

Issue Analysis Form

Date: 09/22/2020
Item: Executive Order – Payroll Tax Deferral IRS Notice 2020-65
Lead Department(s): Finance
Contact Person(s): Betsy Drewry



Description and Current Status

President Trump issued an Executive Order allowing the deferral of social security tax withholdings. The IRS issued Notice 2020-65 related to this executive order. See attached analysis prepared by Sands Anderson, PC, Attorneys at Law (**Attachment A**).

Participation in the deferral is optional for employers (not mandatory).

The potential deferral applies to **only the employee portion of Social Security taxes** (6.2%) between September 1, 2020 and December 31, 2020, and eligible employees are those with taxable wages of \$4,000 or less for a bi-weekly payroll (comparable to \$4,333.33 for our semi-monthly payroll). The deferral does **not** apply to federal or state income tax withholdings.

The deferral requires repayment between January 1, 2021 and April 30, 2021 and employees would “double up” on social security withholdings during that time period.

We contacted several localities, and all polled indicated they were not allowing the tax deferral. [Colonial Heights, Chesterfield, Dinwiddie, Isle of Wight, Rockingham, Virginia Beach, Chesapeake].

The employer is ultimately liable for repayment of the deferred taxes. We run the risk of being responsible for repayment if an employee leaves employment prior to repayment completion; and bearing the expense for an employee withholding.

The staff recommendation is to not allow employees to defer these taxes.

If the Board would like to allow, the earliest implementation would be October 1, to allow for communication to employees and distribution and collection of information and forms. Additionally, staff recommends having employees sign a form authorizing the County to collect the full amount of remaining tax deferral due from employees who separate employment prior to making full repayment. We also recommend not allowing participation by part-time temporary employees, as those employees may not work during time period of scheduled deferral repayment.

Please see attached power point presentation that summarizes the deferral and recommendation (**Attachment B**).

A draft resolution is included for Board consideration and possible approval.

Government Path

- Does this require IDA action?** Yes No
- Does this require BZA action?** Yes No
- Does This require Planning Commission Action?** Yes No
- Does this require Board of Supervisors action?** Yes No
- Does this require a public hearing?** Yes No
- If so, before what date?** Yes No

Fiscal Impact Statement

Potential County expense of an **employee** tax obligation if employee who deferred taxes separates from employment prior to fully repaying deferred tax amounts; amount indeterminable

County Impact

Allowing tax deferral would require:

- staff creation of at least two new deductions within our financial system;
- additional administrative time of tracking taxes deferred, employee wage eligibility each pay period, and subsequent repayment;
- administrative burden of attempting to collect deferred taxes from employees who separate employment prior to fully repaying deferred taxes

Notes

Top Five Questions from Employers Regarding the Executive Order's Payroll Tax Deferral



Written by

David J. Gundlach

September 04, 2020

Business and Corporate Law

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On August 8, 2020, President Trump issued the [Memorandum on Deferring Payroll Tax Obligations in Light of the Ongoing COVID-19 Disaster](#) [<https://www.whitehouse.gov/presidential-actions/memorandum-deferring-payroll-tax-obligations-light-ongoing-covid-19-disaster/>] (the “Executive Order”) allowing for the deferral of employee social security payroll tax obligations that are normally withheld from employees and paid to the IRS by employers. The Executive Order grants a deferral, not a tax cut or waiver of the employee social security payroll tax obligations. An act of Congress is required to forgive or waive such taxes. On August 28, 2020, the IRS released guidance on implementation of the Executive Order in the form of [IRS Notice 2020-65](#) [<https://www.irs.gov/newsroom/guidance-issued-to-implement-presidential-memorandum-deferring-certain-employee-social-security-tax-withholding>]. Here are the top 5 questions from employers, followed by answers regarding the deferral of payroll taxes pursuant to the Executive Order as of today:

1. **Is the deferral of the payroll taxes pursuant to the Executive Order optional?**

Yes, based on the Executive Order and the IRS Notice 2020-65 the deferral of the payroll taxes pursuant to the Executive Order is optional or voluntary for employers.

