
Payroll Guide

□ Highlights □

Client Letter Highlights Important 2012 Federal Payroll Tax Changes There have been some significant payroll tax developments over the past year.

State Payroll Tax Information for 2012 Many states have issued new withholding tables, increased their minimum wage rates, or revised their unemployment/disability taxable wage bases for the 2012 tax year.

Payroll Tax Cut Legislation No Longer on Hold The Social Security withholding rate on employee wages will remain at 4.2% through Feb. 29, 2012. Congress hopes to keep it at this rate through all of 2012.

IRS Updates Electronic Filing Specifications for Substitute Forms W-2/W-3 The new specifications should be used beginning with substitute Forms W-2/W-3 for the 2011 calendar year.

IRS Finalizes New Form 94x Schema Software developers and transmitters may now test whether their software has been properly updated to take into account the fact that employers in many states will be paying higher FUTA rates on their 2011 Form 940.

Office of Child Support Enforcement Launches New Web Application to Help Employers Report Lump Sum Payments The OCSE believes that the new web application will be a great time-saving tool for employers.

Businessman Guilty of Failing to Pay More Than \$15 Million in Payroll Taxes for Temporary Staffing Companies The businessman gave false bank statements to auditors to conceal the nonpayment of the payroll taxes.

No Overtime Violation When Employer Unaware of Work Performed During her eight years with the company, the employee had never told her employer that she was doing work before the start of her scheduled shift.

Employer Under No Obligation to Determine Validity of IRS Tax Levy Once the IRS serves a Notice of Levy on an employer, the employer has a legal obligation to turn the wages over to the IRS even if the levy may not be valid.

DOL Issues 2012 Adverse Effect Wage Rates These rates are used by employers who are looking to hire certain temporary or seasonal H-2A nonimmigrant alien visa holders in the agricultural industry.

Proposed Regulations Would Make It Easier for Home Health Care Workers to Receive Overtime Under the proposed regs, third-party employers, such as in-home care staffing agencies, would not be able to claim the minimum wage and overtime companionship exemption, or the overtime exemption, for live-in domestic workers.

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

Client Letter Highlights Important 2012 Federal Payroll Tax Changes

Here is a summary of some important information that you need to know for the 2012 tax year.

Withholding Tax

New federal percentage method withholding tables have been issued. An annual federal withholding allowance is now valued at \$3,800 (previously, \$3,700).

The 4.2% Social Security withholding tax rate on wages earned by employees will remain in effect at least through *Feb. 29, 2012*. Congress hopes to enact legislation in the coming weeks that will keep this rate in effect through Dec. 31, 2012 (see Article 1.3).

Fringe Benefits

The standard mileage rate for computing the deductible cost of operating a car (including vans, pickups, or panel trucks) for business use will remain at 55.5¢ per mile. It has been at this rate since July 1, 2011.

An employee may exclude from taxable income up to \$240 a month for qualified parking expenses in 2012 (up from \$230 a month in 2011). The tax-free exclusion for the combined value of transit passes and transportation in a commuter highway vehicle will decrease from \$230 a month to \$125 a month in 2012, unless Congress retroactively enacts legislation that keeps this exclusion equal to the amount of the qualified parking exclusion.

It is now easier for an employer-provided cell phone, or a personally-owned cell phone used for business purposes, to qualify as a tax-free fringe benefit.

Pension Plan Limitations

The maximum amount that an employee may elect to defer to an Code Sec. 401(k) cash or deferred compensation plan is \$17,000 in the 2012 tax year (up from \$16,500 in 2011). The maximum amount that an employee/participant may elect to defer to a savings incentive match plan for employees (SIMPLE plan) remains at \$11,500. The limitation on total annual contributions to defined contribution plans is \$50,000 (up from \$49,000 in 2011). The annual benefit limit for defined benefit plans is \$200,000 (up from \$195,000 in 2011). The limitation on deferrals for Code Sec. 457 deferred compensation plans of state and local governments and tax-exempt organizations increases from \$16,500 to \$17,000 in 2012. The limitation used in the definition of a highly compensated employee increases from \$110,000 to \$115,000 in 2012.

The maximum aggregate annual contribution that can be made to a health savings account in 2012 is

\$3,100 for self-only coverage (up from \$3,050 in 2011) and \$6,250 for family coverage (up from \$6,150 in 2011).

The employee compensation amount used in the definition of "control employee" for purposes of the auto commuting valuation rule increases from \$195,000 to \$205,000 in 2012. The compensation amount used in the definition of company officers who are ineligible for the commuting valuation rule increases from \$95,000 to \$100,000 in 2012.

W-2s.

Employers may now submit up to 50 W-2 forms through W-2 Online (previously, up to 20 W-2 forms).

Unemployment Tax

The 0.2% federal unemployment tax (FUTA) surtax expired on June 30, 2011. The FUTA tax rate, before consideration of state unemployment tax credits, is 6.2% from Jan. 1, 2011 to June 30, 2011, and 6.0% after June 30, 2011. Employers in 20 states (and in the Virgin Islands) will see their state unemployment tax credits reduced on their 2011 FUTA return because their state failed to repay its federal unemployment insurance loans before the required deadline.

