
Payroll Guide

□ Highlights □

Business Mileage Rate Will Remain at 55.5¢ Per Mile in 2012 The business mileage rate has been 55.5¢ per mile since July 1, 2011.

IRS Updates Fringe Benefits Publication The 2012 version of IRS Publication 15-B, *Employer's Tax Guide to Fringe Benefits*, is now on the IRS website.

Two Month Extension of Payroll Tax Cut Would Mean Extra Work for IRS and Employers A two-month only extension of the payroll tax cut would mean that the IRS would have to revise Form 941 and employers would need to separately track wages earned during the first two months of the year.

IRS Notes Common "Non-Format" Errors on Electronically-Filed Information Returns The IRS has updated its publication that provides guidance on filing information returns electronically.

Employers Accepting IRS Misclassified Worker Settlement Offer Should Not Submit a Payment with Their Application The IRS has also issued more frequently-asked questions on the misclassified worker settlement offer.

IRS Lists Evidence It Will Use to Support Recommendation for Imposing Trust Fund Recovery Penalty A new IRS memorandum provides interim guidance to its revenue officers on the documentation that they should receive to support the assertion of a trust fund recovery penalty against a taxpayer.

IRS Finalizes Form 944 Regulations The versions of Form 944 that are filed by employers in American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, the U.S. Virgin Islands, and Puerto Rico will be eliminated beginning with the 2012 tax year.

IRS Issues 2012 Version of Withholding Certificate for Pension or Annuity Payments The IRS has issued the 2012 version of Form W-4P, *Withholding Certificate for Pension or Annuity Payments*.

Deadline Approaching to Inform Employees About the Earned Income Credit The IRS and a few states require an employer to notify certain employees that they may be eligible to claim the federal earned income credit.

Office of Child Support Encouraging Employers to Receive Income Withholding Orders Electronically One employer saved over \$8,000 in postage and processing costs in just the first few weeks that it started receiving its income withholding orders electronically.

Employer Had No Reasonable Cause for Failing to Honor Wage Levy A federal district court has ruled that an employer was personally liable for failing to honor a wage levy, and was also subject to a 50% penalty, because the employer failed to establish any reasonable cause for not honoring the levy.

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

Business Mileage Rate Will Remain at 55.5¢ Per Mile in 2012

Effective Jan. 1, 2012, the standard mileage rates for the use of a car (including vans, pickups, and panel trucks) will be:

- 55.5¢ per mile for business miles driven (currently, 55.5¢ per mile);
- 23 cents per mile for medical or moving purposes (currently, 23.5¢ per mile); and
- 14 cents per mile for service to a charitable organization (same rate as in 2008-2011) [IR 2011-116, 12/09/2011; Notice 2012-1, 2012-1 IRB].

An employer may use the business mileage rates above to reimburse an employee for business use of a personal vehicle, and, under certain conditions, to value the personal use of a vehicle that the employer provides to the employee, and the reimbursement will be treated as a tax-free accountable plan reimbursement if the employee substantiates the time, place, business purpose, and mileage on each trip.

The standard mileage rates for business, medical, and moving purposes are based on an annual study of the fixed and variable costs of operating an automobile. The charitable mileage rate is set by law.

An employer may also reimburse employee car and truck expenses with a mileage allowance, using a flat rate or stated schedule that combines periodic fixed and variable rate payments — a FAVR allowance (see Payroll Guide at ¶ 3806). The FAVR allowance must be based on the cost of a standard automobile selected by the employer. The cost of that standard automobile may not exceed 95% of the automobile's retail price, plus state and local taxes, nor may the cost exceed \$28,000 for automobiles (\$29,300 for trucks and vans) in 2012.

IRS Updates Fringe Benefits Publication

The 2012 version of IRS Publication 15-B, *Employer's Tax Guide to Fringe Benefits*, is now on the IRS website. The publication contains detailed information on the employment tax treatment of various fringe benefits, including accident and health benefits, employee stock options plans, health savings accounts, meals and lodging expenses, moving expense reimbursements, and transportation (commuting) benefits.

There is a table on page six of Publication 15-B that summarizes the differences in the treatment of various fringe benefits for federal income tax withholding (FITW), Social Security and Medicare (FICA), and

federal unemployment tax (FUTA) purposes. For example, payments from an employer's adoption assistance plan that meet certain requirements are not subject to FITW. However, the payments are subject to FICA and FUTA tax.

Employer-provided cell phones. IRS Publication 15-B notes that the value of an employer-provided cell phone, provided primarily for noncompensatory business reasons, is excludable from an employee's income as a working condition fringe benefit. The value of any personal use of an employer-provided cell phone, provided primarily for noncompensatory business reasons, is excludable from an employee's income as a de minimis fringe benefit (see Payroll Guide Newsletter at ¶ 20.3).

Employers must generally determine the value of noncash fringe benefits no later than January 31 of the next year. Before January 31, employers may reasonably estimate the value of the fringe benefits for purposes of withholding and depositing on time. Employers may be subject to a penalty if they underestimate the value of the fringe benefits and deposit less than the amount that they would have had to deposit if the applicable taxes had been withheld. If employers overestimate the value of the fringe benefit and overdeposit, they may either claim a refund or have the overpayment applied to their next Form 941.

IRS Publication 15-B supplements IRS Publication 15 (Circular E), *Employer's Tax Guide*, and IRS Publication 15-A, *Employer's Supplemental Tax Guide*.

Two Month Extension of Payroll Tax Cut Would Mean Extra Work for IRS and Employers

On December 17, the Senate passed a bill that would continue the current reduction in the employee Social Security withholding tax rate on wages from 6.2% to 4.2% through *Feb. 29, 2012*. There is some opposition to this bill in the House, who was scheduled to vote on the bill after this article was published. If the Senate bill was to be signed into law without any subsequent legislation that extended the payroll tax cut through 2012, there would be extra work for both the IRS and employers. A two-month only extension of the cut would mean that the IRS would need to revise 2012 Forms 941, *Employer's Quarterly Federal Tax Return*, to take into account the 2% difference in employee Social Security withholding tax rates in the first two months of 2012 as compared to March 2012. The return would then need to be revised again in the second quarter of 2012 to eliminate the 4.2% rate.

