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**MEMORANDUM**

**To:** Clients  
**From:** Chip Watkins  
**Date:** August 31, 2020  
**Re:** **2020 Employee FICA Tax Deferral**

On August 8, 2020 President Trump signed a memorandum, <https://www.whitehouse.gov/presidential-actions/memorandum-deferring-payroll-tax-obligations-light-ongoing-covid-19-disaster/>, directing the Secretary of the Treasury, pursuant to §7508A of the Internal Revenue Code, and effective for wages paid (up to \$4,000 per bi-weekly pay period) between September 1<sup>st</sup> and December 31<sup>st</sup>, to “defer the withholding, deposit, and payment” of the employee’s share of the Social Security tax on those wages. This is the 6.2% tax on employees’ wages, up to the Social Security wage base.

The deferral does not apply to the employee’s share of the Medicare tax (1.45%), the employer’s share of Social Security and Medicare taxes, income tax withholding, or federal or state unemployment taxes.

The deferral also does not apply to a self-employed individual’s obligation to timely make estimated tax payments toward both his or her income and self-employment tax due.

**IRS Notice 2020-65**

On August 28, 2020, the IRS published Notice 2020-65, <https://www.irs.gov/pub/irs-drop/n-20-65.pdf>, implementing the deferral and providing additional guidance for employers.

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**The deferral of withholding and deposit is *voluntary*.**

Before discussing the details in Notice 2020-65, the most important point to be made about the deferral is that it is *voluntary*. The President’s memorandum and IRS Notice 2020-65 merely *postpone the deadline* for the employer to withhold and deposit the employee FICA tax on “Applicable Wages” paid between September 1 and December 31, 2020. *Under the Internal Revenue Code, employers are free to continue to withhold and deposit employee FICA taxes on “Applicable Wages” in accordance with the requirements to which they are normally subject.*

However, *state laws* may prohibit an employer from voluntarily withholding the employee FICA tax from the paychecks of employees working in that state. Although not addressed by Notice 2020-65, many states prohibit an employer from deducting amounts from an employee’s paycheck unless the deduction is required by law or consented to by the employee.<sup>1</sup> Because between September 1 and December 31, 2020, the employee FICA tax is not required to be withheld by law, employers may be required to obtain the employee’s consent to continue “normally” withholding. Employers should consult with legal counsel, and if necessary, obtain the required consent in writing.<sup>2</sup> A sample consent form is attached.

Links to state laws governing deductions from paychecks are at <https://www.employmentlawhandbook.com/wage-payment-laws/>. Reviewing these laws is not a substitute for consulting with counsel.

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<sup>1</sup> E.g., Md. Labor and Employment Law, §3-503: “An employer may not make a deduction from the wage of an employee unless the deduction is: 1) ordered by a court of competent jurisdiction; (2) authorized expressly in writing by the employee; (3) allowed by the Commissioner because the employee has received full consideration for the deduction; or (4) otherwise made in accordance with any law or any rule or regulation issued by a governmental unit.” An employee *may* have received “full consideration” because the taxes will not be deducted during January – April.

Va. Code §40.1-29.C may permit an employer to deduct the employee FICA tax sooner than otherwise required: “No employer shall withhold any part of the wages or salaries of any employee except for payroll, wage or withholding taxes or in accordance with law, without the written and signed authorization of the employee.”

D.C. Regulations §7-915 prohibits certain involuntary deductions, but is silent as to employment taxes deducted before the required date.

<sup>2</sup> Because of the immediacy of implementation and the temporary nature of the deferral, we do not know whether state agencies charged with enforcing these laws might simply disregard the issue.

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Employers in states that do not require consent to voluntary withholding of employment taxes may wish to provide their employees with an explanation. A sample explanation is also attached.

### **Definitions**

Notice 2020-65 defines three key terms. An **Affected Taxpayer** is any employer “required to withhold and pay the employee share of social security tax under section 3102(a)” of the Internal Revenue Code.

**Applicable Wages** means “wages as defined in section 3121(a) . . . paid to an employee on a pay date during the period beginning on September 1, 2020, and ending on December 31, 2020, but only if the amount of such wages or compensation paid for a bi-weekly pay period is *less than* the threshold amount of \$4,000, or the equivalent threshold amount with respect to other pay periods.” (The “equivalent threshold amount” is: weekly: \$2,000; semi-monthly: \$4,333.33; and monthly: \$8,666.67.)

Employees whose wages are variable, e.g. due to hours worked, commissions, or bonuses, may equal or exceed the \$4,000 (or equivalent) threshold in some pay periods, but not others. When the wages in any pay period equal or exceed the \$4,000 (or equivalent) threshold, the employee FICA wages must be withheld from that paycheck, based on the total wages, not merely the amount in excess of the threshold, and timely deposited.

Amounts that are excluded from the definition of “wages,” e.g., payments for health insurance or contributions to retirement plans, are not taken into account in determining whether “Applicable Wages” equal or exceed the \$4,000 (or equivalent) threshold.

Of course, when amounts paid to employees whose “wages” paid before September 1<sup>st</sup>, or at any time during the deferral period, exceed the Social Security wage base (\$137,700 in 2020), the excess amounts cannot be Applicable Wages, because wages paid in excess of the annual wage base are not subject to FICA tax.

**Applicable Taxes** means the aggregate FICA tax imposed on employees with respect to Applicable Wages paid between September 1, 2020 and December 31, 2020.

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### **Period of deferral**

The deferral applies to Applicable Wages paid between September 1 and December 31, 2020. No penalties or interest will be charged on the amounts whose deadline for withholding or deposit is deferred, provided the amounts are withheld and deposited not later than April 30, 2021.

