
Payroll Guide

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IRS Issues Employer's Supplemental Tax Guide This publication contains alternative methods for computing federal income tax withholding.

IRS Encouraging Information Return Filers Needing More Time to File Their Extension Requests Electronically Extension requests may only be filed on paper if the request is for no more than one filer.

IRS Revises Form to Request Waiver from Filing Information Returns Electronically The penalty for failing to file electronically when required to do so is \$100 per return unless there was reasonable cause for not filing electronically.

New Legislation Would Retroactively Increase the Tax-Free Exclusion for Mass Transit/Vanpool Expenses Under the legislation, the transit pass exclusion would be retroactively increased from \$125 a month to \$240 a month for one year, effective Jan. 1, 2012.

IRS Provides Unemployment Tax Guidance for Employers in Credit Reduction States The guidance will help employers complete Form 940 and Schedule A (Form 940).

IRS Issues Guidance to Its Employees on Processing Employment Tax Refund and Abatement Claims The IRS has issued a memorandum to its employees about changes to its procedures for establishing, working, and closing employment tax refund and abatement claims after a tax examination.

Taxpayer May Not Protest IRS Assessment in Second Administrative Hearing The U.S. Tax Court has ruled that a taxpayer could not contest a "responsible person" penalty in a collection due process (CDP) hearing because he had failed to protest the penalty in a previous hearing.

IRS Revises Nonresident Alien Tax Publication The IRS has issued a 2012 version of Publication 515, *Withholding of Tax on Nonresident Aliens and Foreign Entities*.

IRS Updates ITIN Application Form An ITIN is a nine-digit number issued by the IRS to individuals who are required for U.S. tax purposes to have a U.S. taxpayer identification number but who do not have, and are not eligible to obtain, a SSN.

Social Security Administration to Resume Sending Out Annual Earnings Statements Sometime this year, the SSA plans to introduce a service that will allow all workers to view their earnings and estimated retirement benefits online.

"Real-Time" Tax System Could Mean Less Time to Gather Payroll Tax Information The proposed new system might require annual reporting deadlines to be moved up, W-2 data to be reported more frequently, and/or W-2 electronic filing thresholds to be reduced.

IRS Issues Form for Tax-Exempt Employers Claiming Work Opportunity Credit Tax-exempt employers claim the credit on new Form 5884-C, *Work Opportunity Credit for Qualified Tax-Exempt Organizations Hiring Qualified Veterans*.

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

IRS Issues Employer's Supplemental Tax Guide

The 2012 version of IRS Publication 15-A, *Employer's Supplemental Tax Guide*, is now on the IRS website.

IRS Publication 15-A supplements IRS Pub No. 15, (*Circular E*), *Employer's Tax Guide*, by providing more specialized and detailed employment tax information on certain topics covered in IRS Publication 15. There are sections in IRS Publication 15-A on: (1) Who Are Employees; (2) Employee or Independent Contractor; (3) Employees of Exempt Organizations; (4) Religious Exemptions; (5) Wages and Other Compensation; (6) Sick Pay Reporting; (7) Special Rules for Paying Taxes; and (8) Pensions and Annuities. The publication also provides guidance on electronic filing and payment, and electronic submission of Forms W-4, W-4P, W-4S, and W-4V.

In addition, IRS Publication 15-A includes the following alternative methods for computing federal income tax withholding: (i) formula tables for percentage method withholding for automated payroll systems; (ii) wage bracket percentage method tables for automated payroll systems; (iii) combined income tax, employee Social Security tax, and employee Medicare tax withholding tables; and (iv) tables for withholding on distributions of Indian gaming profits to tribal members. The more common withholding methods are in IRS Publication 15.

For the combined income tax, employee Social Security tax, and employee Medicare tax withholding tables, the IRS is using a 4.2% employee Social Security tax rate. This tax rate is only currently scheduled to be in effect through Feb. 29, 2012. Congress is considering legislation that will keep the 4.2% rate in effect through Dec. 31, 2012. If Congress does not enact legislation, the employee Social Security tax rate will increase to 6.2% on March 1, 2012.

🔍 observation: The IRS has issued a table to compute employee Social Security tax at the 4.2% rate (Table 3). The table will soon be added to IRS Pub No. 926, *Household Employer's Tax Guide For Wages Paid in 2012*. The table does not take into account the \$110,100 Social Security taxable wage base limit.

IRS Encouraging Information Return Filers Needing More Time to File Their Extension Requests Electronically

The IRS has revised the following publications to encourage information return filers seeking more time

to file their returns to file their extension requests electronically: (1) IRS Pub No. 1220, *Specifications for Filing Forms 1097, 1098, 1099, 3921, 3922, 5498, and W-2G Electronically*; (2) IRS Pub No. 1187, *Specification for Filing Form 1042-S, Foreign Person's U.S. Source Income Subject to Withholding, Electronically*; and (3) IRS Pub No. 1239, *Specifications for Filing Form 8027, Employer's Annual Information Return of Tip Income and Allocated Tips, Electronically* [Ann 2012-6, 2016-6 IRB 366].

The deadline for filing 1099 forms on paper is February 28 (not February 29). The deadline for filing 1099 forms electronically is April 2.

The deadline for filing Forms 8027 on paper is February 29. The deadline for filing Forms 8027 electronically is April 2.

