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Deferred Payroll Taxes – What You Should Know

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President Trump signed an executive order (the “Order”) on August 8, 2020 that directs Treasury to suspend collection of the employee portion of Social Security (6.2%) for workers who earn less than \$4,000 (on a pre-tax basis) during a two-week period. The Order only *defers* the collection of the tax, it does not waive the tax. It is, at essence, an interest-free loan from the federal government. While the Order directs Treasury to explore ways to eliminate the deferred payroll tax obligation, an elimination of the tax, even on a temporary basis, presumably requires action from Congress. The Order may also be challenged in court.

The Order leaves many unanswered questions. For example, it is unclear whether the employee or the employer is ultimately responsible for deferred taxes if an employee is no longer with the same employer when the taxes become due. It is also unclear whether complying with the Order is optional for either the employee or the employer and if an employee will receive Social Security credit for any portion of deferred taxes that ultimately are not paid.

What should employers do with all this uncertainty? Most employers will opt to wait until further guidance on the payroll tax deferral is provided by Treasury – that is, most businesses will continue to withhold and remit the tax pending clarity. Some employers may decide to continue withholding and transfer the employee portion of Social Security into an escrow account pending further guidance. For now, continuing to withhold is likely the only practical option given the uncertainty surrounding the Order and the time required for most payroll providers to reprogram systems to accommodate the tax deferral.

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