

Trump executive actions may offer unemployment payments, defer payroll taxes

Blaming the Democrats for the impasse in Congress over the next Coronavirus relief package, President Trump inserted himself into the ongoing controversy by taking executive actions. First, he directed the Federal Emergency Management Agency (FEMA) to assist in providing benefits from the Department of Homeland Security's Disaster Relief Fund (DRF), and called on the States to use their Coronavirus Relief Fund (CRF) allocation to continue to bring financial relief to those who are unemployed due to the COVID-19 pandemic. Second, he directed the Treasury Secretary to use his authority to defer certain payroll tax obligations "with respect to the American workers most in need."

Many stakeholders immediately raised questions about whether either plan outlined by Trump is workable and will actually bring the relief that the President suggests, and at what cost. The president also separately took two other executive actions intended to provide assistance to renters and homeowners, and to continue student loan payment relief. Only the housing action is an executive order; the three other actions are marked as memoranda.

Unemployment compensation extension. The \$600 per week enhanced unemployment compensation payment expired on July 31—and whether the enhancement would continue and in what amount was one of the key sticking points in negotiations between lawmakers. Trump's August 8 "Memorandum on Authorizing the Other Needs Assistance Program for Major Disaster Declarations Related to Coronavirus Disease 2019" aims to provide \$400 per week of enhanced unemployment compensation, with the federal government providing \$300 per week of that amount, with limitations.

Using existing allocations. As the Other Needs Assistance Memorandum notes, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) included \$150 billion appropriated directly to state, territorial, tribal, and some local governments through the CRF to cover costs incurred due to the COVID-19 emergency. According to the Treasury Inspector General's latest report on state expenditures, more than \$80 billion of CRF dollars remain available to supplement the other federal assistance relief that states have received, such as the \$8.8 billion in emergency assistance provided under the Stafford Act. Moreover, the DRF has more than \$70 billion in emergency assistance funding available.

Trump thus directed FEMA to assist in providing benefits from the DRF, and called on the states to use their CRF allocation, to bring continued financial relief to the unemployed.

Federal funding. To provide financial assistance for the needs of those who have lost employment as a result of the COVID-19 pandemic, Trump directed that up to \$44 billion from the DRF at the statutorily mandated 75 percent federal cost share be made available for lost wages assistance to eligible claimants, to supplement state expenditures in providing these

payments. However, at least \$25 billion of total DRF balances will be set aside to support ongoing disaster response and recovery efforts and potential 2020 major disaster costs.

State funding. Trump called on the states to use amounts allocated to them out of the CRF, or other state funding, to provide temporary enhanced financial support to those whose jobs or wages have been adversely affected by COVID-19. These funds, including those currently used to support state unemployment insurance programs, may be applied as the state's cost share with federal DRF funds. To ensure the continued receipt of supplemental benefits for weeks of unemployment ending no later than December 27, 2020, states should also identify funds to be spent without a federal match should the total DRF balance deplete to \$25 billion.

Lost wage assistance. The Secretary of Homeland Security, acting through the FEMA Administrator, is authorized to make available other needs assistance for lost wages, in accordance with section 408(e)(2) of the Stafford Act (42 U.S.C. 5174(e)(2)) (lost wages assistance), to the people of a state (including the District of Columbia), including the members of any tribe residing there, for a major disaster that Trump declared pursuant to section 401 of the Stafford Act for COVID-19, under the following conditions:

- The governor requests from the FEMA Administrator a grant for lost wages assistance pursuant to 42 U.S.C. 5174(f)(1)(A) and agrees to the cost-sharing requirement of 42 U.S.C. 5174(g)(2); and
- The governor administers delivery of financial assistance for lost wages in conjunction with the state's unemployment insurance system.

Payment and cost-sharing. The Memorandum authorizes approval of a lost wages assistance program that authorizes the governor to provide a \$400 payment per week, reflecting a \$300 federal contribution, to eligible claimants starting from the week of unemployment ending August 1, 2020.