The deadline for filing Forms 1042-S on either paper or electronically is March 15.

Taxpayers may request two separate 30-day extensions of the above deadlines on Form 8809, *Application for Extension of Time to File Information Returns*. Form 8809 may also be used to request an extension of the W-2 filing deadlines (February 29 on paper, April 2 electronically).

Form 8809 may be filed online by completing a filled-in version of the form on the Filing Information Returns Electronically (FIRE) system website. It can also be completed electronically on the FIRE system in a file formatted according to the specifications in IRS Pub No. 1220, Part D. In addition, the form may be filed on paper with the IRS at the following address: Internal Revenue Service, Information Returns Branch, Attn: Extension of Time Coordinator, 240 Murall Drive, Mail Stop 4360, Kearneysville, WV 25430.

Ann 2012-6, 2016-6 IRB 366, notes that Form 8809 may now only be filed on paper if the request is for one filer. Previously, the form could be filed on paper by payers/transmitters requesting extensions of time to file information returns for 10 or fewer payers. Requests for more than one payer must be filed through the FIRE system, using the filled-in version of the form option. Taxpayers may use this option even if they do not have a transmitter control code (TCC).

The announcement also emphasizes the importance of including "Attn: Extension of Time Coordinator," in the mailing address for Forms 8809 that are submitted on paper to the IRS.

Extension requests must be postmarked, transmitted, or completed online by the due date of the returns, or the request will be denied.

IRS Revises Form to Request Waiver from Filing Information Returns Electronically

The IRS has issued a January 2012 version of Form 8508, *Request for Waiver from Filing Information Returns Electronically*.

Form 8508 is used by taxpayers to request a waiver from filing various information returns electronically for the current tax year (e.g., Forms W-2, 1042-S, 1099 series, 3921, 3922, and 8027). The IRS evaluates the request and notifies the taxpayer whether the request is approved or denied.

Taxpayers who have previously requested a waiver from the electronic filing requirements for an information return will only be granted another waiver if the request is because of undue hardship or a catastrophic event. Reg § 301.6011-2(c)(2) states that “the principal factor in determining hardship will be the amount, if any, by which the cost of filing the information returns exceeds the cost of filing the returns on other media.” Taxpayers must attach two cost estimates from two service bureaus or other third parties to the waiver request. Estimates must reflect either the total amount that each service bureau will charge for: (1) software, software upgrades, or programming of the taxpayer’s current system, or (2) producing an electronic file. Failure to provide two cost estimates will result in an automatic denial of the waiver request. If the request is not related to undue hardship, taxpayers must attach a detailed explanation for the reason why they are requesting a waiver.

Taxpayers who previously received a waiver for an original return do not have to submit another waiver request if they are only making corrections to the original return. A waiver is required if the original return was submitted electronically, but the taxpayer does not want to submit the corrections electronically.

The penalty for failing to file electronically when required to do so is \$100 per return, unless there was reasonable cause for not filing electronically.

Form 8508 should be filed at least 45 days before the due date of the return.

New Legislation Would Retroactively Increase the Tax-Free Exclusion for Mass Transit/Vanpool Expenses

Legislation included in H.R. 1, *The American Recovery and Reinvestment Act of 2009*, made the tax-free exclusion for the combined value of employer-provided transit passes and transportation in a commuter highway vehicle (transit pass exclusion)

equal to the tax-free exclusion for qualified parking expenses from March 2009 to December 2011. The legislation is no longer in effect. For 2012, an employee may exclude up to \$240 a month for qualified parking expenses (up from \$230 a month in 2010 and 2011), and up to \$125 a month for the combined value of transit passes and transportation in a commuter highway vehicle (down from \$230 a month in 2011).

On February 7, the Senate Finance Committee approved the Chairman’s Mark, as modified to the Highway Investment, Job Creation and Economic Growth Act of 2012. Senate Finance Chairman Max Baucus’s (D-MT) modified Chairman’s Mark would, among other changes, make the transit pass exclusion equal to the exclusion for qualified parking expenses for the entire 2012 tax year (i.e., the transit pass exclusion would be retroactively increased for one year from \$125 a month to \$240 a month, effective Jan. 1, 2012).

The Senate is expected to consider this legislation soon.

IRS Provides Unemployment Tax Guidance for Employers in Credit Reduction States

The IRS has posted a list of frequently asked questions (FAQs) on its website on Form 940, *Employer’s Annual Federal Unemployment (FUTA) Tax Return*, and Schedule A (Form 940), *Multi-State Employer and Credit Reduction Information*.

Background. Employers must fill out Schedule A if they were required to pay their state unemployment tax in more than one state, or if they paid wages in any state that is subject to “credit reduction.”

Credit reduction states. Under Title XII of the Social Security Act, states with financial difficulties can borrow funds from the federal government to pay unemployment benefits. If a state defaults on its repayment of the loan, the amount of state unemployment tax credits that employers in the state may claim on Form 940 is reduced (i.e., the state is a “credit reduction” state). Employers in credit reduction states pay federal unemployment tax (FUTA) at a 0.3% rate higher than other employers, beginning with the second consecutive January 1 in which the loan isn’t repaid.

