
Payroll Guide

□ Highlights □

IRS Issues 2012 Employer's Tax Guide (Circular E) Circular E includes the 2012 wage bracket withholding tables.

IRS Revises Guidance on Reporting of Employer-Sponsored Health Insurance Coverage on Form W-2 The guidance includes 39 Q&As on new W-2 reporting requirements that go into effect for most employers beginning with W-2 forms for the 2012 calendar year (filed in 2013).

APA Offers Tips on How Businesses Can Avoid Compliance Penalties When Paying Independent Contractors Employers are not always required to send a Form 1099-MISC to an independent contractor.

Several Ways to Receive W-2 Information from the IRS and SSA Taxpayers and third parties may be able to receive a copy of the form itself, or a transcript of the information on the form.

IRS Announces FMV Limits for Valuation of Employer-Provided Vehicles The IRS has issued the fair market value thresholds for vehicles first made available to employees for personal use in 2012 under the cents-per-mile and fleet-average valuation rules.

Sneak Peek at the 2012 Fact Finder The *Fact Finder* contains many important 2012 federal and state payroll tax figures.

Several Recent Rulings Issued on Trust Fund Recovery Penalty In one ruling, the court noted that following orders does not protect an otherwise responsible person from the penalty. In another ruling, the IRS failed to prove that the officer was a responsible person during the period at issue.

IRS Issues Ruling on Taxation of Unemployment Insurance Premiums and Benefits The IRS has issued a private letter ruling on whether unemployment insurance premiums and benefits are subject to taxation.

Wage Limit for Government "Control Employee" Remains at \$145,700 in 2012 The wage limit used in the definition of a "control employee" for a governmental employer under the commuting-only valuation rule will remain at \$145,700 in 2012.

Tax-Exempt Employers Eligible to Receive 2011 Credit for Hiring Veterans Shouldn't Wait for Form 941 to Be Revised Tax-exempt employers eligible to receive the credit on their fourth quarter 2011 Form 941 should file the form as they normally would and the IRS will provide guidance on how to claim the credit at a later date.

DOL Issues New Fact Sheets on Retaliation There are new fact sheets on the Fair Labor Standards Act, Family and Medical Leave Act, and the Migrant and Seasonal Agricultural Worker Protection Act.

DOL Delays Effective Date for Revised H-2B Visa Program Wage Rate Calculation Rules Yet Again The rules are now scheduled to go into effect on Oct. 1, 2012.

State Highlights A number of states have reported new laws and developments.

IRS Issues 2012 Employer's Tax Guide (Circular E)

The 2012 version of IRS Pub No. 15, (*Circular E Employer's Tax Guide*), is now on the IRS website. The publication provides guidance on the requirements for withholding, depositing, reporting, paying, and correcting employment taxes. The publication includes information on the forms that employers must give to employees, and the forms that employees must give to employers, as well as the forms that must be sent to the IRS and the Social Security Administration. IRS Pub No. 15 also includes the 2012 wage bracket withholding tables and the previously-released percentage method withholding tables (see Payroll Guide at ¶ 23,121).

The IRS notes that the Social Security withholding tax rate on wages and tips earned by employees before March 1, 2012 is 4.2%. Congress has been discussing an extension of the 4.2% rate through Dec. 31, 2012, but it is possible that the rate could increase to 6.2% on wages and tips earned after Feb. 29, 2012.

Employers should implement the 4.2% tax rate as soon as possible, but no later than Jan. 31, 2012. For any Social Security tax over-withheld during January, employers should make an offsetting adjustment to workers' pay as soon as possible but no later than March 31, 2012.

What's New

IRS Pub No. 15 also notes the following recent developments:

(1) *Withholding allowances.* An annual withholding allowance is valued at \$3,800 in 2012.

(2) *FUTA tax rate.* The federal unemployment tax (FUTA) rate, before consideration of state unemployment tax credits, is 6.0% in 2012. It was 6.2% through June 30, 2011, but the rate was lowered to 6.0% after the expiration of the 0.2% FUTA surtax on June 30.

(3) *Tip reporting programs.* The IRS discontinued the Attributed Tip Income Program (ATIP), effective Dec. 31, 2011.

(4) *Work opportunity tax credit.* The VOW to Hire Heroes Act of 2011 was signed into law by the President on Nov. 21, 2011. It provides an expanded work opportunity tax credit (WOTC) to employers that hire eligible unemployed veterans, and, for the first time, also makes part of the credit available to tax-exempt organizations (see Payroll Guide at ¶ 4055). The credit may be claimed on eligible unemployed veterans who begin work after Nov. 21, 2011, and before Jan. 1, 2013. The WOTC may only currently be claimed on the hire of unemployed veterans, unless

Congress enacts legislation that allows the credit to be claimed on other targeted groups.

(5) *New change of address form.* Beginning in 2012, employers must use new Form 8822-B, *Change of Address – Business*, to report any address changes.

IRS Revises Guidance on Reporting of Employer-Sponsored Health Insurance Coverage on Form W-2

The IRS has issued a new notice, Notice 2012-9, 2012-4 IRB, that restates and amends the previous IRS interim guidance (i.e., Notice 2011-28) on informational reporting to employees on the cost of their employer-sponsored group health plan coverage. The new notice was issued in response to comments from the public on the new information reporting requirements.