Eligible claimants. To be eligible under the Memorandum, claimants must receive, for the week lost wages assistance is sought, at least \$100 per week of any of the following benefits:

- Unemployment compensation, including Unemployment Compensation for Federal Employees (UCFE) and Unemployment Compensation for Ex-Service members (UCX), under section 8501 of title 5, United States Code;
- Pandemic Emergency Unemployment Compensation (PEUC), under section 2107 of the CARES Act;
- Pandemic Unemployment Assistance (PUA), under section 2102 of the CARES Act;
- Extended Benefits (EB), under section 3304 of title 26, United States Code;
- Short-Time Compensation (STC), under section 3306(v) of title 26, United States Code;
- Trade Readjustment Allowance (TRA), under sections 2291 through 2293 of title 19, United States Code;
- Payments under the Self-Employment Assistant (SEA) program, under section 3306(t) of title 26, United States Code; and

- The claimant must also provide self-certification that they are unemployed or partially unemployed due to disruptions caused by COVID-19.

Additional assistance. The Secretary of Labor is required to provide, as appropriate and consistent with applicable law, technical assistance to the FEMA Administrator and governors in the implementation of lost wages assistance programs, including timely processing of advances from the federal unemployment account pursuant to section 1321 of title 42, United States Code 321.

Program termination. The lost wages assistance program will be available for eligible claimants until the balance of the DRF reaches \$25 billion, or for weeks of unemployment ending not later than December 6, 2020, whichever occurs first, at which time the lost wages assistance program will terminate. The Memorandum also provides that the lost wages assistance program will terminate upon enactment of legislation providing, due to the COVID-19 outbreak, supplemental federal unemployment compensation, or similar compensation, for unemployed or underemployed individuals.

Deferred payroll taxes. In a separate, "Memorandum on Deferring Payroll Tax Obligations in Light of the Ongoing COVID-19 Disaster," President Trump directed the Secretary of the Treasury to use his authority "to defer certain payroll tax obligations with respect to the American workers most in need," a "modest, targeted action" that Trump said "will put money directly in the pockets of American workers and generate additional incentives for work and employment, right when the money is needed most."

Stakeholders, however, are already questioning whether employees will get stuck paying the deferred payroll taxes at the end of year, and if there is payroll tax forgiveness, how that will impact the already vulnerable Social Security Trust fund.

Taxpayers making less than \$100K. Specifically, the Treasury Secretary is directed "to defer the withholding, deposit, and payment of the tax imposed by 26 U.S.C. 3101(a), and so much of the tax imposed by 26 U.S.C. 3201 as is attributable to the rate in effect under 26 U.S.C. 3101(a), on wages or compensation, as applicable, paid during the period of September 1, 2020, through December 31, 2020," subject to these conditions:

- The deferral shall be made available with respect 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.
- Amounts deferred shall be deferred without any penalties, interest, additional amount, or addition to the tax.

Tax forgiveness. The Secretary is also directed to explore avenues, including legislation, to eliminate the obligation to pay the taxes deferred pursuant to the implementation of Trump's Deferring Payroll Tax Memorandum.

Will they actually help? Notably, Trump's enhanced unemployment compensation extension would cut the benefit amount that expired last month from \$600 per week to \$400 per week. Democratic Leaders Nancy Pelosi (D-Calif.) and Chuck Schumer (D-N.Y.) had this to say about Trump's executive actions: "Today's meager announcements by the President show President Trump still does not comprehend the seriousness or the urgency of the health and economic crises facing working families. We're disappointed that instead of putting in the work to solve Americans' problems, the President instead chose to stay on his luxury golf course to announce unworkable, weak and narrow policy announcements to slash the unemployment benefits that millions desperately need and endanger seniors' Social Security and Medicare."

As noted by multiple media reports, there are potential legal issues with Trump's actions, as the U.S. Constitution gives Congress the authority to tax and spend. In addition, it is estimated that the available funds from the Treasury might cover far fewer payments for unemployed Americans than necessary to last through December 2020—longer, of course, if the number of people receiving unemployment benefits drops significantly.)