On Form 940, Part I, line 1a, employers who only pay state unemployment tax to one state must enter that state’s two-letter abbreviation. On Part I, line 2, employers must indicate whether they paid wages to a state that is subject to credit reduction. They must complete Schedule A if they paid wages to a credit reduction state.

Federal/state taxable wage differences. In some states, employers may elect to exclude wages earned by corporate officers from state unemployment tax, even though the wages are subject to FUTA.

The Q&As. There are three new Q&As, one of which has two parts.

Question 1. An employer pays wages in a state which is designated a credit reduction state. Some, but not all, of the employees' wages are exempt from state unemployment insurance (SUI) tax. None of the employees' wages are exempt from FUTA tax. Should the exempt SUI wages be included on Form 940?

IRS answer to Question 1. The exempt SUI wages may or may not be included on Form 940, depending on the outcome from the worksheet for line 10 included in the instructions for Form 940. Line 10 of Form 940 provides in part that, "If some of the taxable FUTA wages you paid were excluded from state unemployment tax . . . , complete the worksheet in the instructions." The amount from line 7 of the worksheet is entered on line 10 of Form 940. Also see question 2 below regarding credit reduction and wages exempt from SUI tax.

Question 2. What should be included on Schedule A (Form 940) if an employer paid \$5,000 in FUTA wages, and \$1,000 of those wages is exempt from state unemployment insurance (SUI) tax?

IRS answer to Question 2. A total of \$5,000 would be included on Schedule A (Form 940). The instructions for Schedule A (Form 940) provide that the total FUTA taxable wages you paid in that state should be used.

Question 3a. An employer paid wages in a credit reduction state; however, all of the wages paid were exempt from FUTA tax and state unemployment insurance (SUI) tax. In this situation, is the taxpayer required to list the state on line 1a of Form 940? Or can line 1a be left blank?

IRS answer to Question 3a. Line 1a of Form 940 only requires that the information be entered, "If you had to pay state unemployment tax in one state only." So if the employer "paid" the state unemployment tax, but later found out it was exempt from tax in that state, the information on line 1a is required. If the employer never paid the state unemployment tax, line 1a should be left blank.

Question 3b. If a state must be listed on line 1a of Form 940, is Schedule A (Form 940) required to be filed?

IRS answer to Question 3b. If a state is listed in line 1a of Form 940, and additionally the state is a credit reduction state so that line 2 is filled out, then Schedule A (Form 940) will need to be filed. If a state is listed on line 1a of Form 940 and it is not a credit reduction state, Schedule A (Form 940) does not need to be filed.

The deadline for filing 2011 Form 940 was January 31. However, employers had until February 10 to file their returns if all taxes had been timely deposited.

IRS Issues Guidance to Its Employees on Processing Employment Tax Refund and Abatement Claims

The IRS has issued an internal memorandum to its employment tax territory managers, group managers, and specialists about changes to its procedures for establishing, working, and closing employment tax refund and abatement claims after a tax examination [IRS SBSE Memorandum SBSE-04-0112-018, 1/31/12].

Employment tax abatement claims. The memorandum notes that after employment taxes have been assessed in a tax examination, the taxpayer will generally be required to pay the assessment and file a claim for refund before the IRS will consider any taxpayer request to abate the taxes. However, the IRS will consider a claim for abatement of the assessment (audit reconsideration) on its merits if a jeopardy assessment is involved. The IRS makes a jeopardy assessment when it believes that collection of a proposed deficiency will be endangered if it follows its regular procedures. The IRS will also consider a claim for abatement of the assessment if the taxpayer establishes a meritorious reason for considering the claim, such as a failure to receive a preliminary (30-day) letter from the IRS. Notice 2002-5, 2002-1 CB 320, generally requires a taxpayer to receive a "30-day" letter from the IRS that lists the proposed employment tax adjustments before the IRS makes an actual assessment.

If a taxpayer's audit reconsideration request warrants consideration on its merits, the request will be given due consideration by the IRS Appeals Office. If a taxpayer files a claim for abatement of the assessment and there has been no previous examination action, the claim will still be considered by the IRS examiner, but not by the IRS Appeals Office.

The IRS will be revising the following sections of the Internal Revenue Manual (IRM) to take into account the internal memorandum:

(1) IRM 4.23.13.1-*Overview: Centralized Classification of Employment Tax Adjusted Returns and Claims for Refund or Abatement*. This section provides guidelines to IRS examiners on handling employment tax refund or abatement requests.

(2) IRM 4.23.13.2-*Employment Tax Abatement Claims*. See discussion above.

(3) IRM 4.23.13.5-*Employment Tax Adjusted Returns or Tax Claims Allowed on Survey*. Adjusted returns or claims for refund or abatement that do not meet audit reconsideration requirements may be “surveyed after assignment” if the examiner concludes after a review of the case file that the claim is clearly allowable in full and that the case does not otherwise warrant examination.

(4) IRM 4.23.13.6-*Examination and Disposition of Employment Tax Adjusted Returns or Tax Claims on their Merits*. This section of the IRM includes the forms that IRS examiners should prepare after reviewing adjusted returns or refund claims.

Taxpayer May Not Protest IRS Assessment in Second Administrative Hearing

The U.S. Tax Court has ruled that a taxpayer could not contest a “responsible person” penalty in a collection due process (CDP) hearing because he had failed to protest the penalty in a previous hearing [*William B. Perrin v. Commissioner*, T.C. Memo 2012-22, 1/19/12].