Employers would need to separately track employee Social Security wages for the first two months of the year and adjust their payroll systems to account for the 2% increase in the withholding rate beginning with wages earned on March 1. Both the Senate bill and a previously-passed House bill would extend unemployment benefits for the long-term unemployed.

IRS Notes Common ‘Non-Format’ Errors on Electronically-Filed Information Returns

IRS Publication 3609, *Filing Information Returns Electronically*, provides guidance on filing Forms 1042-S, 1097-BTC, 1098, 1099, 3921, 3922, 5498, 8027, 8935, 8955-SSA, and W-2G with the IRS electronically through the Filing Information Returns Electronically (FIRE) system. (Note: W-2 forms are filed with the Social Security Administration.) Taxpayers with 250 or more information returns for any calendar year are required to file the returns electronically. The IRS encourages all taxpayers to file electronically even if they have less than 250 information returns.

In the latest version of Publication 3609 (revised June 2011), the IRS notes the following common non-format errors that taxpayers make in filing information returns:

(1) SPAM filters are not set up to receive e-mails from and regarding files, processing results, reminders, and notices.

(2) Transmitters of files do not provide the IRS with their correct e-mail address. When the “Verify Your Filing Information” screen is displayed, transmitters should make sure that their correct e-mail address is listed. If not, they should update it with their correct e-mail address.

(3) Transmitters do not check the FIRE system to determine why the file is bad. Generally, the results of a file transfer are posted to the FIRE System within two business days. If the correct e-mail address was provided on the “Verify Your Filing Information” screen when the file was sent, the IRS will send the transmitter an e-mail regarding the file status. If the results in the e-mail indicate “Good, Not Released,” and the “Count of Payees” is correct, the transmitter is finished with this file. If any other results are received, the transmitter should follow the instructions in the “Check File Status” option. If the file contains errors, the transmitter can get an online listing of the errors. If the file status is good, but the file should not be processed, the transmitter should contact IRS/IRB

within 10 calendar days after the transmission of the file.

(4) Incorrect files are not replaced timely.

(5) The transmitter sends an original file that is good, and then sends a correction file for the entire file even though there are only a few changes. The correction file containing the proper coding should only contain the records needing correction, not the entire file. Improper submission can result in duplicate reporting of payee information.

(6) The transmitter sends a file and “Check File Status” indicates that the file is good, but the transmitter wants to send another file containing the same information. Once a file has been transmitted, a replacement file cannot be sent unless the “Check File Status” indicates the file is bad (one to two business days after the file was transmitted). If a file should not be processed, the transmitter should contact the IRS/IRB at (866) 455-7438 to see if this is a possibility.

(7) The transmitter compresses several files into one. The transmitter should only compress one file at a time. For example, if there are 10 uncompressed files to send, the transmitter should compress each file separately, and send 10 separate compressed files to the IRS.

(8) The files must not be formatted in Extended Binary Coded Decimal Interchange Code (EBCDIC). All files must be formatted in standard ASCII code.

(9) If a transmitter is filing for multiple companies, the transmitter must use the Taxpayer Identification Number (TIN) that was assigned to the one Transmitter Control Code (TCC). The uploaded file must contain the TINs of the businesses that made payments subject to reporting on information returns. The payer TIN is the information that will be passed forward.

If a wrong file has been transmitted to the IRS, or if the transmitter does not want a file processed, the transmitter should contact the IRS/IRB at (866) 455-7438 to terminate the file before it has been processed.

To file information returns electronically, transmitters should submit Form 4419, *Application for Filing Information Returns Electronically*, to the IRS. Once approved, the IRS will assign a five-character alpha/numeric TCC to the transmitter. Form 4419 must be submitted at least 30 days prior to the due date of the returns for current year processing. The form can either be mailed or faxed to the IRS.

Employers Accepting IRS Misclassified Worker Settlement Offer Should Not Submit a Payment with Their Application

The IRS has posted a note on its website that employers participating in the “Voluntary Classification Settlement Program” (VCSP) should not submit a payment with Form 8952, *Application for Voluntary Classification Settlement Program (VCSP)* [IRS website, Forms and Publications, Changes to Current Forms and Publications, *Caution regarding payment for participation in the Voluntary Classification Settlement Program (VCSP)*, 12/5/11].

Background. Earlier this year, the IRS launched a new VCSP that allows employers to prospectively reclassify — as employees — those workers that they have erroneously treated as independent contractors or as other nonemployees. The new program carries generous settlement terms and provides audit relief for previous years (see Payroll Guide Newsletter at ¶ 20.1). The VCSP is open to businesses, tax-exempt organizations, and government entities. Employers whose application has been accepted will enter into a closing agreement with the IRS to finalize the terms of the VCSP.

The IRS notes that if an employer submits a payment with Form 8952, it may cause a processing delay. Employers will be required to submit a payment after they sign the closing agreement.

More FAQs. The IRS has also issued more frequently-asked questions (FAQs) on the VCSP, in addition to the 16 FAQs that the IRS issued in October (see Payroll Guide Newsletter at ¶ 21.7). The new FAQs cover the following topics:

- The IRS’s rejection of a VCSP application will not automatically trigger initiation of a federal audit. The rejected taxpayer could be audited for another reason, but not as a result of filing Form 8952 (see FAQ #21).
- The VCSP concerns future years only. The IRS won’t make any determination with regard to prior years, and a taxpayer that signs a VCSP isn’t making any representation as to the workers’ proper status for prior years for federal employment tax purposes. In other words, a taxpayer that signs a VCSP closing agreement is not admitting liability or wrongdoing for past periods (see FAQ #22).
- A taxpayer can’t participate in the VCSP if its parent or subsidiary or another member of its consolidated group is under IRS audit (see FAQ #23).
- One of the threshold qualifications for the VCSP is filing Forms 1099 for the previous three years for

affected workers. The IRS says a taxpayer will be eligible for the VCSP if it files the required Forms 1099 within six months of their due date (including extensions), assuming the other eligibility requirements are met. Taxpayers that haven’t previously filed required 1099 forms or filed them more than six months after their due date (including extensions) are not eligible to participate in the VCSP (see FAQ #20).

The IRS won’t share information about VCSP participants with the Department of Labor or state agencies (see FAQ #s 18-19). The IRS also notes that a worker’s filing of Form SS-8, *Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding*, isn’t treated as an audit and won’t bar the taxpayer from participating in the VCSP (see FAQ #17).

