Treasury Releases Guidance on Temporary Deferral of Employee Payroll Taxes

On Friday, August 28th, Treasury released Notice 2020-65, which provides guidance to employers that wish to implement President Trump's Executive Order allowing a *temporary* deferral of employee-side Social Security taxes. The deferral applies to pay periods from September 1 through December 31, 2020. The deferral is temporary, and will remain so unless and until Congress takes action to make it permanent.

The Executive Order stated that an employer may defer Social Security taxes for an employee whose pre-tax compensation is *less than* $4,000 in a bi-weekly pay period, or an equivalent amount for other pay periods. Notice 2020-65 makes clear that the $4,000 ceiling is determined on per-pay period basis rather than as an annualized amount. Deferral is not available during a bi-weekly pay period for an employee whose wages are at or above $4,000 for such pay period.

Notice 2020-65 further provides that employers who implement the deferral program do not have a payroll tax deposit obligation for Social Security taxes until they are withheld from an employee's wages. Payment of the deferred taxes is due ratably between January 1 and April 30, 2021.

During the repayment period, employers will need to withhold and deposit deferred taxes in addition to regular payroll tax withholdings for the current period. Notice 2020-65 allows employers to make other arrangements with an employee to collect amounts deferred. Thus, employers, *not employees*, remain responsible for the deferred taxes.

Although the Executive Order allowed for deferral without penalties, interest, or additions to tax, Notice 2020-65 imposes these sanctions if deferred amounts are not repaid by May 1, 2021.

Notice 2020-65 raises even more questions than the original Executive Order. What happens if an employee leaves service before the repayment period begins or before the deferral is fully repaid—for example, may the employer deduct the entire remaining deferral amount from the employee's final paycheck? How will the tax withholdings in 2021 affect an employee who may not have enough wages to fully cover the deferred taxes?

Employers should roll out a deferral program only if they are willing to assume the risk of having to cover any deferred taxes that prove to be uncollectible from employees. Employers should also 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;
- That, in addition to normal payroll withholding, amounts deferred between September 1 and December 31, 2020, will be ratably withheld from wages between January 1 and April 30, 2021; and

- If an employee is terminated for any reason before the deferred taxes are fully repaid, the remaining amount will continue to be owed and may be deducted from his or her final paycheck.

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.