Executive Action Takes Aim At Reducing Payroll Taxes And Extending Enhanced Unemployment Payments As COVID-19 Crisis Continues

Insights
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While Congress continues to work on a legislative deal, President Trump signed Executive Memoranda and Executive Orders that are designed to provide additional stimulus to address the ongoing economic ramifications of the COVID-19 crisis. This article focuses on two employment-related directives from the August 8 actions that directly impact employers: (1) deferral of payroll taxes; and (2) the extension of enhanced unemployment insurance benefits to dislocated workers. What do employers need to know about these developments and what needs to be done as a result?

Payroll Tax Deferral
The first action seeks to defer payment of federal payroll taxes for certain workers until the end of the year. The order would only defer payments of Social Security payroll tax paid by employees through withholdings, currently set at 6.2%, but does not apply to an employer's payment of the Social Security tax. It also does not apply to the Medicaid taxes paid by both employees and employers, currently set at 1.45% each (for a total of 2.9%). The deferral – not an elimination – of the 6.2% employee Social Security tax obligation would apply to wages paid during the period of September 1, 2020 through December 31, 2020, without penalties or interest. The deferral period may be for up to one year.

The deferral would only apply to "any employee the amount of whose wages or compensation, as applicable, payable during any bi-weekly pay period generally is less than $4,000, calculated on a pre-tax basis, or the equivalent amount with respect to other pay periods" – which would limit the deferral to only apply to employees who make approximately $104,000 and under.

The executive order directs the Secretary of the Treasury to "explore avenues, including legislation, to eliminate the obligation to pay the taxes deferred pursuant to the implementation" of the executive order. Accordingly, it appears that Congress will need to pass legislation to convert any deferral into an elimination of the tax. It is unclear whether employers will retain any liability for the deferred payroll taxes if, for some reason, they are not later paid by an employee, or whether implementing the deferral will be optional for employers or employees.

The order creates many unanswered questions about the how the deferral program will be administered, and the Treasury Department is expected to issue additional guidance.

Extension Of Enhanced Unemployment Benefits

With the enactment of the CARES Act earlier this year, employees qualifying for unemployment benefits received an additional federally funded $600 unemployment benefit over and above the regular unemployment benefit. Employers have complained that this additional benefit created a disincentive for employees to return to work.

However, this benefit ended on July 31 with Congress failing to pass an extension. The House and Senate have each passed their own version of legislation that would extend the benefit but have failed to reach an agreement. Under the proposal passed by the House, there would be an enhanced $600 weekly benefit extended through January 2021. The Senate's version would provide an initial $200 enhanced benefit that would increase in time up to $500, and would mandate that states develop programs to reflect an unemployment benefit of 70% to 75% of lost wages.

The president's order would extend the enhanced unemployment benefit up to $400 per week. It supports the extension of the enhanced UI benefits by re-directing $44 billion in federal funds that had previously been authorized to Federal Emergency Management Agency. It directs states to provide an enhanced unemployment insurance benefit of $400 per week, with a portion to be covered by the state. After some pushback, the administration has committed to the federal funding of $300 per week of enhanced benefits and has stated that the extra $100 of state funding would be optional. The enhanced benefit will terminate the earlier of December 6, 2020, or when the program reaches $25 billion.

However, there is an open question as to whether the president's executive authority would permit him to redirect funds in this fashion. A legislative action may render this attempt irrelevant, or the order could face a legal challenge on its own.

Stay Tuned

Given the uncertainty surrounding each of these actions, employers should hold off on taking any actions until additional guidance is provided by the administration. You should also stay tuned as the House and Senate continue to conduct negotiations on additional economic stimulus measures that may well impact these executive directives, and since additional judicial challenges to these actions are expected.

Fisher Phillips will continue to monitor these developments and provide updates as the situation develops. Make sure you are subscribed to Fisher Phillips' Alert System to get the most up-to-date information.

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