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President Trump’s Aug. 8 Tax Executive Orders

Impact on Taxpayers and COVID-19 Negotiations

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Executive Order Overview

- On Saturday, Aug. 8, 2020, President Donald Trump signed four Executive Orders (EO) to defer payroll taxes; set up an assistance program for lost wages to supplement unemployment benefits; extend the federal moratorium on evictions; and defer student loan payments.
  - **Payroll Tax Deferral.** The EO calls on the secretary of the Treasury to defer the withholding, deposit and payment of payroll taxes from Sept. 1, 2020, through Dec. 31, 2020.
  - **Assistance Program for Lost Wages.** The EO provides that the federal government will set up a federal assistance program for lost wages to supplement unemployment benefits. The federal government would provide a $300 payment per week, with states covering an additional $100 payment, for a total of $400 for eligible claimants.
  - **Eviction Moratorium Extension.** The EO extends a federal moratorium on evictions for renters living in homes with federally backed mortgages through Aug. 31, 2020. The eviction moratorium expired two weeks ago.
  - **Student Loan Assistance.** The EO pauses monthly payments and interest for student loan borrowers until Dec. 31, 2020. Student loan payment relief granted under the CARES Act expires on Sept. 30, weeks before the November elections. In a speech earlier today, the president promised to further extend payment relief after Dec. 1, 2020.
- The slides that follow focus on the first two EOs related to payroll tax deferral and the assistance program for lost wages.

Payroll Tax Deferral

How Will It Work and What Choices Will Taxpayers Have?

Payroll Tax Deferral – Overview

- The EO calls on the secretary of the Treasury to defer the withholding, deposit and payment of the employee portion of the 6.2% Old Age, Survivors, and Disability Insurance (OASDI) segment of Federal Insurance Contributions Act (FICA) taxes imposed by I.R.C. § 3101(a)—often referred to as Social Security taxes.

- The deferral does **not** apply to the employer or employee portion of Medicare taxes (1.45% each) or the employee share of Additional Medicare taxes (0.9% for employee's earning over $200,000). The Additional Medicare tax only applies to employees, not to employers.

- In order to qualify, an employee's compensation during a biweekly pay period must be less than $4,000, calculated on a pre-tax basis, or the equivalent amount with respect to other pay periods—this is about $104,000 annually.

- The deferral applies to taxes on wages paid from Sept. 1, 2020, through Dec. 31, 2020.

- The EO does not specify when deferred payroll taxes must be repaid.

- The EO seems to apply to self-employed individuals, but it is unclear as to how the deferral would be implemented for these individuals.

- In remarks accompanying the release of the EOs, the president said he hopes to make the deferral retroactive to July 1, 2020. The president also said he hopes to further extend the payroll tax deferral. The EO directs the secretary of the Treasury to explore avenues, including legislation, to eliminate the obligation to repay the deferred taxes.

Impact

What Is the Value of the Deferral and Who Benefits?

•Payroll taxes consist of: (1) Old Age, Survivors, and Disability Insurance (OASDI), i.e., Social Security tax: 6.2% for the employer and 6.2% for the employee, or 12.4% total; and (2) Medicare and Additional Medicare taxes: 1.45% for the employer and 1.45% for the employee, or 2.9% total. The Additional Medicare tax is 0.9% for those employees earning over $200,000. Social Security taxes have a wage base limit of $137,700. The wage base limit is adjusted annually for cost-of-living. This EO only provides for the deferral of the 6.2% employee Social Security tax.

•The CARES Act already deferred payroll taxes for businesses/employers from March 27, 2020, through Dec. 31, 2020.

•The EO is very limited in scope—it calls for the *voluntary* deferral of payroll taxes for a four-month period for workers earning less than $4,000 during a biweekly pay period—about $104,000 annually. While this might feel like a tax cut to many Americans, it is only a tax deferral, which means the taxes will need to be paid back at a later date. President Trump is urging Congress to extend the deferral and to forgive the taxes.