Federal Minimum Wage Rate

The federal minimum wage rate is still \$7.25 per hour in 2012.

Other

The IRS has launched a "Voluntary Classification Settlement Program" that it says will allow many employers to resolve past worker classification issues under the tax law at a low cost if they voluntarily agree to reclassify their workers as employees.

The work opportunity tax credit (WOTC) allows employers who hire members of certain targeted groups to receive an income tax credit. The WOTC may now only be claimed by employers who hire qualified veterans (i.e., no other targeted groups besides qualified veterans) between Jan. 1, 2012 and Dec. 31, 2012. It's possible that Congress will retroactively enact legislation that will allow employers who hire other targeted groups, besides qualified veterans, to claim the WOTC in 2012. Tax-exempt organizations are now allowed to offset the WOTC against their OASDI (Social Security) tax liability.

State Payroll Tax Information for 2012

Many states have issued new withholding tables, increased their minimum wage rates, or revised their unemployment/disability taxable wage bases for the 2012 tax year. Here is a summary of the changes.

Withholding Tables

The following states have issued new withholding tables for 2012:

- California (see Payroll Guide at ¶ 23,608);
- Connecticut (see Payroll Guide at ¶ 23,803);
- Delaware (see Payroll Guide at ¶ 23,902);
- District of Columbia (see Payroll Guide at ¶ 24,002);
- Hawaii (see Hawaii Dept. of Taxation Announcement 2011-29, 12/22/2011);
- Idaho (see Payroll Guide at ¶ 24,402);
- Kentucky (see Payroll Guide at ¶ 24,908);
- Maine (see Payroll Guide at ¶ 25,109);
- Maryland (see Payroll Guide at ¶ 25,202);
- Massachusetts (see Payroll Guide at ¶ 25,302);
- Minnesota (see Payroll Guide Newsletter at ¶ 25.10);
- Missouri (see Payroll Guide at ¶ 25,705);
- New Mexico (see Payroll Guide Newsletter at ¶ 24.10);
- New York (see New York Department of Taxation and Finance Publication New York Department of Taxation & Finance Publication NYS-50-T-NYS, 01/01/2012);
- North Dakota (see Payroll Guide Newsletter at ¶ 25.10);
- Oklahoma (see Article 1.10);
- Oregon (see Payroll Guide at ¶ 26,905);
- Rhode Island (see Payroll Guide at ¶ 27,208); and
- Vermont (see Payroll Guide at ¶ 27,805).

Indiana revised its county income tax withholding tables, effective Dec. 1, 2011 (see Indiana Departmental Notice 1, 12/01/2011).

The Queen Anne's County, Maryland, withholding tax rate increases from 2.85% to 3.2% in 2012.

There are new Yonkers, New York withholding tables (see New York Department of Taxation and Finance Publication New York Department of Taxation & Finance Publication NYS-50-T-Y, 01/01/2012).

There is a new local earned income tax (EIT) collection system in Pennsylvania (see Payroll Guide at ¶ 9068).

Minimum Wage

State minimum wage rate changes, *effective Jan. 1, 2012*, are as follows: Arizona (from \$7.35 to \$7.65 per hour); Colorado (from \$7.36 to \$7.64 per hour); Florida (from \$7.31 to \$7.67 per hour); Montana (from

\$7.35 to \$7.65 per hour for large employers); Ohio (from \$7.40 to \$7.70 per hour); Oregon (from \$8.50 to \$8.80 per hour); Vermont (from \$8.15 to \$8.46 per hour); and Washington (from \$8.67 to \$9.04 per hour).

Effective Jan. 1, 2012, employees who work in San Francisco, California (including temporary and part-time employees) must be paid at least \$10.24 per hour (previously, \$9.92 per hour).

There is a quick reference chart on minimum wage rates in Payroll Guide at ¶ 19,010.

Unemployment Tax

The following states are increasing their taxable wage bases in the 2012 tax year:

- Alaska (from \$34,600 to \$35,800);
- Colorado (from \$10,000 to \$11,000);
- Florida (from \$7,000 to \$8,500);
- Hawaii (from \$34,200 to \$38,800);
- Idaho (from \$33,300 to \$34,100);
- Illinois (from \$12,740 to \$13,560);
- Iowa (from \$24,700 to \$25,300);
- Kentucky (from \$8,000 to \$9,000);
- Michigan (from \$9,000 to \$9,500);
- Minnesota (from \$27,000 to \$28,000);
- Montana (from \$26,300 to \$27,000);
- New Hampshire (from \$12,000 to \$14,000);
- New Jersey (from \$29,600 to \$30,300);
- New Mexico (from \$21,900 to \$22,400);
- North Carolina (from \$19,700 to \$20,400);
- North Dakota (from \$25,500 to \$27,900);
- Oklahoma (from \$18,600 to \$19,100);
- Oregon (from \$32,300 to \$33,000);
- Rhode Island (from \$19,000 to \$19,600, except the taxable wage base for employers who are assigned the highest unemployment tax rate is \$21,100 in 2012);
- South Carolina (from \$10,000 to \$12,000);
- South Dakota (from \$11,000 to \$12,000);
- Utah (from \$28,600 to \$29,500);
- Vermont (from \$13,000 to \$16,000);
- Washington (from \$37,300 to \$38,200); and
- Wyoming (from \$22,300 to \$23,000).