The facts. William Perrin served as an in-house accountant and office manager for the Watson Law Firm. Charles Watson was the sole owner of the firm. Per Watson’s instructions, Perrin signed checks and paid the law firm’s other creditors while the law firm’s employment taxes for those periods remained unpaid. Perrin followed Watson’s instructions in order to preserve his job. During this period, Watson enjoyed an expensive lifestyle. He was subsequently imprisoned, involved in bankruptcy proceedings, and subject to state bar disciplinary proceedings. The employment taxes remained unpaid.

On Feb. 27, 2007, the IRS notified Perrin that it was proposing to assess a “responsible person” penalty against him. This penalty is imposed under Code Sec. 6672 against a person who: (1) is responsible for collecting, accounting for, and paying over payroll taxes; and (2) willfully fails to perform this responsibility.

Perrin, through his representative David Allie, submitted a written protest of the assessment to the IRS, and, after a conference with Allie, the IRS Appeals

Office determined that Perrin was a responsible person. Shortly thereafter, the IRS sent Perrin a “Final Notice - Notice of Intent to Levy and Notice of Your Right to a Hearing.” Perrin, through Allie, returned the form and indicated that he was unable to pay the amount due, but would like to discuss an offer in compromise or an installment payment plan. Allie did not challenge the existence or the amounts of the underlying tax liabilities.

A great deal of correspondence then passed between IRS representatives and Allie, trying to arrange a satisfactory payment arrangement for Perrin utilizing national and local standards for living expenses. Perrin ultimately did not enter into a partial payment plan. On June 17, 2010, the IRS issued Perrin a notice of determination for the amount that was in the original proposed assessment.

Perrin now argues that he was not a responsible person subject to Code Sec. 6672 penalties for failure to pay the law firm’s employment taxes, and that it was unfair to require him to pay taxes that should have been paid by Charles Watson.

The law. Code Sec. 6330(c)(2)(B) allows a person to challenge the existence or amount of an underlying tax liability if the person did not receive any statutory notice of deficiency for such tax liability “or did not otherwise have an opportunity to dispute such tax liability.”

The ruling. The Tax Court said that Perrin could no longer protest the assessment because he had an opportunity to contest the underlying liabilities at a previous hearing, and, therefore, was precluded from doing so in the current proceeding. Prior case law also supported this conclusion. The Tax Court did say that Perrin could continue to negotiate a payment plan with IRS collection officers.

IRS Revises Nonresident Alien Tax Publication

There is now a 2012 version of IRS Publication 515, *Withholding of Tax on Nonresident Aliens and Foreign Entities*, on the IRS website. The publication may be helpful to withholding agents who pay income to foreign persons, including nonresident aliens, foreign corporations, foreign partnerships, foreign trusts, foreign estates, foreign governments, and international organizations. Publication 515 includes information on the persons responsible for withholding, the type of income subject to withholding, and the information return and tax return filing obligations of withholding agents.

Generally, a foreign person is subject to U.S. tax on his or her U.S. source income. Most types of U.S. source income received by a foreign person are subject to tax at a 30% rate, but a reduced rate or exemption may apply if there is a tax treaty between the foreign person's country of residence and the United States. The tax, if any, is generally withheld from the payment made to the foreign person.

A withholding agent is a U.S. or foreign person who has control, receipt, custody, disposal, or payment responsibility for any item of income of a foreign person that is subject to withholding. A person may be considered a withholding agent even if there is no requirement to withhold from a payment, or even if another person has withheld the required amount from the payment. A withholding agent is personally liable for any tax required to be withheld. This liability is independent of the tax liability of the foreign person to whom the payment is made. The applicable tax will be collected only once. If the foreign person satisfies his or her U.S. tax liability, the withholding agent will not be liable for the tax, but will remain liable for any interest and penalties for failure to withhold.

There are three tables in IRS Publication 515. Table 1 contains withholding tax rates on income other than personal service income. Table 2 is a country-by-country listing of personal service income performed in the U.S. that is exempt from withholding and federal income tax under an income tax treaty. Table 3 is a listing of tax treaties in effect through Dec. 31, 2011.

What's new. Table 1 has been revised. Columns have been deleted or renamed, and footnotes have been added, deleted, or revised for clarity. There are also new income codes in Table 2 for payments to an artist or athlete that are exempt from U.S. withholding under a tax treaty. Use income code 42 for payments to an artist or athlete who has not signed a central withholding agreement. Use income code 43 for payments to an artist or athlete who has signed a central withholding agreement.

The IRS also notes that Form 8809, *Application for Extension of Time To File Information Returns*, must now be filed electronically if the request is for more than one payer.

IRS Updates ITIN Application Form

The IRS has issued a January 2012 version of Form W-7, *Application for IRS Individual Taxpayer Identification Number*, and its instructions.

ITIN. An individual taxpayer identification number (ITIN) is a nine-digit number issued by the IRS to individuals who are required for U.S. tax purposes to have a U.S. taxpayer identification number but who do not have, and are not eligible to obtain, a Social Security Number (SSN). Individuals must check a box on Form W-7 to indicate the reason why they are filing the form. Box a on the form must be checked by nonresident aliens (NRA) who are not eligible to obtain a SSN, but who are required to obtain an ITIN to get the benefit of reduced withholding under an income tax treaty.

