

August 11, 2020 Publication

Topics

Tax
Employment
COVID-19
Federal Tax

Related People

Craig A. Day
dayc@lanepowell.com

Lewis M. Horowitz
horowitzl@lanepowell.com

Eric J. Kodesch
kodesche@lanepowell.com

Related Practices & Industries

Business
COVID-19 Resource Center
Labor, Employment & Benefits
Tax

How Employers Should Implement the President's Payroll Tax Relief for Employees

COVID-19 Resource

The stalemate in Congress over supplemental unemployment benefits during the COVID-19 pandemic, and President Trump's most recent proclamations of relief, leave employers caught in the middle. A key component of the President's initiatives includes a Social Security tax holiday for employees, but that effort is causing chaos not only because it may not be enforceable but also because it tries to defer but does not (and cannot) eliminate the tax obligation. Accordingly, it leaves employers both confused how to implement and vulnerable to penalties if they get it wrong. For now, the best approach is to do nothing.

How Did We Get Here?

Congressionally sanctioned supplemental unemployment benefits of \$600/week expired at the end of July, risking an economic train wreck for the tens of millions of unemployed — and a political train wreck for any elected official who fails to act like they care. But members of Congress remain unable to agree on the next federal stimulus package. Although President Trump blames Speaker Pelosi and the Democrats for intransigence, viewers of this political theatre know that the Senate Republicans are insufficiently supportive of Majority Leader McConnell on the nature and scope of the next stimulus package to enable negotiation of a compromise between the House's \$3 Trillion HEROES bill and the Senate's \$1 Trillion HEALS bill.

So on August 8, President Trump took matters into his own hands and issued three memoranda and an executive order, as described by the NYT

[here](#), the WSJ [here](#) and the Washington Post [here](#).¹ This [article](#) focuses on the Memorandum on Deferring Payroll Tax Obligations in Light of the Ongoing COVID-19 Disaster (the Memorandum), which is intended to provide payroll tax relief to American workers earning less than an annualized rate of \$104,000/year in any pay period — because that initiative requires cooperation by employers.

Before examining the President's actions, let's take a quick detour to ensure that everyone understands what we are talking about here. Payroll taxes generally refer to an employer's obligations with respect to FICA, income tax withholding and unemployment taxes (and can include other state or local taxes). President Trump's actions concern FICA, which consists of two components: Social Security tax and Medicare tax. These taxes are *generally* split evenly between employers and employees with the employee's share deducted from the employee's paychecks. In general, the employer and employee each pay Social Security tax equal to 6.2 percent of an employee's wages up to the taxable "wage base," an inflation-adjusted amount which is \$137,700 for 2020. For most workers, the employer and employee Medicare tax equals 1.45 percent of an employee's wages with no comparable wage base. President Trump's Memoranda only affects the employee portion of Social Security taxes, not the Medicare tax.

As we discussed in previous articles ([here](#) and [here](#)), Congress formerly allowed employers to delay payment of the **employer portion** of Social Security taxes accruing between March 27 and December 31. President Trump has now attempted to provide a similar benefit for the employee portion, with a promise to eliminate any repayment obligation if he is re-elected.

What the Memorandum Does & Doesn't Do

The Memorandum provides no details on implementation and is not self-executing. Rather, it directs the Secretary of Treasury to use his authority to defer the withholding of the employee portion of Social Security (not Medicare) tax from an employee's paychecks issued between September 1 and December 31 if employee's annualized compensation is less than \$104,000 (*e.g.*, biweekly wages of less than \$4,000).

Other key things to note about the Memorandum include:

- Although the relief will result in an increase of affected employees' paychecks, employees remain liable for such Social Security taxes — unless action is taken to permanently eliminate such taxes for this period. The Memorandum directs the Treasury Secretary to “explore avenues, including legislation” to permanently eliminate the deferred employee portion of Social Security tax obligation. At this point, however, the taxes are only deferred, and there is no indication how long such deferral will last.
- Severe penalties generally apply to employers who do not withhold the employee portion of Social Security taxes from their employees' pay, which include responsible officer liability (that is, the CEO or CFO can be personally responsible for the unpaid employee portion of Social Security taxes). The Memorandum provides that the unpaid Social Security taxes “shall be deferred without any penalties, interest, additional amount, or addition to the tax.” However, as discussed in this [WSJ article](#), employers (and the responsible officers of employers) have no assurance that the Memorandum overrides or obviates that penalty exposure.
- Prior to the President's actions, GOP leadership in both houses of Congress opposed Social Security tax relief for employees because such relief only benefits those who are **working** and the primary problem in the eyes of Congress is unemployment compensation. Democratic leadership likewise opposed employee Social Security tax relief for the same reason and also because they believe it undermines the solvency of the Social Security system.
- The Treasury Secretary was directed to issue guidance, but we have no clue what that guidance will actually say or when it will be available. Some difficult questions that will need to be addressed include:
 - How long is the deferral and how will deferred taxes be collected?
 - If the plan is for employers to collect the deferred taxes from the employee paychecks, when will that be required and how will employees cope with the repayment obligation?
 - What happens if an employee changes employers between now and the end of the deferral period? If the plan is to require employees to repay the deferred taxes when they file their income taxes, it is easy

to imagine surprise and disappointment among the great many employees accustomed to refunds.

- How is eligibility determined for employees who received less than \$4,000 in some biweekly periods but more than that in others (e.g., those employees who work on commission or who work more hours in some weeks than others)?
- If deferral is made permanent, how will it affect both the solvency of the Social Security program and the employee's benefits under the Social Security Program?

This issue is mired in politics, and we are not taking sides. We can say that it is far from clear that the President has the unilateral authority to suspend withholding of the employee portion of Social Security taxes. Congress may yet take action on a new stimulus package and make the social security tax holiday issue moot or clear. If not, we anticipate litigation.

What is an Employer to do Given the Contradiction Between the Memorandum and Clear Federal (Tax) Statutes?

We recommend waiting for guidance from the Treasury Department before taking any action. The effective date is still three weeks away, and we are likely to know much more by then. Meanwhile, if employees inquire about “releasing” their share of Social Security taxes as part of their paychecks, we recommend a simple response: *we are awaiting guidance and will follow the law*. Unless, of course, you are eager to become the test case for litigating in this politically charged environment.

Determining how best to meet your business needs during these uncertain times can be challenging. Lane Powell's team of attorneys are here to help you develop and implement the strategy that supports your business and your employees. For more information, consult Lane Powell's [COVID-19 Resource Center](#) or the authors of this article, [Lewis Horowitz](#), [Craig Day](#) and [Eric Kodesch](#).

1 Those reading these articles can be forgiven if they fail to realize that they seem to reflect *three sides of the same coin*.