Background. Code Sec. 6051(a)(14), which was added to the Internal Revenue Code by § 9002 of the Patient Protection and Affordable Care Act (Health Care Act, P.L. 111-148), generally provided that the "aggregate cost" of employer-sponsored health insurance coverage be reported on employee W-2 forms. For this purpose, "aggregate cost" is determined under rules similar to the rules in Code Sec. 4980B(f)(4) that refer to the definition of "applicable premium" with respect to COBRA continuation coverage. The information is to be reported in Box 12 of Form W-2, using code "DD."

In October 2010, the IRS announced that it will not require employers to include the "aggregate cost" of employer-sponsored health insurance coverage on employee W-2 forms for the 2011 calendar year (filed in 2012). Reporting this information on 2011 W-2 forms is optional [Notice 2010-69, 2010-44 IRB 576; IR 2010-103, 10/12/2010].

Notice 2011-28 included 31 Q&As on the reporting requirements. The new notice, Notice 2012-9, 2012-4 IRB, modifies some of the Q&As in Notice 2011-28 and includes some new Q&As. There are 39 Q&As in Notice 2012-9, 2012-4 IRB. Q&A-1 and Q&A-2 discuss the general requirements. Q&A-3 identifies the employers subject to the reporting requirements. Q&A-4 through Q&A-10 provide the methods for reporting the cost of the coverage on Form W-2. Q&A-11 through Q&A-15 define certain terms related to the cost of coverage required to be reported on Form W-2. Q&A-16 through Q&A-23 set forth the types of coverage the cost of which is required to be included in the amount reported on Form W-2.

Q&A-24 through Q&A-27 describe several calculation methods that may be used to determine the cost of the coverage. Q&A-28 through Q&A-31 address a number of other issues employers may encounter in determining the cost of the coverage. Q&A-32 through Q&A-38 contain additions to the guidance initially set forth in Notice 2011-28.

Q&A-3 states that, effective with W-2 forms for the 2012 calendar year, and W-2 forms for later years (unless and until further guidance is issued), an employer is not subject to the reporting requirement for any calendar year if the employer was required to file fewer than 250 W-2 forms for the preceding calendar year.

Q&A-7 explains the application of the reporting requirement to certain related employers not using a common paymaster.

Q&A-23 modifies and corrects the previous Q&A in Notice 2011-28 to clarify that the reporting requirement does not apply to the cost of coverage includible in income under Code Sec. 105(h), or payments or reimbursements of health insurance premiums for a 2% shareholder-employee of an S corporation who is required to include the premium payments in gross income.

Q&A-32 states that employers are not required to include the cost of coverage under an employee assistance program (EAP), wellness program, or on-site medical clinic in the reportable amount if the employer does not charge a premium with respect to that type of coverage provided under COBRA to a qualifying beneficiary.

Q&A-34 explains how to calculate the reportable amount for coverage only a portion of which constitutes coverage under a group health plan.

Q&A-35 explains how to calculate the reportable amount if an employer is provided notice after December 31 of events that occurred on or before December 31 of a calendar year that affect the prior year's coverage, such as an employee providing an employer notice of a divorce or other change in family status that occurred during a prior calendar year.

Q&A-36 explains how to calculate the reportable amount where coverage extends over the payroll period including December 31.

Q&A-39 states that the reportable amount is not required to be included on a W-2 form provided by a third-party sick pay provider.

Notice 2012-9, 2012-4 IRB, generally applies to W-2 forms for the 2012 calendar year (that is, the forms required for the 2012 calendar year that em-

ployers are generally required to give employees by the end of January 2013 and then file with the Social Security Administration). In addition, employers may rely on the guidance provided in Notice 2012-9, 2012-4 IRB, if they voluntarily choose to report the cost of coverage on 2011 W-2 forms, even though this reporting is not required for 2011. The new guidance remains in effect until further guidance is issued.

APA Offers Tips on How Businesses Can Avoid Compliance Penalties When Paying Independent Contractors

The American Payroll Association (APA) has issued a press release that includes the following five basic tips on how to avoid IRS penalties when paying independent contractors:

(1) *Form 1099-MISC is required for noncorporate service providers.* Employers must provide a Form 1099-MISC, *Miscellaneous Income*, by Jan. 31, 2012, to any noncorporate service provider who was paid at least \$600 for services during 2011. The Form 1099-MISC does not have to be provided to a corporate service provider. Employers should look at the completed Form W-9, *Request for Taxpayer Identification Number and Certification*, that they received from the service provider to determine whether the service provider is "noncorporate" or "corporate." Employers must provide Form 1099-MISC to sole proprietorships, partnerships, attorneys, and medical service providers who do business as corporations.

(2) *Form 1099-MISC not required if contractor paid electronically.* There is no requirement to send a Form 1099-MISC to any contractor that was paid electronically, such as by credit card, debit card, PayPal, or gift card. The bank or credit card company that made the actual payment to the contractor will send the contractor Form 1099-K, *Merchant Card and Third Party Network Payments*.

(3) *Pilot program for truncation of TIN numbers has been extended.* The IRS pilot program that allows for the truncation of taxpayer identification numbers (TINs) on 1099 forms has been extended to include 1099s through the 2012 calendar year (filed in 2013). This means that the first five digits of the TIN can be replaced with asterisks or Xs on the payees' paper copies of Form 1099, but copies filed with the IRS must have their full TIN. See Payroll Guide at ¶ 4264 for further information on the IRS pilot program.

(4) *Better safe than sorry.* The APA advises employers who are unsure whether a Form 1099-MISC is required to go ahead and send one. Employers can't

go wrong by sending more 1099s than are required, but could be subject to penalties if they do not send all qualified service providers their Form 1099-MISC.