Electronic filing. The Form W-7 instructions note that individuals may not file tax returns electronically using an ITIN in the calendar year that the ITIN was issued. Tax returns can be filed electronically with ITINs beginning in the following year. For example, if an ITIN was received in 2011, an individual cannot electronically file any return using that ITIN (including prior year returns) until 2012.

Social Security Administration to Resume Sending Out Annual Earnings Statements

The Social Security Administration (SSA) has informed the U.S. Senate Select Committee on Aging that it will resume mailing earnings and benefits statements to some workers this month, and that it plans to make the information available to all workers by the end of fiscal year 2012 (Oct. 1, 2011 to Sept. 30, 2012) [U.S. Senate Select Committee on Aging, Press Release, 1/24/12; SSA Letter to Senate Select Committee, 1/20/12].

Background. The earnings and benefits statements (the statements) show how much workers have paid into the Social Security system and how much they are scheduled to receive in retirement benefits. In March 2011, the SSA announced that it was no longer mailing out the statements to workers. The SSA said that the decision was made "in light of the current budget situation." The U.S. Senate Select Committee on Aging (the Committee) told the SSA that it was disappointed with the SSA's decision to stop sending out the statements.

SSA plans for sending out the statements again. The SSA will resume mailing paper statements to workers 60 and over, who are not already receiving Social Security benefits, this month. In months to come, the SSA will introduce an online statement service as an alternative to the paper statements. Workers 60 and over may opt to sign up for the online

service in lieu of receiving the annual paper statements.

Later in fiscal year 2012, the SSA plans to resume a first-time mailing to workers who are age 25. This one-time statement will include: (1) a welcome message with information about the Social Security program; (2) where to go for further information; (3) what services the SSA offers; and (4) what business can be conducted online, including signing up for access to online statements.

Individuals who cannot access their information through online channels, including victims of domestic violence or identity theft who have blocked electronic access to SSA services, will be able to request a paper statement. In addition, Spanish-language versions of the statement will be available on request.

Certain workers may estimate their retirement benefits using the "Retirement Estimator" on the SSA website. Workers may use the "Retirement Estimator" if they have enough Social Security credits to qualify for retirement benefits and are not: (a) currently receiving Social Security benefits on their own Social Security record; (b) age 62 or older and receiving benefits on another Social Security record; or (c) eligible for a pension based on work not covered by Social Security.

"Real-Time" Tax System Could Mean Less Time to Gather Payroll Tax Information

IRS Commissioner Doug Shulman has outlined a plan that would move the agency away from the traditional "look back" model of compliance, and instead perform substantially more "real time," or up-front matching of tax returns when they are first filed with the IRS. The payroll tax community has made suggestions for helping the IRS to reach its objective, some of which would shorten the time that payroll tax professionals currently have to gather and report the information [IR 2012-10, 01/18/2012].

IRS initiative. The goal of the IRS initiative, called the "Real-Time Tax System" (RTTS), is to improve the tax filing process by reducing the burden for taxpayers and thereby increasing overall compliance. Commissioner Shulman explained how the RTTS would work at the National Press Club in April 2011 (see IR 2011-38, 04/06/2011). The IRS would get all information returns from third parties (W-2s, 1099s, etc.) before individual taxpayers filed their income tax returns. Taxpayers or their professional return preparers could then access that information via the Web, and download it into their returns, using com-

mercial tax software. Taxpayers would then add any self-reported and supplemental information to their returns, and file the returns with the IRS. The IRS would embed this core third-party information into its pre-screening filters, and would immediately reject any return that did not match up with its records. The RTTS would thus allow the IRS to reject an income tax return and ask a taxpayer to fix it before the IRS even processed the return. Shulman believes that more accurate returns would be filed using the RTTS, and the IRS would be able to deal with many more problems up-front. The IRS would be able to shift resources to spend more money getting tax returns correct in the first place, and would do less back-end auditing.

Feedback from the payroll tax community. The IRS is hosting a series of public meetings on the RTTS. The last meeting was held on January 25. At the meeting, several members of the payroll tax community, including the National Payroll Reporting Consortium (NPRC), expressed some concerns about the RTTS. The NPRC noted the large burden already placed on payroll tax professionals. In addition to cash wages, employers are responsible for gathering and reporting as many as 50 distinct elements of compensation, such as health and welfare benefits, equity compensation, and various non-cash fringe benefits, many of which are administered by third parties, and/or which may not be determinable for several days or weeks after December 31. The NPRC also noted that, as tax laws have evolved, Form W-2 has also become the most complex information return, with 10 fields for indicative data (names, addresses, EINs, SSN, and state and local information); three check-boxes; and 15 monetary fields, with two monetary fields that are variably used. One of these is Box 12, in which more than 26 defined monetary amounts are reported, along with an alpha code to identify the amount being reported. The other is Box 14 ("Other"), in which more than a dozen tax, insurance, and various other state and locally-defined deductions are reported, in addition to optional use by the employer. Each data element represents a distinct determination and record-keeping responsibility for the employer, and virtually all are subject to extensive regulations.

The NPRC made several suggestions for accelerating the receipt of tax information by payroll tax professionals to meet the goals of the Real-Time Tax System.

