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Payroll Guide

Highlights

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Employment Tax Penalties Abated Even Though Not First-Time Offense The U.S. Tax Court has ruled that an employer had reasonable cause for failing to remit employment taxes on a timely basis.

Employer Can't Challenge IRS Closing Agreement that Had Incorrect EIN The U.S. Tax Court has ruled that an employer was not coerced into signing an IRS closing agreement, and that the closing agreement could still be enforced despite an incorrect EIN.

Revenue Officers Given 15 Days to Contact Employers Included in Federal Tax Deposit Alert Cases An employer included in a Federal Tax Deposit Alert will be more likely to be subject to a federal tax deposit penalty if not promptly contacted about the deposit problems by an IRS revenue officer.

Federal E-Verify Program Now Accepts Mississippi Driver's Licenses The U.S. Citizenship and Immigration Services recently announced that a Mississippi driver's license may be used as one of the documents that new hires give to their employer to verify their eligibility to work in the United States.

Did You Know? There are changes you can make to the "Home" screen on *Checkpoint* to find payroll documents more quickly.

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

Trust Fund Recovery Penalties May Be Assessed Against Third Parties Too

The IRS Small Business/Self-Employed (SB/SE) Division has issued an internal memorandum which says that the "trust fund recovery penalty" (TFRP) may be imposed against third-party payroll service providers, as well as the employer [IRS Memorandum SBSE-05-0711-044, *Issuing Interim Guidance for Trust Fund Recovery Penalty Investigations for Third-Party Payer Cases,* 7/1/11].

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

Common law employers. The new IRS memorandum applies to "common law employers." A "common law employer" is any person who has the status of employer under the usual common law rules applicable in determining the employer-employee relationship. Generally an employer-employee relationship exists when the person for whom the services are performed has the right to direct and control the worker who performs the services, not only as to the result to be accomplished by the work, but also as to the details and means by which that result is accomplished.

Third-party arrangements. Common law employers may designate a third party who is not the common law employer or a statutory employer under Code Sec. 3401(d)(1) to take over some or all of the employer's federal employment tax withholding, reporting, and payment responsibilities and obligations. A third party that could be subject to a TFRP includes: (a) a payroll service provider (PSP), or (b) a professional employer organization (PEO) or employee leasing company that is not the common law or statutory employer. The trust fund recovery penalty may be assessed against the payroll service provider, PEO, or responsible parties within the PSP or PEO.

A third-party payer is considered a responsible person under (1) above in Code Sec. 6672 if the person had significant control over the payment of its client's employment taxes. A third-party payer is considered to have willfully failed to perform the payroll tax responsibility (i.e., item (2) above) if failure to perform the responsibility was intentional, deliberate, voluntary, reckless, or knowing, as opposed to accidental. No evil intent or bad motive is required.

A common law employer that uses a third party to prepare its employment taxes can still be subject to the trust find recovery penalty if it meets conditions (1) and (2) above. Employees of the common law employer may also still be subject to the penalty.

Further information from the IRS. The IRS briefly discussed the memorandum during its July 14 payroll industry conference call. The IRS noted that it is still the employer that is ultimately responsible for the payment of any unpaid tax. However, the TFRP, depending on the circumstances, can be assessed against both the employer and the third-party payroll service provider, as there can be more than one responsible person. The total amount of the TFRP that the IRS assesses against all parties will not exceed the amount of the unpaid taxes.

IRS Hopes to Issue Draft of 2011 Form 940 in Near Future

Beginning July 1, the 0.2% federal unemployment tax (FUTA) surtax is no longer in effect. The surtax was part of the 6.2% gross unemployment tax rate that employers paid on the first $7,000 of wages paid annually to each employee (6% permanent tax rate, 0.2% temporary surtax). The FUTA tax rate, before consideration of state unemployment tax credits, is 6.0%, *effective with wages paid beginning July 1, 2011.* Most employers are allowed to claim 5.4% in state unemployment tax credits against the FUTA tax rate, making the net FUTA rate 0.6% beginning with wages paid on July 1.