IRS Lists Evidence It Will Use to Support Recommendation for Imposing Trust Fund Recovery Penalty

The IRS has issued an internal memorandum that provides interim guidance to its revenue officers on the documentation that they should receive to support the assertion of a trust fund recovery penalty (TFRP) against a taxpayer [IRS SBSE Memorandum SBSE-05-1211-104, 12/7/11].

Background. If an employer fails to properly pay over its payroll taxes, the IRS is allowed under Code Sec. 6672(a) to seek to collect a trust fund recovery penalty equal to 100% of the unpaid taxes from a “responsible person,” i.e., a person who: (1) is responsible for collecting, accounting for, and paying over payroll taxes; and (2) willfully fails to perform this responsibility.

The memorandum notes that each recommendation that a revenue officer makes for assertion of a TFRP against a responsible person must stand on its own merits based on the facts that the revenue officer discovers and documents in the case file during the TFRP investigation. The revenue officer should determine on a case-by-case basis the amount of documentation required to support an assertion recommendation based upon the “responsibility” and “willfulness” factors of the responsible person. The memorandum includes examples of the level of documentation required to support a TFRP recommendation. In the majority of cases, the core evidence necessary to support a TFRP recommendation will be:

- (1) “*Form 4180*” interviews: Form 4180 is the form that is used by revenue officers to conduct TFRP interviews. It is intended to be used as a record of a

personal interview with a potentially responsible person;

(2) *Articles of incorporation;*

(3) *Bank signature authority cards or electronic PINS/passwords;* and

(4) *Copies of a sampling of cancelled checks demonstrating payment to other creditors in preference to the government (or bank statements demonstrating debit transaction payments in preference to the government, if the taxpayer predominately uses electronic banking):* The memorandum advises revenue officers to obtain documentation, including bank records, from the business entity whenever possible. If the business entity does not provide the requested records by the deadline provided, a summons will be served on either the business entity, the bank, or both, to secure the required documents.

This guidance will be incorporated into the Internal Revenue Manual no later than *Dec. 7, 2012*.

IRS Finalizes Form 944 Regulations

The IRS has issued final regulations under the Employers' Annual Federal Tax Program (the Form 944 Program) [TD 9566, 12/09/2011; Reg § 31.6011(a)-1, 12/09/2011, Reg § 31.6011(a)-4, 12/09/2011, Reg § 31.6302-1, 12/09/2011].

Background. Employers whose estimated annual employment tax liability is \$1,000 or less are eligible to file annual Form 944, *Employer's Annual Federal Tax Return*, rather than quarterly Forms 941, *Employer's Quarterly Federal Tax Return*. In 2008, the IRS issued temporary regulations (see Payroll Guide Newsletter at ¶ 1.3), and a notice of proposed rulemaking cross-referencing the 2008 temporary regulations, that made filing Form 944 voluntary, rather than mandatory, beginning after Dec. 31, 2008.

Employers who estimate that their annual employment tax liability will be \$1,000 or less can contact the IRS to express their desire to file Form 944 instead of Forms 941 for a taxable year. Only upon such a request will the IRS send a notification letter to qualified employers confirming that they may file Form 944 for that taxable year. Once employers receive this notice, they must file Form 944 (not Form 941) until they contact the IRS to change their filing requirement to Form 941 for that taxable year and receive confirmation from the IRS that their filing requirement has been changed. In 2009, the IRS issued Rev Proc 2009-51, 2009-45 IRB 625, which set forth the procedures for employers to follow to request to file Form 944 (i.e., to opt in). The revenue procedure also in-

cluded guidance on how employers who previously were notified to file Form 944 could file Forms 941 instead (i.e., opt out).

The final regulations. TD 9566, 12/09/2011, adopts the rules in the 2008 proposed regulations with no substantive changes. The final regulations state that employers should follow the procedures contained in Rev Proc 2009-51, 2009-45 IRB 625, or its successor, to opt in or to opt out of the Form 944 Program.

Beginning with the 2012 tax year, Form 944-SS, *Employer's Annual Federal Tax Return (American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, and the U.S. Virgin Islands)*, and Form 944-PR, *Planilla para la Declaración Federal ANUAL del Patrono*, will be eliminated due to the low volume of employers filing these forms. Employers who would otherwise file a Form 944-SS or Form 944-PR will file Form 944. The Treasury Department and the IRS plan to retain Form 944(SP), *Declaración Federal ANUAL de Impuestos del Patrono o Empleador*, which is the Spanish equivalent of Form 944.

The Treasury Department and the IRS are considering changes to the Form 944 Program in light of the program's performance, as measured against the program's original goals, administrative and operational considerations, and overall program effectiveness.

The final regulations also include guidance on the lookback periods and deposit requirements for employers required to file Forms 941 and Form 944. See Payroll Guide at ¶ 4285 for further information on these rules.

IRS Issues 2012 Version of Withholding Certificate for Pension or Annuity Payments

The IRS has posted the 2012 version of Form W-4P, *Withholding Certificate for Pension or Annuity Payments*, on its website. The form is used by recipients of pensions, annuities, and other deferred compensation to advise the payer of the correct amount of federal income tax to withhold from their payment (see Payroll Guide at ¶ 4015). Form W-4P may also be used by the recipient to choose: (a) not to have any federal income tax withheld from the payment (except for eligible rollover distributions, or payments to U.S. citizens delivered outside the U.S. or its possessions); or (b) to have an additional amount of tax withheld.

If recipients of periodic payments (payments made in installments at regular intervals over a period of more than one year) do not submit a Form W-4P to the payer, the payer must withhold based on a filing

status of married claiming three withholding allowances. Generally, this means that tax will be withheld if the pension or annuity is at least \$1,640 a month (\$1,600 a month in 2011).

Some amounts in the "Deductions and Adjustments Worksheet" have changed from the previous year. There are special instructions for taxpayers who have more than one source of pension income subject to withholding, or who have a spouse who also has pension income subject to withholding.

Deadline Approaching to Inform Employees About the Earned Income Credit

The IRS has issued a December 2011 version of Notice 1015, *Have You Told Your Employees About the Earned Income Credit (EIC)?*

The earned income credit (EIC) is a tax credit available to low-income employees. The credit reduces taxes owed and is intended to offset living expenses and Social Security taxes paid. Eligible employees claim the credit on their personal income tax returns.

