

## May I or Must I: Questions Remain on Implementing Payroll Tax Deferral Executive Order

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September 1, 2020

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On Friday, August 28th, just two business days prior to the September 1st effective date of the executive order (the “**Executive Order**”) directing the Treasury Secretary to defer the withholding and payment of the employee portion of Social Security taxes otherwise due on wages paid to eligible employees for the last four months of 2020, the IRS issued Notice 2020-65 (the “**Notice**”), which provides additional guidance (discussed in the following paragraph) on implementing that tax deferral. Notably, however, the Notice did not answer two key questions for employers and employees alike: (1) is the tax deferral mandatory, and (2) who is ultimately responsible for remitting any deferred taxes to the IRS when they become due (*i.e.*, what if an employee’s future paycheck is insufficient to cover the deferred taxes or if the employer is unable to recoup deferred taxes from a former employee). The Executive Order permits the deferral of the employee portion of Social Security taxes on amounts paid to employees between September 1, 2020 and December 31, 2020 who earn less than \$4,000 per bi-weekly pay period or the equivalent amount with respect to other pay periods (\$2,000 per weekly pay period or \$4,333.33 per bi-monthly pay period). The Notice clarifies that the determination of whether an employee is eligible for the tax deferral is determined on a pay period-by-pay period basis. So it is possible that an employee with an annual salary of less than \$104,000, who would thus generally be eligible for the tax deferral, would not be eligible for the tax deferral for a given pay period if his or her pay in that period exceeds the applicable threshold amount, such as, for example, if he or she received a bonus in that pay period. In addition, the Notice provides that any deferred taxes must be withheld and remitted to the IRS in substantially equivalent installments from wages or other compensation paid to employees between January 1, 2021 and April 30, 2021; interest and penalties would begin to accrue on any unpaid deferred taxes on May 1, 2021. Finally, the Notice provides that employers “may make arrangements to otherwise collect” the deferred taxes from employees but does not provide any guidance on what such arrangements could include or require. Due to the remaining unanswered questions and the potential for a significant financial impact to employers and their employees, employers should consult their tax and legal advisors in determining whether and how to implement this tax deferral. Notice 2020-65 is available [here](#). The Executive Order is available [here](#). Our prior blog post on the Executive Order is available [here](#).