

From the Business Council: Payroll Tax 'Holiday' Guidance Released

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There have been many questions about [President Trump's Executive Order on Payroll Tax Deferral](#), issued on August 8, 2020. That order used existing statutory authority to defer, but not cancel, the withholding of employee's social security payroll tax for the period September 1 to December 31, 2020. It would provide temporary relief to employees that are "generally" paid up to \$4,000 biweekly, or \$104,000 per year. While the order instructed the Treasury Department to consider options for cancelling these deferred withholdings, no statute, rule or order has been issued doing so.

The IRS has issued implementation guidance, [available here](#).

Key points from the Executive Order and IRS guidance for consideration by employers:

- This deferral is optional, at the election of the employer. An employer can choose to NOT participate in this program, and no further action would be required by the employer. As example, there is no obligation for employers to post a notice or otherwise notify employees of the program and/or the employer's decision to not participate.
- This employee payroll tax liability is only deferred. The deferred amount must be withheld from employees and remitted to the IRS during the period January 1, 2021 to April 30, 2021, during which period employees may see their withholding increased to double their "normal" level. Moreover, interest and penalties will begin to accrue on May 1, 2021, with respect to any unpaid amount of deferred tax.
- The deferral only applies to biweekly pay periods during which an employee earns \$4,000 or less, so payroll processors must be aware of pay period pay levels to correctly apply the deferral. No deferral is available for pay periods during which an employee earns over that threshold – a compliance provision that will add complexity for some employers.

Even with this IRS guidance, there are many unanswered questions regarding this program:

- If an employer opts into the program, do they have to apply the deferral to all eligible employees during all eligible pay periods?
- Are there restrictions on when an employer can opt into, and once in, opt out of the deferral program?
- Can an employer that opts into the program allow individual employers to opt in or out of the deferral program?
- How are payroll taxes recouped if an employee no longer works for the same employer during the January to April 2021 period for recovery of deferred withholdings? Would employers be liable for any unrecovered tax liability?
- What will Congress do? They could include a payroll tax "holiday" in an upcoming COVID relief bill, either forgiving taxes deferred under the Executive Order, or substituting a different program. To date, Congressional agreement on a payroll tax holiday has seemed unlikely.

In our view, due to the temporary nature of this employee "benefit," the requirement for full recovery of deferred withholdings from employees in 2021, and the significant uncertainties regarding the program, it will make sense for most employers to not opt-in.