The elimination of the surtax means that Form 940, *Employer's Annual Federal Unemployment (FUTA) Tax Return,* will need to be revised unless legislation is enacted to retroactively reinstate the surtax. On the July 14 payroll industry conference call, Sherry Saucerman, IRS Tax Analyst, said that the IRS hopes to have a draft version of 2011 Form 940 on the IRS website soon. In a previous payroll industry conference call, Anita Bartels, IRS Program Manager in Employment Tax Compliance Policy, said that the revision to Form 940 would probably be handled in a similar fashion to the way that Form 941 for the 2011 tax year was revised to reflect the reduction in the employee Social Security tax rate from 6.2% to 4.2%. That is, an additional line would be added to Form 940 to compute the tax on FUTA taxable wages earned from July 1 to December 31 that takes into account the elimination of the surtax. Another line on the form

would be used to compute the tax on FUTA taxable wages earned from January 1 to June 30.

2011 Form 940 must be filed in January 2012.

IRS Revises Form Used to Report Employment Tax Discrepancies After Acquisition, Merger, or Consolidation

There is now a June 2011 version of Form 941, Schedule D, *Report of Discrepancies Caused by Acquisitions, Statutory Mergers, or Consolidations,* and its instructions on the IRS website. The form was last revised in April 2010.

Employers file Schedule D to explain certain discrepancies caused by acquisitions, statutory mergers, and consolidations in the amount reported on Forms W-2 and 941 for Social Security wages, Medicare wages and tips, Social Security tips, federal income tax withheld, and advance earned income credit (AEIC) payments (for tax years ending before Jan. 1, 2011). Each party to the transaction must file its own Schedule D. The schedule does not need to be filed, even if there is an acquisition, statutory merger, or consolidation, if there aren't any of the discrepancies noted above between Forms W-2 and 941.

The new version of the form notes that the AEIC may not be claimed after the 2010 tax year. The form also has a new mailing address. The mailing address for Schedule D is now: IRS Philadelphia Campus, Mail Stop 4-G08 151, 2970 Market Street, Philadelphia, PA 19104. The IRS cautions filers that there is a different mailing address for Form 941. Schedule D may also be filed electronically with Form 941.

Deadline for filing Schedule D. The deadline for filing Schedule D depends on whether the business continues to operate after the statutory merger, acquisition, or consolidation. If the business continues to operate, the form should be filed no later than by the due date for the first quarter Form 941 after the calendar year of the transaction. If the business does not continue to operate, the form should be filed with the final Form 941. For example, if the transaction occurred in the third quarter of 2010, and the business is continuing to operate, an employer would have needed to file Schedule D no later than the deadline for filing Form 941 for the first quarter of 2011 (i.e., May 2, 2011). However, if the business did not continue to operate, an employer would have been required to file Schedule D no later than the deadline for filing Form 941 for the third quarter of 2010 (i.e., Nov. 1, 2010).

IRS Revises Information Reporting Penalty Publication

The IRS has posted a June 2011 version of Publication 1586, *Reasonable Cause Regulations and Requirements for Missing and Incorrect Name/TINs (including instructions for reading CD/DVDs and Magnetic Media),* on its website. The publication was last updated in September 2007.

The goals of the publication are:

(1) To provide the information necessary to avoid penalties for information return documents that are filed with missing or incorrect taxpayer identification numbers (TINs).

(2) To describe the actions that must be taken or should have been taken to solicit (request) a TIN.

(3) To explain how to establish "reasonable cause" for not providing required information.

Changes. The latest version of Publication 1586 includes the following changes:

- A new section has been added on the increase in information return penalties, *effective Jan. 1, 2011* (see Payroll Guide at ¶ 4294).
- The extension number to obtain the encryption key for transmitting information reporting documents has been changed to: (800) 455-7348, extension 3.
- The address where Form 10301, *CD/DVD Code Authorization for CP 2100/972CG Notices,* should be mailed is now: Internal Revenue Service, Enterprise Computer Center Martinsburg, Information Reporting Program, 230 Murall Drive, Mail Stop 4360, Kearneysville, WV 25430. The fax number for Form 10301 has been changed to: (877) 477-0572.
- A section on "Importing the CD/DVD to Access Information" has been added.

Reasonable cause. Publication 1586 notes that the penalty for filing information returns with missing TINs or incorrect name/TIN combinations may be waived by showing that the failure was due to reasonable cause and not to willful neglect. The information return filer must establish that he/she acted in a responsible manner before and after the failure occurred. In addition, the filer must prove that the failure was due to significant mitigating factors (for example, an established history of filing information returns with correct TINs), or to events beyond the filer's control (for example, a payee did not provide a correct name/TIN in response to a request for the corrected information).

