

President Trump issues Executive Orders for payroll tax relief, other pandemic-related assistance

August 11, 2020

In brief

President Trump on August 8 issued four executive orders intended to provide employee payroll tax relief, enhanced federal unemployment insurance (UI) benefits, financial assistance for renters and homeowners facing eviction or mortgage foreclosure, and student loan payment relief.

The executive actions came after Administration officials and Democratic Congressional leaders failed to reach an agreement on 'Phase Four' legislation to provide additional COVID-19 economic relief by a self-imposed, end-of-the-week deadline. While some progress reportedly had been made, a number of key issues -- including the overall cost of the legislation, the amount of extended unemployment assistance, and additional funding for state and local governments -- had not been resolved.

The executive order on payroll tax relief directs the Treasury Secretary to use his authority under Internal Revenue Code Section 7508A to defer the withholding, deposit, and payment of the employee share of certain payroll taxes (the 6.2% OASDI payroll tax or equivalent Railroad Retirement Tax Act taxes on employees) on wages or compensation paid during the period of September 1, 2020, through December 31, 2020. The payroll tax deferral would be available to employees earning less than roughly \$100,000 per year (\$4,000 pre-tax paid every two weeks, or the equivalent).

President Trump has said he would seek to extend the payroll tax deferral and "terminate" the deferred obligation payroll tax if he is re-elected. The executive order directs the Treasury Secretary to explore avenues, including legislation, to eliminate the obligation to pay the deferred payroll taxes.

House Speaker Nancy Pelosi (D-CA) and Senate Democratic Minority Leader Chuck Schumer (D-NY) have criticized President Trump's executive orders for bypassing Congress and failing to address the full range of issues that are part of the 'Phase Four' negotiations. White House and Congressional leaders have left open the possibility that negotiations could resume to reach an agreement on broader legislation that could pass both the Democratic-controlled House and the Republican-led Senate. Congress also faces September 30 deadlines to continue funding for the federal government and to reauthorize the federal highway program.

In detail

Overview

Talks between Trump Administration officials and Democratic Congressional leaders have been underway to reach a compromise between the \$3 trillion 'Phase Four' bill that was passed by the House on May 15, and a \$1 trillion 'Phase Four' package of proposals that was offered by Senate Republicans on July 27. Both the House and Senate proposals would generally extend or expand certain 'Phase Three' tax provisions enacted in late March as part of the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act). While differing in significant details, key tax proposals that are part of both the House and Senate proposals include a second round of individual 'recovery rebate' checks, enhancements to the employee retention credit, and additional support for the 'Paycheck Protection Program.'

President Trump's executive order on payroll tax relief comes after Senate Republicans decided to not include a payroll tax cut in their 'Phase Four' package. His other executive orders address CARES Act provisions that have expired or will expire in the absence of agreement being reached with Congress. CARES Act provisions that had provided enhanced federal UI benefits (an additional \$600 per week) and a federal renter eviction moratorium expired July 31 and July 24, respectively. CARES Act provisions providing a federal mortgage foreclosure moratorium and student loan payment relief are scheduled to expire August 31 and September 30, respectively.

Payroll tax relief executive memorandum raises questions for employees and employers

Treasury and the IRS are expected to issue guidance on how President Trump's executive order on deferring employee payroll taxes is intended to operate. The payroll tax deferral could provide a benefit to employees making less than \$4,000 biweekly (or the equivalent amount with respect to other pay periods) from September 1, 2020, through December 31, 2020, but leaves many questions on the logistics and implementation for Treasury and the IRS to address.

For example, it is unclear if the deferral will be mandatory or elective for employees and employers. The order directs Treasury to defer the withholding, depositing, and payment of employee social security tax, and provides that the deferral shall be made available with respect to any employee that meets the wage criteria. In light of this language, Treasury and the IRS may take the position that the deferral would be mandatory.

At the same time, since the order calls for a deferral and not forgiveness, some employees may not want to delay their payroll tax liability to another year -- particularly if it means they will have to pay the 6.2% tax for the 2020 deferral period out of their 2021 wages (or future wages, depending on guidance issued as to the due date of payment) -- as that could significantly reduce their future take home pay. Accordingly, Treasury and the IRS will need to address whether employees will be able to elect into the deferral, or whether it will be mandatory.

Observation: The executive order does not specify when the deferred taxes will have to be paid. Unlike the deferral of the employer's share of Social Security taxes under the CARES Act, there is no payment date provided in the executive order for the employees' deferred taxes. Although the executive order provides that the deferral shall be made without interest or penalties, it is unlikely that the deferral can be indefinite.