The taxable wage base for Nevada is decreasing from \$26,600 to \$26,400 in 2012.

There is a quick reference chart on unemployment tax rates and taxable wage bases in Payroll Guide at ¶ 11,075.

Disability Tax

California, Hawaii, New Jersey, and Rhode Island have all recently announced their disability tax rates and wage bases for the 2012 tax year. See Payroll Guide at ¶ 11,110 for further information.

Payroll Tax Cut Legislation No Longer on Hold

On Dec. 23, 2011, the House and the Senate reached an agreement that will extend the “payroll tax cut” through *Feb. 29, 2012*. President Obama signed the legislation into law later that day [H.R. 3765, the *Temporary Payroll Tax Cut Continuation Act of 2011*; IR 2011-124, 12/23/2011].

The “payroll tax cut” temporarily lowers the Social Security withholding tax rate on wages earned by employees from 6.2% to 4.2%. The cut originally was only supposed to last for one year, beginning with wages earned on Jan. 1, 2011. The new agreement extends the payroll tax cut through Feb. 29, 2012.

Employers should use the 4.2% tax rate in 2012 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*.

The Senate had previously passed legislation that would have extended the payroll tax cut through February 2012, but some members of the House objected to certain provisions in the bill. One of the key points of contention was the Social Security wage base, which is \$110,100 in 2012. The Senate bill would only have reduced the Social Security withholding rate to 4.2% on the first \$18,350 of wages earned through February 29 (i.e., $\$110,100 \times 2/12$). The Senate was fearful that without the \$18,350 cap, high income taxpayers would receive the full benefit of the payroll tax cut in the first two months of 2012, while other taxpayers would not if the cut was not extended beyond February 29. Some members of the House objected to the \$18,350 cap for reasons that included the fact that there wouldn’t be much time for payroll professionals to update their payroll systems for the change to the taxable wage base.

Under the new agreement, the 4.2% employee Social Security withholding rate may be used on the first \$110,100 of wages earned by an employee through February 29. The agreement will allow employers to continue to process and withhold payroll taxes using their current payroll systems. If an employee’s wages during the first two months of 2012 exceed \$18,350,

and the payroll tax cut is not extended for the remainder of 2012, an amount equal to 2% of those excess wages would ultimately be recaptured on the employee’s 2012 personal income tax return.

The new agreement calls for the House and the Senate to immediately appoint conferees to meet in the coming weeks to hopefully come to an agreement on a full-year payroll tax cut extension in 2012.

IRS Updates Electronic Filing Specifications for Substitute Forms W-2/W-3

The IRS has issued new electronic filing specifications for substitute Forms W-2/W-3. The new specifications should be used *beginning with wages paid during the 2011 calendar year* [Rev Proc 2011-62, 2011-52 IRB 1032].

What’s New

Rev Proc 2011-62, 2011-52 IRB 1032, notes the following changes:

(1) Company logos, slogans, and advertising may still appear on Form W-2 (Copy A), Form W-3, and any employee statements for wages paid during the 2011 calendar year. The IRS postponed the prohibition against using slogans, advertising, and logos on information returns until wages paid in the 2012 calendar year.

(2) The IRS and the Social Security Administration (SSA) have added a barcoded version of Forms W-2 and W-3 to the list of acceptable submission formats. The barcoded version is an optional alternative to the non-barcoded substitute Forms W-2 and W-3. Both versions are fully supported by the SSA. At this time, neither the IRS nor the SSA mandates the use of barcoded substitute forms.

(3) The SSA has changed the name “laser forms” to “Substitute black-and-white Copy A and W-3 Forms.”

(4) There are both physical address and email address changes noted for the SSA. The applicable email address is changing from to The “attention” line for the SSA Data Operations Center is now “Substitute Black-and-White Copy A Forms, Room 348.”

(5) A new Part B, Section 3, has been added to Rev Proc 2011-62, 2011-52 IRB 1032, which includes information on the electronic delivery of Forms W-2 and W-2c recipient statements. Part C, Section 4, *Reproducible Copies of Forms*, has also been revised.

(6) The IRS website is now referred to as “IRS.gov” instead of “www.irs.gov.”

(7) The Enterprise Computing Center – Martinsburg (ECC) is now referred to as the Internal Revenue Service/Information Returns Branch (IRS/IRB).

Rev Proc 2010-42, 2010-47 IRB 715, is superseded.

The specifications for substitute Forms 1096, 1097-BTC, 1098, 1099, 3921, 3922, 5498, W-2G, 1042-S, and 8935 have also been updated [Rev Proc 2011-60, 2011-52 IRB 934].

IRS Finalizes New Form 94x Schema

Software developers and transmitters use the guidelines provided in IRS Publication 3823, *Employment Tax e-file System Implementation and User Guide*, along with electronically published Extensible Markup Language (XML) Schemas, in order to develop and test their software for use with the Employment Tax e-file system. The IRS has now issued a new version of the XML Schema. It's called "Final 2012 Form 94x Schema (version 2.12)." The Schema was updated to take into account the fact that 20 states (and the Virgin Islands) are "credit reduction" states for federal unemployment tax (FUTA) purposes in the 2011 tax year, and will therefore pay a higher FUTA tax rate on their 2011 Form 940, *Employer's Annual Federal Unemployment (FUTA) Tax Return*, than in previous years. "Credit reduction" states are states that did not repay the money they borrowed from the federal government to pay unemployment benefits.