•As a result of wage base limit, many high-income earners have already fulfilled the bulk of their payroll tax obligation for 2020.

•The maximum value of the deferral of Social Security taxes in the EO is about $2,232 for someone earning just under the wage cap of $104,000.

•According to the Bureau of Labor Statistics, median weekly earnings for full-time wage and salary workers was $1,002 in July, which is about $52,100 annually. The average worker would be able to defer about $1,076 between September and the end of the year. This is about $62 extra per week or about $124 reflected in each biweekly paycheck.

•Ultimately, employers must implement the payroll tax deferral. Per the order, employers have about three weeks to make changes.

Impact

What Is the Impact If the Payroll Tax Deferral Were Converted to a Payroll Tax Holiday, as the President Suggests?

•The Trump administration is exploring avenues, including legislation, to eliminate the obligation to repay the deferred taxes.

•There are serious consequences to a payroll tax holiday. Social Security is designed to replace a percentage of a worker's pre-retirement income based on their lifetime earnings. These benefits come from the taxes paid by the worker and the employer into Social Security.

•A Social Security payroll tax holiday potentially impacts an employee's retirement if the unpaid employee payroll taxes are never remitted. If this happens, the employee will not earn any credit for the quarter worked. Those missing quarters can make a difference as to when Social Security benefits commence at a later date.

•Congress normally adds a provision to hold the Social Security Trust Fund harmless and grant workers full credit for their work, regardless of whether the 6.2% in OASDI is actually paid. This is what Congress did in 2011 under the Obama administration. (*See slide 9 for more information on the Obama-era payroll tax holiday.)*

Next Steps and Unanswered Questions

- The EO does not contain information on several key details, which means the Treasury Department and the Internal Revenue Service (IRS) will need to issue regulatory guidance on the following:

  - When must taxes be remitted or repaid by individuals who take advantage of the deferral?
  - How will a deferral work for employees? Will they need to fill out a form and elect to have the deferral apply?
  - How will overtime pay, commissions and premium pay be accounted for?
  - How will withholding work for those with variable income? For example, employees who make over $4,000 in one pay period and under this amount in another pay period?
  - How will this work for self-employed individuals?
  - What happens if an employee is terminated or changes jobs prior to Jan. 1, 2021? How will repayment of deferred amounts work?
  - What happens if an employee has several jobs and collective compensation is above the $4,000 threshold?
  - How will repayment work? Will additional amounts be deducted from future paychecks until the deferred amount is repaid, or will the deferred taxes be due as one or more lump sum payments?

- It is unclear as to when the Treasury Department and IRS will release guidance. It could come as early as next week.

Legality

Legality

- The EO states that the president is invoking his authority under 26 U.S.C. 7508A, which allows for the postponement of certain deadlines by reason of a presidentially declared disaster. The president declared a state of disaster on March 13, 2020, under § 501(b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act.

- One Republican senator has criticized the EO—Sen. Ben Sasse (R-NE) said that the president “does not have the power to unilaterally rewrite the payroll tax law.”

- While a payroll tax deferral does not impact Social Security because the taxes must be repaid, Democrats have criticized this as an attempt to gut Social Security down the line, and potentially Medicare as well, if the president is looking to permanently eliminate the tax. However, White House advisors have already walked back President Trump’s statement that he would make “permanent” cuts to the payroll tax.

- **Brownstein Observation:** President Trump appears to have acted within the authority granted to him by the Internal Revenue Code.

Historical Perspective

- The last payroll tax holiday was implemented under the Obama administration. The Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (P.L. 111-312) (Dec. 17, 2010) implemented a temporary 2% reduction in the payroll tax rate for employees and self-employed individuals in 2011. Thus, the payroll tax rate for employees went from 6.2% to 4.2% for employees and for self-employed workers went from 12.4% to 10.4%.

- The tax holiday was extended twice and was ultimately effective for two years.