Q&As. Publication 1586 also includes questions and answers on employer responsibilities with re-

spect to requesting a Social Security number for Form W-2.

Employers in Several States to Soon Pay Interest Surcharges

As of June 30, 2011, 29 states and the Virgin Islands have borrowed money from the federal government to help keep their unemployment insurance (UI) trust funds solvent. The loans total over $41 billion. The federal government will charge interest on these loans unless legislation is enacted that waives the interest charges. Many states are passing the interest charges on to employers. Some employers will be paying additional interest assessments in the next few months. Here is a summary of the assessments:

Alabama. All employers, except reimbursing employers, should soon be receiving a bill from the Alabama Department of Industrial Relations to help the State pay the interest due on its federal UI loans.

Arizona. Employers will pay a special assessment in 2011 and 2012 to help Arizona pay the interest on its federal unemployment insurance loans. The rate may not exceed 0.4% of taxable wages in 2011. The assessment for the first three quarters of 2011 will be paid with the third quarter unemployment tax return due on *Oct. 31, 2011.* The assessment for the fourth quarter of 2011 and all four quarters in 2012 will be paid with the unemployment tax return for that quarter [L. 2011, H2619].

Arkansas. Employers must pay a 0.2% advance interest tax, *beginning in the second quarter of 2011.* The tax is computed on taxable wages. It is paid with the quarterly unemployment tax report. (The second quarter return must be filed by *August 1*.) All employers, except reimbursing employers, must pay this assessment.

Colorado. Employers received (or should soon be receiving) a bill from the Colorado Department of Labor and Employment (DL&E) called "Unemployment Insurance Notice of Trust Fund Assessment" to help the State pay the interest due on its outstanding federal unemployment insurance loans. Employers must pay the assessment within 30 days of the billing date. The first payment will cover interest due to the federal government from January 2011 through April 2011 [DL&E website, *Federal Interest Repayment*].

Connecticut. The first annual special assessment will be mailed to employers on Aug. 1, 2011. The assessment must be paid by *Aug. 31, 2011.* The estimated average cost per employee is $35 [DOL Employer Information Notice, June 2011].

Hawaii. In the 2011 tax year, all employers, other than those selecting an alternative method of financing for unemployment benefits, must pay the employment and training fund assessment. The employment and training fund assessment rate is 0.02% of taxable wages in 2011. This rate includes a 0.01% surtax on employers to reimburse Hawaii for interest it must pay on federal loans to the State's unemployment trust fund [L. 2011, H1077].

Indiana. Experienced employers are paying a 13% surcharge in 2011 to help Indiana pay the interest on its federal unemployment insurance loans [Ind. Code § 22-4-10-4.5].

Michigan. Negative-balanced employers are required to pay a solvency tax (maximum rate of 0.75% for 2011) in 2011 to help Michigan pay the interest on its federal unemployment insurance loans [Michigan UIA Solvency Tax Fact Sheet #121, October 2010].

Minnesota. Employers, except reimbursing employers, are paying a 2% federal loan interest assessment in the 2011 tax year to help Minnesota pay the interest on its federal unemployment insurance loans.

Missouri. Employers will pay an additional assessment with their second quarter 2011 unemployment tax return to help Missouri pay the interest due on its federal unemployment insurance loans. The Missouri Department of Labor has told *RIA* that the amount due will be 0.0931895% of an employer's taxable wages for calendar year 2010. Employers will pay $12.11 (i.e., 0.0931895% × $13,000 = $12.11) on each employee who earned wages equal to or greater than the 2010 taxable wage base of $13,000.

New Jersey. The New Jersey Department of Labor (DOL) has mailed (or should soon be mailing) the "Federal Loan Interest Assessment" (FLINT) to employers. New Jersey employers (except governmental entities and nonprofit organizations) will be paying this assessment to help the State pay the interest on its outstanding federal unemployment insurance loans. Employers must pay the assessment by *Aug. 14, 2011.* The assessment will be equal to 2.786% of an employer's 2010 unemployment insurance contributions, or $5, whichever is higher [New Jersey DOL website, Employer Information, *Federal Loan Interest (FLINT) Assessment*].