Version 2.12 may be found on the IRS webpage called "94x XML Developers' Forum - Employment Tax e-file System."

See Payroll Guide at ¶ 4255 for further information on the FUTA calculation for employers in credit reduction states [IRS e-News for Payroll Providers, Issue No. 2011-15, 12/22/11].

Office of Child Support Enforcement Launches New Web Application to Help Employers Report Lump Sum Payments

Certain states require employers to deduct withholding from lump-sum payments (e.g., a bonus) made to an employee who owes child support. The federal Office of Child Support Enforcement (OCSE) has introduced a new reporting application called the "Debt Inquiry Service" (DIS) that allows registered and authorized employers to report information about employees who are eligible to receive a bonus, lump-sum, or other type of payment, using an online

web application. Employers may either upload a file or enter information on a screen on the DIS application. The OCSE then compares this information to its debtor file, maintained at the federal level and containing information on all state-submitted non-custodial parents who owe past-due child support. The DIS returns matches to the appropriate state child support agency(ies) responsible for collecting past-due child support.

Participation in the DIS is voluntary for both employers and states. The OCSE believes that the DIS will be a great time-saving tool.

Employers who would like to view a demonstration of the DIS, or who have further questions, should either contact Cindy Holdren at (telephone number: (240) 676-2808), or Erica Holliman at (telephone number: (202) 401-5730) [OCSE website, *New tool for lump bonus reporting*].

Businessman Guilty of Failing to Pay More Than \$15 Million in Payroll Taxes for Temporary Staffing Companies

The Department of Justice (DOJ) has announced that Bruce Gregory Harrison III was convicted following a jury trial for failing to pay over more than \$15 million in federal taxes withheld from the pay of his thousands of employees in the years 2004-2006 and 2009 [DOJ News Release, 12/21/11].

According to the trial evidence and other documents filed in the case, Harrison did business under various corporate names, including U.S.A. Staffing and Compensation Management Inc. He owned or controlled temporary staffing companies operating in at least nine states. Harrison's staffing companies contracted with client businesses to provide temporary workers. Harrison's companies promised to assume full responsibility for the payment of wages and the withholding and transmitting of taxes to the IRS for those employees. Instead, Harrison failed to account for and pay over in excess of \$15 million in federal payroll taxes for the employees of those companies. The evidence at trial showed that Harrison caused false bank statements to be presented to auditors to conceal the nonpayment of the payroll taxes.

Harrison was also convicted of corruptly endeavoring to obstruct the IRS by means of false statements to IRS revenue officers. Evidence established he had used company funds to purchase personal residences, to buy a yacht, and to finance commercial motion pictures.

No Overtime Violation When Employer Unaware of Work Performed

The U.S. Court of Appeals for the Seventh Circuit has ruled that an employer did not violate the overtime provisions in the Fair Labor Standards Act (FLSA) when the employer was unaware that the employee was performing work before her scheduled start time [*Kellar v. Summit Seating, Inc.*, CA7, Dkt. No. 11-1221, 12/11/11].

The facts. Susan Kellar was employed as a sewing manager for Summit Seating (Summit), a small company that manufactures seating for buses, trucks, and vans. Kellar managed between seven and eight employees, and was paid on an hourly basis. Kellar claimed that she would often report to work 15 to 45 minutes earlier than her 5:00 a.m. start time. Some of this time was spent reviewing work schedules, and gathering and distributing materials to her subordinates “so that they could go straight to work, rather than waiting for her to bring fabric to them.” She also spent some time performing “prototype work” (preparing models for production), cleaning the work area, or checking patterns.

If Kellar arrived early in order to work, her supervisors, Ray and Sue Fink (the Finks), who were the owners and the president and vice-president of Summit, respectively, never personally observed it. They typically arrived at the factory after Kellar, between 7:00 and 8:00 a.m. Kellar was also aware that Summit had a policy (outlined in its employee handbook) requiring employees to request pre-approval to work overtime. Even so, Kellar never told the Finks that she was working before the start of her shift. She also never reported errors with her paychecks, requested overtime pay, or mentioned during the weekly production meetings she attended with the Finks that her schedule needed to be adjusted to account for her pre-shift work.

In February 2009, Kellar voluntarily resigned and later sued Summit, claiming that she was not paid overtime wages in violation of the FLSA.

The law. The FLSA imposes an obligation on an employer “to exercise its control and see that work is not performed if it does not want it to be performed.” An employer “cannot sit back and accept the benefits without compensating for them” (see 29 CFR § 785.13). In *Chao v. Gotham Registry, Inc.*, CA2, 514 F.3d 280, 1/24/08, the Second Circuit said that “the employer’s duty arises even where the employer has not requested the overtime be performed or does not desire the employee to work, or where the employee fails to report his overtime hours.” However,

the FLSA stops short of requiring the employer to pay for work it did not know about, and had no reason to know about (see 29 CFR § 785.11).