- A worker's future Social Security benefits are not affected. It provided general revenue transfers to the Social Security trust funds to make up for the loss of payroll tax revenues.

- There has never been a payroll tax deferral in the past. There will be significant pressure on Congress to convert the EO's payroll deferral into a payroll tax holiday and ensure general revenue transfers to make up for the loss of payroll tax revenues.

Impact on Negotiations

Impact on Negotiations

•The president has previously pushed for the inclusion of a payroll tax holiday in COVID-19 stimulus legislation. However, the idea has failed to gain traction amongst both Republicans and Democrats.

•While it is clear the president does not have the authority to eliminate the obligation to pay payroll taxes, as this is a power that only Congress has, the EO simply delays the date on which the taxes are due. If employers stop withholding payroll taxes from employee paychecks, there will be immense pressure down the line for Congress to forgive the accumulated taxes. The outcome of the election will also determine how much consideration Congress gives to converting the payroll tax deferral into a holiday.

•If the payroll tax deferral takes effect, Democrats may view this as part of the GOP's list of priorities for the next package. If the payroll tax deferral is converted into a tax holiday, it amounts to a regressive additional stimulus check for individuals earning below the threshold amount. Democrats may demand additional funding for low-income refundable tax credits, such as the Earned Income Tax Credit and the Child Tax Credit.

Lost Wage Assistance Program

Lost Wage Assistance – Overview

Benefit Amount and Eligibility:

•The EO provides that the federal government will set up an assistance program for lost wages to supplement state unemployment benefits. The federal government would provide a $300 payment per week, with states covering an additional $100 payment, for a total of $400 for eligible claimants.

•To qualify, claimants must receive at least $100 per week in any of the following benefits: (1) Unemployment compensation, including Unemployment Compensation for Federal Employees (UCFE) and Unemployment Compensation for Ex-Service members (UCX); (2) Pandemic Emergency Unemployment Compensation (PEUC); (3) Pandemic Unemployment Assistance (PUA); (4) Extended Benefits (EB); (5) Short-Time Compensation (STC); (6) Trade Readjustment Allowance (TRA); or (7) Payments under the Self-Employment Assistant (SEA) program. The CARES Act stated that in order to qualify for the FPUC, claimants had to receive at least $1 per week from any one of the aforementioned programs.

•This would replace $600 Federal Pandemic Unemployment Compensation (FPUC) payments, authorized by the CARES Act, that expired on July 31. FPUC payments were in addition to regular state unemployment compensation.

•The EO does not specifically reference the FPUC program, instead setting up a new grant program for lost wages pursuant to 42 U.S.C. 5174(f)(1)(A). The EO does provide that the lost wage assistance program shall terminate upon the enactment of legislation providing FPUC, or similar compensation for unemployed individuals. Congress has been attempting to negotiate a package that potentially includes an extension for FPUC payments. However, negotiations are at an impasse.

Lost Wage Assistance – Program Funding

•The EO states that the CARES Act included $150 billion in funding for state and local governments through the Coronavirus Relief Fund (CRF) to cover costs incurred due to the COVID-19 emergency. As of the latest report from the Treasury Inspector General regarding state expenditures, more than $80 billion of CRF dollars remain available. States dispute that this much remains.

•In addition, the Department of Homeland Security's Disaster Relief Fund (DRF) has more than $70 billion in emergency assistance funding available. The president directs the Federal Emergency Management Agency (FEMA) to assist in providing up to $44 billion from the DRF to cover the federal portion of unemployment benefits (75% or $300 per week), and calls upon the states to use their CRF allocation to pay their portion (25% or $100 per week) of continued FPUC benefits.

Impact

Who Benefits from the Lost Wage Assistance Program?

•This program results in eligible claimants receiving weekly payments of $400 for unemployment weeks starting on Aug. 1, 2020, through Dec. 6, 2020, or when the fund allocated for this purpose is depleted to $25 billion, whichever occurs first. These lost wage assistance payments will continue to supplement traditional state unemployment benefits, similar to the way the FPUC program worked.