(5) *File forms on time.* Paper copies of Forms 1099-MISC must be mailed to the IRS *no later than Feb. 28, 2012*. Forms 1099-MISC filed electronically must be submitted to the IRS by *April 2, 2012* [APA Press Release, *5 Tips for Businesses to Avoid Compliance Penalties When Paying Contractors*, 1/4/12].

🔍 observation: The deadline for filing paper copies of Forms 1099-MISC with the IRS is not extended to February 29 during leap years. The deadline is extended to February 29 for paper copies of W-2 forms submitted to the Social Security Administration.

Several Ways to Receive W-2 Information from the IRS and SSA

There are several ways to receive information about a previously-filed W-2 form from the IRS or the Social Security Administration (SSA).

IRS. A taxpayer may file Form 4506-T, *Request for Transcript of Tax Return*, to ask the IRS for a transcript of the information on Form W-2 or Form 1099. The transcript will include data from these information returns. State or local information will not be included with the Form W-2 information. Information for the current year is generally not available until the year after it is filed with the IRS. For example, W-2 information for 2010, filed in 2011, will not be available from the IRS until 2012.

The IRS may be able to provide transcript information for up to 10 years. Most requests will be processed within 45 days. Taxpayers should complete line 5 of Form 4506-T if they would like the transcript to be mailed to a third party.

Taxpayers who wish to receive a copy of the Form W-2 or Form 1099 that was filed with their personal income tax return should complete IRS Form 4506, *Request for Copy of Tax Return*, and ask for a copy of their tax return, including all attachments.

IRS transcript delivery system. Tax practitioners may request transcripts of their client's tax records and receive them within minutes, instead of days or weeks, using an online tool called the "Transcript Delivery System" (TDS) on IRS e-Services. The documents are delivered to the practitioner's computer through a secure online connection. TDS may be used by electronic return originators (ERO) who have e-filed five or more accepted returns, and by reporting agents who are accepted IRS e-file providers. The IRS recently made improvements to TDS that will

allow tax professionals to submit multiple tax forms in one request, and include more than one taxpayer in the same request [IRS Transcript Delivery System (TDS) Flyer, as updated on 12/13/11].

Social Security Administration. The SSA provides copies of W-2 forms at no cost if the request is for a program-related issue that includes: inquiries involving employer reconciliation, IRS and SSA discrepancies, missing wage reports, duplicate tax returns, third-party filing, and IRS issues. However, the SSA does not retain state and local tax-related data for electronically-filed W-2s. The SSA charges \$30 for each Form W-3, and \$3 for each Form W-2 requested by an employer or third party. The SSA also charges a fee if the request is made for a non-program-related purpose, such as: filing federal or state income tax returns, resolving state tax discrepancies, establishing residency, lost forms, and pension fund issues. The fee includes the search, review, and copying of information even if the information requested is not available. Requests for copies of W-2 forms may be submitted to the SSA on company letterhead or using IRS Form 4506 [SSA/IRS Reporter, *Requests for Copies of Form W-2*, Fall 2011].

IRS Announces FMV Limits for Valuation of Employer-Provided Vehicles

The IRS has issued the fair market value (FMV) thresholds for vehicles first made available to employees for personal use in 2012 under the cents-per-mile and fleet-average valuation rules [Rev Proc 2012-13, 2012-3 IRB 295].

Cents-per-mile method. Under Reg § 1.61-21(a), if an employer provides a car to an employee that is available for personal use, the value of the personal use must generally be included in the employee's income and wages. There are several methods that can be used to value the personal use. Under the cents-per-mile method, the value of the personal use is determined by multiplying the standard mileage rate by the total miles driven in the vehicle for personal purposes. However, the cents-per-mile method may not be used if the automobile's fair market value (FMV) exceeds a certain amount, as adjusted for inflation. Inflation is measured by changes to the Consumer Price Index (CPI).

The IRS has announced that for employer-provided vehicles first made available to employees for personal use in 2012, the cents-per-mile method cannot be used if the value of a passenger automobile exceeds \$15,900 (\$15,300 in 2011). The IRS has also announced that for employer-provided vehicles first

made available to employees for personal use in 2012, the cents-per-mile method cannot be used if the value of a truck or van exceeds \$16,700 (\$16,200 in 2011).

Fleet-average valuation rule. Personal use of an employer-provided auto may be valued using the annual lease valuation (ALV) rule if an employer provides an employee with a company auto for an entire calendar year. The ALV, determined according to a table in Reg § 1.61-21(d)(2)(iii), is an IRS estimate of the annual cost of leasing an automobile, based on a four-year lease. An employer with a fleet of 20 or more autos may determine the ALV of each auto in the fleet as if its FMV were equal to the “fleet-average value.” The “fleet-average value” is the average of the FMVs of each auto in the fleet. The fleet-average valuation rule can’t be used to compute the annual lease value of any auto whose FMV exceeds an annually adjusted inflation-indexed figure.

The IRS has announced that the fleet-average valuation rule can’t be used to determine the ALV of any auto if its FMV on the date it is first made available in 2012 for employee personal use exceeds \$21,100 for a passenger auto (\$20,300 in 2011), or \$21,900 for a truck or van (\$21,200 in 2011).

See Payroll Guide at ¶ 3580 for further information on the valuation of employer-provided vehicles.

Sneak Peek at the 2012 Fact Finder

By popular request, we are attaching a draft version of the 2012 *Fact Finder*.

