred for an employee from September 1, 2020 to December 31, 2020 and the employee’s employment is terminated or has a leave of absence during the catch-up period? Notice 2020-65 states that the employer “if necessary … can make arrangements to otherwise collect” the taxes. Practically speaking, it would be extremely difficult and time consuming to collect those taxes. It appears that if the employer cannot collect the deferred taxes from the employee, the employer would be obligated to pay the tax.

Another concern is that there could be Trust Fund Recovery Penalties. These are penalties that can be assessed against a responsible party who willfully fails to collect and pay withheld income and employment taxes. The responsible party may be (but not limited to) a corporate officer or employee, a member of a partnership, corporate director or shareholder. The responsible person can be held personally liable for withheld taxes. How will these rules apply in a situation like the above where the amount cannot be collected from an employee? Notice 2020-65 does not address this issue at all.

There is also the immediate problem of how to implement the deferral. The timing of the Memorandum and IRS guidance leaves payroll companies very little time to update their systems and programs to deal with the deferral. In addition, there has been no guidance on how the deferral would be reported on Form 941, or on employee pay statements.

Conclusion

With so much uncertainty regarding the memorandum on deferring the employees' payroll tax and the very limited guidance from the IRS, PKF O'Connor Davies is strongly suggesting that employers consider whether or not they want to participate in the deferral program. If you feel comfortable with the program, we're happy to assist you in considering the appropriate manner to navigate and report the deferral.

PKF O'Connor Davies will continue to monitor the situation and keep you abreast of any updates.

Contact Us

For further information about this program or any other tax matter, please contact your PKF O'Connor Davies' account team or Ann Buscaglia, CPA, Partner at abuscaglia@pkfod.com.

About PKF O'Connor Davies

PKF O'Connor Davies, LLP is a full-service certified public accounting and advisory firm with a long history of serving clients both domestically and internationally. With roots tracing to 1891, twelve offices in New York, New Jersey, Connecticut, Maryland and Rhode Island, and more than 800 professionals, the Firm provides a complete range of accounting, auditing, tax and management advisory services. PKF O'Connor Davies is ranked 27th on *Accounting Today*'s 2020 "Top 100 Firms" list. It is also ranked among the top 20 best accounting employers to work for in North America by *Vault*.

PKF O'Connor Davies is the lead North American representative in PKF International, a global network of legally independent accounting and advisory firms located in over 400 locations, in 150 countries around the world.