Earlier annual reporting deadlines. The NPRC said that this is the most obvious solution. Employers have long been required to furnish W-2 forms to employees

by January 31. The current March 31 deadline for electronically filing W-2 forms with the IRS was established largely to provide an incentive and benefit for filing electronically. The NPRC notes that the information is available in final form by the end of January. Six states and the District of Columbia already require employers to provide them with W-2 information by January 31.

Preliminary and final/corrected submissions. To the extent that preliminary reports would be helpful in solving some of the challenges faced by the IRS, particularly in the area of refund fraud, the NPRC believes that consideration should be given to a W-2 system that accepts preliminary and final submissions. Since cash wages and withholding are generally known by the last day of the year, initial reports could be submitted much earlier, followed by subsequent revisions which would replace earlier versions.

Expand special rule on recognition of certain non-cash fringe benefits. The NPRC feels that it may be helpful to expand the special rule which permits employers to report certain in-kind fringe benefits provided during the last two months of a calendar year as paid during the subsequent calendar year, e.g., the taxable value of an employer-provided vehicle. Allowing employers to establish an earlier input cutoff may enable earlier finalization of W-2 forms, particularly if there are fringe benefits with complex valuation rules that are dependent on data sources outside the control of the employer.

More frequent (i.e., quarterly) W-2 reporting. More frequent W-2 reporting has been identified as a federal administration budget proposal for several years. The IRS may find substantial help from the states, some of which have already shifted from annual W-2 reporting to quarterly reporting, with a number of variations, such as requiring quarterly reporting instead of, or in addition to, annual W-2s.

Report to the IRS directly. Increasingly in recent years, large employers are being contacted by specialized units within the IRS to request electronic W-2 data long before it is due to be filed with the Social Security Administration (SSA). This information is requested on a voluntary basis in order to enable the IRS to validate claims of earnings and withholding during the tax season; i.e., to identify potential fraudulent W-2s and prevent refund fraud. The IRS generally accepts such information in any form the employer is able to provide; typically, a copy of the W-2 file prepared for submission to the SSA is accepted. In practice, the IRS has found the earlier availability of W-2 data from employers to be quite valuable.

Expand electronic filing of information returns. The threshold for electronic filing of federal W-2 forms (i.e., 250 or more forms) has remained unchanged for 30 years, despite some dramatic improvements in technology [Internal Revenue Service Public Hearing, *Proposed Real-Time Tax System*, Comments from the National Payroll Reporting Consortium, 1/25/12].

IRS Issues Form for Tax-Exempt Employers Claiming Work Opportunity Credit

The IRS has issued a new form for tax-exempt employers claiming the work opportunity credit for hiring “qualified veterans” [IR 2012-17, 02/09/2012; Notice 2012-13, 2012-9 IRB].

Background. On November 16, Congress passed H.R. 674, the “3% Withholding Repeal and Job Creation Act” (the Act). The Act included a provision that allows tax-exempt employers to receive a payroll tax credit for hiring “qualified veterans” who begin work for the employer *after Nov. 21, 2011 and before Jan. 1, 2013*. A tax-exempt employer is an employer described in Code Sec. 501(c) that is exempt from tax under Code Sec. 501(a). A “qualified veteran” is a veteran who is certified by the designated local agency as falling within one of the four categories in Code Sec. 51(d)(3)(A).

The credit is claimed against the employer portion of the OASDI (Social Security) tax on the veteran’s wages. The credit does not apply to the employer portion of the Medicare tax. The IRS had previously advised tax-exempt employers eligible to receive the credit on their fourth quarter 2011 Form 941, due on Jan. 31, 2012, that they should file the form as they normally would and the IRS would provide guidance on how to claim the credit at a later date (see Payroll Guide Newsletter at ¶ 2.12). The IRS has now provided such guidance.

New form. Tax-exempt employers claim the credit on new Form 5884-C, *Work Opportunity Credit for Qualified Tax-Exempt Organizations Hiring Qualified Veterans*. An employer files Form 5884-C after it files its employment tax return (e.g., Form 941, Form 943, or Form 944) for the employment tax period for which it is claiming the credit.

Credit will be refunded. Form 5884-C is filed separately from any other returns. The credit claimed on Form 5884-C will not affect the tax liability reported on the taxpayer’s employment tax returns. Accordingly, an employer should not reduce its required deposits in anticipation of any credit. Instead, the IRS will refund the amount shown on line 11 of Form 5884-C, plus

any interest that applies, unless the IRS corrects Form 5884-C during processing, or the employer owes other taxes, penalties, or interest.

The amount claimed on Form 5884-C is treated as a credit on the first day of the taxpayer's employment tax return period. However, because Form 5884-C will generally not be processed with the taxpayer's employment tax return, an employer that reduces its required deposits in anticipation of a Form 5884-C credit may receive a system-generated IRS notice reflecting a balance due and associated penalties and interest, if applicable. The balance due, including any related penalties and interest, resulting from the reduction in deposits to reflect the Form 5884-C credit will be abated by the IRS when the credit is applied. The abatement will generally occur without any action required by the employer.

Due date. Employers should file Form 5884-C after they have filed their employment tax return for the employment tax period for which they are claiming the credit. It will take the IRS 8-12 weeks to process Form 5884-C. The form should be filed for each employment tax period during which the employer paid qualified first-year wages to a qualified veteran. An employer should not generally file more than one Form 5884-C per employment tax period.