The *Fact Finder* is a two-page laminated schedule that is updated annually. The *Fact Finder* provides subscribers with timely payroll facts and figures, pension and transportation limits, federal mileage rates, FICA and FUTA tax rates, and state unemployment and disability wage bases. Most of the federal and state amounts on *Fact Finder* have been announced for the 2012 tax year. Congress has yet to decide whether the 4.2% employee OASDI (Social Security) withholding tax rate will remain in effect during all of 2012, and whether there will be any retroactive increase to the current 2012 tax-free exclusion for the combined value of transit passes and transportation in a commuter highway vehicle.

We will update the 2012 *Fact Finder* as more information becomes available.

Several Recent Rulings Issued on Trust Fund Recovery Penalty

There have been several recent federal court rulings on whether corporate officers were liable for the trust fund recovery penalty.

Code Sec. 6672 imposes the trust fund recovery penalty on any person who: (1) is responsible for collecting, accounting for, and paying over payroll taxes; and (2) willfully fails to perform this responsibility. The amount of the penalty is equal to the amount of the tax that was not collected and paid. The penalty is imposed on a “responsible person.” A responsible person may be anyone in a business entity who has the duty to collect, account for, or pay over the tax.

Following orders no excuse for not paying payroll taxes. In *Bernabe v. U.S.*, DC CA, 108 AFTR 2d ¶ 2011-5607, 12/19/11, a federal district court ruled that the secretary/treasurer for four financially-strapped affiliated nursing facilities was a responsible person subject to the trust fund recovery penalty, even though the president of the facilities verbally abused her and let her know that payment of payroll taxes should not be her top priority. The court said that the secretary/treasurer met the requirements to be classified as a responsible person based on her high-ranking officer position, plus the fact that she had hiring/firing and check-signing authority; endorsed checks for significant sums without approval; and was involved in daily financial operations, including managing billing and collections, opening numerous corporate accounts, and signing substantial leases. The court also said that following orders does not protect an otherwise responsible person from Code Sec. 6672 liability.

In *Jimenez v. U.S.*, DC CA, 108 AFTR 2d ¶ 2011-5610, 12/19/11, a federal district court ruled that the vice-president of the four financially-strapped affiliated nursing facilities noted above was also a responsible person subject to the trust fund recovery penalty. The fact that the president of the facilities gave her explicit instructions on payroll priority/non-priority didn’t negate the fact that she was a responsible person with significant financial authority of her own. The court said that she willfully failed to perform her responsibility because she knew the payroll taxes were going unpaid when she approved non-IRS payments. The court considered her arguments that she wanted to pay the IRS and that corporate funds were constrained by certain regulatory controls or lender conditions to be irrelevant since she met the requirements to be classified as a responsible person.

CFO may not have been responsible person during period in question. In *U.S. v. Hulick*, DC NH, 108 AFTR 2d 2011-7401, 12/7/11, a federal district court denied summary judgment to the IRS, finding that there was a question of fact as to whether a company's vice president and chief financial officer (CFO) was a responsible person for purposes of the Code Sec. 6672 trust fund recovery penalty. The court said that the IRS may have proved that the taxpayer had the necessary authority prior to the periods at issue, but it failed to show that during the tax quarters in question, the vice president/CFO retained the ability to decide which of the company's creditors would be paid.

IRS Issues Ruling on Taxation of Unemployment Insurance Premiums and Benefits

The IRS has issued a private letter ruling (PLR) on whether unemployment insurance premiums and benefits are subject to taxation [IRS Letter Ruling 201201003].

The facts. Certain employees are eligible to participate in their employer's insurance plan. There are two participation options. The first participation option (Option 1) is available to employees with less than two years of service. Employees participating in the insurance plan under this option will voluntarily make premium payments with their own after-tax dollars. The second participation option (Option 2) is available to certain employees with two or more years of service. The employer will make premium payments on behalf of its employees who participate in the insurance plan under this option.

Benefit payments received by employees under either Option 1 or 2 will supplement State A's public unemployment insurance benefits and will allow the employees, or the employer, to purchase insurance which, together with the state unemployment benefits, covers 50% of the insured's wages. Participants in the insurance plan are entitled to unemployment benefit payments only if they are eligible for benefits under State A's public unemployment insurance plan.

Rulings were requested on the following issues: (1) Are unemployment benefits received by employees under Option 1 subject to taxation? (2) Are unemployment insurance (UI) premium payments paid by the employer under Option 2 excluded from the employee's income as a working condition fringe benefit? (3) Are UI benefits received by employees under

Option 2 considered wages for FICA and FUTA tax purposes?

Ruling #1. The IRS said that UI benefit payments under Option 1 are not subject to employment taxes. The premium payments under Option 1 were purchased by employees with after-tax dollars in their individual capacities pursuant to a plan in which the employer is not a party. Therefore, these benefits do not constitute wages.

Ruling #2. The IRS ruled that the UI premium payments made by the employer on behalf of its employees under Option 2 were not subject to employment taxes, and were not includable in employees' gross incomes, because they satisfied the definition of a working condition fringe under Code Sec. 132(d), and the requirements set forth in Reg § 1.132-5(a)(2)(i). That is, if the employees had made the payments themselves: (i) the payments would be deductible by the employees for income tax purposes under Code Sec. 162, and (ii) the payments would be deductible with respect to the employees' specific trade or business of being employees to the employer.

