Payroll Tax Deferral FFCRA Update

September 15, 2020

Payroll Tax Deferral

Here is what we know today:

The Employee deferral of Social Security is effective for the period of September 1, 2020, through December 31, 2020.

Payroll Thresholds are as follows

- < $2,000 - weekly
- < $4,000 - biweekly
- < $4,333 - semi-monthly
- < $8,666 - monthly

Threshold is determined on a payroll to payroll basis, which means that the timing of compensation can impact eligibility for deferrals. I.E. Bonuses

Example of Benefit and Repayment

Income	Bi-Weekly Pay	Increase Per Pay Period	Tax Bill Due in 2021 (based on 9 pay periods)	Repayment Per Pay Period during 2021
$35,000	$1,346.15	$83.46	$ 751.15	$83.46
$50,000	$1,923.08	$119.23	$1,073.08	$119.23
$75,000	$2,884.62	$178.85	$1,609.62	$178.85
$104,000	$4,000.00	$248.00	$ 2,232.00	$248.00

The withholding is a DEFERRAL

- Not a tax credit or tax cut
- Future payback will be necessary
- Any employee social security that is deferred will need to be paid by 5/1/2021
- Employers will have from 1/1/2021-4/30/2021 to withhold and pay the taxes.

Opt-in/Required: Advice from Treasury Secretary Mnuchin has indicated that the employer can opt in or out, but the Executive Order indicates that the employee makes that choice. In either case, the employer is responsible for repayment and for making arrangements to otherwise collect the total from the employee if necessary.

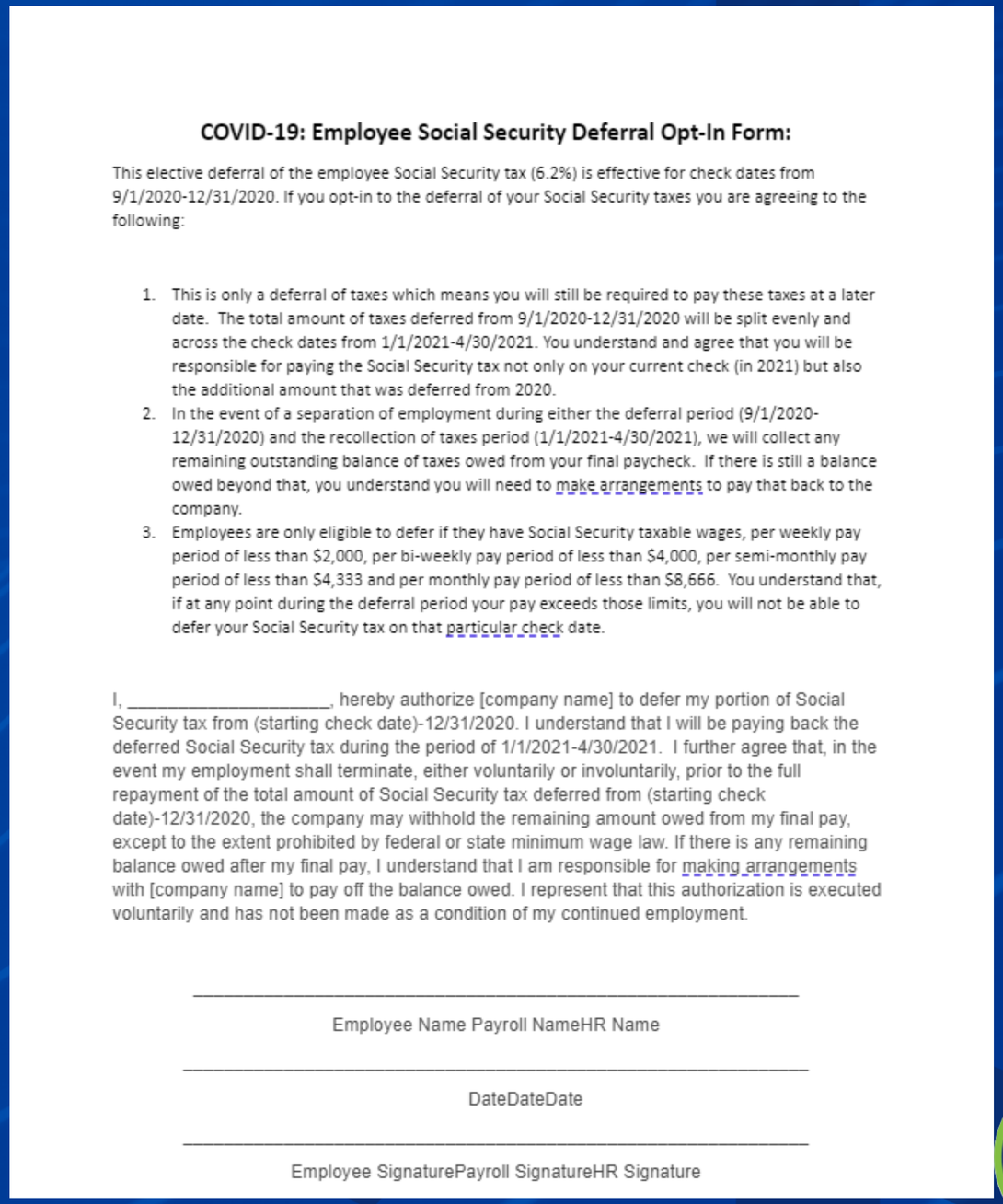
There is a significant risk that, even with careful planning, employers will end up responsible for some repayment amounts because of an inability to withhold or collect from the employee.

