Lowenstein Sandler

Employee Benefits & Executive Compensation

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IRS Issues Guidance to Implement Deferral of Employee Social Security Taxes Through December 31, 2020

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On August 8, President Trump issued a Memorandum directing the Treasury Department to permit employers to defer the withholding of employees' social security and railroad retirement taxes through December 31, 2020. On August 28, the IRS issued Notice 2020-65, as guidance to implement the President's directive.

Under Notice 2020-65, employers may defer withholding of employee social security and railroad retirement taxes on "Applicable Wages" paid during the period September 1, 2020 through December 31, 2020, and then ratably withhold those amounts from wages paid in the first quarter of 2021. The Coronavirus Aid, Relief, and Economic Security (CARES) Act allowed employers to defer payment of the employer's share of social security and railroad retirement taxes on wages paid from March 27, 2020 through December 31, 2020 (see http://www.lowenstein.com/news-insights/publications/client-alerts/updates-on-tax-deadlines-and-key-tax-provisions-of-the-cares-act).

Applicable Wages are wages paid to an employee on a pay date during the period beginning on September 1, 2020, and ending on December 31, 2020, but only if the amount of such wages or compensation paid for a bi-weekly pay period is less than $4,000 (or the equivalent amount with respect to other pay periods). The determination of Applicable Wages is made on a pay period-by-pay period basis. Amounts excluded from wages for purposes of determining social security and railroad retirement tax withholding are not included when determining Applicable Wages.

An employer must withhold and pay any deferred taxes ratably from wages paid between January 1, 2021 and April 30, 2021. It remains unclear how this obligation will apply to employees who terminate employment before the deferred taxes have been fully withheld. Interest, penalties, and additions to tax will begin to accrue on May 1, 2021 with respect to any unpaid deferred taxes.

Though not stated in the Notice, President Trump has publicly vowed to work to eliminate the obligation to pay taxes deferred pursuant to the Notice if reelected. If the obligation to repay stands, the short-term relief for the remaining four months of 2020 could turn into short-term headache in the first quarter of 2021 when employees' wages will be subject to both regular tax withholdings and make-up withholdings to cover the deferred taxes. For this reason, employers may consider asking employees whether or not they wish to have their social security or railroad retirement taxes deferred.

Employers should keep clear records of amounts deferred on an employee by employee basis so that the proper withholding amounts can be made in 2021. Notice 2020-65 does not address W-2 reporting, so additional guidance may be needed by the IRS for employers to disclose amounts deferred.

We will be keeping watch out for additional guidance regarding these deferrals. If you have any questions, Lowenstein Sandler's Employee Benefits & Executive Compensation Practice Group is available to help guide you through Notice 2020-65 and the broad spectrum of governmental relief issued to address the COVID-19 pandemic.

To see our prior alerts and other material related to the pandemic, please visit the Coronavirus/ COVID-19: Facts, Insights & Resources page of our website by clicking here.

Contacts

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