Which employees must be notified about the EIC? An employer must notify employees about the EIC if the employee worked for the employer at any time during 2011 and didn't have any withholding deducted. In addition, an employer is encouraged to notify employees whose wages for 2011 were less than \$49,078 that they may be eligible to claim the EIC. An employer is not required to notify employees about the EIC if they claimed exemption from withholding on their W-4 form.

How to notify employees about the EIC. Employees who meet the EIC notification requirements above must be provided one of the following:

- (1) Form W-2, which has the required EIC information on the back of Copy B.
- (2) A substitute Form W-2 with the same EIC information on the back of the employee's copy that is on Copy B of Form W-2.
- (3) A copy of Notice 797, *Possible Federal Tax Refund Due to the Earned Income Credit (EIC)*.
- (4) A written statement that has the same wording as Notice 797.

No further action required. Employers are not required to provide any additional notice to employees about the EIC if: (a) Form W-2 has the required information about the EIC on the back of the employee's copy, (b) the employee is required to receive Form W-2, and (c) the employer timely gives the employee Form W-2.

Circumstances under which additional action is required. If a substitute Form W-2 is given on time but does not have the required information about the EIC, the employer must notify the employee about the EIC within one week of the date that the substitute Form W-2 is issued. If Form W-2 is required, but is not given on time, the employer must give the employee Notice 797 or a written statement by the date that Form W-2 is required to be given to the employee. If the employee is not required to receive Form W-2, the employer must notify the employee about the EIC by Feb. 7, 2012.

Notice 797. The notice about the EIC must be handed directly to the employee or delivered to the employee by first-class mail to the employee's last known address. An employer will not meet the notification requirements by posting Notice 797 on an employee bulletin board or sending it through office mail. However, an employer may post the notice to make all of its employees aware that they may be eligible to claim the EIC.

States requiring IRS EIC notification. The following seven states require employers to notify eligible employees about the federal EIC: California, Illinois, Louisiana, Maryland (eff. 1/1/12), New Jersey, Texas, and Virginia.

Office of Child Support Encouraging Employers to Receive Income Withholding Orders Electronically

The Office of Child Support Enforcement (OCSE) is encouraging employers to participate in the electronic income withholding order (e-IWO) project [SSA/IRS Reporter, Winter 2011].

The e-IWO project allows states to electronically transmit income withholding orders (IWOs) to employers, and employers to electronically notify states regarding the status of IWOs, including terminations and lump sum payments. As of Oct. 31, 2011, 23 states, and employers with 1,910 federal employment identification numbers, are using the e-IWO system.

OCSE notes that employers participating in the project not only receive the benefit of receiving their child support income withholding orders electronically (i.e., no paper), but they are also saving time, money, and resources. One employer saved over \$8,000 in postage and processing costs in just the first few weeks that it was on e-IWO.

There is no cost to employers for participating in the e-IWO project. Employers can choose to implement e-IWO using a "No Programming Option" (NPO) or a

“System to System” (SYS) implementation. The NPO requires minimal IT resources and employers can start receiving e-IWOs in 2-4 weeks. Once on e-IWO, employers receive an image-ready PDF of every order, along with a prefilled acknowledgment. The SYS implementation requires employers to receive and process the e-IWO documents electronically, and generate acknowledgments using a flat file or XML schema. Because the e-IWO documents arrive in a flat file or XML schema, employers can automatically upload the withholding order information to their payroll system. This option, because of the programming involved, usually requires 3-5 months to complete. Employers doing the SYS implementation have the option of receiving incoming withholding orders as image-ready PDFs.

Employer Had No Reasonable Cause for Failing to Honor Wage Levy

A federal district court has ruled that an employer was personally liable for failing to honor a wage levy, and was also subject to a 50% penalty, because the employer failed to establish any “reasonable cause” for not honoring the levy [*U.S. v. Heli USA Airways, Inc.*, DC NV, 108 AFTR 2d ¶ 2011-5501, 11/14/11].

The facts. Heli US Airways, Inc. (Heli) employed a pilot, Lee Rhodes, from 2008-2010. Rhodes owed federal incomes taxes and civil penalties. The IRS issued a notice of levy on Rhodes’ wages, salary, and other income to Heli, in accordance with Code Sec. 6321. The levy required Heli to turn over to the IRS Rhodes’ “wages and salary that have been earned but not paid, as well as wages and salary earned in the future until this levy is released.” The levy was sent by U.S. mail to the attention of Omara Palacios, the Chief Financial Officer of Heli. The initial notice was ignored, as was a second notice sent by certified mail. The IRS then issued a final demand for payment notice that was sent to Palacios’ attention.

Shortly thereafter, Palacios left Heli, citing severe anxiety and depression. The company then discovered that Palacios had neglected his business and legal responsibilities during his tenure as CFO. The IRS subsequently filed a complaint against Heli for failing to honor the wage levy. As of March 1, 2011, the outstanding balance on Rhodes’ tax liabilities and penalties for the years 1999 through 2003, included on the levy served on Heli, was \$49,175.92.

The law. Code Sec. 6332(a) allows the IRS in situations where a delinquent taxpayer’s property is held by a third party, such as an employer, to serve a notice of levy on the third party. Code Sec. 6332(a)

also requires the person in possession of, or obligated with respect to, the property that was levied to surrender it to the IRS on demand. Failure to surrender the property results in personal liability under Code Sec. 6332(d)(1).

Reg § 301.6331-1(c) allows the notice to be sent by certified mail, return receipt requested. In *Busquets-Ivars v. Ashcroft*, CA9, 333 F.3d 1008, 6/24/03, the U.S. Court of Appeals for the Ninth Circuit stated that there was a presumption of delivery when the return receipt is received by the sender.

The IRS provided testimony that the notices of levy were sent to the correct address and provided the return receipt from the U.S. Postal Service for one of the notices. It asserted that Heli was personally liable for Rhodes’ unpaid taxes and penalties under Code Sec. 6332(d)(1).

The ruling. The federal district court agreed with the IRS that Heli was personally liable for Rhodes’ unpaid taxes and penalties. The court noted that under Code Sec. 6332, a person served with a notice of levy only has the following two defenses for not honoring the levy: (1) the person is not in possession of the property of the delinquent taxpayer; or (2) the property is already subject to prior judicial attachment. Neither defense applied in this situation and the return receipt from the U.S. Postal Service was sufficient evidence that Heli had received the levy notices.

