

The Bankler Report

September 3, 2020

INTRODUCTION

On Saturday, August 8, 2020, President Trump issued an Executive Order (EO) directing the Treasury Department to defer the withholding, deposit, and payment of certain employee payroll taxes beginning September 1, 2020, thru December 31, 2020.

The President's powers were included in previous legislation dealing with "Presidential declared disaster areas". These powers include the deferral of taxes for no longer than a year. The EO utilizes this power.

- 1. Deferral – not forgiveness of these taxes** – The deferral relates only to the employee's portion of Social Security payroll taxes (6.2%) for those who generally earn less than \$4,000 on a pre-tax basis during any bi-weekly pay period (\$104,000/yr). Therefore, the maximum deferred under the EO would be about \$2,150 ($\$104,000 * 6.2\% * 4/12$ [taxes for four out of the 12 months]).

Observation - The EO uses the words "generally earn." Does this mean an employee may not lose the deferral for certain one-time payments (bonuses)? Treasury needs to provide further guidance.

- 2. IRS issued Notice 2020-65 on August 28, 2020** - The notice implements the Presidential Executive Order. It provides that the employee's payroll taxes, which were deferred, must be paid ratably between January 1, 2021, and April 20, 2021. In addition, the Notice also authorizes employers, "if necessary," to "make arrangements to otherwise collect the total Applicable Taxes from the employee."

Observation - These deferrals apply ONLY to the EMPLOYEE portion of the SOCIAL SECURITY taxes (FICA) of 6.2%. There is NO DEFERRAL of the employee MEDICARE taxes. In addition, employer matching taxes are NOT DEFERRED under the EO, but may be deferred under the CARES ACT, which became law on March 27, 2020. It allows employers to elect to defer their share of Social Security tax during the period of March 27, 2020, and ending December 21, 2020. Half (50%) of these deferred taxes are due on December 31, 2021, and the balance on December 31, 2022.

- 3. This Notice does not address significant issues, some of which include:**
 - a. What happens if the employee has left the employer before these taxes have been repaid?
 - b. Is the employer responsible for the remaining balance?
 - c. What rights do employers have to collect these amounts from former employees?
 - d. Can an employer permit (or require) an employee to elect out of deferring these taxes?
 - e. What does "generally earn" wages include or exclude? Bonuses? Unusual overtime? Unusual commission/sales incentives?
 - f. If the "unusual wages" cause the \$4,000 bi-weekly cap to be exceeded, is the full amount excluded or just the excess (especially if the annualized wage is below the annualized cap)?

This EO raises numerous questions that remain unanswered by the Notice. Please feel free to contact us with your specific questions.