

Eye on Washington Regulatory Update



Treasury Guidance Issued Concerning Deferral of Employee Social Security Tax

On August 28, 2020, the U.S. Treasury Department and Internal Revenue Service (IRS) issued [Notice 2020-65](#) (Treasury Notice) implementing the Presidential Memorandum issued on August 8, 2020, which allows employers the option to defer (i.e., postpone) withholding and payment of Social Security tax for employees whose wages are below \$4,000 biweekly, or equivalent amounts with respect to other pay periods, for wages paid September 1 through December 31, 2020.

Employers considering whether to defer employee Social Security taxes should be aware of the following key takeaways from the Treasury Notice:

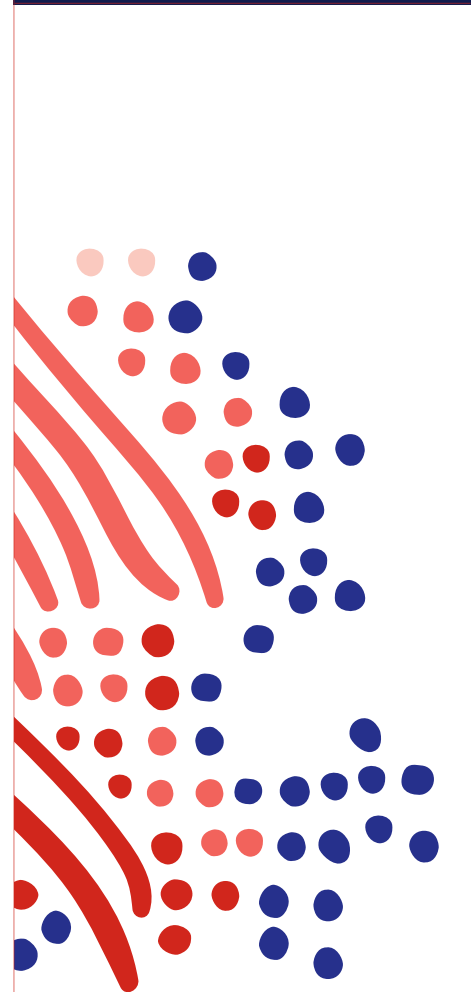
- Employers remain liable to collect from employees and pay to the IRS after December 31, 2020, the full amount of the employee Social Security taxes deferred.
- Employers are required to withhold the total taxes deferred for an employee from the employee's wages ratably for the four-month period from January 1 – April 30, 2021.
- If an employee is not employed with the employer for the full four-month period, the employer is still obligated to pay the total deferred taxes to the IRS. Interest, penalties and additions to tax will begin to accrue on May 1, 2021.
- Employers are permitted, if necessary, to "make arrangements to otherwise collect" the total taxes due from the employee, but the guidance is silent on how an employer may do so.

For further information on the Treasury Notice:

Employers That Offer Deferral Must Withhold and Repay Amounts Deferred

The Treasury Notice clarifies that the deferral effectively postpones the time for employers to withhold and pay employee Social Security taxes. Employers that defer must withhold and pay the total taxes deferred ratably from wages and compensation paid between January 1, 2021 and April 30, 2021. This withholding will be *in addition* to the normal Social Security tax due for 2021 wages paid during the same period, which may cause some questions and concerns.

For example, if an employee deferred a total of \$800 in 2020, an employer that has eight scheduled payrolls between January 1 and April 30, 2021, will deduct \$100 per pay from the employee to collect and pay the full amount deferred in 2020.



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Employers Remain Liable for Unpaid Amounts

The IRS will require all deferrals to be properly reported and reconciled and will collect any deferred amounts not paid by April 30, 2021, from the employer. Interest, penalties and additions to tax, for which employers would be liable, will begin to accrue on May 1, 2021, with respect to any unpaid taxes. The Notice provides that "If necessary, the [employer] may make arrangements to otherwise collect the total Applicable Taxes from the employee." The Treasury Notice does not provide any further guidance on how an employer may otherwise collect unpaid Applicable Taxes from an employee.

In the event that an employee will not be employed through April 2021, the employer should make arrangements to collect all amounts deferred from the employee. When obtaining employee elections to defer, employers should also consider requiring employees to acknowledge that deferred amounts will be withheld from wages beginning in January 2021, and that employers may also use other arrangements if necessary to collect any deferred taxes, including from employees who separate employment before the full amount of deferred taxes is withheld.

Eligibility for Deferral

An employee is eligible for the Social Security tax deferral for any payment of Social Security taxable wages paid from September 1 through December 31, 2020, that is less than \$4,000 for a biweekly pay period. Each pay period is considered separately. No deferral is available if an employee's taxable wages are \$4,000 or more for a biweekly pay period, or the equivalent amount with respect to other pay periods.

The eligibility determination is made on a pay-period-by-pay-period basis. If wages for a pay period are less than the threshold amount, that amount qualifies regardless of the amount of wages paid to the employee in total for 2020, or for any other pay period.

Employee Election to Defer

The Treasury Notice does not obligate employers to defer employee Social Security taxes, and Treasury Secretary Steven Mnuchin has described the program as optional for employers. Both the Treasury Notice and Presidential Memorandum are silent, however, on whether employers must first obtain the affirmative opt-in of employees before deferring their employee Social Security taxes. Because the current program is merely a deferral of taxes lasting only a few months, many employees may prefer that taxes not be deferred. Employers that wish to offer this option should consider providing employees with a detailed explanation, and employees who wish to defer their Social Security tax should make an affirmative election to do so. ADP® has prepared a sample employee notice for our clients.

The Treasury Notice is silent on how such notices and elections should be administered. As a best practice, electronic notices and consent mechanisms would be appropriate for employees to make their deferral elections, especially if employees customarily receive similar notices from their employer electronically and make similar elections (e.g., annual benefits enrollments) electronically. Employers will need to maintain records of any elections.

Further Guidance Is Expected

The IRS has not yet issued guidance as to the reporting requirements associated with the program. Deferred amounts will be reported on Form 941, and possibly Form W-2. The IRS will need sufficient information concerning amounts deferred to reconcile and collect such amounts from the employer if necessary.

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