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CLIENT ALERT

Treasury Issues Guidance on Trump's "Payroll Tax Holiday"

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On August 28, 2020, Treasury issued guidance on Trump's August 8, 2020 Presidential Memorandum which announced a "payroll tax holiday," meaning an extension of the due date for employees' 6.2% payroll tax obligations. The Presidential Memorandum called on Treasury to use powers authorized under Section 7508A of the Internal Revenue Code following the presidential declaration of COVID-19 as an emergency. Section 7508A allows Treasury to delay the due date of taxes for those affected by an emergency, which Treasury has already done during COVID-19, moving the due dates for certain returns and payments from April 15, 2020 to July 15, 2020 for example. Under the CARES Act, dates for deposit and payment of the employer's portion of payroll taxes for most of 2020 have been delayed until December 31, 2021 (50%) and December 31, 2022 (remainder).

In the wake of this Presidential Memorandum, many businesses were left wondering how to handle withholding from employees' paychecks for the remainder of 2020, when the taxes would be due, and whether the program was mandatory. Treasury issued guidance to address businesses' questions on August 28, 2020. Notice 2020-65 explains that withholding, deposit, and payment deadlines for employees' portion of payroll taxes have been deferred to 2021. The 6.2% tax on wages of up to $4,000 bi-weekly from September 1, 2020 to December 31, 2020, is deferred until the first quarter of 2021 (employees paid more than $4,000 bi-weekly are not eligible for the deferral). In other words, employers may stop withholding this tax for the rest of 2020, but would need to pay liabilities accrued during this period over the first quarter of 2021. Because the obligation to withhold, deposit, and pay is deferred, penalties on employers for failure to withhold and deposit will not accrue until 2021. While the due date for these taxes is deferred, withholding in 2020 is still permitted and participation is not mandatory.

Because this program is not mandatory some employers will choose not to participate. First, these amounts are deferred and not excused. The make-up withholding required in 2021 will result in employees receiving far less of their paychecks in the first quarter of 2021, although they would receive only 6.2% more of each paycheck during the last few months of 2020. Second, employers will be on the hook for these amounts whether or not they can withhold these make-up amounts from the employee next year. If an employee leaves or is terminated before that time, the employer may be unable to recoup those funds from the former employee, but will face penalties if they do not pay over 2020 amounts owed to the IRS by April 2021. For those employers that choose to continue to withhold, their deposit obligations shall continue as before.

In his Presidential Memorandum, President Trump also asked Treasury to explore the possibility of excusing employees' payroll tax liabilities. However, Section 7508A only empowers to Treasury to take certain actions such as delaying due dates, and does not empower Treasury to excuse payment altogether. Only Congress could take such action, and indeed President Trump has mentioned pursuing a payroll tax cut in Congress if he wins a second term.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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