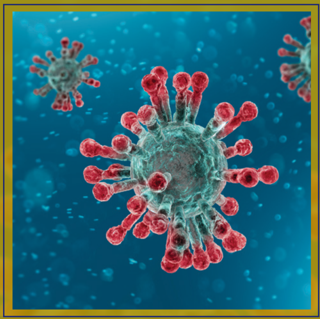

NECA Legal Alert

IRS COVID-19 Payroll Tax Deferral Guidance

What is the Coronavirus?

Coronavirus Disease 2019 (COVID-19) is a respiratory disease caused by the Severe Acute Respiratory Syndrome (SARS)-CoV-2 virus. The current mutation is a new strain of the SARS virus and no individual has any immunity prior to an exposure. The CDC has reported that testing has begun on a vaccine but for now, everyone should prepare and plan for possible impacts resulting from COVID-19. It has spread from China to many other countries around the world, including the United States.

Jef Fagan, *NECA General Counsel*

Early last month, President Trump signed an executive order directing the secretary of the treasury to allow employers to defer the withholding, deposit and payment of a certain portion of social security taxes in light of the ongoing COVID-19 pandemic. The IRS has issued guidance implementing the president's order. However, Notice 2020-26 still leaves employers responsible for collecting the tax from employees and for interest and penalties if the employers are unable to collect the tax after the deferral period. As a result, employers should carefully consider whether it is prudent to participate in the program. As always, NECA contractors are encouraged to seek competent local legal, tax and accounting counsel for specific questions and concerns related to the deferral of payroll taxes.

The Basics

Employers are *permitted* to defer withholding the 6.2 percent employee portion of social security tax on wages paid between September 1, 2020 and December 31, 2020. The deferral is optional for employers and not mandatory. Employers *may* defer this tax for employees whose income is less than $4,000 per bi-weekly pay period, or the equivalent based on a different period. While the president's order also directs the treasury to look into ways to forgive the tax, such forgiveness would literally take an act of Congress.

Concerns and Uncertainties

- There is no discussion of how to handle requests from employees for deferral. However, it is clear that the deferral is at the employer's discretion.
- The wage threshold is calculated on a pay period-by-pay period basis without regard to any other period.
- Employers remain on the hook for repayment and must ratably repay the deferred taxes by withholding from wages and compensation paid between January 1, 2021 and April 30, 2021.
- Employers are subject to interest, penalties and additions to tax for any deferred tax unpaid by April 30, 2021.
- The IRS does not allow an employer to withhold the tax and delay depositing these funds with the IRS. The IRS imposes failure-to-deposit and failure-to-pay penalties if employment taxes are not deposited and paid in a timely fashion.
- It is unclear what happens if an employee leaves employment at any time between September 1, 2020 and April 30, 2021, leaving the employer unable to collect the deferred taxes. Similarly, if an employee's wages or compensation in 2021 are not enough to ratably repay the tax, employers will have to ask employees for other forms of payment or face paying the tax themselves to avoid interest and penalty.

It may be best to wait until forgiveness rules are determined

Employers who choose not to defer may still be able to refund the tax to employees if it is forgiven. If the tax is forgiven in 2020 however, the law allows employees to request a refund of any overpayment directly from employers. If the tax is forgiven in 2021, employees will have to wait until they file their income tax returns to request a refund of the overpaid tax.

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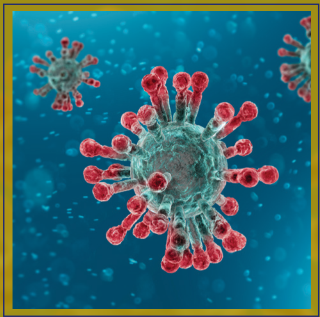

Employers who defer should ensure employees are aware of the obligations to repay the tax through paycheck withholding beginning January 1, 2021. Employers should consider communicating reasons to employees for not participating in the deferral, but maintaining the status quo certainly makes this communication optional.

As with most of the COVID-19 legislation and regulation, additional guidance is likely forthcoming. NECA will updated its resources as necessary. Please see competent tax advice to determine the best course of action.

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