Kellar argued that Summit should have known that she was performing pre-shift work since her time cards reflected that she clocked in early.

The ruling. The Seventh Circuit denied overtime pay to Kellar. The court said that the Finks had no reason to suspect Kellar was acting contrary to the conditions that generally prevailed in their industry. Kellar’s behavior raised no flags. When Kellar forgot to punch in, she would simply write in her time card that she arrived at the beginning of her scheduled work shift. Over the course of eight years, Kellar never told the Finks that she was working overtime. There was also no indication that anyone else knew Kellar was performing pre-shift work.

The court also noted that Summit’s management conducted weekly meetings to discuss the following week’s schedule. Kellar never mentioned during any of those meetings that she was working before her shift began or that she was not being properly compensated, even though she claimed to have had a good relationship with the Finks. Kellar was also aware of Summit’s policy prohibiting overtime work absent express permission. She had, in fact, even reprimanded another employee once for clocking in early.

Employer Under No Obligation to Determine Validity of IRS Tax Levy

A federal district court has ruled that an employee may not proceed with a lawsuit against his employer who he claimed should have known that an IRS tax levy was invalid before it garnished his wages [*Gust v. US Airways*, DC NC, 108 AFTR 2d ¶ 2011-5603, 12/16/11].

The facts. Thomas E. Gust brought an action in state court against US Airways claiming that it unlawfully complied with a tax levy and garnished his wages. US Airways succeeded in getting the case transferred to the federal district court where it sought dismissal for failure to state a claim upon which relief could be granted. The matter was assigned to a Magistrate Judge who recommended granting the motion to dismiss. Gust objected and requested the district court to review the Magistrate Judge’s recommendation.

The law. Under Code Sec. 6332(e), employers who comply with an IRS Notice of Levy by garnishing

wages are immune from liability to the employee for their conduct in complying with the levy.

Gust didn't believe that the levy itself was the core issue. He believed that the core issue was whether an employer has an obligation to determine the validity of an IRS tax levy and to challenge the status of the wages being garnished.

The ruling. The district court dismissed the lawsuit. It said that US Airways had no duty to ensure that the levy was valid. It noted that once the IRS served a Notice of Levy on US Airways, the company had a legal obligation under Code Sec. 6332(a) to turn over the wages to the IRS. The fact that Gust could challenge the validity of the levy in no manner altered US Airways's obligation to comply with it. In addition, the court noted that Code Sec. 6332(e) has been consistently interpreted to be valid and unambiguously protects parties who comply with an IRS Notice of Levy from facing liability.

The court also pointed out that, under Code Sec. 6332(d)(1), any entity in possession of property subject to IRS levy will be personally liable if it refuses to honor the levy.

The court also rejected Gust's argument that US Airways should have honored his designation of the wages as exempt from garnishment. The court noted that there have been several judicial rulings where courts have held that an employer cannot be made liable for failing to honor an employee's W-4 form when it has been directed to ignore the form by the IRS. For the same reasons that an employer must honor an IRS tax levy, it must also comply with an IRS demand for garnishment of wages despite a taxpayer's designation of those wages as exempt from garnishment.

DOL Issues 2012 Adverse Effect Wage Rates

The U.S. Department of Labor's (DOL) Employment and Training Administration (ETA) has issued the adverse effect wage rates (AEWRs) for the 2012 tax year. The rates are used by employers who are looking to hire certain temporary or seasonal H-2A nonimmigrant alien visa holders in the agricultural industry [Fed. Reg. Vol. 76, p. 79711-79712, 12/22/2012; ETA News Release, 12/21/11].

AEWRs are the minimum wage rates that an employer in a specific geographic location must pay its seasonal nonimmigrant workers, and their U.S. counterparts, in the agricultural industry. AEWRs were established to ensure that the hiring of H-2A nonresident alien visa holders does not adversely affect the

wages of U.S. workers in the area. Employers of these workers must pay the highest of the AEWR, the prevailing wage or piece rate, the agreed-upon collective bargaining rate, or the federal or state minimum wage rate in effect at the time the work is performed. AEWRs vary from state to state. In 2012, AEWRs range from \$9.30 (Arkansas, Louisiana, and Mississippi) to \$12.26 (Hawaii).

The DOL published the adverse effect wage rates earlier than anticipated in order to provide growers with as much advance notice of changes as possible and to reduce application processing delays. The amounts that employers may charge their workers for providing three meals a day and the maximum travel subsistence reimbursement that a worker with receipts may claim in 2012 will be published in a separate Federal Register notice in early 2012.

Proposed Regulations Would Make It Easier for Home Health Care Workers to Receive Overtime

The Department of Labor (DOL) has issued proposed regulations that would allow domestic workers who are employed by third parties (e.g., home health care agencies) to be eligible to receive minimum wages and overtime [RIN 1235-AA05, 12/15/11].