New York. All employers (except reimbursing employers) must pay an additional assessment to help New York State pay the interest due on its federal loans. The assessment is computed on 0.25% of taxable wages from the fourth quarter of 2009 through

the third quarter of 2010. The payment is due on *Aug. 15, 2011.*

Pennsylvania. All employers (except reimbursing and new employers) must pay an additional assessment for interest due on federal loans. The interest factor tax is a variable rate, not to exceed 1%. The interest factor tax is 0.44% in the 2011 tax year.

Rhode Island. The job development assessment fee has been increased by 0.3% to help Rhode Island pay the interest on its federal unemployment insurance loans.

South Carolina. All employers, except reimbursing employers, must pay an interest surcharge in 2011 to help South Carolina pay the interest on its federal unemployment insurance loans.

Wisconsin. Employers recently received a letter from the Wisconsin Department of Workforce Development (DWD) that notified them of a "Special Assessment for Interest" that will be billed in early August 2011 and will be due in *September 2011.* The assessment will be approximately 0.2% of taxable payroll (0.15% for reimbursing employers). Employers will pay the assessment if their taxable payroll for calendar year 2010 was greater than $25,000 [DWD website, *Special Message to Employers: Information on Special Assessment for Interest*].

Failure to Pay Workers for Pre-Shift Work Activities Will Cost Employer More than $1.5 Million

Farmers Insurance Inc. has agreed to pay over $1.5 million in back wages to 3,459 employees following an investigation by the U.S. Department of Labor's Wage and Hour Division (WHD) that disclosed significant and systemic violations of the federal Fair Labor Standards Act's (FLSA) overtime and record-keeping provisions. The violations occurred at 11 customer service call centers across the country [WHD News Release, *Los Angeles-based Farmers Insurance to pay more than $1.5 million in back wages to nearly 3,500 employees following US Labor Department investigation,* 7/6/11].

The FLSA requires that covered employees be paid for pre-shift and post-shift job duties, and for attending required meetings.

Investigators found through interviews with employees and a review of the company's timekeeping and payroll systems that the company did not account for time employees spent performing pre-shift work activities. Employees routinely performed an average of 30 minutes per week of unrecorded and uncompensated work, such as turning on work stations, logging into the company phone system, and initiating certain software applications necessary to begin their call center duties. Employees are owed compensation at time and one-half their regular rates for hours that exceeded 40 per week. Farmers Insurance has agreed to pay the back wages, as well as to maintain future compliance with the FLSA by properly recording and compensating all hours worked by its employees.

Employment Tax Penalties Abated Even Though Not First-Time Offense

The U.S. Tax Court has overturned an IRS assessment imposing penalties and interest on an employer for failure to deposit and pay employment taxes, finding that there was "reasonable cause" for the failure [*Custom Stairs & Trim Ltd. Inc. v. Commissioner,* TC Memo 2011-155, 7/5/11].

The facts. Custom Stairs & Trim Ltd. (Custom Stairs) is a Florida business that fabricates staircases for residential properties. It was strongly affected by Hurricane Ivan in 2004, the collapse of the housing market, and the recession. The company laid off employees, eliminated vacations and paid holidays, and cut employee benefits. Custom Stairs went so far as to list its office property with a real estate broker in hopes of paying off its debts.

The company had a history of timely filing its Forms 941 and making deposits of the tax assessed. However, following the hurricane, it also had a history of failing to pay the full amount and having to pay penalties and interest. The company fell behind with its employment taxes in early 2005 and was thereafter consistently in arrears. For most of the calendar quarters at issue, Custom Stairs actually paid over to the IRS amounts that would have fully satisfied its liability for the current quarter, but the IRS applied its payments to prior arrearages, leaving all or portions of each successive quarter's required deposits underpaid. This situation caused the IRS to assess cascading penalties.

On Nov. 20, 2008, Custom Stairs received from the IRS a "Final Notice, Notice of Intent to Levy and Notice of Your Right to a Hearing" (CDP levy notice), that showed a $9,919.27 liability for the quarter ended June 30, 2008. On Dec. 2, 2008, Custom Stairs was mailed a "Notice of Federal Tax Lien Filing and Your Right to a Hearing." On Dec. 11, 2008, Custom Stairs timely filed a Form 12153, *Request for a Collection Due Process or Equivalent Hearing.* Under the heading "Offer in Compromise," Custom Stairs requested a

"reduced penalty, under the present economic conditions." Under the heading "Lien Withdrawal," Custom Stairs stated that the IRS lien was filed prematurely because Custom Stairs had been keeping current while slowly paying its past due liabilities. Custom Stairs also claimed that, as of Dec. 4, 2008, all of the past due amounts (except penalties) had been paid.

