

SOCIAL SECURITY: County not required to pay social security  
COUNTY EMPLOYEES: contributions on wages of former employees not  
employed at the time of the entry upon agreement  
with Federal Social Security Agency.  
Officers are required to pay contributions for  
former term although serving a subsequent term  
at the time county enters into agreement.

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JOHN M. DALTON

March 5, 1953



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J. C. Johnsen

Honorable James T. Riley  
Prosecuting Attorney  
Cole County  
Jefferson City, Missouri

Dear Sir:

This is in reply to your recent request which is as follows:

"Under the various sections of Chapter 105, R.S.Mo. 1939, the several political subdivisions of the State of Missouri are authorized to enter into agreements to accept the provisions of the Federal Laws relating to old age and survivors insurance. On January 15, 1953, our County Court made an order accepting such provisions and proposing to enter into an agreement with the State Agency retroactive to January 1, 1951.

"Presumably such agreement would have to include each and every person who is employed by the County for any period of time since January 1, 1951. It would also have to include such elective officials whose terms expired December 31, 1952.

"I would like to have the expression and opinion from your office regarding the following:

"(a) Is the County Court or County Treasurer authorized to pay the tax required by the Federal Statutes on the salaries of the employees and officers who are no longer employed by the County, or whose term of office expired prior to the County Court's order of January 15, 1953.

"(b) If the County Court and County Treasurer is authorized to pay the Federal Tax, is the County then authorized to collect the contributions due from the former employee or elective official by civil suit or otherwise.

"(c) If the County Court or County Treasurer is unable to collect the contributions due from the employees for the past periods, can the County then pay from its treasury, both the employers and employees contribution under Section 105.380.

"(d) Can the County Court and County treasurer make its order and contribution effective against an elective official whose term expired on December 31, 1952, and who was re-elected January 1, 1953."

From the context of your letter, we presume that you have reference to sections in V.A.M.S. In order to comprehend the problems of law involved in the State's participation in the Federal Old-Age and Survivors Insurance Act, we feel that a brief discussion of the circumstances of the acceptance by Missouri is first necessary. Section 418, Title 42, U.S.C.A., of the Federal Social Security Act was amended August 28, 1950, making possible the inclusion of the employees of States and the employees of local subdivisions of States under the provisions of the Old-Age and Survivors Insurance Benefits. Section 418, Paragraph (a) (1) as so amended in 1950, is as follows:

"(a) (1) The Administration shall, at the request of any State, enter into an agreement with such State for the purpose of extending the insurance system established by this subchapter to services performed by individuals as employees of such State or any political subdivision thereof. Each such agreement shall contain such provisions, not inconsistent with the provisions of this section, as the State may request."

The coverage of State and local government employees

was not automatic under the Act, but required a request and an agreement from the State. The amended law further provided, as to the effective date of the State's agreement by Sub-section (f) of Section 418, as follows:

"(f) Any agreement or modification of an agreement under this section shall be effective with respect to services performed after an effective date specified in such agreement or modification, but in no case prior to January 1, 1951, and in no case (other than in the case of an agreement or modification agreed to prior to January 1, 1953) prior to the first day of the calendar year in which such agreement or modification, as the case may be, is agreed to by the Administrator and the State."

The State of Missouri elected to participate in accordance with the above-quoted Federal law, and enacted the State Social Security Law now contained in Laws of Missouri, 1951, pages 788 to 798. This law provided, as to the effective date of the necessary agreement to be made under the Federal Act, the following section, Section 10, page 796, Laws of Missouri, 1951:

"Section 10. Effective date of coverage. . .  
The coverage provided for in this act shall be effective to the employees as defined herein on or before July 1, 1951."

In the Missouri law it was further provided that political subdivisions could come under the provisions of the Social Security Act when a plan submitted to the State agency was approved. It was provided that such political subdivision in making its first payment could agree to pay contributions in respect to wages equal to the amount due and payable if the agreement had been effective back to January 1, 1951. The political subdivisions could thereby set back the beginning of the coverage of their employees under the Old-Age and Survivors Insurance Act. Laws of Missouri, 1951, page 793, Section 5, Sub-section 4.(1), is as follows:

"Each political subdivision or instrumentality whose plan has been approved under this section shall pay into the contributions fund, with respect to wages at such times as the state

agency may prescribe, contributions in the amounts and at the rates specified in the agreement entered into by the state agency, except that each such political subdivision or instrumentality in making its first payment into the contribution fund after the effective date of its agreement with the state agency, may agree to pay contributions with respect to wages, a sum equal to the amount which would have been due and payable had the agreement and this act been effective on January 1, 1951."

(Underscoring ours.)

This is the statutory authority for a political subdivision to make its payments into the contribution fund correspond to the antedating of the effective date of the participation on behalf of its employees. This is the provision for contributions by employers.

Since the enactment of the above-quoted statutes the Federal Social Security Law has been amended, enabling States to further modify agreements so that political sub-divisions may participate until January 1954 with a January 1st, 1951, effective date, by the enactment of Title 42, U.S.C.A., Section 417 (f), June 28, 1952, or 488, 66 Stat. 285.