Background. Under 29 CFR § 552.109 in the Fair Labor Standards Act (FLSA), employees who are engaged in providing "companionship services" and who are employed by an employer or agency other than the family or household using their services, are exempt from minimum wage and overtime pay. "Companionship services" are defined in 29 CFR § 552.6 as services for the care, fellowship, and protection of persons who because of advanced age or physical or mental infirmity cannot care for themselves. Such services include household work for aged or infirm persons, including meal preparation, bed making, clothes washing, and other similar personal services. General household work is also included, as long as it does not exceed 20% of the total weekly hours worked by the companion.

The DOL notes that even though the regulations governing minimum wage and overtime exemptions have been substantially unchanged since they were promulgated in 1975, the in-home care industry has undergone a dramatic transformation. There has been a growing demand for long-term in-home care, and, as a result, the in-home care services industry has grown substantially. However, the earnings of in-home care employees remain among the lowest in

the service industry, impeding efforts to improve both jobs and care. Moreover, the workers that are employed by in-home care staffing agencies are not the workers that Congress envisioned when it enacted the companionship exemption (i.e., neighbors performing elder sitting), but instead are professional caregivers entitled to FLSA protections. In view of these changes, the DOL believes it is appropriate to reconsider whether the scope of the regulations is now too broad and not in harmony with congressional intent.

The proposed changes. The DOL is proposing to revise the regulations to accomplish two important purposes. First, the DOL seeks to more clearly define the tasks that may be performed by an exempt companion. Second, the DOL proposes to limit the companionship minimum wage and overtime exemption to only companions employed by the family or household using the services. Third-party employers, such as in-home care staffing agencies, would not be able to claim the companionship exemption or the overtime exemption for live-in domestic workers, even if the employee is jointly employed by the third party and the family or household.

The proposed regulations would clarify that “companionship services” do not include the performance of medically-related tasks for which training is typically a prerequisite. Any work benefiting other members of the household, such as preparing meals or performing housekeeping or laundry for other members of the household, would not fall within the allowable “incidental duties” of a companion who is exempt from minimum wages and overtime. The proposed regulations would also revise the recordkeeping requirements for live-in domestic workers. Employers would be required to maintain an accurate record of hours worked by such workers.

Interested parties have until February 27 to comment on the proposed regulations.

For further information on the proposed regs, see the Wage and House Division’s webpage at <http://www.dol.gov/whd/flsa/companionNPRM.htm>.

Stateline

New laws and developments are reported from the following states:

CONNECTICUT

Withholding. The Connecticut Department of Revenue Services (DRS) has posted new wage bracket withholding tables on its website that are *effective Jan. 1,*

2012. The DRS had previously issued 2012 withholding calculation rules (see Payroll Guide at ¶ 23,803).

There are 2012 versions of Forms CT-W4, CT-941, CT-945, and CT-8109 on the Connecticut Department of Revenue Services (DRS) website [DRS E-News, 12/23/11].

DELAWARE

Unemployment. The Delaware Division of Unemployment Insurance (DUI) notes in a December 13 Facebook entry that unemployment tax rates for experienced employers will continue to range from 0.3% to 8.2% in the 2012 tax year. These rates include a 0.2% supplemental assessment rate. A spokesperson for the DUI has told *RIA* that the new employer rate for non-construction employers will remain at 3.1% in 2012. The new employer rate for construction employers will increase from 5.9% to 6.0% in 2012. The taxable wage base will remain at \$10,500.

DISTRICT OF COLUMBIA

Withholding. The Mayor has signed the “Income Tax Withholding Statements Electronic Submission Temporary Act of 2011” into law. It requires employers or payors submitting 25 or more information returns to submit them electronically [L. 2011, Act 19-250, effective after a 30-day period of congressional review].

HAWAII

Unemployment. The Hawaii Department of Labor and Industrial Relations (DLIR) has announced that contribution rate schedule H will be in effect in the 2012 tax year, unless changed by subsequent legislation. Schedule H has the highest tax rates. Unemployment tax rates under Schedule H are scheduled to range from 2.4% to 5.4%. The new employer tax rate will be 5.2% (4.0% in 2011). The employment and training assessment rate will not be in effect. The taxable wage base will increase from \$34,200 to \$38,800 in 2012. The maximum weekly unemployment benefit is scheduled to decrease from \$549 to \$523 in 2012 [DLIR website, *Tax Rates And Weekly Benefit Amount*].

Withholding. Employers should now be using Booklet A (rev. 2006), *Employer’s Tax Guide*, and the supplemental insert to Booklet A that was issued in June 2009 to compute withholding for the 2011 and 2012 tax years. See Payroll Guide Newsletter at ¶ 25.10, for further information on this development [Hawaii Dept. of Taxation Announcement 2011-29, 12/22/2011].

IDAHO

Withholding. The Idaho State Tax Commission (STC) has posted a Dec. 19, 2011 version of “A Guide to Idaho Income Tax Withholding,” on its website that includes new withholding tables. Although the tables are effective for 2011, the STC is advising employers that

they do not need to adjust withholding for the months prior to receiving the tables. The annual withholding allowance has increased from \$3,500 to \$3,700. The supplemental withholding rate is still 7.8%.

