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CORONAVIRUS UPDATE #88

TREASURY DEPARTMENT TONIGHT ISSUES GUIDANCE ON PRESIDENT TRUMP'S PAYROLL TAX DEFERRAL EXECUTIVE ACTION

Earlier this month, President Donald Trump signed an executive action deferring the payment of certain employee payroll taxes. Throughout discussions on numerous Coronavirus stimulus bills during the crisis, President Trump had been interested in payroll tax forgiveness. Republicans and Democrats were reluctant, however, and wanted more immediate stimulus. Congressional leaders were not in favor of doing anything with payroll taxes, since employees would not receive the benefit immediately and instead would receive it gradually over time.

The President's recent executive action ended up being for deferral and not forgiveness of the employee portion of payroll taxes. It appears the Trump Administration concluded that was all they could legally pass without Congress' involvement, which significantly reduces any potential benefits to employees.

This evening, to support the Trump executive action, the U.S. Treasury Department issued guidance which indicates that deferral of Social Security withholdings can occur from September 1, 2020, to December 31, 2020, at the employer's discretion if an employee wants to participate. The employer is responsible for repaying the amounts deferred from January 1, 2021, to April 30, 2021, and can arrange to collect these amounts from employees. Employers should be concerned with those employees that defer payroll taxes and then terminate their employment prior to fully repaying the balance due. In these cases, it appears the employer would be responsible for these amounts.

Tonight's guidance is available [here](#).

Under the executive action and the guidance, in order to qualify for deferral, the following apply:

- The deferral is only for payroll taxes incurred between September 1, 2020 and December 31, 2020.
- Only the employees' portion of Social Security tax incurred is eligible (the 6.4% rate).
- The deferral is only valid for bi-weekly pre-tax compensation earned up to \$4,000 (\$104,000 annually).
- If payroll frequency is more or less than bi-weekly then the \$4,000 amount is to be prorated.
- Similar to provisions related to compensation in the PPP loan program, if an employee is paid compensation on a variable basis, it is possible they could defer their payroll taxes and still earn more than \$104,000 annually.
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Albin, Randall & Bennett is recommending employers proceed cautiously with deferral on behalf of their employees, especially given the guidance issued by the Treasury Department tonight regarding repayment. Again, according to this guidance, repayment of these amounts is up to the employer, not the employees. It is up to the employer to go back to employees and withhold these amounts in 2021. Other complications to consider are what happens if an employee terminates their employment prior to repaying this balance. In this case, it appears the employer will definitely be held “holding the bag.” As with government programs, the “devil is in the details.”

We expect there will be additional guidance regarding this program in the coming weeks. We will keep you informed as additional information becomes available.

Daily Massachusetts COVID-19 Tracker

The state’s COVID-19 Dashboard with up-to-the-date data can be found [here](#).

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