Ruling #3. The IRS ruled that the UI benefits received by employees under Option 2 would not be considered wages for FICA and FUTA tax purposes because the insurance plan at issue is a supplemental unemployment benefit (SUB) plan, since it is similar in all material respects to the plan described in Rev Rul 56-249, 1956-1 CB 488, as modified by Rev Rul 90-72, 1990-2 CB 211. That is, the insurance plan is designed to supplement state unemployment benefits and the benefits are linked to the receipt of state unemployment compensation. The benefit payments are, however, subject to federal income tax withholding to the extent that the payments are includable in employees' gross incomes under Code Sec. 3402(o).

The private letter ruling is directed only to the taxpayer who requested it. It may not be used or cited as precedent.

Wage Limit for Government 'Control Employee' Remains at \$145,700 in 2012

The wage limit used in the definition of a "control employee" for a governmental employer under the commuting-only valuation rule will remain at \$145,700 in the 2012 calendar year [U.S. Office of Personnel Management, 2012 Pay Tables for Executive and Senior Level Employees].

Under the commuting-only valuation rule (see Payroll Guide at ¶ 3580), the value of a vehicle provided

to an employee for commuting use is determined by multiplying each one-way commute (that is, from home to work or from work to home) by \$1.50. To use this rule, the following requirements must be met: (1) The employee must be required for bona fide non-compensatory business reasons — i.e., unsafe conditions — to travel between home and work (commute) in a company road vehicle that is not otherwise available for personal use. (2) The employer must have a written policy under which it does not allow the employee to use the vehicle for personal purposes other than for commuting or de minimis personal use. (3) The employee must not use the vehicle for personal purposes other than commuting and de minimis personal use. (4) If the vehicle is an automobile (any four-wheeled vehicle, such as a car, pickup truck, or van), the employee who uses it for commuting must not be a “control employee.”

A “control employee” for a government employer is either an elected official, or a government employee whose compensation equals or exceeds the compensation paid to a federal government employee holding an Executive Level V position. The compensation paid to a federal government employee holding an Executive Level V position is \$145,700 in the 2010-2012 calendar years. This amount has remained the same in recent years because there is currently a pay freeze in effect for certain federal government executive positions.

The IRS previously announced that a compensation limit of \$205,000 should be used to determine whether a worker is a “control employee” for a non-governmental employer in 2012 [see IR 2011-103, 10/20/2011].

Tax-Exempt Employers Eligible to Receive 2011 Credit for Hiring Veterans Shouldn't Wait for Form 941 to Be Revised

On November 16, Congress passed H.R. 674, the “3% Withholding Repeal and Job Creation Act” (the Act). The Act included a provision that allows employers to claim the work opportunity tax credit (WOTC) on their income tax returns for “qualified veterans” who begin work for the employer *before Jan 1, 2013*. In addition, the Act allows tax-exempt employers to receive a payroll tax credit for hiring “qualified veterans” who begin work for the employer *after Nov. 21, 2011 and before Jan. 1, 2013*.

A tax-exempt employer is an employer described in Code Sec. 501(c) that is exempt from tax under Code Sec. 501(a). A “qualified veteran” is a veteran who is

certified by the designated local agency as falling within one of the four categories in Code Sec. 51(d)(3)(A). The credit will be claimed against the OASDI (Social Security) tax that the tax-exempt employer would otherwise have to pay on Form 941, *Employer's Quarterly Federal Tax Return*. The IRS has not yet issued guidance on how to claim the credit on Form 941.

On the January 5 IRS payroll industry conference call, Scott Mezistrano from IRS Employment Tax said that tax-exempt employers eligible to receive the credit on their fourth quarter 2011 Form 941 due on Jan. 31, 2012, should file the form as they normally would and the IRS will provide guidance on how to claim the credit at a later date.

DOL Issues New Fact Sheets on Retaliation

The U.S. Department of Labor's (DOL) Wage and Hour Division (WHD) has issued new fact sheets on retaliation with respect to the Fair Labor Standards Act, Family and Medical Leave Act, and the Migrant and Seasonal Agricultural Worker Protection Act.

Fact sheet on Fair Labor Standards Act. Under the Fair Labor Standards Act (FLSA), all nonexempt employees who are covered under the Act must be paid no less than the current federal minimum wage rate for all hours worked, and overtime pay at time and one half the regular pay rate, for all hours worked over 40 in a workweek. New WHD Fact Sheet #77A, *Prohibiting Retaliation Under the Fair Labor Standards Act (FLSA)*, provides general information on the FLSA's prohibition on retaliating against any employee who has filed a complaint or cooperated in a WHD investigation.

Fact sheet on Family and Medical Leave Act. The Family and Medical Leave Act (FMLA) entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave. The FMLA applies to all public agencies, including state, local, and federal employers, local education agencies (schools), and private-sector employers who employed 50 or more employees in 20 or more workweeks in the current or preceding calendar year, including joint employers and successors of covered employers.

New WHD Fact Sheet #77B, *Protection for Individuals under the FMLA*, provides general information on the FMLA's prohibition on employers retaliating against an individual for exercising his or her rights, or

participating in matters protected under the FMLA. The fact sheet includes the following examples of prohibited conduct:

- Refusing to authorize FMLA leave for an eligible employee;
- Discouraging an employee from using FMLA leave;
- Manipulating an employee's work hours to avoid responsibilities under the FMLA;
- Using an employee's request for or use of FMLA leave as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions; and
- Counting FMLA leave under "no fault" attendance policies.

