The Executive Order
On August 8, 2020, President Trump issued an executive memorandum (that action was not technically an executive order but is referred to in this article as an “order”) authorizing certain employees to defer Social Security withholding from their payroll checks (6.2%) beginning September 1, 2020, and through the end of the calendar year, with the deferred taxes being due in 2021. The President does not have the legal authority to unilaterally forgive taxes, so the order directed the Department of the Treasury (referred to in this article as the IRS) to “explore avenues, including legislation” to forgive the deferred taxes.

Who the Order Applies To, What Taxes It Applies To; and Repayment Terms
The deferral does not apply to an employee’s (or employer’s) 1.45% share of Medicare taxes. The deferral is only for the employee (not employer) portion of Social Security withholding, but employers were already authorized to defer the employer’s matching portion of Social Security withholding under the CARES Act enacted earlier in 2020. The deferral is only available to employees having annual bi-weekly wages “generally” less than $4,000 ($104,000/year). For an employee with a $104,000 annual salary, the deferred taxes would total $2,232.

The employer is obligated to withhold payroll taxes from the gross wages otherwise due to the employee, including the employee’s 6.2% Social Security tax obligation, then pay that amount over to the IRS. That withholding by the employer of taxes from the employee’s gross wages is sometimes referred to as “trust funds” because it is the employee’s money the employer is holding and then paying over to the IRS on behalf of the employee.

The deferred amount is to be repaid by April 30, 2021, without interest or penalties. Thus, it would essentially be an interest-free short-term loan. It is up to the employer to make arrangements to collect the deferred Social Security taxes from the employee. The employer must withhold and pay the deferred employee portion of Social Security taxes ratably from the employee’s compensation during the period January 1, 2021, through April 30, 2021.
IRS Guidance Issued Late on August 28, 2020

The order directed the IRS to issue guidance on implementing the order. That guidance was issued late on August 28, 2020, one business day before September 1, 2020, the date on which the employee Social Security tax deferral is scheduled to begin.

The IRS guidance makes clear that participation in the payroll tax deferral program is optional for employers – employers do not need to implement it. If the employer elects to implement the payroll tax deferral, it appears the employer can simply implement it without giving individual employees the option to defer or not defer the Social Security taxes. Left unanswered by the IRS guidance is if an employee has the right to opt out of the payroll tax deferral.

The IRS guidance clarifies that the employer is responsible for paying the Social Security tax deferred by employees. If the employee who deferred taxes is still employed by the employer during the period January 1, 2021, through April 30, 2021, the employer can withhold the deferred payroll taxes from the employee’s paychecks during that time – basically resulting in no employee-side Social Security withholding for the four month period beginning September 1, 2020, then double withholding during the first four months of 2021.

If an employee who deferred Social Security tax is not employed by the employer during the first four months of 2021, it is still the employer’s responsibility to pay the deferred taxes and, under the IRS guidance (the guidance states, “if necessary, [the employer] may make arrangements to otherwise collect [the deferred taxes] from the employee”). Thus, the employer owes the IRS the taxes the employee deferred and, for those employees no longer employed, has to make arrangements to collect the deferred taxes from the now-former employee.
Many Employers Opting Out of Employee Payroll Tax Deferral

Many employers are expected to elect against implementing the payroll tax deferral authorized by the order for a combination of reasons, including the fact that the employer is responsible for paying the employee portion of Social Security taxes withheld from the gross wages of an employee, even if the employee is no longer employed when the deferred taxes are due; the short-term nature of the deferral; the additional administrative burden to an employer in implementing the order and tracking the amount deferred by each employee.

For instance, on August 18, 2020, the U.S. Chamber of Commerce, along with roughly 30 industry groups, in a letter sent to Treasury Secretary Mnuchin, Senate Majority Leader McConnell and House Speaker Pelosi, called the order “unfair” to employers and “unworkable” and concluded that “many of our members will likely decline to implement deferral.” The IRS guidance has done nothing to ease those concerns.