Our State law in regard to contributions by employees is found in Section 5, Sub-section 4, (2), Laws of Missouri, 1951, page 793, and is as follows:

"(2) Each political subdivision or instrumentality required to make payments under this act is authorized, in consideration of the employee's retention in, or entry upon, employment after the passage of this act, to impose upon its employees, as to services which are covered by an approved plan, a contribution with respect to wages, not exceeding the amount of tax which would be imposed by section 1400 of the Federal Insurance Contribution Act and to deduct the amount of such contribution from the wages when paid, except that such political subdivision or instrumentality may agree to impose upon its employees,

during the first quarter of coverage after the effective date of its agreement with the state agency, a contribution with respect to wages, equal to the amount which would have been due and payable from such employees had the agreement and this act been effective on January 1, 1951. Contributions so collected shall be paid into the contribution fund in partial discharge of the liability of the political subdivision or instrumentality. Failure to deduct the contribution shall not relieve the employee or employer of liability therefor."

(Underscoring ours)

This is the statutory authority of political subdivisions to make deductions from the salaries or wages of employees, as is said, in consideration of the employees retention in, or entry upon, employment, under the Federal Contribution Act. It will be seen, that none of the quoted sections of the statutes requires or authorizes a political subdivision to pay the tax required on the salaries of employees or officers who are no longer employed by the political subdivision. We believe that a county being a political subdivision under the definition of the statute has no authority to pay the tax for persons not in the employee-employer relation at the time the agreement between the county and the state is accepted by the Federal Government. This answers question (a) of your request. Inasmuch as questions (b) and (c) are only to be answered in the event question (a) is answered in the affirmative, this disposes of the necessity of considering them.

In regard to question (d), there can be no doubt that if the agreement of your political subdivision was accepted by the state and federal authority during the period of coverage - from January 1, 1951, to December 31, 1952 - the elective public officials of the county would have been covered under the law for that period. It is likewise true that they are now under covered employment subsequent to the final acceptance of the agreement for the continuing term of their respective offices. We have then a situation to consider where the same person holds the same position both before and after entry under agreement of his employer, the political subdivision, under the Old-Age and Survivors Benefits Insurance provisions of the Federal Social Security Act.

It is our opinion herein that a person employed at the time of the agreement, and thereafter, is covered by the applicable provisions of the Social Security Act. But here we have an expiration of one term and the entering into another term by the same person. The Act provides an income tax upon the employee and an excise tax upon the employer. This interpretation was put upon this type of regulation as early as 1937 by the United States Supreme Court. In *Helvering vs. Davis*, 301 U.S. 619, 81 L. ed. 1307, l.c. U.S. 635, it is stated as follows:

"Title VIII, as we have said, lays two different types of tax, an 'income tax on employees,' and an 'excise tax on employers.' The income tax on employees is measured by wages paid during the calendar year. Section 801. The excise tax on the employer is to be paid 'with respect to having individuals in his employ,' and, like the tax on employees, is measured by wages. Section 804. \* \* \*."

As given in Laws No. 1951, page 789, Section 1, paragraph (2), the definition of employee is, in part, as follows:

"\* \* \* Elective or appointive officers and employees of any political subdivision of the state, \* \* \*."

(Underscoring ours)

The definition of employment following the above employee definition on page 789 is equally as broad as the above and for our purposes here practically all including. At least it makes no distinction in regard to elective officers' terms of office.

Our conclusion then would be that an officer whose term expired on December 31, 1952, and resumed office would still be in employee-employer relation with his county.

In *State vs. Sims*, 65 S.E. (2d) 730, one of the cases which has been decided concerning the particular laws here in question the Alabama Supreme Court said, l.c. 737, as follows:

"\* \* \* Though, without its consent, a State is exempt from taxation by the government of the United States, the State may remove that immunity. United States v. Bekins, 304 U.S. 27, 58 S. Ct. 811, 816, 82 L. ed. 1137. In that case the Supreme Court of the United States said: 'While the instrumentalities of the national government are immune from taxation by a State, the State may tax them if the national government consents (Baltimore National Bank v. State Tax Comm., 297 U.S. 209, 211, 212 (56 S. Ct. 417, 418, 80 L. ed. 586) and by a parity of reasoning the consent of the State could remove the obstacle to the taxation by the federal government of state agencies to which the consent applied.' \* \* \*."

We believe that it may be said further that since the county by its acceptance has waived its constitutional barriers against the Federal law, the employee-employer relationship as provided in the Federal law governs the relationship between the employee of the county and the county. It also appears to be evident from a search of relevant statutes, that a temporary, momentary cessation of the employer-employee relationship such as between expiration of term and entry into another term, is not contemplated and can make no difference under the Federal Tax Law, the Federal Social Security Law or the State law accepting the Federal.

#### CONCLUSION

It is, therefore, the opinion of this office that a county is not required to pay the tax on the salaries of employees or officers employed during a period of coverage but who are not employed at the time of or after the agreement between the political subdivision and the Federal Social Security agency is entered into, regardless of the effective date of the agreement.

It is further the opinion of this office that upon approval of the plan submitted by a county that the elected officials of the county, whose terms of office expire December 31, 1952, and who were re-elected and serving at the time of

Honorable James T. Riley

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approval are required to pay contributions in respect to wages, for the service under coverage by the agreement which fell within the expired terms.

This opinion, which I hereby approve, was prepared by my Assistant, James W. Faris.

Very truly yours,

JOHN M. DALTON  
Attorney General

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