Penalties. The IRS also assessed a 50% penalty against Heli under Code Sec. 6332(d)(2), which allows the IRS to demand an additional penalty against “any person” who “fails or refuses to surrender such property or rights to such property without reasonable cause.” Reg § 301.6332-1(b)(2) states that a penalty should not be imposed “in cases where a bona fide dispute exists concerning the amount of the property to be surrendered pursuant to a levy or concerning the legal effectiveness of the levy.”

The district court upheld the penalty. It said that there was no dispute about the amount of property to be surrendered. Heli argued that Palacios’ mental health breakdown was the cause of the failure to respond to the levy notices. Heli contended that it could not have known that Palacios was ignoring the levy notices and that management properly supervised Palacios because it was regularly in contact with Palacios and had an outside firm perform an audit of the company’s financial statements. The court did not agree that Palacios’ conduct provided a sufficient basis to forego the penalty. Heli cited no authority upholding a “reasonable cause” defense based on the

conduct of a rogue employee — even a properly supervised one.

Stateline

New laws and developments are reported from the following states:

ALABAMA

Unemployment. A spokesperson for the Alabama Department of Industrial Relations (DLIR) has told *RIA* that unemployment tax rates for experienced employers will again be determined under rate Schedule D in the 2012 tax year. Rates will range from 0.65% to 6.8%. These rates include a 0.06% special assessment. In addition, all experienced employers must pay a 0.6% shared cost assessment in 2012 (1.6% in 2011). The new employer rate will remain at 2.7% and the taxable wage base will remain at \$8,000.

ALASKA

Unemployment. The Alaska Department of Labor and Workforce Development's (DLWD) has issued the 2012 new employer tax rates by industry. Rates will range from 2.74% to 3.45%. Experienced employer rates were previously announced (see Payroll Guide at ¶ 11,304) [DLWD website].

CALIFORNIA

Withholding. The Franchise Tax Board (FTB) can no longer process requests for reduced nonresident withholding on Form 589, *Nonresident Reduced Withholding Request*, that have effective dates that aren't in the current calendar year. Taxpayers that need to submit a request for 2012 should go on the FTB website near the end of December and look for the new version of Form 589 [California FTB Tax News 12/01/2011, 12/01/2011].

COLORADO

Withholding. *Beginning Jan. 1, 2012*, withholding deducted on payments to non-employees should be remitted to the Colorado Department of Revenue (DOR) with new Form DR 1107, *1099 Income Withholding Tax Return*. Wage withholding should still be remitted to the DOR with Form DR 1094, *Income Withholding Tax Return*. Employers should include Form DR 1093, *Annual Transmittal of W-2 Forms*, with the W-2 and 1099 forms that they send to the DOR for the 2011 tax year. Employers will include new Form DR 1106, *Annual Transmittal of State 1099 Forms*, with the 1099 forms that they submit to the DOR for the 2012 tax year (filed in 2013). Employers will continue to include Form DR 1093 with the 2012 W-2 forms that they submit to the DOR [Form DR 1107 instructions].

There is a now a November 2011 version of Colorado FYI Tax Publication Withholding 5, 11/01/2011, *Colo-*

rado Wage Withholding Tax Requirements, on the Colorado Department of Revenue (CDOR) website. *Beginning Jan. 1, 2012*, taxpayers who withhold from amounts paid and reported on Form 1099 must set up a separate account to pay the 1099 withholding. Employers who submit withholding applications *after Nov. 30, 2011*, will be required to file by EFT or through Revenue Online. If unable to file electronically, Form DR 1094, *Income Withholding Return*, may be downloaded from the CDOR website.

Worker Classification. The U.S. Department of Labor (DOL) and the Colorado Department of Labor and Employment (DLE) have signed an agreement that they hope will reduce the number of employees who are misclassified as independent contractors [DOL News Release, 12/5/11].

CONNECTICUT

Withholding. Connecticut Department of Revenue Services (DRS) Commissioner Kevin B. Sullivan is reminding employers to take special care when calculating income tax withholding for employees with unusual earnings during the holiday season. Said Sullivan, "I'm sure no one wants to see employees earning extra income for the holidays get 'Scrooged' by inaccurate overwithholding. For new seasonal employees, employees earning holiday overtime or employees receiving end of year bonuses, we want to remind employers and their payroll processors not to treat the unusual income as if it is part of the employee's income all year" [DRS Announcement, *Commissioner Urges Employers To Avoid Ho-Ho-Holiday Over-Withholding*, 12/9/11].

DELAWARE

Withholding. The Delaware Department of Revenue (DOR) has published a list of withholding tax deadlines for the 2012 calendar year. Electronic filing transactions must be initiated at least one day before the due date to ensure that the return is filed timely. There will be posting problems and/or erroneous assessments if employers fail to use the correct tax type code of 01106 [DOR Notice, *Withholding Tax Due Dates for Calendar Year 2012*, 11/9/11].

DISTRICT OF COLUMBIA

Withholding. The District of Columbia income tax withholding tables and formula have been revised, effective *Jan. 1, 2012* (see Payroll Guide at ¶ 24,002), to eliminate the use of the standard deduction in the formula. This will cause employee withholding to increase. Employers who use the withholding formula need to make only one subtraction to calculate the income on which withholding will be deducted (i.e., subtract the result of \$1,675 times the number of exemptions from the annual amount of wages) [Office of Tax and Revenue News Release, 12/7/11].

FLORIDA

Unemployment. The Florida Department of Revenue (DOR) is reminding employers that made installment payments of unemployment tax for any of the first three quarters of 2011, that final payment is due on *Dec. 31, 2011*. Electronic payments must be initiated by *5 p.m. EST on Dec. 29, 2011*. The unemployment tax payment for the fourth quarter of 2011 is still due on Jan. 31, 2012, along with the fourth quarter return [DOR Notice, *Florida Unemployment Tax Final 2011 Installment Due Date Reminder*, 12/15/11].

IDAHO

Unemployment. Unemployment tax rates for experienced employers will continue to range from 0.96% to 6.80% in the 2012 tax year. The new employer rate will remain at 3.36%. The above rates include the workforce training tax. The special administration reserve fund tax is not in effect in 2012. The taxable wage base will increase from \$33,300 to \$34,100 in 2012 [Idaho Department of Labor website, *2012 Tax Array Chart*].

