
To: FCA International Members
From: FCA International Legal Counsel
Subject: **Payroll Tax Deferral FAQs**
Date: Sept. 9, 2020

Answers to Your Questions on Employee Payroll Tax Deferrals

Uncertainty continues regarding an employer's rights and obligations under President Trump's Presidential Memorandum titled, "[Memorandum on Deferring Payroll Tax Obligations in Light of the Ongoing COVID-19 Disaster](#)."

The following FAQs are intended to provide some clarification. They are based upon the Memo, as well as information and guidance issued by the Treasury Department Internal Revenue Service as of September 2, 2020, including [Notice 2020-65](#).

FAQ #1: What is the Payroll Tax Deferral Memo?

President Trump issued a Presidential Memorandum entitled, "Memorandum on Deferring Payroll Tax Obligations in Light of the Ongoing COVID-19 Disaster," which directed the Secretary of the Treasury to defer certain payroll tax obligations for qualifying employees. This means that employers who participate may defer the employee's 6.2% share of the Social Security portion of FICA payroll taxes. The Memo does not go into detail about the implementation of this program, and instead directs the Treasury Department to issue guidance.

FAQ #2: Which workers are eligible?

The deferral can be made available to any employee whose wages or compensation (payable during any bi-weekly pay period) are less than \$4,000, calculated on a pre-tax basis.

FAQ #3: When does the program become effective? When does it end?

The program is in effect Sept. 1 through Dec. 31, 2020.

FAQ #4: Are employers required to stop withholding employee payroll taxes?

At this point, it is not clear whether employers must stop withholding their employee's portion of the Social Security tax. The Memo and subsequent guidance do not expressly state either that this program is optional or that it is mandatory.

Thus far, the majority of commentary surrounding the issue has treated the deferral as optional on the part of the employer. Further guidance may clarify this, but for now the program appears to be voluntary.

FAQ #5: If any employer does not participate in the deferral program, should they continue to withhold and deposit on their normal schedule?

Yes. Employers who choose to continue withholding their employees' full payroll taxes should absolutely continue to follow their normal collection and deposit schedule.

FAQ #6: For employers who decide to participate, when do the deferred taxes need to be repaid?

Any deferred taxes will be repaid between Jan. 1, 2021 and April 30, 2021. Employers who either participate in the withholding deferral, or allow their employees to choose whether or not they participate, should advise their employees in writing that they will be subject to double withholdings of the employee portion of the Social Security tax during the period from January through April 2021.

FAQ #7: Will there be additional guidance on this program?

There may. The Memo directed the Treasury Secretary to issue guidance in order to implement the goals of the Memo. Now that some guidance has been issued, we do not know whether there will be further guidance.

Given the level of ambiguity in the Memo and existing guidance, and the number of open questions about how this program is supposed to be implemented, we are hopeful that either the Treasury Department or IRS issues further clarifications.

FAQ #8: Will the tax deferrals be forgiven?

The Memo directs the Treasury Secretary to “explore avenues” in order to ultimately forgive the deferred payroll taxes. However, this would likely have to be accomplished via legislation, and it is premature to rely on the potential for such forgiveness. For now, employers should not assume that these deferred taxes will be forgiven.

FAQ #9: If an employer chooses not to defer the withholdings, do employees have a claim against the employer?

It is unlikely that employees would be able to bring a claim. The Memo itself seeks to provide some protection, in that it states that it “is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.” (emphasis added).

This language indicates that the President did not intend to create a private right of action regarding this deferral program. While it is possible—perhaps even likely—that some employees will try to litigate this issue, this provision would make it difficult to do so.

Employers that continue to withhold these payroll taxes, and continue to remit them, may also be protected by Treasury Regulation 31.3102-1(d), which provides, in pertinent part, that an employer is indemnified against the claims and demands of any person for the amount of any payment of such tax made by the employer. Again note that it is important that if an employer continues to withhold the payroll taxes, that they also continue to remit them to the IRS on their normal deposit schedule.

FAQ #10: If an employer chooses not to participate, and gets push back from their employees, are there any benefits to employees by not participating that an employer could cite?

Yes. Employees should be advised that as of now, this program is not a windfall or second round of stimulus. Since employees and employers have to assume for the moment that these amounts will not be forgiven, they will have to be paid back from January to April 2021. Obviously, in many households the double withholding could cause cash flow issues. Having consistency in take home pay may be better for planning purposes, especially since deferring the 6.2% Social Security tax likely won't result in a significant amount of money on an individual basis.

FAQ #11: If an employer chooses to participate in the deferral, can an employee demand that the employer continue to withhold their taxes?

This is unlikely for the same reason that an employee likely cannot make a claim against an employer if the employer chooses not to participate in the deferral program—the Memo does not create a private right of action, and the guidance issued to this point does not indicate that employee choice is a relevant factor in determining whether or not this program is voluntary. Note, however, that there is nothing to prevent an employer from honoring a request by any employee to not defer their withholdings.

Indeed, asking employees to make an election about whether they want their payroll tax withholdings deferred may be the most conservative approach when trying to avoid a dispute. If taking this approach, it is important to obtain employee’s elections in writing, and to advise employees in writing of the consequences of what this election means, e.g. that there will be a double withholding for the Social Security tax from January through April 2021. Thus, for planning purposes, employees should be aware that their take home pay from January through April 2021 would be reduced.

FAQ #12: Are there consequences for failing to remit all deferred taxes by April 30, 2021?

Yes, the guidance indicates that any deferred amounts not repaid by April 30, 2021 would be subject to interest, penalties, and additions beginning on May 1, 2021. Note that per Treasury Regulation 31.3102-1(d), an “employer is liable for the employee tax with respect to all wages paid by him to each of his employees whether or not it is collected from the employee.”

Thus, any employer choosing to participate in the deferred payroll taxes program must ensure that they are confident in their ability to later collect the employee’s portion of the payroll taxes, otherwise it is possible that employers who participate in this program will be liable for the deferred taxes and be left to pursue their own employees or former employees for reimbursement.

FAQ #13: What if an employer defers the payroll taxes, but then later an employee for whom such taxes were deferred is terminated prior to repaying all deferred taxes?

If an employee is terminated prior to repaying all of their deferred payroll taxes, that employee and the employer would still be liable for the unpaid portion of the deferred payroll taxes. This issue may be complicated by State-specific tax codes and employment laws, and thus employers should speak with their accountants about this. If possible, employers should seek to withhold all as yet unpaid and previously deferred amounts from the terminated employee’s final paycheck.