Where to file. Form 5884-C should be mailed to: Department of the Treasury, Internal Revenue Service, Ogden, UT 84201.

Stateline

New laws and developments are reported from the following states:

ARKANSAS

Withholding. The Arkansas Department of Finance and Administration (DFA) no longer accepts W-2 information on magnetic round tapes, cartridges, or floppy discs. W-2 forms may be submitted to the DFA electronically, on CDs, or on DVDs. The filing deadline is *Feb. 28, 2012* [DFA notice, *2011 Specifications for Filing Forms W-2/1099 Electronically*, as revised on 1-19-12].

CALIFORNIA

Wage and Hour. The Court of Appeal has affirmed a trial court ruling that recruiters, whose primary function was to locate candidates to fill job orders placed with their employer by client companies, were not eligible for overtime under the commissioned employees exemption. The court rejected the recruiters' arguments that: (1) they were not primarily engaged in sales; (2) their commissions were not based on price; and (3) the company's compensation system was not a bona fide com-

mission system [*Muldrow v. Surrex Solutions Corp.*, Cal. Ct. App., 4th Dist., Dkt. Nos. D057955 & D058958, 1/24/12].

Withholding. The Franchise Tax Board (FTB) has created the *Small Business Withholding Tool* to help payers determine when withholding is required on payments of California source income to a California nonresident [Form FTB 1018, *Small Business Withholding Tool*; California FTB Informational Publication 1018, 01/01/2012].

Worker Classification. The U.S. Department of Labor (DOL) and the California Department of Industrial Relations have signed an agreement that is designed to reduce the misclassification of employees as independent contractors. California Governor Brown recently signed legislation that increased the penalties for willful misclassification of workers. Colorado, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Missouri, Montana, Utah and Washington have signed similar agreements with the DOL [DOL News Release, 2/9/12].

COLORADO

Unemployment. *Beginning with fourth quarter 2011 returns and payments*, quarterly reports and unemployment tax payments sent by mail are considered timely based on the postmark date. The Colorado Department of Labor and Employment (DL&E) previously used the date of receipt to determine the timeliness of reports [DL&E January 2012 Flyer, *Important Information About Unemployment Insurance Premiums*].

Withholding. The Colorado Department of Revenue (DOR) has updated its guidance on tax account maintenance, including licensing information, monthly remittals (or quarterly remittals where permitted), and notifications of changes and closures of accounts for those taxes with annual filings [Colorado FYI Tax Publication General 22, 01/01/2012].

FLORIDA

Unemployment. The Florida Department of Revenue (DOR) is issuing assessment notices to employers (Form UCT-27Fi) for the interest due on the State's outstanding federal loans. The 2012 assessment rate is 0.092% on taxable wages for the period from July 1, 2010 to June 30, 2011. Employers will pay an additional \$6.44 per employee on each employee who earned wages up to the taxable wage base of \$7,000 in this time period (i.e., \$7,000 × .00092). The taxable wage base has since increased to \$8,500. The assessment must be paid by *June 30*. It may be paid using the DOR's online bill payment system. The DOR is encouraging employers to make a separate payment for the assessment, using the coupon located at the bottom of Form

UCT-27Fi, rather than paying it with their quarterly unemployment tax return. This will ensure that the payment is deposited into the correct fund [DOR notice, *Interest Payment on Federal Funds Borrowed To Pay Unemployment Claims*, 1/24/12].

Payments made by an employer on behalf of an employee for accident or health insurance are not considered taxable wages for unemployment tax purposes. This includes amounts paid by an employer for accident or health insurance on behalf of a more than 2% S corporation shareholder/employee [Fla. Stat. § 443.1217(2)(b); e-mail from Florida Department of Revenue on 1-30-12].

GEORGIA

Garnishment. New legislation allows authorized officers and employees of a business to respond to a writ of garnishment without the business having to hire legal counsel. In September 2011, the Georgia Supreme Court had adopted UPL Advisory Opinion No. 2010-1, which said that a nonlawyer (e.g., a clerical employee of a corporation) who responded to a garnishment order issued by a Georgia court for a garnishee that was not himself was engaging in the unlicensed practice of law. The new legislation was issued in response to the Advisory Opinion [L. 2012, H683].

HAWAII

Unemployment. The Hawaii House Committee on Labor and Public Employment has recommended that proposed legislation be enacted that would keep Rate Schedule F in effect for the 2012 calendar year. Rates for experienced employers would range from 1.2% to 5.4%. Rate Schedule H (the highest tax rate schedule) is currently scheduled to be in effect in 2012. Unemployment tax rates under Schedule H range from 2.4% to 5.4% [L. 2012, HB2096].

MAINE

Withholding. *Beginning with first quarter 2012 returns*, all taxpayers who withhold Maine income tax, and all preparers who file returns on behalf of their clients on Forms 941ME, 941P-ME, 941/C1-ME, and W-3ME, must file the returns electronically unless they obtain a waiver from the electronic filing requirements. Prior to 2012, the electronic filing rule only applied if there was five or more employees, payees, or members of a pass-through entity, or if a preparer filed five or more returns on behalf of his or her clients [Maine Tax Alert 2, 02/01/2012, 22].