If you are still considering the employee tax deferral and want more information, email customer service at customerservice@dominionpayroll.com

We have an employee opt-in form available at dominionpayroll.com.

It will explain the parameters of the Employee Deferral

It will explain the employees responsibility as far as the repayment of the deferred taxes



COVID-19: Employee Social Security Deferral Opt-In Form:

This elective deferral of the employee Social Security tax (6.2%) is effective for check dates from 9/1/2020-12/31/2020. If you opt-in to the deferral of your Social Security taxes you are agreeing to the following:

1. This is only a deferral of taxes which means you will still be required to pay these taxes at a later date. The total amount of taxes deferred from 9/1/2020-12/31/2020 will be split evenly and across the check dates from 1/1/2021-4/30/2021. You understand and agree that you will be responsible for paying the Social Security tax not only on your current check (in 2021) but also the additional amount that was deferred from 2020.
2. In the event of a separation of employment during either the deferral period (9/1/2020-12/31/2020) and the recollection of taxes period (1/1/2021-4/30/2021), we will collect any remaining outstanding balance of taxes owed from your final paycheck. If there is still a balance owed beyond that, you understand you will need to make arrangements to pay that back to the company.
3. Employees are only eligible to defer if they have Social Security taxable wages, per weekly pay period of less than $2,000, per bi-weekly pay period of less than $4,000, per semi-monthly pay period of less than $4,333 and per monthly pay period of less than $8,666. You understand that, if at any point during the deferral period your pay exceeds those limits, you will not be able to defer your Social Security tax on that particular check date.

I, _____, hereby authorize [company name] to defer my portion of Social Security tax from (starting check date)-12/31/2020. I understand that I will be paying back the deferred Social Security tax during the period of 1/1/2021-4/30/2021. I further agree that, in the event my employment shall terminate, either voluntarily or involuntarily, prior to the full repayment of the total amount of Social Security tax deferred from (starting check date)-12/31/2020, the company may withhold the remaining amount owed from my final pay, except to the extent prohibited by federal or state minimum wage law. If there is any remaining balance owed after my final pay, I understand that I am responsible for making arrangements with [company name] to pay off the balance owed. I represent that this authorization is executed voluntarily and has not been made as a condition of my continued employment.

_____

Employee Name Payroll NameHR Name

_____

DateDateDate

_____

Employee SignaturePayroll SignatureHR Signature

FFCRA Update

Families First Coronavirus Response Act (FFCRA) UPDATE:

The U.S. Department of Labor has updated guidance in response to the August 3 decision by the U.S. District Court of Southern New York

Effective 9/16/20

The revisions follow a ruling from the U.S. District Court for the Southern District of New York that invalidated portions of the DOL's April 1 temporary rule. According to the agency, the revisions, which are now in effect, do the following:

- Reaffirm that employees may take FFCRA leave only when work is actually available to them.
- Reaffirm that employees must have their employer's approval to take intermittent FFCRA leave, but the definition of intermittent is not what you think!
- Revise the definition of "health care provider" to include "only employees who meet the definition of that term under the Family and Medical Leave Act regulations or who are employed to provide diagnostic services, preventative services, treatment services or other services that are integrated with and necessary to the provision of patient care which, if not provided, would adversely impact patient care.“
- Clarify that employees must provide employers with documentation as soon as practicable supporting their need for FFCRA leave. They do not HAVE to provide it BEFORE taking leave.