ILLINOIS

Unemployment. Unemployment tax rates for experienced employers in the 2012 tax year will range from 0.55% to 9.45% (0.70% to 8.4% in 2011). The new employer rate will be 4.35% (3.8% in 2011). All of the above rates include a 0.55% fund building rate (0.50% in 2011). The taxable wage base increases to \$13,560 in 2012 (\$12,740 in 2011) [Illinois Department of Employment and Security (DES) website, *UI Tax Contribution Rates*].

Withholding. The Illinois Department of Revenue (IDOR) has posted a new version of Form IL-W-4, *Employee's Illinois Withholding Allowance Certificate*, on its website. Employees exempt from federal and Illinois withholding must check a box and sign and date the form. There are also now 2012 versions of Forms IL-941 and IL-501 on the IDOR website.

MICHIGAN

Unemployment. New legislation (Senate Bill 806) increases the taxable wage base limit for unemployment tax purposes from \$9,000 to \$9,500, *beginning with the 2012 tax year*. The taxable wage base will decrease again to \$9,000 for nondelinquent employers if the balance in the unemployment compensation trust fund reaches \$2.5 billion at the beginning of any tax year. The legislation will require employers with 25 or more employees to file their quarterly wage reports electronically, *beginning with the first quarter 2013 report*. The legislation will allow certain employers with 25 or fewer employees to make their first quarter unemployment tax payment in installments beginning with the 2013 tax year. Senate Bill 806 also includes several provisions on unemployment benefits. Other legislation (Senate Bill 483) allows Michigan to issue bonds to repay its federal unemployment debts, so Michigan employers will hopefully not have to pay a higher federal unemployment tax rate than other employers in future years. Senate Bill 484 requires employers to pay an unemployment obligation assessment in each year that Michigan has an outstanding loan, *beginning in 2011*. The Michigan Unemployment Insurance Agency (UIA) has announced that, due to these legislative changes, 2012 unemployment tax rate notices will not be mailed to employers until the end of January 2012 [L. 2011, S483; L. 2011, S484; L. 2011, S806; Michigan UIA Director Arwood Letter Concerning Recent Changes Affecting 2012 Tax Rate Determinations, 12/27/11].

The Michigan Department of the Treasury (DOT) has announced that Michigan has paid off its federal unemployment insurance loans through the issuance of \$3.3 billion in variable rate bonds. The interest rate on the bonds is considerably less than the 4.1% interest rate that Michigan has been paying on the federal loans. The state solvency tax on negative balance employers (see Payroll Guide at ¶ 13,405) will not be assessed in 2012. Michigan employers will also not have to pay a higher federal unemployment tax (FUTA) rate in the 2012 tax year than other employers since the federal loans have been repaid. (Michigan employers do pay a higher FUTA rate in the 2011 tax year, see Payroll Guide at ¶ 13,405). The bonds will be repaid through a quarterly assessment on employers [DOT Notice, *Michigan Finance Authority Issues \$3.3 Billion in Unemployment Insurance Bonds*, 12/28/11].

MISSOURI

Withholding. The Missouri Department of Revenue (DOR) has issued the 2012 withholding tax formula. It's in a draft version of the 2012 "Missouri Employer's Tax Guide." A spokesperson for the DOR has told *RIA* that this is the final version of the formula. Standard deduction amounts will increase in 2012. Missouri W-4 allowance amounts will not change in 2012. Missouri previously released 2012 wage bracket withholding tables (see Payroll Guide at ¶ 25,705).

NEVADA

Unemployment. A spokesperson for the Nevada Department of Employment, Training and Rehabilitation has told *RIA* that unemployment tax rates for experienced employers will continue to range from 0.25% to 5.4% in the 2012 tax year. However, a new tax rate schedule will go into effect on Jan. 1, 2012 that will revise the reserve ratio ranges in the 18 tax rate classes. Employers will pay more unemployment tax in 2012, even if their unemployment benefit experience is similar to what it was in 2011. Employers, other than employers in the 5.4% rate, also pay a 0.05% career enhancement program fee that is not included in the above tax rates. The new employer rate is 2.95%, not including the 0.05% career enhancement program fee. The taxable wage base will decrease from \$26,600 to \$26,400 in 2012.

NEW YORK

Withholding. The New York State Department of Taxation and Finance has issued 2012 New York State (NYS) and Yonkers withholding tax tables and methods. The tables and methods must be used *for payrolls prepared on or after Jan. 1, 2012*. The new tables and methods were issued in response to recent legislation that revised personal income tax rates for most taxpayers beginning in 2012. New York State Form IT-2104, *Employee's Withholding Allowance Certificate*, will be

revised for 2012 to reflect the personal income tax rate changes. The revised rates in the new tables should ensure that the proper amount of tax is withheld for 2012. However, employers should encourage employees who completed a Form IT-2104 prior to Jan. 1, 2012, using the charts in Part 4 of the form, or showing an additional dollar amount of NYS withholding on line 3 of the form, to complete a revised Form IT-2104. The NYS supplemental wage withholding rate will decrease from 9.77% in 2011 to 9.62% in 2012. The Yonkers supplemental wage withholding rate will decrease from 1.70975% to 1.443% for Yonkers residents in 2012, but will remain at 0.50% for Yonkers nonresidents [New York Department of Taxation & Finance Publication NYS-50-T-NYS, 01/01/2012; New York Department of Taxation and Finance Publication New York Department of Taxation & Finance Publication NYS-50-T-Y, 01/01/2012].