If your area is affected by a hurricane, you can still file your tax return, but you have the option of using the delayed deadlines. In line with IRC § 7508A, the IRS and Treasury press releases for IRS Notice 2020-65 use permissive language such as: “The guidance allows employers” and “makes relief available for employers.” Additionally, neither the Executive Order nor IRS Notice 2020-65 provide penalties for electing not to defer.

There is no prohibition in the Executive Order nor IRS Notice 2020-65 on an employer providing the option to defer or not defer to the employee. As discussed below, this approach would expose the employer to risks and may not be administratively feasible.

For employers that withhold the applicable payroll taxes, IRS Notice 2020-65 does not defer the deposit obligation, observing that such relief is unnecessary because the deposit obligation arises at withholding. Continuing withholding but not depositing the tax is not a viable option. IRS Notice 2020-65 does not defer the obligation to deposit taxes once withholding has occurred. As a result, a wait-and-see approach of withholding and retaining the amounts may result in penalties for failure to deposit.

2. Does the employee have the right to choose whether to opt into or out of the deferral of the payroll taxes pursuant to the Executive Order?

The answer is no, unless the employer gives the employee the option.

Pursuant to IRS Notice 2020-65 the “employers that are required to withhold and pay the employee share of social security tax under section 3102(a) or the railroad retirement tax equivalent under section 3202(a) are affected by the COVID-19 emergency for purposes of the relief described in the Presidential Memorandum and this notice (Affected Taxpayers)”. According to the IRS Notice 2020-65, the due date for the Affected Taxpayers’ withholding and payment of the payroll taxes is postponed. The employee is not the Affected Taxpayer. Furthermore, the employer, who is the Affected Taxpayer, is responsible for the payment of the deferred payroll taxes between January 1, 2021 and April 30, 2021 with penalties, interest, and additions to tax beginning to accrue on May 1, 2021 for taxes outstanding. The employer may make arrangements to otherwise collect the total deferred payroll taxes from the employee. To summarize, the employer is on the hook when the deferred payroll taxes come due.

~~tax-deferral-context=article-related~~ and federal employers (including government employees) have no say in whether the deferral is made or not. The federal agencies in question elected to defer the payroll taxes pursuant to the Executive Order.

3. Who is liable for the payment of the deferred payroll taxes when they must be paid from January 1, 2021 through April 30, 2021?

Employers are liable to the IRS for the deferred payroll taxes when they come due. Unless Congress acts, the deferred payroll taxes must be paid. According to IRS Notice 2020-65, the employer as the Affected Taxpayer is responsible for the withholding and payment of the deferred payroll taxes and would face the penalties, interest, and additions to tax beginning to accrue on May 1, 2021 for taxes outstanding.

One further item of concern is that these deferred payroll taxes, if not paid, can give rise to personal, individual liability for the individuals at the employer responsible for the withholding and payment of the deferred payroll taxes.

4. Are there guidelines for arrangements that employers can make with their employees regarding the repayment of the deferred payroll taxes?

No. IRS Notice 2020-65 is three pages long and leaves much to be desired for guidance. On the subject, IRS Notice 2020-65 states “If necessary, the Affected Taxpayer may make arrangements to otherwise collect the total Applicable Taxes from the employee.” If an employee is terminated or quits prior to or is not paid sufficiently (e.g. is furloughed or has limited hours) for the full repayment of the deferred payroll taxes during the January 1, 2021 through April 30, 2021 period, then the employer is liable for the unpaid balance.

Employers can implement arrangements (“Arrangements”) with employees to collect the deferred payroll taxes such as by collecting the taxes from a final paycheck or by separate check from the employee. Such Arrangements may give rise to issues such as conflicts with employment contracts or limitations imposed by other laws or agreements.