In early 2009, Settlement Officer Salinger from the IRS Appeals Office contacted Rebecca Cordes, Vice President of Custom Stairs, about the federal tax lien. Cordes claimed that the lien was unnecessary because the underlying taxes had been paid and the only balance for that period was a penalty. Cordes did not believe that she had to submit the documentation that Salinger had requested because she had been making payments on the delinquent tax liability. Still Salinger argued that Custom Stairs did not have "reasonable cause" for abatement of the penalty, as Custom Stairs had not submitted any of the documentation requested, and the company had not suggested any collection alternatives. When Salinger asked Cordes how she wished to resolve the liability, she informed him that she did not know because she did not have the money to pay it.

Reasonable cause. Code Sec. 6651(a) allows an employer to avoid penalties for noncompliance if it can show that its failure to file, pay, or deposit taxes was due to "reasonable cause" and not willful neglect. Reg § 301.6651-1(c) states that in determining whether the taxpayer exercised ordinary business care and prudence, "consideration will be given to all the facts and circumstances of the taxpayer's financial situation, including the amount and nature of the taxpayer's expenditures in light of the income." The primary factors cited by the federal courts of appeals in determining whether there was "reasonable cause" are: (1) the taxpayer's favoring other creditors over the government; (2) a history of failing to make deposits; (3) the taxpayer's financial decisions; and (4) the taxpayer's willingness to decrease expenses and personnel.

The ruling. The Tax Court ruled that Custom Stairs' failure to timely deposit and pay was due to reasonable cause. The court analyzed the four factors above. It concluded that Custom Stairs' failure to make the deposits, in the context of cascading penalties being assessed from one quarter to another, was due in significant part to Hurricane Ivan, the 2008 economic collapse, and the practical fact of the cascading penalties themselves. The court also noted that Custom Stairs had exercised ordinary business care and prudence in cutting benefits and payroll, selectively paying business expenses, and attempting to sell its real property to pay its tax liability. While the IRS argued that if the company cannot afford to make timely tax payments it should not be in business, the court found that the economy is negatively impacted by such an approach.

Employer Can't Challenge IRS Closing Agreement that Had Incorrect EIN

The U.S. Tax Court has ruled that an employer was not coerced into signing an IRS closing agreement, and that the closing agreement could still be enforced even though it did not contain the correct employer identification number (EIN) [*Tree-Tech Inc. v. Commissioner,* TC Memo 2011-162, 7/11/11].

The facts. On Feb. 1, 2007, the IRS notified William Moon, attorney-in-fact for Tree-Tech Incorporated, that it was conducting an audit of the company. The sole officer and director of the company was Julie Moon (i.e., William Moon's wife). The exam was originally going to focus on the company's failure to report officer's compensation as wages, but after his first meeting with Mr. and Mrs. Moon, IRS examiner William Cookenour expanded the examination to include worker classification issues.

Cookenour met with Mr. and Mrs. Moon after the audit was concluded to explain the terms of an IRS settlement offer under the Classification Settlement Program (see Payroll Guide at ¶ 2315). The Moons said that at the meeting, Cookenour presented them with two different calculations of the company's liabilities and told them that if they did not accept the offer to settle for the lower amount, the IRS would assess the higher amount. The Moons also said that Cookenour told them that they could appeal the assessment, but that they would not win on appeal. Mrs. Moon accepted the settlement offer at that meeting by signing a closing agreement titled "Closing Agreement on Final Determination Covering Specific Matters Regarding Worker Classification." Mrs. Moon agreed to pay the amount shown on the closing agreement in full satisfaction of the company's liability stemming from its incorrect worker classification, and she agreed to begin treating company workers as employees.

The closing agreement signed by Mrs. Moon contained an incorrect EIN in the document heading. However, the closing agreement did contain the correct EIN in the first paragraph and it identified the employer by name as "Tree Tech Incorporated."