Fact sheet for agricultural workers. The Migrant and Seasonal Agricultural Worker Protection Act (MSPA) protects migrant and seasonal agricultural workers. The MSPA establishes employment standards related to wages, housing, transportation, disclosures, and recordkeeping. It also requires farm labor contractors to register with the U.S. Department of Labor. New WHD Fact Sheet #77C provides general information on the MSPA's prohibition on discrimination against a migrant or seasonal agricultural worker who has filed a complaint or participated in any proceeding under or related to the MSPA.

DOL Delays Effective Date for Revised H-2B Visa Program Wage Rate Calculation Rules Yet Again

The Department of Labor (DOL) has announced that the effective date for the final rule revising the H-2B visa program wage rate calculations has been postponed from Jan. 1, 2012 to *Oct. 1, 2012* [Fed. Reg. Vol. 76, p. 82115, 12/30/2011].

Background. The H-2B visa program (see Payroll Guide at ¶ 20,390) allows foreign workers to enter into the U.S. when qualified U.S. workers are not available, and when the employment of foreign workers will not adversely affect the wages and working conditions of similarly employed U.S. workers.

Final regulations revised the calculation of wage rates for workers in the H-2B visa program. The final regs require employers to pay H-2B and American workers recruited in connection with an H-2B job application a wage that meets or exceeds the highest of: the prevailing wage rate, the federal minimum wage rate, the state minimum wage rate, or the local minimum wage rate.

The effective date of these regulations has been changed several times due to ongoing litigation. The latest delay is the result of recently enacted legislation that prohibits any funds from being used to implement the final regs for the remainder of the federal government's current fiscal year (FY) that ends on Sept. 30, 2012.

Stateline

New laws and developments are reported from the following states:

ARIZONA

Unemployment. Unemployment tax rates for experienced employers will range from 0.02% to 6.38% in the 2012 tax year (0.02% to 5.86% in 2011). The new employer rate remains at 2%. All employers (except reimbursable employers) are also subject to a separate 0.1% job training tax and a 0.5% special assessment rate in 2012. The taxable wage base remains at \$7,000 [Arizona Department of Employment Security (DES) website, *UI Tax Rates for Current and Prior Years*].

CALIFORNIA

Disability. Employers not subject to the California Unemployment Insurance Code may elect disability insurance coverage. The 2012 disability insurance elective coverage (DIEC) rate is 3.05% on the first \$95,585 of net profit. Form DE 3DI, *Quarterly Premium Notice for DIEC*, must be signed and returned each quarter by employers electing disability insurance coverage, even when no premium is due [Employment Development Department Publication 3DI-I Rev. 52 (1-12)].

Employment Taxes. The Employment Development Department (EDD) is reminding employers that fourth quarter 2011 Forms DE 9, *Quarterly Contribution Return and Report of Wages*, and DE 9C, *Quarterly Contribution Return and Report of Wages (Continuation)*, should be filed together. Employers with balances due must complete Form DE 88, *Payroll Tax Deposit*, and mail it with payment to the address on the form. Employers should not mail the payment with Forms DE 9 and DE 9C, because it may cause a delay in processing [EDD Tax Branch News #162, 1/10/12].

The California Department of Industrial Relations (DIR) has announced the launch of the Labor Enforcement Task Force (LETF). The primary partners in the LETF are the DIR, the Employment Development Department, the Contractor's State License Board, the Board of Equalization, and the Bureau of Automotive Repair. The goals of the LETF include: (1) ensuring that workers receive proper payment of wages; (2) ensuring that the State receives taxes due from employers and

collects penalties owed by employers who violate labor laws; and (3) leveling the playing field so that employers who comply with the law and support California's economy do not have to compete with employers who break the law [DIR News Release, *DIR Launches New Labor Enforcement Task Force to Battle California's Underground Economy*, 12/28/11].

Unemployment. Employers can view their 2012 unemployment tax rates on the Employment Development Department's (EDD) *e-Services for Business* webpage by selecting the "Payroll Tax Rates" link, entering their payroll account number, and clicking on the "Get My Rate" button. Payroll agents can obtain unemployment tax rates for multiple clients by logging in to *e-Services for Business* and selecting "I want to . . . Submit Bulk Rate Inquiry" [California EDD Tax Branch News #163, 1/11/12].

Wage Payment. The "Wage Theft Prevention Act of 2011" requires most private employers, *effective Jan. 1, 2012*, to provide written notice to newly hired employees about their rate of pay, pay basis (i.e., shift, piece, salary, commission, etc.), overtime rate when applicable, allowances claimed against the minimum wage (i.e., meals, lodging, etc.), and payday, along with certain information about the employer. The California Division of Labor Standards Enforcement (DLSE) has now issued a template that may be used by employers to meet this requirement [DLSE template, *Notice to Employee, Labor Code Section 2810.5*].

CONNECTICUT

Withholding. The Connecticut Department of Revenue Services (DRS) has revised a publication that employees may use to determine if they need to update their withholding. The DRS is also urging employers and employees to review the withholding status on Form CT-W4, *Employee's Withholding Certificate*. This is especially important for employees who adjusted their Connecticut withholding during 2011 because of changes to the state tax rates [Connecticut Informational Publication 2012(7), 12/28/2011; DRS Notice, *Taxpayers Reminded to Review CT-W4 Withholding Status*, 1/4/12].