Withholding. There is now a Nov. 3, 2011 version of the Idaho Annual Withholding Report Instructions. In addition to providing general instructions on completing Form 967, *Idaho Annual Withholding Report*, the instructions include information on who must file Form 967, the filing deadlines, and how to file electronically. Employers must file Form 967 if they had an active withholding account for any part of the year, even if they didn't have any employees, paid no wages, or deducted no withholding.

ILLINOIS

Unemployment. Recently-enacted legislation sets the taxable wage base for unemployment tax purposes at: (1) \$13,560 in 2012; (2) \$12,900 in 2013; and (3) \$12,960 in 2014-2019. In addition, the legislation authorizes Illinois to issue bonds in 2012 to pay back its federal unemployment loans so that Illinois will not be a credit reduction state for federal unemployment tax purposes in the 2012 tax year. (It is a credit reduction state in the 2011 tax year; see Payroll Guide at ¶ 12,505). The legislation sets the minimum unemployment tax rate at 0% for calendar years 2012 through 2019; and the building fund rate at 0.55% for each calendar year when there are outstanding bonds in the unemployment trust fund as of October 31 in the prior calendar year. In addition, employers will pay a new 0.3% surcharge in calendar years 2016 and 2018. The maximum number of weeks that claimants may receive unemployment benefits will be reduced from 26 to 24 in 2016 and 2018 [L. 2011, S72].

Withholding. The Illinois Department of Revenue has posted a November 2011 version of Publication 131, *Withholding Income Tax Payment and Filing Require-*

ments, on its website. Beginning *Jan. 1, 2012*, taxpayers who, during the "look-back" period (July 1, 2010 to June 30, 2011), reported more than \$12,000 in withholding, are assigned to the semi-weekly payment and quarterly return schedule. Taxpayers who have been registered for less than 18 months, or have a compliance problem (underpayment, missing return, etc.), and who reported \$12,000 or less in withholding during the look-back period, are assigned to the monthly payment and quarterly return schedule. Taxpayers who have been registered for the full look-back period, are in good standing, and reported more than \$1,000 but no more than \$12,000 in withholding taxes, are assigned to the monthly payment and annual return schedule [Publication 131, *Withholding Income Tax Payment and Filing Requirements*, 11/11].

IOWA

Withholding. The Iowa Department of Revenue (IDOR) has made the following two improvements to the eFile & Pay System: (1) The Business eFile Number (BEN) and legal name have been added to the Log In Screen, under "User Authentication." Users are requested to verify their business information for accuracy before entering their user ID and password. (2) Bank information that is no longer correct will be automatically deleted on the ePay Information screen [IDOR e-mail, *Improvements to the Iowa eFile & Pay System*, 12/7/11].

KANSAS

Unemployment. Unemployment tax rates for experienced employers in the 2012 tax year will range from 0.11% to 5.4% for positive-balance employers, and 5.7% to 9.4% for negative-balance employers. The new employer rate will remain at 4%, except that new employers in the construction industry will pay 6%. The tax rate for newly-rated government employers will increase from 0.25% to 0.28% in 2012. The taxable wage base will remain at \$8,000. The maximum weekly unemployment benefit is now \$444 [Kansas Department of Labor website, *Employer Tax Rates*].

MASSACHUSETTS

Withholding. The Massachusetts Department of Revenue (DOR) has posted new withholding tables on its website, *effective for wages paid beginning Jan. 1, 2012*. The withholding rate will decrease from 5.3% to 5.25% in 2012. Exemption amounts remain the same as in previous years [Massachusetts Circular M, *Income Tax Withholding Tables Effective January 1, 2012*].

MINNESOTA

Withholding. The Minnesota Department of Revenue (DOR) has issued a release that reviews withholding tax changes and announcements for the 2012 tax year. The DOR is transitioning businesses to its new online filing

and payment system called “e-Services” (see Payroll Guide at ¶ 7510). In e-Services, the fourth quarter return will no longer serve as an annual reconciliation. The return will include only wage and withholding information for the fourth quarter. Employers/payors must electronically submit 2011 W-2 and 1099 forms to Minnesota if they have more than 10 forms to file (previously, more than 25 forms). W-2s and 1099s must be submitted to the DOR by *Feb. 28, 2012*. The new release also includes guidance on when employees must file Minnesota Form W-4MN rather than federal Form W-4 [DOR Release, *Withholding Tax Announcements for Tax Year 2012, 12/12/11*].

MISSOURI

Withholding. The Missouri Department of Revenue has posted 2012 wage bracket withholding tables on its website. Some withholding tax computations will change in 2012.

MONTANA

Unemployment. Unemployment tax rates for experienced employers will again be determined under Schedule VII in the 2012 tax year. Rates will range from 0.82% to 2.62% for positive balance experienced employers, and from 4.12% to 6.12% for negative balance experienced employers. New employer rates vary by industry. In 2012, new employer rates will range from 1.7% to 4.1%. Employers will also pay a 0.18% administrative fund tax in 2012 that is not included in the above rates. A penalty rate that is 50% higher than the employer’s computed experience rate will be assigned to employers who have a balance due, or who have not filed all reports by the time the Montana Unemployment Division calculates tax rates. The taxable wage base will increase from \$26,300 to \$27,000 in 2012 [Montana Unemployment Division website, *2012 Unemployment Insurance Contribution Rates & Wage Base*].

NEW JERSEY

Unemployment. The New Jersey Division of Employer Accounts has announced that, starting with the fiscal year that begins on July 1, 2012, employers will no longer receive a paper copy of their annual contribution rate notice. The notice will be available through the Tax Web Enabled System (TWES) [New Jersey Division of Employer Accounts website, *Important Information for Calendar Year 2012*].

Withholding. The New Jersey Division of Taxation has posted a Jan. 1, 2012 version of Publication NJ-WT, *New Jersey Gross Income Tax Instruction Booklet for Employers, Payors of Pension and Annuity Income and Payors of Gambling Winnings*, on its website. The booklet contains useful information and forms, such as withholding rate tables (which are the same tables that were

effective Jan. 1, 2010 and remain unchanged); Form NJ-W4, *Employee’s Withholding Allowance Certificate*; and rules for paying and reporting withholding taxes.

