

August 31, 2020

Employer Social Security Withholding Relief: Treasury Initial Guidance Implementing Executive Memorandum

Employers now have official guidance regarding the much discussed employee social security tax obligations. Treasury released Notice 2020-65 on Friday, August 28, in response to the August 8, 2020 Presidential Memorandum directing the Secretary of the Treasury to defer withholding, deposit and payment of the employee's share of social security tax. Treasury has implemented this provision beginning for pay dates (from and including) September 1, 2020 and ending on December 31, 2020. Deferred amounts must be withheld and deposited ratably from wages and compensation paid between January 1, 2021 and April 30, 2021 (or interest, penalties and additions to tax will begin to accrue).

Attorneys
[Lee E. Allison](#)
[Kat Saunders Gregor](#)

Employers may defer withholding and payment of social security tax for employees whose bi-weekly pay is less than \$4,000 (or the equivalent amount for other pay periods). This threshold is determined by pay period, without reference to annual pay or prior pay periods.

Treasury has determined that any employer required to withhold and pay the employee share of social security tax under Section 3102(a) of the Internal Revenue Code (or the equivalent amount of railroad retirement tax under Section 3202(a)) will be eligible. Employers may take advantage of the deferral by simply not withholding (or depositing) the relevant tax. The notice makes clear that employers may not simply defer their deposit obligation for otherwise withheld tax—rather, the deposit obligation automatically arises once tax is withheld.

Although the Notice does not separately state that this deferral is optional to employers, it is drafted with reference to delayed due dates and Secretary Mnuchin has separately stated that the relief is optional for employers.

The Notice leaves open key areas:

- The Notice provides no relief for the default trust fund penalty rules that hold employers responsible for amounts they are otherwise required to withhold from employees, and refers to penalties beginning to accrue as of May 1.
- Further, the Notice refers to the possibility that employers may need to make arrangements with employees to collect the taxes when due.
- The Notice does not discuss whether Treasury will implement any anti-abuse provision in the event that employees and employers were to purposefully adjust compensation between periods.
- The Notice does not address whether any portion of deferred Social Security Tax will be required to be paid directly by employees (i.e., with the filing of their 2020 tax returns).
- The Notice does not contain any comparable relief for self-employed individuals.

The Notice can be found [here](#), and the Presidential memorandum can be found [here](#). To better understand how this affects your business, please contact the authors listed below or any member of the Ropes & Gray tax, employment and benefits department.