OHIO

Withholding. The Ohio Department of Taxation (DOT) has posted the "Ohio and School District Employer Withholding Due Dates 2011-2012 Payment Schedule" on its website. The schedule includes due dates for Ohio and school district returns, and 2012 Ohio withholding tax deposits.

The Ohio Department of Taxation will discontinue mailing Forms IT 501, IT 941, IT 3, SD 101, and SD 141, and related instructions, to certain employers on an annual basis. Employers affected are those who have previously filed a return and/or made electronic payments for the associated withholding tax account via the Ohio Treasurer of State or the Ohio Business Gateway website, either directly or through a third-party payroll provider or tax preparer [Ohio Tax Information Release 12/22/2011, 12/22/2011].

OKLAHOMA

Withholding. The Oklahoma Tax Commission has posted new withholding tables for the 2012 tax year on its website. The tables take into account the reduction in the maximum personal income tax rate from 5.5% to 5.25% for most taxpayers, beginning in 2012. Withholding allowance amounts are the same as in 2011 [Packet OW-2, 2012 Oklahoma Income Tax Withholding Tables].

OREGON

Withholding. The Oregon Department of Revenue (DOR) has issued new wage bracket withholding tables for the 2012 tax year. The withholding tables have been revised to reflect the last phase of increasing the federal tax subtraction to \$6,100, and to include changes to other indexed items. Employees may notice a small change in the amount of Oregon tax withheld. Employees should refer to Publication 150-206-643, *Oregon*

Income Tax Withholding, to adjust their withholding for too much or too little tax withheld. The DOR had previously issued new 2012 computer withholding tax formulas [Oregon Publication 150-206-430, *Oregon Withholding Tax Tables, Effective January 1, 2012*].

PENNSYLVANIA

Withholding. Pennsylvania Act 32 of 2008 created a new local earned income tax (EIT) collection system that went into effect on *Jan. 1, 2012*. The Pennsylvania Department of Community and Economic Development (DCED) is advising employers doing an address search on its website for EIT rates, political subdivision (PSD) codes, and tax collector/officer contact information, to: (1) use Microsoft Internet Explorer 6.0 or later (pop-up blocker must be disabled); (2) not enter P.O. boxes or rural route addresses; (3) either follow the instructions noted at the bottom of the "Find Your Withholding Rates by Address" web page if an address does not appear in the system, or contact their tax collector/officer to determine local tax rates and PSD codes; and (4) enter the PA address in both the work and home address fields if an employee lives or works out of state. On the residency certificate form, employees should enter only the relevant information for the PA address. For the out-of-state address, employees should enter the PSD code 880000 and the EIT rate 0. See Payroll Guide at ¶ 9068 for further information on Pennsylvania Act 32 [DCED website, *Act 32 - Local Earned Income Tax*].

SOUTH CAROLINA

Unemployment. The South Carolina Department of Employment and Workforce (DEW) has announced that contribution rates for experienced employers in the 2012 tax year will range from 0.098% to 8.686%. The new employer rate will be 2.212%. All of the above rates include an interest surcharge and a 0.06% contingency assessment. The taxable wage base will increase from \$10,000 to \$12,000 in 2012 [DEW website, *Official CY2012 Unemployment Tax Rate Table*].

Withholding. The South Carolina Department of Revenue (SCDOR) has announced that there will be no changes to the withholding tables in the 2012 tax year. Employers may continue to use the tables in Payroll Guide at ¶ 27,301 and Payroll Guide at ¶ 27,302 [SCDOR website, Withholding Tax Home Page].

TENNESSEE

Unemployment. A spokesperson for the Tennessee Department of Labor and Workforce Development has told *RIA* that Premium Rate Table 1 will continue to be in effect in the first half of 2012. Rates range from 0.5% to 10.0%. In addition, employers pay a 0.6% temporary additional premium fee. The new employer rate will remain at 2.7%. New employers in certain industries pay a

different tax rate (see Payroll Guide at ¶ 15,504). The taxable wage base will continue to be \$9,000 in 2012.

WISCONSIN

Withholding. *Effective beginning with the 2011 tax year*, the Wisconsin Department of Revenue (DOR) will automatically waive the requirement for employers to submit federal W-2 forms and Wisconsin Form 9b, *Miscellaneous Income*, to the DOR if the employer is not reporting any Wisconsin withholding, and the employer submits W-2 and 1099 forms to the IRS. The DOR receives the federal information directly from the IRS. Employers who have no Wisconsin withholding to report

are not required to have an active Wisconsin withholding tax account number. Employers who have an inactive withholding tax account number and no Wisconsin withholding to report, but who are required to report Wisconsin wages on federal Form W-2, may continue to use the Wisconsin withholding tax account number in box 15 of federal Form W-2 ("Employer's state ID number"). Employers who never had a Wisconsin withholding tax account number, and who are not required to withhold Wisconsin taxes, may use their federal EIN in box 15 of federal Form W-2 to report Wisconsin wages [Wisconsin News for Tax Practitioners 12/21/2011, 12/21/2011].



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