

# **BARSAMIAN & MOODY**

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## **CONFIDENTIAL ATTORNEY WORK PRODUCT**

### MEMORANDUM

TO: Barsamian & Moody Clients

FROM: Barsamian & Moody

DATE: September 4, 2020

RE: Guidance for Implementation and Compliance with Presidential  
Memorandum Deferring Employee Social Security Tax Withholding

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On August 8, 2020, President Trump directed the Secretary of the Treasury to allow employees to defer the payment of the employee share of payroll taxes due to COVID-19. The IRS has now issued official guidance. Unfortunately, the guidance is not very clear. We are providing a brief overview of program here. Please note that Barsamian & Moody are not tax professionals and do not provide tax or accounting services. Please consult your accountant and/or tax advisor to ensure proper compliance with tax obligations.

### **OVERVIEW OF THE PAYROLL TAX DEFERRAL PROGRAM**

The payroll tax deferral program allows eligible employees the option to defer the payment of their share of Social Security taxes for wages paid between September 1 and December 31, 2020. Employers are required to allow employees to participate in the program; however, employees are not required to participate. In other words, each eligible employee must be given the choice whether to “opt-in” or “opt-out” of the program. To date, there is very little guidance clarifying how employers are supposed to make this program available, what notice must be provided to employees, or whether an affirmative “opt-in” or “opt-out” is required.

### **What employees are eligible to participate in the payroll tax deferral program?**

Employees who earn less than \$4,000 in gross wages during a bi-weekly pay period. As the guidance is written, the limits are \$2,000 in gross wages during a weekly pay period, or \$4,333 gross wages for semi-monthly pay periods. In this context, the term “wages” is defined as “all remuneration for employment, including the cash value of all

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remuneration (including benefits) paid in any medium other than cash,” and “compensation” is defined as “any form of money remuneration paid to an individual for services rendered as an employee to one or more employers.” Eligibility is based upon the wages and compensation paid by employers individually, this means that if an employee works at two or more entities, each employing entity must make its own determination of employee eligibility based upon only the wages paid by that entity.

There are payments, including disability pay, which are specifically excluded from the definition of “wages” and “compensation” under the Internal Revenue Code. Your accountant, payroll expert, or tax specialist will help you to determine what qualifies to determine eligibility for employee deferral of Social Security tax.

### **Is eligibility determined on a pay-period-by-pay-period basis?**

Yes. Many employers have requested the IRS restrict employees to one opt-in and one opt-out for the whole four-month period, but no restriction has been established.

### **How does repayment work?**

Currently, the deferral period expires on December 31, 2020, at which time the payment of deferred taxes begins. Between January 1, 2021, and April 30, 2021, the employer is required to withhold from the employees’ wages or compensation the employees’ share of the deferred taxes in addition to the taxes otherwise owed each pay period. The President has directed the Secretary of Treasury to look into eliminating the repayment obligation, but for now, it is important that employees know that they will be hit with double tax amounts next year if they defer this year.

### **What happens if an employee participates in the deferral program, but then no longer works for the employer during the repayment period?**

Guidance provided by the IRS indicates that if withholding the deferred taxes is not an option, the employer may make other arrangements to collect the taxes from the employee. Currently, it is not clear what legal options an employer has to obtain the deferred taxes from the employee if they are no longer employed with the employer. We recommend that, as drafted in the attached proposed notice to employees, you make it clear that if the employment relationship is terminated, you retain your right to seek collection of the deferred taxes as allowable by law.

If you are unable to obtain the deferred taxes from the employee, the employer will be responsible for paying the deferred taxes or incur interest and penalties. Guidance provides that interest, penalties, and additions to tax will begin to accrue on unpaid deferred taxes starting May 1, 2021. However, it is not clear what the penalties will be or how those penalties will be applied.

**What are the penalties for noncompliance?**

To date, there are no established penalties for noncompliance. However, this does not mean that employers should overlook this program. Employers should begin working with their payroll systems, tax specialist, accountants, and legal counsel to roll out this program.

We recommend that employers provide their employees who may become eligible at any time during the four-month period with written notice advising of the deferral program and providing the option to opt-in or opt-out. A sample notice is attached. It is important to note that as more guidance becomes available, employers' responsibilities and notice requirements are likely to change. Therefore, you should continue to consult with your tax specialist, accountant, and labor counsel.

**ADDITIONAL RESOURCES**

- Internal Revenue Services
  - Call the Notice 2020-65 Hotline at (202) 317-5436

## ATTACHMENT A

[Company Letterhead or Company Name]

[Date]

### NOTICE OF SOCIAL SECURITY TAX WITHHOLDING DEFERL PROGRAM

[Employee name], you may become eligible to defer your contribution of Social Security taxes for one or more pay periods between September 1 and December 31, 2020, under a new federal government program. To be eligible, your gross wages or compensation must be less than [choose the applicable pay period: \$4,000 for the bi-weekly OR \$2,000 for the weekly OR \$4,333 for the semi-monthly] pay period. Your eligibility is determined each pay period between now and December 31, 2020.

You are required by law to pay a percent of your income to Social Security through taxes which are automatically withheld from your paycheck. Due to COVID-19, during any pay period in which you are eligible, you are authorized to defer the withholding from your paycheck. This would result in you receiving an increase in your net income, which you will see on your paycheck.

If you choose to opt in, you will have to pay any deferred taxes starting January 1, 2021. This will result in you paying your usual taxes, **plus** the deferred taxes. You will have until April 30, 2021, to pay the deferred Social Security taxes. If your employment with [employer name] ends prior to you fully paying your deferred Social Security taxes, [employer] reserves the right to take action as allowable by law to collect the deferred taxes.

If you choose to opt out of the Social Security tax deferral program, your normal taxes will be withheld as required by law. You can choose to opt in at a later date by requesting an opt-in form from [HR representative].

### ACKNOWLEDGMENT OF NOTICE OF EMPLOYEE SOCIAL SECURITY TAX WITHHOLDING DEFERRAL PROGRAM

I [employee name] acknowledge that I have received and reviewed the Notice of Employee Social Security Tax Withholding Deferral Program from [Employer name]. I have asked any questions that I have and had any provisions that I did not understand explained to me in my primary language by [the Company] [HR Representative].

(  ) I choose to **Opt-In** to the deferral program and have [employer name] cease withholding Social Security taxes on my behalf for each pay period in which I am eligible for the deferral program. I understand that I am responsible for paying these deferred

Social Security taxes beginning January 1, 2021 and that I have until April 30, 2021 to pay the deferred taxes. If I have not paid my deferred taxes by April 30, 2021, the IRS may impose penalties, interest and additional taxes for which I am responsible.

I choose to **Opt-Out** of the deferral program and have [employer name] continue withholding my normal Social Security taxes on my behalf for each pay period regardless of my eligibility for the deferral program.

Date: \_\_\_\_\_

\_\_\_\_\_

(employee signature)

\_\_\_\_\_

(print employee name)