Withholding is deducted from employee wages to fund the unemployment insurance, disability insurance, and family leave programs. The withholding tax rate from Jan. 1, 2012 to Dec. 31, 2012 is 0.705%, up to the taxable wage base of \$30,300. The 0.705% rate is allocated as follows: 0.3825% to the unemployment contribution fund, 0.0425% to the Workforce Development/Supplemental Workforce Funds, 0.2% to the disability fund, and 0.08% to the family leave insurance program. The 2011 rate was 0.985%, up to the taxable wage base of \$29,600 [New Jersey Department of Labor and Workforce Development website, *Division of Employer Accounts 2012 Rates*].

NEW YORK

Employer Taxes. New legislation will reduce or eliminate the Metropolitan Commuter Transportation Mobility Tax (MTA Payroll Tax; see Payroll Guide at ¶ 8418) for many employers. The legislation provides that, *effective with the quarter beginning on April 1, 2012*, employers with payroll expenses of \$312,500 or less in a calendar quarter will not be subject to the MTA payroll tax. The bill will reduce the payroll tax rate from 0.34% to 0.11% for employers with payroll expenses of between \$312,501 and \$375,000 in a calendar quarter. The payroll tax rate will be reduced from 0.34% to 0.23% for employers with payroll expenses of between \$375,001 and \$437,500 in a calendar quarter [L. 2011, S2].

Withholding. New legislation will temporarily revise the current income tax brackets. Taxes are expected to decrease for 4.4 million middle-class New Yorkers and increase for the wealthiest taxpayers in 2012 [Governor Cuomo Press Release, *Op-Ed On Tax Reform*, 12/5/11; Governor Cuomo Press Release, *Governor Cuomo, Majority Leader Skelos & Speaker Silver Announce Comprehensive Plans to Create Jobs and Grow the Economy*, 12/6/11; L. 2011, S2].

NORTH CAROLINA

Unemployment. A spokesperson for the North Carolina Division of Employment Security (DES) has told *RIA* that the taxable wage base for unemployment tax purposes will increase from \$19,700 to \$20,400 in the 2012 tax year. Tax rates for experienced employers will continue to be determined under Schedule A. Rates will range from 0.0% to 6.84%. The new employer tax rate will remain at 1.2% in 2012.

Withholding. The North Carolina Department of Revenue (DOR) has posted a November 2011 version of Publication NC-30, *Income Tax Withholding Tables and Instructions for Employers*, on its website. There are no

changes to the withholding tables or withholding allowance chart in Payroll Guide at ¶ 26,503.

NORTH DAKOTA

Unemployment. A spokesperson for Jobs Service North Dakota (JSND) has told *RIA* that unemployment insurance (UI) tax rates for experienced employers will range from 0.20% to 9.91% in the 2012 tax year. The new employer tax rate will be 1.36% (1.37% in 2011), except the new construction employer tax rate will be 9.91% (10.0% in 2011). The taxable wage base will be \$27,900 in 2012 (\$25,500 in 2011).

OHIO

Withholding. In 2012, there will be new school district taxes in: (1) Amanda-Clearcreek LSD (Fairfield County) – 1.5%; and (2) Willard CSD (Crawford, Huron counties) – 0.75%. The Miami East LSD (Champaign, Miami counties) rate will increase from 1% to 1.75%. The Minster LSD rate (Auglaize, Darke, Mercer, Shelby counties) will increase from 0.5% to 1%. The Adena LSD (Pickaway, Ross counties) 1% tax will no longer be in effect in 2012. The Ohio Department of Taxation (DOT) is advising employers to identify the school district on W-2 forms by its four-digit code. By doing so, it will reduce the likelihood that the DOT will experience any delay in processing the employee's income tax return [DOT Notice, *Expirations, New School Districts, Renewals and Rate Changes Effective 1/1/2012*].

OREGON

Withholding. The Oregon Department of Revenue (DOR) is advising employers that, even though they are now required to submit W-2 information electronically, they are still required to submit the paper version of Form WR, *Oregon Annual Withholding Tax Reconciliation*, to the DOR to reconcile their account. If an employer amends a quarterly report for withholding after it has submitted the original Form WR, it must also submit an amended WR to report the adjustment and to provide the new withholding total for the year. This is especially true if the adjustment results in a refund of an overpayment [Oregon Payroll Tax News-Listserv, Dec. 2011].

The Oregon Tax Court has ruled that the sole proprietor of a construction company failed to establish that a worker was an independent contractor, and, thus, the compensation paid to the worker for the period in question was wages subject to withholding and the Lane transit tax. Under Oregon law, there are four requirements that must be met for a worker to be classified as an independent contractor, including that the worker be customarily engaged in an independently established business. The sole proprietor did not provide sufficient evidence to establish that the worker met this requirement [*Mckenzie Fence Co. v. Dept. of Rev.*, Or. Tax Ct.,

Magis. Div., Dkt. Nos. TC-MD 101272B and TC-MD 101273B, 11/30/11].

PENNSYLVANIA

Withholding. The Philadelphia Department of Revenue (DOR) is reminding taxpayers that the Philadelphia wage/earnings income tax rate from Jan. 1, 2012 to June 30, 2012 will remain at 3.928% for residents and 3.4985% for nonresidents. Philadelphia Bill No. 110138, effective July 1, 2011, froze the rate of tax at the level in effect on July 1, 2010 for July 1, 2010 and thereafter [DOR website, Tax Revenue & Water Revenue Bureau, *What's New*, November 2011].

RHODE ISLAND

Disability. The Rhode Island Department of Labor and Training (DLT) has announced that the employee contribution rate to the Temporary Disability Insurance (TDI) Fund will decrease from 1.3% to 1.2% in the 2012 tax year. However, the TDI taxable wage base will increase from \$58,400 to \$60,000. The maximum TDI contribution will decrease from \$759.20 to \$720.00 [DLT Media Advisory, 12/2/11].

Unemployment. Unemployment tax rates for experienced employers will continue to range from 1.69% to 9.79% in the 2012 tax year. The new employer tax rate will increase from 2.46% to 2.64%. The taxable wage base will be \$19,600 for most employers. It will be \$21,100 for employers in the highest tax rate bracket [Rhode Island Department of Labor and Training Media Advisory, 12/2/11].