### **Withholding and payment of amounts deferred**

Notice 2020-65 states that the “due date for the withholding and payment of” the employee FICA tax “is postponed until the period beginning on January 1, 2021, and ending on April 30, 2021.”

“An Affected Taxpayer must withhold and pay the total Applicable Taxes that the Affected Taxpayer deferred under this notice *ratably* from wages and compensation paid between January 1, 2021 and April 30, 2021.” (Emphasis added.)

This means that the total amount of FICA tax that was not withheld or deposited between September 1 and December 31, 2020, must be withheld in (usually) eight or nine equal installments (in addition to the FICA tax imposed on the employees’ current pay) beginning January 1, 2021. “Interest, penalties, and additions to tax will begin to accrue on May 1, 2021, with respect to any unpaid Applicable Taxes.”

### **Open questions**

Like the President’s memorandum, Notice 2020-65 does not address any details about how the employer is expected to collect the deferred taxes from *former* employees, except to state, “If necessary, the Affected Taxpayer may make arrangements to otherwise collect the total Applicable Taxes from the employee.” For example, if an employer defers withholding and deposit of taxes beginning September 1<sup>st</sup>, and an employee resigns effective November 1<sup>st</sup>, can the employer withhold the deferred amount from the employee’s final paycheck? We assume so, but Notice 2020-65 doesn’t address the issue.

### **Comments**

Because employers who defer withholding will be required generally to withhold twice the usual employee FICA tax during January through April 2021, employers should

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consider *not* deferring withholding and deposit of employee FICA taxes. This will avoid providing their employees with more cash in the fall, but less in the winter and early spring. Employers that elect not to defer withholding and payment of employee FICA taxes should explain this issue to their employees.

Employers that defer withholding and deposit should withhold the aggregate deferred FICA taxes from the final paycheck of an employee whose employment terminates (for any reason) after September 1, 2020 and before April 30, 2021.

Employers with employees in states that require consent to voluntary withholding may want to provide those employees with consent forms that explain that if they do not consent, the employer will be required to, in effect, withhold twice the normal amount of employee FICA taxes during the period between January 1 and April 30, 2021. A sample consent form is attached

We will keep you updated regarding additional developments.

**Note: This memorandum does not provide legal advice, but is provided for informational purposes only. Should you need legal advice, please contact me at (202) 688-3548.**

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**SAMPLE  
CONSENT TO WITHHOLD EMPLOYEE SOCIAL SECURITY TAX**

**Background:** The Internal Revenue Service has implemented President Trump’s direction that *defers* [Company’s] obligation to withhold the 6.2% of your compensation that we normally withhold for Social Security [FICA] taxes from each paycheck. The deferral is permitted for amounts paid between September 1 and December 31, 2020, but only if your wages during the **bi-weekly** pay period are less than **\$4,000.00**. Amounts not withheld between September 1 and December 31 must be withheld ratably from each paycheck you receive between January 1 and April 30, 2021 (in addition to the 6.2% we are already required to withhold from those paychecks).

**Consent required:** Because **State** law requires Company to obtain your consent to withhold any amounts not required by law, we are asking for your consent to withhold the employee FICA tax from your September – December paychecks.

If you do not consent, you will receive more after-tax pay in September through December, but less in January through April. This is illustrated by the following example:

Assume an employee earns \$2,000 every two weeks. The employee FICA tax is \$124 (\$2,000 x .062). Each of the nine paychecks received between September 1 and December 31 would be \$124 more than usual. However, during January through April, each paycheck would be \$124 less than usual, because the amounts not withheld in the fall, must be withheld during January through April, in addition to the normal 6.2% withholding.

If you do not consent to withholding and you leave employment before December 31, 2020, Company will withhold the previously deferred amounts in a lump sum from your last paycheck.

If you have any questions about this consent, please contact **Name**, at **[e-mail address]** or **[cell phone]**.

**I have read and understand the preceding statement, and consent to Company’s withholding the employee FICA tax from my paychecks between September 1 and December 31, 2020.**

Signature: \_\_\_\_\_

September \_\_, 2020

Print name: \_\_\_\_\_

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**SAMPLE  
NOTICE REGARDING EMPLOYEE SOCIAL SECURITY TAX WITHHOLDING**

The Internal Revenue Service has implemented President Trump's direction that *defers* [Company's] obligation to withhold the 6.2% of your compensation that we normally withhold for Social Security [FICA] taxes from each paycheck. The deferral is permitted with respect to amounts paid between September 1 and December 31, 2020, but only if your wages during the bi-weekly pay period are less than \$4,000.00. Amounts not withheld between September 1 and December 31 must be withheld ratably from each paycheck you receive between January 1 and April 30, 2021 (in addition to the 6.2% we are already required to withhold from those paychecks).

For example, assume an employee earns \$2,000 every two weeks. The employee FICA tax is \$124 ( $\$2,000 \times .062$ ). Each of the nine paychecks received between September 1 and December 31 would be \$124 more than usual. However, during January through April, each paycheck would be \$124 less than usual, because the amounts not withheld in the fall, must be withheld during January through April, in addition to the normal 6.2% withholding.

Because the effect of the deferral would merely be to temporarily increase your after-tax pay until December, followed by an equivalent temporary decrease in your after-tax pay in January through April, and because Company would incur significant costs to implement both the deferral and the additional collections required next year, Company has decided not to defer the withholding and payment of employee FICA taxes.

If you have any questions about this notice, please contact Name, at [e-mail address] or [cell phone].