The DRS has updated its electronic filing publications on information returns (i.e., Forms W-2, 1099-R, 1099-MISC, and W-2G) for the 2011 tax year. Taxpayers filing 25 or more of each form, per form type, are required to file electronically through the DRS Taxpayer Service Center (TSC). The due date for electronic returns is *April 2, 2012* (Feb. 29, 2012 for paper returns). The DRS now accepts amended and supplemental filings (must be done using the "Single Client - Key and Send filing"). The DRS has also issued the 2012 version of Form CT-W4NA, *Employees Withholding or Exemption Certificate-Nonresident Apportionment*. Nonresidents should

complete this form if they don't want their employer to withhold Connecticut income tax on all of their wages [Connecticut Informational Publication 2011(11), 01/01/2012; Connecticut Informational Publication 2011(25), 01/01/2012; DRS E-News, 1/11/12].

Taxpayers now have additional time to initiate payments by electronic funds transfer (EFT) without the tax payment being treated as a late payment. *Effective for tax periods beginning on or after Jan. 1, 2012*, taxpayers may initiate an ACH debit payment up until midnight on the due date for the payment and it will still be considered timely. A payment made using the ACH credit method will still be considered timely if it is initiated on or before the due date and the payment is credited to the Connecticut Department of Revenue Services' (DRS) bank account on or before the next business day *following* the due date for the payment. Previously, a payment was only considered to have been made timely if the money was credited to the DRS's bank account on the due date for the payment [Connecticut Announcement 2011(7), 12/29/2011; DRS News Release, *New EFT Rules Easier for Taxpayers*, 12/29/11].

DELAWARE

Withholding. The Delaware Division of Revenue (DOR) has revised the withholding tax computation table, *effective Jan. 1, 2012*. The tax rate on taxable income \$60,000 and over has decreased from 6.95% to 6.75%. *Effective Jan. 1, 2014*, the tax rate on taxable income of \$60,000 and over will decrease from 6.75% to 5.95% [Delaware Employer Guide, Section 17, *Computing Withholding Taxes*].

DISTRICT OF COLUMBIA

Unemployment. A spokesperson for the District of Columbia Department of Employment Services (DES) has told *RIA* that unemployment tax rates for experienced employers will continue to be determined under Table V in the 2012 tax year. Tax rates range from 1.6% to 7.0%. The new employer rate remains at 2.7%. All employers continue to be subject to a 0.2% administrative funding assessment on all wages. The taxable wage base will remain at \$9,000.

Withholding. *Effective Jan. 1, 2012*, payors of distributions from retirement plans or accounts subject to federal withholding must withhold income tax at the District's highest tax rate (8.95%, as of Jan. 1, 2012) at the time of distribution. For withholding purposes, a retirement plan or account means: (1) a qualified employee benefit plan; (2) a qualified employee annuity plan; (3) a defined contribution plan; (4) a tax sheltered annuity plan; (5) an individual retirement account; (6) any combination of the plans and accounts previously noted; or (7) any similarly situated plan as defined by the Internal

Revenue Code of 1986 [District of Columbia Revenue Notice 2011-09, 12/28/2011].

FLORIDA

Unemployment. The Florida Department of Revenue (DOR) has issued guidance to help employers understand their unemployment tax rate notices (UCT-20) and recent law changes. The DOR made changes to the final benefit ratio calculation in an effort to minimize the increase in 2012 tax rates [DOR Pub TIP #1160BB-02, *Understanding Your 2012 Tax Rate Calculation*, 12/14/11].

GEORGIA

Unemployment. A spokesperson for the Georgia Department of Labor (DOL) has told *RIA* that unemployment tax rates for experienced employers will continue to range from 0.03% to 7.29% in the 2012 tax year. The new employer rate remains at 2.7%. These rates include a 0.08% administrative assessment fee that is paid by all employers, except those assigned the minimum or maximum tax rate. The taxable wage base remains at \$8,500.

INDIANA

New Hire Reporting. The Indiana Department of Workforce Development (DWD) is reminding employers that, for new hire reporting purposes, they should be reporting the date that a new employee began work, rather than the date that the worker was hired. Employers must report the date a new hire began work within 20 days. New hires may be reported online at the Indiana New Hire Reporting Center [DWD Memorandum, *2012 Unemployment Insurance Premium Rates and Other News*, 12/16/11].

MASSACHUSETTS

Withholding. Massachusetts has adopted the 2012 federal monthly exclusion amounts of \$240 per month for employer-provided parking, and \$125 per month for the combined value of transit pass and commuter highway vehicle transportation (transit pass) benefits. Massachusetts follows the Jan. 1, 2005 Internal Revenue Code. Massachusetts didn't adopt the federal exclusion amounts for these fringe benefits in the 2011 tax year, because the 2011 federal limits were based on federal legislation that was enacted after Jan. 1, 2005. In 2011, the Massachusetts exclusion for employer-provided parking was \$230 per month, and the exclusion for the combined value of transit pass benefits was \$120 per month. The federal exclusion was \$230 per month for each of these fringe benefits in 2011. If the U.S. Congress makes any further changes to the 2012 exclusion amounts, Massachusetts will not adopt the changes unless approved by the Massachusetts Legislature [Massachusetts Technical Information Release 12-1, 01/05/2012].