•Anyone receiving at least $100 per week in benefits from certain benefits programs, such as state Unemployment Insurance (*details on slide 12*). Under the CARES Act, the FPUC was available to anyone receiving at least $1 in assistance from certain benefits programs.

- The increase in the threshold amount could result in 10% to 15% of lowest-earning UI recipients from receiving FPUC payments, according to Jeff Stein, economist for *The Washington Post*. This may also limit aid for tipped workers and self-employed individuals.

Impact

What Is the Impact on States?

•The EO calls for states to administer the program and use previously appropriated funds to cover $100 (25%) of the FPUC payments. FEMA has indicated that states and territories will continue to administer the program and distribute the funds through their regular unemployment insurance system, as a supplemental payment. No additional funds have been provided for administrative purposes.

•Given that many states are currently facing budget shortfalls, it is unclear how many states will agree to this.

•Additionally, it is unclear whether states can take action in time for this program to have an impact. For example, some states may need to legislatively allocate the money and if the legislature is not in session, it will take time for the EO to take effect.

•A question remains as to whether states can legally use the current Unemployment Insurance system to distribute payments, as specified by FEMA.

•It is also unclear as to how quickly benefits can be distributed to claimants.

Impact

How Long Will the Funding Last?

•Assuming the program is successfully implemented, the EO notes that funding expires on Dec. 6, 2020, or when the Disaster Relief Fund (DRF) being used to pay for this program is depleted to $25 billion. The DRF has about $70 billion in funding available and the EO directs $44 billion to go toward this program. (*See slide 13 for details.)*

•The CARES Act FPUC benefit of $600 per week cost about $176 billion for about four months (April 4, 2020, through July 31, 2020). Accordingly, the program spent about $10 billion per week. Even at half the cost ($5 billion per week), with coverage for fewer claimants due to new restrictions, the funding is unlikely to last until December. If all states adopted the program, $44 billion would cover about two months. The lost wage assistance payments in the EO is likely a very temporary fix, assuming that states are able to stand up a program in the next few weeks.

Next Steps and Unanswered Questions

- Apart from the legality of the program, which is currently in question, there are several unanswered questions with regard to the EO, including:
  - How will states administer the UI system? Will they be able to use existing UI systems to administer this program or will they be required to set up a parallel system?
  - Are states required to provide a $100 match, or can they opt out? Can states pledge to cover the $100 match and begin benefits before they contribute the funds?
  - If waivers of the $100 match are offered, how does the application process work and how long before the Trump administration approves a qualified request?

Legality

•The EO funds lost wage assistance by redirecting disaster relief money from FEMA. However, according to some legal experts, it is unclear if the administration can repurpose disaster relief funds for unemployment benefits without violating the Antideficiency Act.

•Additionally, the EO does not direct more money toward the FPUC program created by the CARES Act. Instead, it creates a new lost wage assistance program and directs states to use existing UI systems to administer the program. Several experts have questioned whether this is legal.

•Some states have not been receptive to the EO. According to a press release on Aug. 8, Senate Finance Committee Ranking Member Ron Wyden (D-OR) reported that states have “grave concerns” and “are simply going to opt out” as “they cannot afford a 25 percent match.” There is also a lack of clarity as to whether states must provide the $100 in state match benefits.

- **David Levine.** David Levine, professor at the University of California Hastings College of Law, disagrees, saying, “From the state’s point of view, States would say under the 10th Amendment you can’t force us to participate in this program, particularly with money we don’t have.”
- **Larry Kudlow.** Appearing on the Aug. 9 Sunday talk shows, National Economic Council Director Larry Kudlow said it was unclear whether states have enough funds to provide the additional benefits, saying, “we’ll probably find that out.”
- **President Trump.** When asked what happens if governors do not have enough funds to pay the benefits, President Trump said “If they don’t, they don’t. That’s up to them.”