MARYLAND

Withholding. A nonresident spouse of a service member exempt from Maryland withholding under the federal Military Spouses Residency Relief Act (MSRRA) was required to submit new Form MW507M, *Exemption*

from Maryland Withholding Tax for a Qualified Civilian Spouse of a U.S. Armed Forces Servicemember, effective beginning with the 2011 tax year. Taxpayers subject to the MSRRA who have already filed Form MW507 for 2011 should contact their employer to obtain and complete Form MW507M. Form MW507M will be effective retroactive to the date that Form MW507 was filed [Maryland Administrative Release 1, 09/01/2011].

MICHIGAN

Unemployment. Michigan recently issued bonds to repay its outstanding federal unemployment insurance loans. The bonds will be repaid through an obligation assessment (OA) on each contributing employer. The 2012 OA rate is 0.08% (\$42 per employee). The OA will not be billed to employers. Instead, the OA rate will be included as part of the employer's annual unemployment tax rate determination on Form UIA 1771 [Michigan Unemployment Insurance Agency (UIA) website, *New Legislative Update*; UIA website, *Computation of the Unemployment Obligation Assessment Rate*].

The State Information Data Exchange System (SIDES) allows participating employers and third party administrators to submit employee separation information electronically. SIDES is a secure electronic exchange that provides a single point of contact between the Michigan Unemployment Insurance Agency (UIA) and participating employers and third party administrators [UIA Notice to Employers about SIDES, December 2011].

NEW MEXICO

Wage and Hour. The City of Santa Fe living wage rate will increase from \$9.85 per hour to \$10.29 per hour on *March 1, 2012* [City of Santa Fe website, City News Desk Release, *City of Santa Fe Living Wage to be \$10.29 Per Hour*; Effective March 1, 2012, 1/20/12].

NEW YORK

Withholding. The New York State Department of Taxation and Finance (DTF) has issued a 2012 version of Form IT-2104, *Employee's Withholding Allowance Certificate*. Revisions have been made to the worksheet, charts, and additional dollar amounts in the form instructions used to compute withholding allowances, or to request an additional dollar amount to withhold, as a result of recent legislation that revised personal income tax rates for most taxpayers, beginning in 2012. The DTF is advising employees who previously filed a Form IT-2104, and used the worksheet, charts, or the additional dollar amounts, to complete a new 2012 Form IT-2104 and give it to their employer [DTF e-mail, *Withholding Tax - Form IT-2104 (2012)*, *Employee's Withholding Allowance Certificate*, 2/6/12].

OHIO

Withholding. The City of Akron will be conducting a tax amnesty program for businesses that have failed to report and pay withholding taxes. The program covers *tax years prior to 2011*. It will run from *March 5, 2012 through May 4, 2012*. Businesses that voluntarily come forward and pay the taxes and interest due will not be assessed any penalties. Under certain circumstances, taxpayers will be able to enter into an installment payment plan [City of Akron News Release, 1/31/12; City of Akron Income Tax Amnesty FAQs, 1/31/12].

OREGON

Employer Taxes. The Oregon Department of Revenue has amended Oregon Administrative Rule § 150-267.380(2), effective Jan. 1, 2012, to remove an incorrect statement that tip income should not be treated as wages for transit payroll tax purposes [Oregon Administrative Rule § 150-267.380(2), as amended in the 2/12 Oregon Bulletin, page 291].

Withholding. “iWire Direct” is a new electronic W-2 filing system that will allow small businesses to manually enter their W-2 information on the Oregon Department of Revenue (DOR) website. iWire Direct is free and does not require new software. It will be available beginning in early March. If a small business uses iWire Direct, it may file its W-2 forms *by May 31, 2012*, without incurring a penalty. The electronic filing deadline is April 2, 2012 for other employers. The DOR is extending the deadline to May 31, 2012 for iWire Direct filers because the new system won’t be in place until close to the normal electronic filing deadline [DOR News Release, 2/3/12].

The electronic filing threshold for 1099 forms will decrease from 250 or more forms to 100 or more forms *beginning with 2012 forms due in 2013* [Oregon Administrative Rule § 150-314.360, as amended in the 2/1/12 Oregon Bulletin, page 293].

PENNSYLVANIA

Withholding. Act 32 created a new local earned income tax (EIT) collection system that went into effect on Jan. 1, 2012. Due to high call volume, the Pennsylvania Department of Community & Economic Development (DCED) is asking taxpayers to use its “Contact Us - Act 32” web form on the DCED website if they need assistance on Act 32. The web form asks a few questions to help the DCED provide timely feedback.

VERMONT

Withholding. The electronic filing deadline for 2011 W-2 and 1099 forms, and Form WH-434, *Annual Reconciliation of Withholding Tax Account*, is *Feb. 28, 2012*. In previous years, the electronic filing deadline was March 31st. Electronic filing is required for all taxpayers whose total combined number of W-2 and 1099 forms is greater than 25. W-2 and 1099 information files must be in the federal standard format [Vermont 2011 W-2 File Specifications].

WISCONSIN

Withholding. The Wisconsin Department of Revenue has issued a Jan. 1, 2012 version of its Withholding Tax Guide [Wisconsin Dept. Rev. Tax Publication W-166, 01/01/2012].



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