5. What are potential risks and pitfalls related to electing to opt into the deferral of the payroll taxes?

which covers the employee's applicable minimum payroll taxes right after the holiday season;

- The employer would be on the hook for any unpaid deferred payroll taxes plus potential penalties, interest, and additional tax;
- The unpaid deferred payroll taxes can lead to individual liability for the individuals at the employer responsible for the withholding and payment of said taxes;
- Setting up the Arrangements should be done when the employer elects the blanket deferral for all its employees or when the employer grants the employee the option to defer or not, which could take some time; and
- The administration of a blanket deferral or deferral at the election of each employee may not be administratively feasible for the employer's payroll systems.

Note that this deferral only runs to December 31, 2020 and payroll systems may take time to reprogram. The potential benefits to the employees may be low once the reprogramming is live and the Arrangements are finalized.

Any decision by an employer to elect to defer or not defer pursuant to the Executive Order should be made after consultation with the employer's accounting, tax, and legal advisers. Each employer and its employees have their own unique circumstances that should be considered when reaching a final decision on this topic.

If you would like to discuss this matter or any of your other legal needs, please reach out to a member of the Tax Team [<https://www.sandsanderson.com/practices/tax/>] or your Sands Anderson attorney contact.

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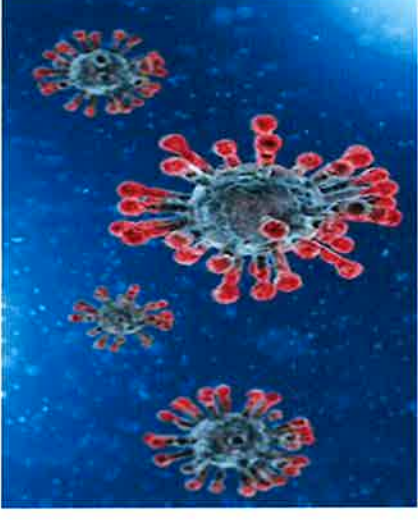


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Executive Order / IRS Notice 2020-65 the Deferral of Payroll Taxes



DEFERRING PAYROLL TAX OBLIGATIONS IN
LIGHT OF THE ONGOING COVID-19 DISASTER
[EMPLOYEE PORTION OF SOCIAL SECURITY TAX
– 6.2%]

Current Social Security Tax Withholding & Contribution

- Employees currently have 6.2% withheld from taxable wages for Social Security
- The employer (Prince George County) “matches” with an additional 6.2% contribution

EXECUTIVE ORDER / IRS Notice 2020-^{ATTACHMENT B} 65 – PAYROLL TAX DEFERRAL

EMPLOYERS HAVE THE **OPTION** TO ALLOW EMPLOYEES TO DEFER THEIR SOCIAL SECURITY WITHHOLDING:

- **Who** - Employees with \$4,000.00 or less bi-weekly wages [semi-monthly \$4,333.00] qualify to defer Social Security contributions. *Overtime counts towards taxable semi-monthly earnings*
- **When** – SS Tax deferral can start as early as September 1, 2020; ends on December 31, 2020
- **Paying back deferral** – Repayments of deferred Social Security taxes will be made January 1, 2021 thru April 30, 2021.
 - Employees would “double up” his/her SS tax withholding (12.4%) January 2021 – April 2021
 - Interest and penalties will accrue on unpaid deferred taxes starting May 1, 2021

