

CHAIR, EMPLOYEE
BENEFITS PRACTICE
GROUP

Dana Thrasher,
Birmingham, AL

EDITORS IN CHIEF

Robin Shea
Winston-Salem, NC

Susan Bassford Wilson
St. Louis, MO

IRS issues guidance on President Trump's payroll tax memorandum

By Deborah Hembree
Birmingham Office

and

Graham Newsome and Jeff Thompson
Macon Office

On August 8, President Trump issued a **memorandum** directing the Secretary of the Treasury, Steven Mnuchin, to use his authority to defer certain payroll tax obligations in an effort to provide individuals with additional COVID-19 relief. The Memorandum further directed Secretary Mnuchin to issue rules and regulations pertaining to the deferral.

On Friday, the Internal Revenue Service issued **Notice 2020-65**, which provides some guidance in interpreting President Trump's Memorandum. According to the IRS, the deadline for withholding, and thus the related payment of, the employee's share of Social Security taxes (or railroad retirement taxes) on "Applicable Wages" is postponed until the first quarter of 2021.

"Applicable Wages" is defined as the wages or other compensation paid to the employee on a pay date in the fourth quarter of 2020, up to a maximum of \$4,000 in a single pay period. This is based on a bi-weekly pay period, so if the employer uses a different pay period, the threshold amount for its employees' Applicable Wages will need to be adjusted.

This is one area where the added clarity of the IRS Notice could cause headaches and confusion with payroll providers. The Notice clarifies that the deferral of payroll taxes is available *only* if the amount of wages or compensation for a bi-weekly pay period is less than the "threshold" amount of \$4,000. Since this determination is made separately for each employee in each pay period, the deferral could be available to an employee for one pay period but not another. For example, an employee with bi-weekly pay of \$3,500 in the first pay period after implementation of the deferral would be eligible for deferral of the applicable payroll taxes, but then ineligible in the next pay period when his or her bi-weekly pay increases to \$4,500. This is likely to cause confusion with employers' payroll systems, even if those systems are provided by third parties. Continued monitoring would be required.

It is important for both employers and employees to understand that the relief



September 2, 2020

Legal Bulletin #824

provided here is only a deferral of the applicable payroll tax withholding and payment to a later date. Despite mention in the President's Memorandum of a desire to eliminate the eventual payment of any deferred payroll taxes under this guidance, the IRS Notice does not provide for any tax forgiveness. Instead, the deferred withholding from the fourth quarter of 2020 must be withheld and paid on a *pro rata* basis from wages and compensation paid in the first quarter of 2021. Interest and penalties will begin to accrue on May 1, 2021, for any deferred amounts that are not paid by the end of the first quarter of 2021. This means that employees who may see additional monies in their paychecks in the fourth quarter of 2020 because applicable withholdings are not made will in turn see less in their paychecks in the first quarter of 2021, when employers withhold both the deferred and current payroll taxes.

The deferral of payroll tax withholding until the first quarter of 2021 also raises the question of what happens when an employee whose withholdings were deferred terminates employment before the deferred amounts can be later withheld and paid. Unfortunately, the IRS Notice does not provide guidance for employers whose employees' withholding was deferred in the last quarter of 2020 and who are on unpaid leaves of absence, terminate employment, or otherwise do not have enough wages to "repay" the deferred amounts in the first quarter of 2021. The IRS Notice does provide that employers may make arrangements to "otherwise" collect the deferred amounts from the affected employees, but there is no specific guidance as to how an employer should go about collecting the deferred amounts from its employees.

Perhaps the most important item to be gleaned from the IRS Notice is that the Notice does not expressly *require* an employer to defer the payment of employee payroll taxes. Employers were hopeful that the IRS would specifically address whether deferral was required, in light of the language in the Presidential Memorandum that the deferral "shall" be made available to applicable employees. Instead, employers are left to interpret the intent of the IRS. Some commentators have said that deferral is not required based on Secretary Mnuchin's unofficial media comments that the IRS cannot "force" employers to defer withholdings, as well as language in the IRS press release accompanying its Notice indicating that employers are "allowed" to defer withholding and payment of the applicable payroll taxes. The IRS press release indicating that relief is "available" to employers and its Notice indicating that those employers who are otherwise required to withhold and pay the employee share of the applicable taxes are the ones to whom the relief is made available read as though the deferral of payroll taxes is optional on the part of the employer. In addition, the IRS Notice does not indicate that any penalties will be imposed against employers who choose not to defer withholding of the applicable payroll taxes. Additional guidance in this area would certainly be welcome.

Questions abound as to how employers will implement this new IRS guidance. If employers defer withholdings for one employee, must they do it for all employees? Can employees opt in or opt out of having withholdings deferred? At this point, it appears that much of that decision-making will have to be done by the employer and its payroll provider. We hope that the IRS will issue more guidance related to the Presidential Memorandum in the near future.

LEGAL BULLETIN

September 2, 2020



Legal Bulletin #824

This is a publication of Constangy, Brooks, Smith & Prophete, LLP. The information contained in this newsletter is not intended to be, nor does it constitute, legal advice. The hiring of a lawyer is an important decision that should not be based solely upon advertisements. Before you decide, ask us to send you free written information about our qualifications and experience. No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers. This email could be considered advertising under applicable laws.

IRS Circular 230 Notice: Federal regulations apply to written communications (including emails) regarding federal tax matters between our firm and our clients. Pursuant to these federal regulations, we inform you that any U.S. federal tax advice in this communication (including any attachments) is not intended or written to be used, and cannot be used, by the addressee or any other person or entity for the purpose of avoiding penalties that may be imposed under the Internal Revenue Code.



www.constangy.com
Toll free 866.843.9555

Need help with reopening?
Check out our **Coronavirus Return to Work FAQs** for the latest guidance. And more general information is available on our **Coronavirus Resource Center** page.

Constangy, Brooks, Smith & Prophete, LLP
Constangy, Brooks, Smith & Prophete offers a wider lens on workplace law. We have counseled employers exclusively since 1946. With offices in 15 states, we are one of the largest labor and employment law practices in the U.S. Constangy has been named as a top firm for women and minorities by organizations including Law360, the National Law Journal and **Vault.com**. Many of our more than 190 attorneys have been recognized by leading authorities such as Chambers & Partners, Best Lawyers in America® and Martindale Hubbell. Find out more about us online at www.constangy.com or follow us on Twitter @ConstangyLaw.

Office Locations
Alabama, Arkansas, California, Colorado, Florida, Georgia, Massachusetts, Minnesota, Missouri, New Jersey, New York, North Carolina, South Carolina, Tennessee, Texas, and Virginia.