

September 4, 2020

August 8th Presidential Memorandum on Deferral of Employee Payment of Certain Payroll Taxes.

Bottom line, IRS opinion is that employers are not obligated to implement the deferral of payroll tax that is the subject of the President's August 8th Memorandum. Cities – you may do this, but you don't have to.

There is a lot of confusion around the [President's Memorandum](#) which defers the obligation of employees to pay payroll (6.2% social security) for the period September 1 to December 31. The money then has to be paid back early next year, unless Congress takes action to eliminate the obligation altogether. The payroll tax deferral holiday applies to employees with wages below a biweekly threshold of \$4,000.

[Treasury guidance](#) issued on August 28th provided limited clarification. It instructs employers which implement the deferral to double withhold (12.4%) from 1/1/2021 to 4/30/21, although there could be flexibility for other arrangements to recoup the deferred taxes.

Secretary of Treasury has said more than once that it is not mandatory for employers to apply the deferral, however there is nothing explicitly saying that in the treasury guidance. Our General Counsel called the Treasury help line and they confirmed that, in IRS' view, this order, which is technically a Memorandum rather than an Executive Order, is not mandatory for employers.

The federal government has implemented the deferral for all employees.

As to the question of whether, if the city decides to opt in, they must defer the taxes for all covered employees — we believe the answer is no. Cities must make the initial decision to opt in to the deferral (they don't have to - it's not mandatory). If they do opt in, it's then an option available to those employees who qualify (but not required that if one employee gets it, they all must get it, unless the city chooses to set it up that way.)

As to *who* makes the decision of whether or not to withhold — neither the president's order nor the IRS's guidance explicitly addresses that. However, we believe only the employer has that power.

- The employers (cities) are the ones who are ultimately responsible for paying all the deferred taxes by April 30, 2021. So, it would follow that it would be up to the city employer whether or not to defer.
- Although the employees are ultimately the taxpayers, the purpose of these recent changes seem to be being made with the *employer* in mind (In its guidance, the IRS stated that

employers that are required to withhold and pay the employees' share of these taxes are the "Affected Taxpayers" for purposes of the Presidential Memo and the guidance).

- So, the city's power here is to make the initial decision of whether or not to opt in to this deferral. If they decide not to do so, employees can't just opt in on their own.
- If the city does decide to opt in, however, it will then depend on which system the city adopts (i.e. automatically enrolling all covered employees or giving them an option instead).

As to who *specifically* has the power in the city to make the decision to either opt in or out, that is a policy choice which will depend on the city's government structure and policies. Here at the League, the Executive Director took the decision not to implement the deferral. If the City Administrator makes personnel decisions, he/she would be responsible; if not, then the city commission or council has the authority; discuss with your city attorney.

What if an employee leaves before repaying the deferred amount? If the city opts in, the city may want to establish rules for what happens if the employee leaves the city's employment, IRS regs say that the city can make other arrangements for payments. Not clear whether that means the city can deduct from the final paycheck; discuss with your city attorney.

Does the city have to opt in/out by resolution?

No, there is no formal process required. Cities may use a resolution, if that is what they usually do for a personnel/financial decision. Otherwise, use the usual decision-making process at whatever level is appropriate for your city.