Example

Standard 6.2% Social Security Deduction	Deferring 6.2% Social Security tax	Payment of Deferred Social Security tax in 2021
1,871.33 Per Pay Salary X 26 Bi-Weekly 48,654.58 Annual Salary	1,871.33 Per Pay Salary X 26 Bi-Weekly 48,654.58 Annual Salary	1,871.33 Per Pay Salary X 26 Bi-Weekly 48,654.58 Annual Salary
1,871.33 Salary 4.60 Imputed Life 1,875.93	1,871.33 Salary 4.60 Imputed Life 1,875.93	1,871.33 Salary 4.60 Imputed Life 1,875.93
1,875.93 (108.80) Social Security 6.2% (25.44) Medicare 1.45% (171.95) Federal Taxes (77.60) State Taxes (2.96) Vision (93.57) VRS Plan 1 (118.18) Flexible Spending 1,277.43 Take home Pay	1,875.93 - Deferred Social Security 6.2% (25.44) Medicare 1.45% (171.95) Federal Taxes (77.60) State Taxes (2.96) Vision (93.57) VRS Plan 1 (118.18) Flexible Spending 1,386.23 Take home Pay	1,875.93 (217.60) Social Security 12.4% (25.44) Medicare 1.45% (171.95) Federal Taxes (77.60) State Taxes (2.96) Vision (93.57) VRS Plan 1 (118.18) Flexible Spending 1,168.63 Take home Pay

\$108.80 ↑ (\$108.80) ↓

Poll of Peers & Neighbors

City of Colonial Heights – Not allowing deferral

Chesterfield County - Not allowing deferral

Dinwiddie County – Not allowing deferral

Isle of Wight County – Not allowing deferral

Rockingham County - Not allowing deferral

City of Virginia Beach – “Sent to City Council” – staff recommendation not to allow deferral

City of Chesapeake – “Sent to City Council” – staff recommendation not to allow deferral

Recap - IRS Notice 2020-65

- The Executive Order and IRS Notice 2020-65 is **optional or voluntary** for employers
- Unless the employer allows, the employee does not have the right to choose whether or not to defer payroll taxes pursuant to the Executive Order
- The order only impacts Social Security taxes (6.2%), **not federal or state income tax withholdings**
- Employee must repay deferred payroll taxes between January 1, 2021 and April 30, 2021 [**“double up” SS withholding - 12.4%**]
- Risk to employer - If an employee separates from employment, Prince George County is responsible for repaying the deferred payroll taxes (and pursuing repayment from employee)

Recommendation

- Staff recommends NOT to allow deferral
- System setup in short timeframe [now and again in January 2021]
 - Creation of new SS withholding deductions for those electing to defer and repay later
- Administrative burden of reviewing wages for each electing employee each payroll to ensure they are eligible – less than \$4,333.33 (public safety wages in particular vary considerably with overtime)
- Administrative burden of attempting to collect deferred taxes from those employees who separate employment [or don't receive pay in January – April if part-time]
- Employee feedback – 3 of 4 employee inquiries have been – “don't defer my taxes”
- Neighboring locality poll
- Potential failure of employee to consider financial impact January – March
- **If Board would like to allow:**
 - Earliest implementation October 1 [employee communication and collection of required deferral election paperwork]
 - Recommend requiring employee to sign form, authorizing PGC to collect full remaining tax deferral from leave payout and/or final paycheck if employee separates from employment January – April 2021
 - Not allowing for Part-Time Temporary employees (PTT employees don't necessarily receive wages each payday)

Questions?

ATTACHMENT B



Board of Supervisors
County of Prince George, Virginia

Resolution

At a regular meeting of the Board of Supervisors of the County of Prince George held in the Boardroom, Third Floor, County Administration Building, 6602 Courts Drive, Prince George, Virginia this 22nd day of September, 2020:

Present:

Donald R. Hunter, Chairman
Alan R. Carmichael, Vice-Chairman
Floyd M. Brown, Jr.
Marlene J. Waymack
T. J. Webb

Vote:

A-4

On motion of _____, seconded by _____, which carried unanimously, the following Resolution was adopted:

RESOLUTION; AFFIRMATION NOT TO ALLOW EMPLOYEE
PAYROLL TAX DEFERRAL PERMITTED BY EXECUTIVE ORDER /
IRS NOTICE 2020-65

BE IT RESOLVED That the Board of Supervisors of the County of Prince George this 22nd day of September, 2020, does hereby affirm that Prince George County will not allow employee deferral of payroll taxes permitted by Executive Order / IRS Notice 2020-65.

A Copy Teste:

Percy C. Ashcraft
County Administrator