Notably, absent forgiveness, Treasury and the IRS will need to address an employer's liability for the deferral, since employers generally are liable for the employee share of tax whether or not withheld. For example, will an employer be left to pay an employee's taxes if that employee elects to defer and then terminates employment, so that the employer cannot recoup the funds? If an employer ends up paying the employee's deferred taxes because the employee no longer is employed, will the employer need to treat those taxes as additional taxable wages to the employee (i.e., will the employer be forced to gross up those taxes, putting the employer in a situation where it is out of pocket again)?

Observation: Given concerns around liability, employers may be reluctant to allow employees to defer their social security taxes without clear guidance from Treasury that the employer will not be liable for the taxes. Similar concerns from third-party payers, such as certified professional employer organizations and professional employer organizations, will also need to be addressed as these types of payers may not want to take on the liability for their clients' employees.

Guidance on implementation -- whether and how to track any deferral, and how to determine which employees are eligible -- also is needed. If the deferral is elective on the part of employees, Treasury and the IRS will need to provide guidance

to employers as to how employees should make such an election, including whether it can be revoked and made retroactively. Guidance as to when payment will be required also will be needed, as will guidance regarding whether and when the deferral will be forgiven (if forgiveness is provided).

Any guidance around implementation will need to take into account that system changes likely will be difficult since Social Security taxes generally are set for the year based on the wage base and mid-year changes generally are difficult to implement.

Observation: It took several weeks to update payroll systems for the implementation of the employer payroll tax deferral that was enacted as part of the CARES Act.

Treasury will also need to address questions such as whether Social Security tax kicks back in if an employee receives a bonus in a pay period that puts the employee's compensation at more than \$4,000 for the pay period, and what happens if an employee's wages vary so that they receive \$4,000 biweekly for some pay periods but less in others (e.g., if overtime puts them over the \$4,000 cap for a September 1, 2020 through December 31, 2020 pay period). Having to track such changes, rather than just turning off Social Security tax withholding for employees that generally are expected to make less than \$4,000 biweekly, would present logistical difficulties for employers.

Similarly, Treasury and the IRS will need to address those deposits to which the deferral applies. The payroll tax relief indicates it applies to the employee share of social security tax on wages or compensation paid from September 1, 2020 through December 31, 2020. The implication appears to be that the deferral would be available for taxes due on wages paid from September 1, 2020, through the end of the year, but this is not clear, and employers likely will have questions as to which taxes can be deferred, particularly if withholding and deposit requirements cross over September 1, 2020. For example, if a biweekly payroll period covers August 28-September 11, will employers be required to determine the social security taxes applicable only to wages paid from September 1-11 so that only those taxes are deferred?

Observation: Since changes to payroll systems take time and that the logistics can be complex, Treasury and the IRS will need to provide clear direction to employers on these and other issues around the payroll tax deferral.

Other executive orders

The executive order on unemployment insurance directs the Labor Secretary and FEMA Administrator to approve a 'lost wages' assistance program that authorizes governors to provide a \$400 payment per week (including a \$300 federal contribution financed by federal disaster relief funds) to eligible claimants from the week of unemployment ending August 1, 2020, and until the earlier of weeks of unemployment ending not later than December 6, 2020, or the balance of federal disaster relief funds reaches \$25 billion.

The executive order on renter eviction and mortgage foreclosure directs the Treasury Secretary and the Secretary of Housing and Urban Development (HUD) to "identify any and all available federal funds to provide temporary financial assistance to renters and homeowners who, as a result of the financial hardships caused by COVID-19, are struggling to meet their monthly rental or mortgage obligations" and to take other steps to avoid eviction or foreclosure.

The executive order on student loan payment relief directs the Education Secretary to provide economic hardship deferments to borrowers as necessary to continue the temporary cessation of payments and the waiver of all interest on student loans held by the Education Department until December 31, 2020.

For more information

- For the payroll tax relief presidential memorandum, click [here](#).
- For the unemployment assistance presidential memorandum, click [here](#).
- For the student loan assistance presidential memorandum, click [here](#).
- For the renters and homeowners assistance presidential memorandum, click [here](#).

The takeaway

President Trump's executive order on deferring employee payroll taxes leaves many questions on the logistics and implementation for Treasury and the IRS to address. Employers will want to analyze the coming guidance closely before proceeding to make changes to their employee tax withholding systems. Individuals and businesses also will want to see if the White House and Congressional leaders resume negotiations to reach an agreement on 'Phase Four' legislation that could provide broader economic relief.

Let's talk

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