Withholding. The Rhode Island Division of Taxation (RIDOT) has posted new withholding tables for the 2012 tax year on its website. There are no changes to tax rates in 2012, but the range of wages in each tax rate has changed. Exemption amounts remain the same as in the 2011 tax year, but the dollar thresholds under which the exemption allowance is phased out have changed. For example, in 2012, exemptions should not be subtracted from the wage payment in percentage method withholding computations if weekly wages are greater than \$3,898.08 (\$3,750 in 2011). There are no longer separate withholding tables based on filing status (i.e., single, married). Employers with a weekly (biweekly, semi-monthly, monthly, etc.) payroll period will use only one table to compute withholding for all filing status types. The uniform table reflects a change in state law enacted in June 2010. The supplemental withholding rate remains at 5.99% [2012 Rhode Island Employer's Income Tax Withholding Tables; RIDOT Notice, *Advisory: Tax Division update for tax year 2012*, 12/15/11].

TEXAS

Unemployment. Unemployment tax rates for experienced employers in the 2012 tax year will range from

0.61% to 7.58%. These rates include a 0.17% obligation assessment, a 0.42% replenishment tax ratio, and a 0.10% employment and training assessment. The new employer tax rate remains at 2.7%. The interest tax surcharge will not be in effect in 2012. The taxable wage base will continue to be \$9,000 [Texas Workforce Commission website, *2012 Tax Rates*].

UTAH

Withholding. There is now a December 2011 version of Utah Informational Publication 99, 12/01/2011, *Guidelines for Substitute and Copied Utah Tax Forms*. The publication includes additional guidelines for preventing printer distortion of PDF files and new criteria for preparing Utah tax coupons with scan lines. Dates entered in scannable fields should be entered as numbers with slashes (mm/dd/yyyy or mm/dd/yy, as required). Developers of substitute Utah tax forms must receive approval from the Utah State Tax Commission prior to filing the forms with the Commission or releasing the forms to their customers.

VERMONT

Unemployment. *Effective beginning with the quarter ending Dec. 31, 2011*, businesses with 25 or more employees must file and pay their quarterly unemployment taxes online. This requirement also applies to health care contribution reporting and payments. Businesses with 25 to 250 employees must file their quarterly unemployment tax reports using the Vermont Tax and Wage System (VITWS) at the Vermont Department of Labor (VDOL) website. Employers must have registered for online reporting by *Dec. 10, 2011*, to use VITWS for the quarter ending Dec. 31, 2011. Employers with more than 250 employees must use the Large Employer Reporting System. The specifications and application (Form C-29A) for this system are online at the VDOL website. Employers must have submitted an application to use the Large Employer Reporting System by *Dec. 10, 2011*, in order to use it in the quarter ending Dec. 31, 2011 [VDOL Notice CL-15, *Notice of Critical Information*].

Withholding. The Vermont Department of Taxes (DOT) has posted 2012 percentage method withholding tables and wage bracket withholding charts on its website. Withholding allowance amounts will increase in 2012. The DOT is advising civil union partners to use the married withholding tables. Employees who have adjusted their federal withholding in anticipation of receiving the Child Tax Credit, Hope or Lifetime Learning Credit, or other credits that do not affect Vermont tax, and employees who are in civil unions or same-sex civil marriages, will not have the correct Vermont tax withheld unless they complete Form W-4VT, *Vermont Employee's Withholding Allowance Certificate* [2012 Vermont Income Tax Withholding Tables and Instructions].

VIRGINIA

Unemployment. Unemployment insurance (UI) tax rates for experienced employers will range from 0.83% to 6.93% in the 2012 tax year (0.77% to 6.87% in 2011). The new employer tax rate will be 3.23% (3.17% in 2011). New foreign contractors doing business in Virginia, delinquent employers, and non-rated experienced employers pay 6.93%. The above rates include a 0.20% fund balance charge and a 0.53% pool cost charge (0.47% in 2011). The taxable wage base will remain at \$8,000 in 2012 [Virginia Employment Commission, *2012 Tax Rate Table*].

WASHINGTON

Unemployment. A spokesperson for the Washington Employment Security Department (ESD) has told *RIA* that unemployment tax rates for experienced employers will range from 0.17% to 5.85% in 2012. The rates include the applicable employment administrative fund (EAF) surtax and graduated social cost rate. New employer rates vary by industry. The taxable wage base will increase from \$37,300 to \$38,200 in 2012.

WEST VIRGINIA

Withholding. The West Virginia Tax Department has amended a procedural rule to provide, among other things, that mandatory electronic filing of taxes will apply to taxpayers meeting the \$100,000 single-tax type threshold in the 2011 and 2012 tax years. Prior legislation had changed the mandatory e-filing threshold from \$100,000 to \$10,000, effective for tax years beginning on or after Jan. 1, 2011 (see Payroll Guide Newsletter at ¶ 2.9), but the new procedural rule revises that legislation by gradually phasing in the implementation of the \$10,000 threshold, so that it will take effect beginning in tax years after Dec. 31, 2014 [Code of State Rules § 110-10D-9].

WISCONSIN

Withholding. Wisconsin Dept. of Revenue, *Withholding Tax Update 2011-1*, 12/1/11, notes that the current withholding tax rates will remain in effect in the 2012 tax year. The update also discusses the differences between federal and Wisconsin treatment of transit pass and commuter fringe benefits, and whether federal Form W-4 or Wisconsin Form WT-4 should be filed.

The Wisconsin Department of Revenue (DOR) has updated its publication on the taxation of retirement benefits. The publication may be used in preparing 2011 personal income tax returns. There are no substantive differences between the 2010 and 2011 versions of the publication. The 2011 version reflects the DOR's position on laws enacted by the Wisconsin legislature that are effective as of Nov. 1, 2011 [Wisconsin Dept. Rev. Tax Publication 126, 12/01/2011].

WYOMING

Unemployment. Unemployment tax rates for experienced employers in the 2012 tax year will range from 0.65% to 10.0% (0.67% to 10.0% in 2011). New employers will pay their industry average rate or 4.12%. The

taxable wage base will increase from \$22,300 to \$23,000 in 2012 [Wyoming Dept. of Employment website, *Wyoming Unemployment Insurance Average Tax Rate by NAICS Grouping for CY 2012*].



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