Impact on Negotiations

•White House negotiators have reportedly offered Democrats a number of short-term UI extensions, all of which were rejected by the Democrats.

•Republicans have also attempted to pass on the Senate floor a number of extensions, all of which were rejected along party lines.

•The leading Republican UI proposals are:

- The Republican proposal in the HEALS Act would replace the $600 FPUC payments that supplement state UI benefits with a $200 per week FPUC through Oct. 4, after which states must match 70% of workers' prior earnings or continue to pay the flat FPUC amount through November.
- Sens. Mitt Romney, Susan Collins and Martha McSally introduced a bill that would extend currently expired coronavirus unemployment insurance benefits through the end of the year. The bill would extend UI benefits by allowing states to either provide an immediate 80% wage replacement or phased down payments over the next three months. Those who choose the latter option are eligible for an extra $500 per week in August, $400 per week in September, and $300 per week in October. It would also allocate $2 billion to the states to update their UI systems.
- One potential compromise is a higher FPUC benefit (e.g., $400 per week), capped at 100% of income, so that workers cannot earn more on UI than they would have earned through pre-COVID-19 wages.
- According to American Action Forum's Analyst Isabel Soto, even a $100 FPUC would result in 25% of workers making more on maximum unemployment than pre-COVID-19 wages.

Impact on COVID-19 Negotiations

Impact on Negotiations

Reactions from Democratic Leadership:

•In a joint statement, Speaker Nancy Pelosi (D-CA) and Senate Minority Leader Chuck Schumer (D-NY) criticized the EOs, saying the "meager announcements" from the president "provide little real help to families." Schumer and Pelosi called on Republican negotiators to return to the negotiating table and "meet [them] halfway."

- Last week, Democrats offered to reduce their topline number by $1 trillion if Republicans were willing to increase theirs by the same amount. This would have resulted in a deal around $2.4 trillion. Republicans rejected the offer, saying it was too expensive for many members.

•On Aug. 9, Pelosi said the EO, even if successful, is not enough. Another package that addresses major priorities such as funding for schools; stimulus checks for individuals; state and local aid; and tax credits for rehiring workers and cleaning and Personal Protective Equipment (PPE) is still necessary.

•Similarly, Schumer said on Aug. 9 the presidential action "doesn't do the job," arguing the EOs will not "go into effect in most places for weeks or months." Schumer continues to push for a deal on a stimulus package.

Impact on Negotiations

Reactions from Republican Leadership:

•Sen. Chuck Grassley (R-IA), chair of the Senate Finance Committee, released a statement applauding the EOs. In a Tweet, Grassley said, “I applaud [the president’s] executive actions to help the American [people.] Democrats all or nothing strategy jeopardizes the certainty Americans need to pay their bills. President Trump puts the American [people] first compared to nonstop political games by Democrats.”

•Senate Majority Leader Mitch McConnell (R-KY) said, “struggling Americans need action now. Since Democrats have sabotaged backroom talks with absurd demands that would not help working people, I support President Trump exploring his options to get unemployment benefits and other relief to the people who need them the most.”

•Sen. Lindsey Graham (R-SC) highlighted congressional inaction in a Tweet: “I appreciate the President taking this decisive action but would much prefer a congressional agreement. I believe President Trump would prefer the same.”

Reactions from Business Groups:

•Prominent business groups, including the Chamber of Commerce, have emphasized the need for Congress to pass a full stimulus package in addition to the EOs.

Impact on Negotiations

Next Steps:

- Rep. Pelosi (D-CA) and Sen. McConnell (R-KY) have both left the door open on continuing negotiations and resolving differences. Both face significant obstacles within their respective parties. Both party leaders hope to reach a potential deal, given that there are several key elements that both Republicans and Democrats agree upon.

- Reports indicate that a deal might be pushed to late August or September and may be included in a Continuing Resolution to fund the government. The upcoming fiscal year deadline is Sept. 30, 2020.