BTI BANK & CAPITAL MARKETS TAX INSTITUTE

VIRTUAL CONFERENCE & WORKSHOPS

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ALM Events

Employee Social Security Tax Deferral

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President's Memo to Treasury

President's Memo
August 8

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Notice 2020-65
August 28

- Postpones the due date for withholding the 6.2% employee share of Social Security tax
- Applies to wages paid (not earned) between Sept. 1, 2020 and Dec. 31, 2020

Common questions

Question	Answer???
Is the deferral optional?	Yes, it is the employer's option
Can employee opt in or out?	Appears employees have no administrative recourse to force an employer to defer or withhold currently
Should employers ask for employee input?	Not a best practice
When must the deferred amounts be repaid?	Withheld from the employee's pay and deposited with IRS ratably from Jan. 1, 2021 through Apr. 30, 2020

Common questions (continued)

Question	Answer???
What happens if the employee has variable compensation, and there is little compensation in a 2021 pay period?	Appears to be no relief – employer must still withhold the ratable amount
What happens if the employee quits before the deferred amount is withheld in 2021?	Employer remains on the hook for withholding and depositing the deferred amount
Can and employer withhold the entire deferred amount from an employee's last paycheck?	Maybe, but check state and local wage garnishment laws

Common questions (continued)

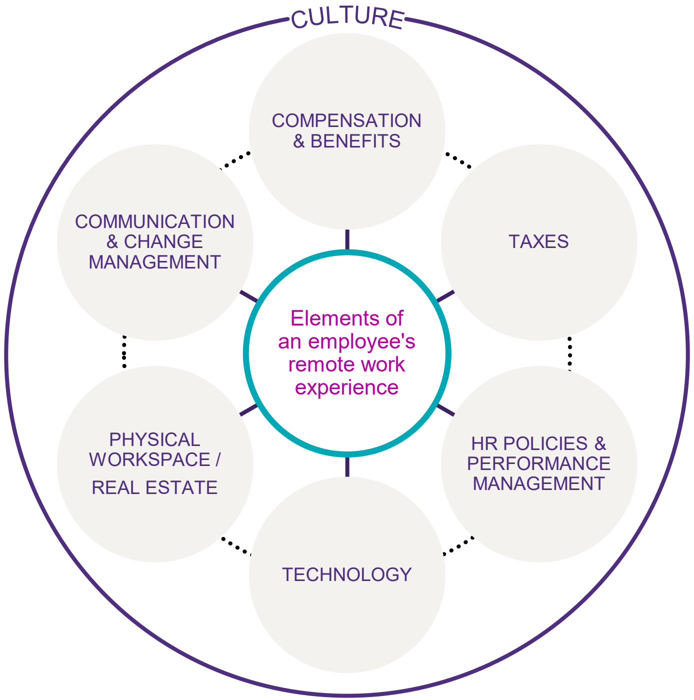
Question	Answer???
How does the $4,000 wage limit apply?	$4,000 is based on a bi-weekly pay period. Use an equivalent for other pay period.
Are payroll service providers ready to implement this?	They are working on it. Contact your provider for procedures
What if the deferral is not implemented until after the first eligible payroll period?	Possible to catch-up in the same calendar quarter
What are the reporting requirements	No guidance on how the deferrals will be reported by employers to employees in 2020 or 2021

Common questions (continued)

Question	Answer???
Can an employer withhold the employee Social Security tax, hold it, and then deposit it in 2021?	No
Will the deferral be forgiven?	Unclear. Congress must enact law to forgive the deferral
Should we communicate to employees our decision to defer or continue to withhold?	Yes. There is no requirements, but employers should consider communicating the decision to employees, including why they made the decision

Overview of Remote Working

Overview of Remote Working



Challenges of Remote Working

Telework provides many benefits but it also creates risks and challenges for employees working in different cities and states. Two critical challenges include compliance requirements for state and federal mandated requirements.

Organizations need to consider two primary areas of concern:

Workforce Strategy

- Employee engagement
- Change management
- Personnel productivity
- Performance management
- Workspace
- Communication

Compliance with Federal and State Requirements

- Employment tax
- State and Local Income/Franchise Tax
- HR polices
- Business expenses

Employer-provided Covid-19 assistance

Employers want to help employees

Home office furniture and supplies	Cash for better internet	Cash for increased utilities	Child care assistance
Elder care assistance	Meals	Lodging	Tutoring

What can be a working condition fringe?

Working condition fringe: If the employee would have paid for the property or service provided by the employer, the employee would be allowed a deduction in the employee's trade or business of being an employer of the employer (e.g., business use of a computer)

What can be a working condition fringe?

