Tonkon Torp LLP
888 SW 5th Ave., Suite 1600
Portland, OR 97204
503.221.1440 main

VIA EMAIL

MEMORANDUM

TO: {name}|\n

FROM: Kate Roth

DATE: August 21, 2020

SUBJECT: Client Alert: Deferring Payroll Tax Obligations

On August 8, 2020, President Trump issued an Executive Order directing Treasury Secretary Mnuchin to allow employers a temporary *deferral* on withholding, collecting, and remitting certain employment taxes. This is not a tax forgiveness, at least at this point, although the Executive Order instructs the Treasury to explore ways of making it permanent.

This temporary deferral applies only to the *employee's* share of Social Security tax for the periods between September 1 and December 31, 2020. The *employer's* share is not deferred (although the CARES Act did provide for such a deferral). Deferral is only available for employees whose compensation is less than $4,000 in a bi-weekly pay period, or an equivalent amount for those on different pay periods. The $4,000 ceiling is calculated on a pre-tax basis.

The Treasury Department has yet to publish any implementing guidance, although Secretary Mnuchin has stated that the temporary deferral is "not mandatory." Many questions remain: How does an employer opt in-to this program? Is the employer required to give employees a choice, or is the employer required to have blanket policy for all eligible employees? How do eligible employees make an affirmative election to defer these taxes? For employees with multiple employers, does the $4,000 limit apply separately to each? Will late-adopting employers be able to make the deferral retroactive? How do employers report amounts that are deferred?

A fundamental question for both employers and employees is who will be responsible for ultimately paying any deferred taxes—and how will this be accomplished. Without legislation forgiving the deferred tax, the employee's share of deferred Social Security taxes will ultimately have to be paid. If the taxes remain as a temporary deferral, employees may have a higher-than-expected tax bill when they file their 2020 returns, or employers may have to over-withhold in 2021. Potential penalties and interest on the amount deferred are also uncertain. The

Executive Order explicitly states that penalties and interest will not accrue, but it gives no clear directive on how that would be accomplished. Because employer "responsible persons" can be liable for the 100% trust fund penalty, employers should be especially cautious with this deferral.

Employers should roll out a deferral program at this time only if they are willing to comply with whatever guidance is eventually issued, and they should develop a written opt-in process in which they obtain written consent from employees to defer. The consent form should clearly inform employees:

- they are voluntarily electing to defer their portion of Social Security taxes;
- the deferral is temporary; and
- amounts deferred will need to be withheld from wages in 2021 or, if the deferral is forgiven, their 2020 wages may be higher.

For more information or assistance with creating a deferral program, please contact an attorney in the Tax and Employee Benefits group at Tonkon Top LLP.

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