



In our last FAQ on August 13, we provided information about the new memorandum pertaining to deferral of Social Security taxes for your employees. Since August, there have been many questions surrounding the process for deferring employees' Social Security taxes. While we are still awaiting guidance from Department of Treasury, we wanted to share the information that we do know as of now regarding the payroll tax deferral.

**Q: Is it mandatory for me to offer my employees the option to defer their Social Security tax pursuant to the Presidential Memorandum?**

A: No. Based on the guidance currently available, the IRS confirmed on September 3 that offering employees the deferral of withholding of Social Security taxes from eligible wages is optional for employers.

**Q: What should I think about when deciding whether to defer employee Social Security taxes pursuant to this program?**

A: An employer's decision to implement deferrals will depend on the needs of each business and their workers. Before you choose to offer deferrals to your employees, you should be aware of the following requirements and potential implications to employers under the Treasury Notice:

- Employers remain liable to collect from employees and pay to the IRS after December 31, 2020, the employee Social Security taxes deferred.
- Employers are required to withhold the total taxes deferred ratably from the employee's wages 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 or the wage levels are lower than the wages for which taxes were deferred, the employer is still obligated to pay the total deferred taxes to the IRS.
- The employer is permitted to "make arrangements to otherwise collect" the total taxes due from the employee, but the Treasury Notice does not provide guidance on how an employer may do so. The employer may need to consult with legal counsel and tax advisors on how to properly collect the unpaid taxes from the employee.
- For any deferred taxes not paid to the IRS by April 30, 2021, the IRS will accrue interest, penalties and additions to tax beginning on May 1, 2021, and employers may be liable for these further amounts.

We strongly recommend consulting with your legal counsel and tax advisors regarding whether to allow employees to defer Social Security taxes pursuant to the Presidential Memorandum.

**Q: If I decide to opt-out, can one of my employees still receive the benefit of the Social Security tax deferral?**

A: Because this is a payroll tax program, participation is determined by the employer. If you do not participate, the employee will not have an option to participate in the deferral program.

**Q: What do my employees need to know about the Social Security tax deferral?**

A: Employees should consider several factors when deciding whether or not to defer the Social Security taxes, including the following:

- Your employer may not offer the option.
  - It's the employer's choice whether to offer the deferral.
  - If your employer offers it, they may ask you whether you want to take the deferral.
- It is only a delay, not a forgiveness..
  - Any amounts that you don't pay from September through December will be withheld from your pay starting in January.
- Your net pay could increase by 6.2% through December.
  - Social Security tax is 6.2% of your wages (up to \$137,700 for 2020).
  - But in January, your wages could decrease by about 6.2% to repay the deferral (in addition to the other normal taxes and deductions that will apply).
  - It won't be exactly 6.2% in most cases.
- Employers that offer the deferral will generally withhold the taxes deferred in even amounts from January 1 – April 30, 2021.
  - But if you change jobs, your employer may withhold the full amount deferred from your last check.
  - If so, this could take up almost half of your last paycheck (in addition to other taxes and deductions).
- You may not qualify for deferral for every paycheck.
  - It only applies if the amount your wages subject to Social Security taxes are less than \$4,000 bi-weekly (or equivalent amounts for other pay schedules).
  - If you receive other payments such as commissions or bonus in the same pay period, the combined total may result in no deferral.
- There's no phase-out for those with earnings close to the \$4,000 limit.
  - Someone earning \$3,999 in a biweekly pay period would qualify for deferral, but someone earning \$4,000 would not.

**Q: What happens if we missed the September 1 implementation date? Can we refund the taxes already withheld after September 1?**

A: Nothing. The Treasury Notice does not obligate employers to defer employee Social Security taxes. The IRS is aware that employers may implement the deferral after September and recognizes that the deferral may be put into effect any time after September 1 on a prospective basis.

We cannot adjust for prior payrolls to retroactively apply a deferral decision. No refunds are possible if employee Social Security taxes were withheld after September 1 and an employee later chooses to defer. Also, if an employee initially defers and later decides to revoke the deferral election, no additional tax will be collected retroactively for the period in which the deferral election was in effect.

**Q: What if I elect to opt-in to the payroll tax deferral but we're unable to collect the total deferred taxes due from the employee? Will my company be liable for the unpaid taxes? What happens if the employee terminates before the unpaid taxes are collected?**

A: Yes, if an employer fails to withhold or collect and pay the full amount of an employee's deferred 2020 Social Security taxes, **the employer** remains liable to pay the amounts deferred regardless of the employer's inability to collect the amounts from the employee. If an employer fails to fully pay the employee's deferred Social Security taxes by April 30, 2021, the employer is liable for interest, penalties and additions to tax that begin to accrue on May 1, 2021 for any unpaid deferred taxes.

Under the Treasury Notice, if the employee terminates before paying the deferred taxes from 2020, **the employer** remains liable to pay the full amount of the employee's deferred taxes to the IRS. The Treasury Notice permits an employer to "make arrangements to otherwise collect" the deferred taxes from the employee but does not provide further guidance on how an employer may otherwise collect the deferred taxes from the employee.

We strongly recommend for you to consult with their legal counsel and tax advisors to determine what arrangements are appropriate to otherwise collect any deferred taxes that employers do not collect ratably from wages paid from January 1 through April 30, 2021.

Adding to the uncertainty regarding the Deferral, the White House and Treasury could release additional guidance at any point, changing or adding to these rules. Although it is less likely, it is also possible that Congress could pass legislation to forgive the deferred taxes or cancel the Deferral. Regardless, we will keep you informed on developments to make sure the Deferral does not become mandatory or become subject to any penalties.