Office supplies	• Yes, if used for business
Home office furniture	• Yes, if employees must return the furniture to the employer
Enhanced internet	• Possible - show business need above current service
Increased utilities	• Risky

Travel away from home

- Away from Tax Home
    - Generally the employee’s primary work location
        - Not necessarily their place of residence
    - More than one tax home? Or none?
- Is the employee “traveling” for BUSINESS purposes?
- Is the travel temporary or permanent?
    - Generally, assignments of 12 months or less are considered temporary; once it is known or expected to exceed 12 months, the new location may become the employee’s tax home and they are no longer “traveling” for tax purposes (except when they visit home, maybe)
- If the employer pays for it, but it isn’t “travel” for tax purposes, it is a personal expense that is taxable to the employee.

Dependent care assistance - § 129

- Exclude dependent care assistance from an employee's income
- Requires a written plan
- Nondiscrimination requirements must be met
- $5,000 annual limit
- Multiple other requirements

Many employers may already have a dependent care flexible spending arrangement

- $5,000 limit applies to aggregate benefits

Dependent care assistance - § 139

“Qualified disaster relief payments” made by an employer to an employee are excluded from income

Covid-19 context:

- Qualified disaster relief payment: Amounts paid to reimburse or pay <u>reasonable</u> and <u>necessary</u> personal, family, living, or funeral expenses incurred as a result of a qualified disaster.

- Covid-19 declared an emergency under the Stafford Act on March 13, 2020

Applying § 139

When determining whether cash or a benefit is excludible form income, consider the following:

1. Is the payment for an employee's personal, family, living, funeral (including family) expense?
2. Did the employee incur the expense due to Covid-19?
3. Is the expense reasonable and necessary?

Possible employer-provided benefits

- Employer-provided child or elder care
  - Cash to cover additional expenses or an employer-provided facility
  - Above and beyond the § 129 $5,000 limit
- Cash for additional utilities or internet service
- Cell phone
- Tutoring services for children who are not in school
- Food delivery services
- Meal money
- Lodging

§ 139 – excluding benefits from income

§ 139 is often used to exclude amounts from income that otherwise would be compensation income to an employee

No substantiation is required

If giving cash: make sure the amount of cash is reasonable for the expense it is meant to cover

Other considerations may be applicable

Other Tax Considerations
Remote Workforce

State & Local Payroll Taxes

From a state and local payroll tax perspective, there are generally three types of state and local taxes to consider:

- State Unemployment Tax
- State Income Tax Withholding
- Local Income / Payroll Taxes

State Unemployment Tax (SUTA)

- Employers within a state are generally covered by the state's unemployment insurance program if they meet the requirements for coverage under FUTA. When employees perform services all in one state, the employer pays unemployment taxes to that state.

- The Federal Department of Labor has provided assistance to the state agencies in an effort to unify the SUTA laws for employers as it relates to employees that work in more than one state with specific provisions.

- The aspects of SUTA become more complex when employees work in more than one state or if the employee telecommutes. There are four factors ("four-pronged test") employers can use in determining to which state an employee should be allocated for unemployment insurance purposes:

SUTA Four Pronged Test

- These tests are applied in succession to all services an employee performs under a contract of hire. If the application of a test results in allocation of all services to one state no further test may be used. Otherwise go to the next test.

  - **Test 1:** Localization
  - **Test 2:** Base of Operations
  - **Test 3:** Place of Direction and Control
  - **Test 4:** Residence

SUTA Four Pronged Test

- As part of the Four Pronged Test, the department of labor also provided an example of a telecommuter which could be helpful in times COVID times. The example stated the following:

  A resident of New York was hired as a technical specialist for a financial information provider. All services were performed in New York for two years, after which the employee moved to Florida because her husband had changed jobs. Since the employer had invested time and money in training this individual, it agreed to allow her to commute from Florida. After the relocation took place, all of her assignments and work products were communicated via the Internet. Since this employee is now performing all duties in Florida, even though the employer is located in New York, her services are localized in Florida and subject to Florida law. Therefore, all wages from the date she began telecommuting from Florida, are reportable to Florida.

  CONSIDER TEMPORARY VS. PERMANENT MOVES AS A RESULT OF COVID

State Income Tax (SIT)

- Unlike with SUTA, State Income Tax Withholding Rules vary significantly based on the facts and circumstances of each scenario and each state.

General Principal: State Income Tax is withheld in the state in which the service is performed / (i.e., where the wages were earned)

- **Exception 1:** No Income Tax State
- **Exception 2:** Reciprocal Agreement States
- **Exception 3:** Nonresident day threshold
- **Exception 4:** State Convenience of Employer Rules

SIT COVID Implications

- As a result of COVID, many employees who typically work and live in one location may have gone to work in other locations.
- Most states have not changed their original positions on nonresident withholding
- Uncertainty around budget and COVID created lack of guidance
- Some states have provided leniency for state income tax withholding but provided very vague / general guidance
- Some states have special exemptions for disaster relief workers

Local Tax Implications as well!