



Frequently Asked Questions: Memorandum on Deferring Payroll Tax Obligations in Light of the Ongoing COVID-19

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FAQ 1: What is the “payroll tax holiday”?

On August 8, 2020, the President signed a document titled “[Memorandum on Deferring Payroll Tax Obligations in Light of the Ongoing COVID-19 Disaster](#).” The Memorandum directs the Secretary of the Treasury to defer the withholding, deposit and payment of the FICA tax (6.2%) on wages or compensation from September 1, 2020 through December 31, 2020 subject to two conditions:

1. The deferral is available to any employee whose wages or compensation payable during any bi-weekly pay period generally is less than \$4,000 on a pre-tax basis, or the equivalent amount with respect to other pay periods.
2. Amounts deferred are not subject to penalties, interest, or additional amount to the tax.

The Memorandum further directs the Secretary to “explore avenues, including legislation, to eliminate the obligation to pay the taxes deferred pursuant to the implementation of this memorandum.”

On August 28, 2020, the IRS issued [Notice 2020-65](#) providing some additional guidance. Notably, the Notice specifies that payroll taxes deferred under the Memorandum must be withheld and paid by the employer between January 1, 2021 and April 30, 2021, or interest, penalties and additions to tax will begin to accrue May 1, 2021 on any unpaid taxes.

FAQ 2: Does the Memorandum require an employer to defer the 6.2% FICA tax?

No, the payroll tax deferral appears to be optional. While not clearly stated in either the Memorandum or Notice 2020-65, the statute granting the Secretary of the Treasury authority to defer tax liability in light of a federally declared disaster indicates that a deferral under that statute is discretionary. See 26 U.S.C. § 7508A(a) (“the Secretary **may** specify a period of up to 1 year that may be disregarded in determining, under the internal revenue laws, in respect of any tax liability of such taxpayer” (emphasis added)).

FAQ 3: Can an employee require an employer to defer payroll taxes if the employer has chosen not to defer the payroll tax?

Probably not. Because the obligation to collect and pay the FICA tax rests with the employer (26 U.S.C. § 3102) and the employer appears to have the option to choose whether to defer the withholding under the Memorandum, it is unlikely an employee would be successful in requiring the employer to defer the payroll tax. If the employer chooses to defer, it is unclear if any individual employee(s) can demand the employer nevertheless withhold and deposit the applicable payroll tax.

FAQ 4: If an employer decides to defer payroll taxes, whose taxes can be deferred?

Under the Memorandum, the employee payroll tax deferral applies only if wages or compensation paid to an employee for a biweekly pay period are less than \$4,000, or the equivalent amount with respect to other pay period frequencies. This threshold is determined on a pay period-by-pay period basis.

Employees who are paid hourly or whose wages vary from pay period to pay period may not benefit from the payroll tax deferral in every pay period depending on whether the amount of wages exceeds the biweekly threshold of \$4,000, or the equivalent. An employee’s wages or compensation may also fluctuate in a given pay period based upon stipends, extra-duty compensation, or overtime pay which may cause an employee to be ineligible for deferral in any particular pay period. An employer electing to defer payroll tax under the Memorandum will need to ensure payroll taxes are deferred only for those eligible employees each pay period.

FAQ 5: Whose obligation is it to repay the deferred taxes?

The obligation to pay the taxes belongs to the employer. The Notice states that the “Affected Taxpayer,” the employer, must withhold and pay the taxes on which it deferred payment under the Memorandum. Please note that Fair Labor Standards Act and State of Arizona labor laws still apply, and it is advisable to contact legal counsel when considering the additional withholding terms.

An employer may “make arrangements to otherwise collect” the taxes from the employee if necessary. If an employee’s wages are not sufficient for the withholdings (such as due to leave of absence under the FMLA), the employer can pursue payment from the

employee. While there has been no specific guidance addressing repayment of deferred taxes on behalf of employees no longer employed by the employer when it is time to pay the deferred taxes, it is likely the employer will bear the obligation to repay the deferred taxes. Under the Notice, the employer would have the option to try to recover the payment from the former employee. Public employers may wish to consult legal counsel to consider potential implications under the Gift Clause when paying deferred taxes for employees from whom the employer is not able to recover the deferred tax payment.

FAQ 6: What is the impact of the payroll tax deferral to employees?

The payroll tax deferral will have only a short-term modest benefit to employees but could have a negative impact to employee income during the period of repayment. The pay will increase while the tax is deferred, but beginning in January 2021, employee pay will be reduced by the standard 6.2% FICA withholding plus an additional amount as needed for the employer to recover the full amount of the deferred taxes from each employee.

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