MINNESOTA

Withholding. The Minnesota Department of Revenue (DOR) has updated two fact sheets on electronic reporting. Minnesota Withholding Income Tax Fact Sheet 2, 01/01/2012, provides guidance on how employers may file electronic copies of their 2011 W-2 forms with the DOR using either the Social Security Administration's EFW2 electronic filing format, the DOR's new e-Services system, or the DOR's Electronic Data Exchange (EDE) system. Minnesota Withholding Income Tax Fact Sheet 2a, 01/01/2012, explains how employers may file electronic copies of their 2011 W-2 and 1099 forms to the DOR using the Key and Send, or the Simple (delimited) file methods in e-Services. Minnesota does not accept W-2 forms on CD-ROM, diskette, or in PDF format. 1099 forms may still be submitted using one of these formats.

NEBRASKA

Withholding. The Nebraska Department of Revenue (DOR) has updated Information Guides 8-633-2008 and 8-482-1990. Information Guide 8-633-2008, *Nebraska Computer Reporting Procedure, 21EFW2*, provides guidance on how to electronically file Forms W-2 and W-2G. Information Guide 8-482-1990, *Nebraska Computer Reporting Procedure, 21CM*, provides guidance on how to electronically file Forms 1099-MISC, 1099-R and W-2G. Both guides remind taxpayers that any employer that must report more than 50 of the above-mentioned forms must e-file those forms using the DOR's NebFile for Business program [Nebraska Information Guide 8-633-2008, 12/27/2011; Nebraska Information Guide 8-482-1990, 12/27/2011].

NEW HAMPSHIRE

Unemployment. The 1.0% emergency power surcharge will remain in effect through the second quarter of 2012. The rate is expected to be reduced to 0.5% in the third quarter of 2012, and to 0% in the fourth quarter of 2012. Negative balanced employers will continue to pay the 1.5% inverse surcharge, in addition to the emergency power surcharge, in the first two quarters of 2012. See Payroll Guide at ¶ 14,105 for further information on these assessments. Employers will not receive a fund balance reduction in the first two quarters of 2012. The taxable wage base for unemployment tax purposes is now \$14,000 [New Hampshire Department of Employment Security (DES) website, *Quarterly Fund Balance Reductions and Surcharges*].

NEW MEXICO

Unemployment. A spokesperson for the New Mexico Department of Workforce Solutions has told *RIA* that unemployment tax rates for experienced employers will be determined under Reserve Schedule 3 in the 2012 tax year. Unemployment tax rates will range from 0.6%

to 5.4%. Unemployment tax rates are higher than they were in the 2011 tax year when they were determined under Reserve Schedule 1. The new employer rate remains at 2.0%. The taxable wage base increases from \$21,900 to \$22,400 in 2012.

Withholding. The New Mexico Taxation and Revenue Department has revised the withholding tables in FYI-104, *New Mexico Withholding Tax*, to correct some typographical errors. In Table 4a (Monthly Tables for Single Persons) of the percentage method withholding tables, the amount in the last wage bracket is now \$5,596 (previously, \$5,586). In Table 6a (Semiannual Tables for Single Persons), the amount in the last wage bracket is now \$33,575 (previously, \$33,525). The tables should be used for wages paid *on or after Jan. 1, 2012*.

NEW YORK

Unemployment. Unemployment tax rates for experienced employers will continue to range from 1.5% to 9.9% in the 2012 tax year. These rates includes a 0.075% reemployment tax, and a subsidiary tax that ranges from 0.525% to 0.925%, depending on the employer's account percentage. The new employer rate is still 4.1%. The taxable wage base remains at \$8,500. Tax rates notices will be mailed to employers in March [New York State Department of Labor (DOL) website, *Current Employer Tax Rates*].

PENNSYLVANIA

Unemployment. The Pennsylvania Department of Labor and Industry (DLI) has announced that there has been a delay in the mailing of unemployment tax rate notices. They are usually mailed on December 31. The rate notices will be mailed before April 1, 2012, which is the start of the first quarter 2012 filing period [Pennsylvania DLI website, *Unemployment Compensation: Employer Services, 2012 Unemployment Contribution Rate Notice Mailing Delay*].

SOUTH CAROLINA

Withholding. Employers may now submit W-2 forms on the South Carolina Business One Stop (SCBOS)

portal on the South Carolina Department of Revenue (SCDOR) website. The SCBOS W-2 Portal is available 24 hours a day, seven days a week, and offers instant feedback on the status of uploaded file content. It also provides the employer with a receipt and a transaction reference number. Employers with a small number of employees may utilize the direct entry method, and tax professionals who file on behalf of multiple clients can submit return information in a single file. There are training webinars, general FAQs, a comma-separated values (CSV) upload guide, and additional information on this process at the SCDOR website [SCDOR Notice, *Employer W2 Filings Now Available Online, 1/6/12*].

SOUTH DAKOTA

Unemployment. A spokesperson for the South Dakota Department of Labor and Regulation has told *RIA* that unemployment tax rates for experienced employers will continue to range from 0% to 10.03% in the 2012 tax year, including a 0.53% investment fee. The new employer tax rate for all employers in their first year of business, other than new construction employers, continues to be 1.75%. The new employer rate for first year construction employers remains at 6.55%. New employer rates include a 0.55% investment fee. The quarterly tax surcharge is not expected to be in effect in 2012. The taxable wage base increases from \$11,000 to \$12,000 in 2012.

VIRGIN ISLANDS

Unemployment. A spokesperson for the Virgin Islands Department of Labor (DOL) has told *RIA* that unemployment tax rates for experienced employers will range from 0% to 6.0% in the 2012 tax year. The new employer rate remains at 1.0%. The taxable wage base increases from \$22,600 to \$23,700 in 2012. The maximum weekly unemployment benefit is now \$495 (\$470 in 2011).



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