II. Reaffirming and Explaining the Work-Availability Requirement under § 826.20, Consistent with Supreme Court Precedent and FMLA Principles

The Department's April 1, 2020 rule stated that an employee is entitled to FFCRA leave only if the qualifying reason is a but-for cause of the employee's inability to work. 85 FR 19329. In other words, the qualifying reason must be the actual reason the employee is unable to work, as opposed to a situation in which the employee would have been unable to work regardless of whether he or she had a FFCRA qualifying reason. This means an employee cannot take FFCRA paid leave if the employer would not have had work for the employee to perform, even if the qualifying reason did not apply. *Id.* This work-availability requirement was explicit in the regulatory text as to three of the six qualifying reasons for leave.[4] As explained below, the Department's intent, despite not explicitly including the work-availability requirement in the regulatory text regarding the other three qualifying reasons, was to apply the requirement to all reasons.

person is available to do so. For the purposes of the FFCRA, each day of school closure constitutes a separate reason for FFCRA leave that ends when the school opens the next day. The employee may take leave due to a school closure until that qualifying reason ends (*i.e.*, the school opened the next day), and then take leave again when a new qualifying reason arises (*i.e.*, school closes again the day after that). Under the FFCRA, intermittent leave is not needed because the school literally closes (as that term is used in the FFCRA and 29 CFR 826.20) and opens repeatedly. The same reasoning applies to longer and shorter alternating schedules, such as where the employee's child attends in-person classes for half of each school day or where the employee's child attends in-person classes every other week and the employee takes FFCRA leave to care for the child during the half-days or weeks in which the child does not attend classes in person. This is distinguished from the scenario where the school is closed for some period, and the employee wishes to take leave only for certain portions of that period for reasons other than the school's in-person instruction schedule. Under these circumstances, the employee's FFCRA leave is intermittent and would require his or her employer's agreement.

With those explanations and exceptions in mind, the Department reaffirms that employer approval is needed to take FFCRA leave intermittently in all situations in which intermittent FFCRA leave is permitted.

The District Court explained that because the FFCRA adopted the FMLA's statutory definition of "health care provider" in 29 U.S.C. 2611(6), including the portion of that definition permitting the Secretary to determine that additional persons are "capable of providing health care services," any definition adopted by the Department must require "at least a minimally role-specific determination" of which persons are "capable of providing healthcare services." *New York*, 2020 WL 4462260, at *10. In other words, the definition cannot "hinge[ ] entirely on the identity of the *employer*," but must depend on the "skills, role, duties, or capabilities" of the employee. *Id.* To define the term otherwise would sweep in certain employees of health care facilities "whose roles bear *no nexus whatsoever* to the provision of healthcare services." *Id.* The

if an employee learns on Monday morning before work that his or her child's school will close on Tuesday due to COVID-19 related reasons, the employee must notify his or her employer as soon as practicable (likely on Monday at work). If the need for expanded family and medical leave was not foreseeable—for instance, if that employee learns of the school's closure on

Tuesday after reporting for work—the employee may begin to take leave without giving prior notice but must still give notice as soon as practicable.

Accordingly, the Department is revising § 826.100(a) to require the employee to furnish the listed information as soon as practicable, which in most cases will be when notice is provided under § 826.90. That is to say, an employer may require an employee to furnish as soon as practicable: (1) the employee's name; (2) the dates for which leave is requested; (3) the qualifying reason for leave; and (4) an oral or written statement that the employee is unable to work. The employer may also require the employee to furnish the information set forth in § 826.100(b)-(f) at the same time.

We are answering your questions live on the air right now.

Please submit questions through the Q&A function,
not the chat option at the bottom of your screen.

Questions?

For legislative and regulatory questions, please email:

questions@dominionpayroll.com

Don’t forget to wash your hands!