On Sept. 18, 2008, the IRS mailed the Moons a "Final Notice of Intent to Levy and Notice of Your Right to a Hearing" (notice of intent to levy). The Moons timely filed Form 12153, *Request for a Collection Due Process or Equivalent Hearing.* The Moons contested the company's underlying tax liability, arguing that the company was entitled to employment tax relief under Section 530 of the Revenue Act of 1978. Section 530 provides retroactive and prospective relief from employment tax liability for employers who misclassified workers as independent contractors (see Payroll Guide at ¶ 2315). The Moons also argued that Cookenour had coerced Mrs. Moon into signing the closing agreement, and that the agreement was invalid anyway since it included an incorrect EIN for the company. The IRS Appeals Office said that the Moons could not contest the company's underlying tax liability during the collection due process hearing because the assessments were made in accordance with the closing agreement signed by Mrs. Moon.

The law. Code Sec. 7121(b) states that an IRS closing agreement is final and conclusive "except upon a showing of fraud or malfeasance, or misrepresentation of a material fact."

The ruling. The Tax Court granted summary judgment to the IRS on the coercion and incorrect EIN issues. The court said that Cookenour's settlement offer was precisely the kind of arrangement contemplated under the IRS Classification Settlement Program. The court noted that the very nature of a settlement offer is that one party offers the other party a concession to induce that party to agree to the deal. The IRS agreed to assess only a portion of the taxes due under the reclassification in exchange for the Moons' agreement to settle the matter. The court also said that the closing agreement was final and conclusive because the Moons did not raise any issues with respect to fraud, malfeasance, or misrepresentation of a material fact.

The Tax Court acknowledged that there was a minor error in the company's EIN on the closing agreement, but it said that the Moons were in no way prejudiced or confused by the minor error.

The Tax Court said that it lacked jurisdiction to address the Section 530 issue, but pointed out that the company may still be eligible for Section 530 relief under Rev Proc 85-18, 1985-1 CB 518, if it has not yet completely paid the employment tax liability in the closing agreement.

Revenue Officers Given 15 Days to Contact Employers Included in Federal Tax Deposit Alert Cases

The IRS Small Business/Self-Employed (SB/SE) Division has issued an internal memorandum that instructs its revenue officers to contact employers in Federal Tax Deposit (FTD) Alert cases within 15 calendar days [IRS Memorandum SBSE-05-0711-064, 7/1/11].

Background. The FTD Alert program (the Alert program) is a proactive process that provides for early intervention by the IRS when semiweekly depositor employers do not deposit and pay taxes withheld from employees. The Alert program identifies taxpayers that appear to be behind in making deposits of withholding taxes before their quarterly employment tax returns are due to be filed. FTD Alerts are computer-generated, and taxpayers' accounts will have a specific code indicating there is an Alert. If the Alert meets a certain probability level that there will be an underpayment of FTDs, the Alert is assigned to the IRS collection field inventory. Revenue officers in the collection field work Alert cases and contact the identified taxpayers in person to discuss the deposit requirements and obtain payments.

The Alert program can protect the federal government's interest by its early identification of a potential delinquent tax payment. It also serves the employer's interest by allowing IRS involvement before enforced collection action, such as a levy of a bank account, seizure of assets, or bankruptcy, becomes the sole remaining alternative for collecting the taxes owed.

In 2007, the Treasury Inspector General for Tax Administration (TIGTA) issued a report which said that revenue officers do not always promptly contact employers about federal tax deposit issues, and, therefore, more employers incur FTD penalties (see TIGTA Report, *The Federal Tax Deposit Alert Program Helps Taxpayers Comply With Paying Taxes, but Alerts Can Be Worked More Effectively,* Reference Number: 2007-30-180, 9/17/07, and Payroll Guide Newsletter at ¶ 21.12). The new internal memorandum requires revenue officers to contact employers within 15 calendar days after a revenue officer receives a FTD Alert. A telephone call by the revenue officer that does not result in employer contact will not meet IRS requirements for timely contact. Leaving a message within this period is also not considered a timely contact. In these instances, revenue officers should make a field visit to the employer.

Federal E-Verify Program Now Accepts Mississippi Driver's Licenses

The U.S. Citizenship and Immigration Services (USCIS) recently announced that a Mississippi driver's license may be used as one of the documents that new hires give to their employer to verify their eligibility to work in the United States [USCIS News Release, *USCIS and Mississippi Implement New E-Verify Tool to Combat Fraud,* 6/13/11].

The federal E-Verify program is a free, Internet-based system that determines the employment eligibility of new hires by comparing information from the new hire's Form I-9, *Employment Eligibility Verification,* to Department of Homeland Security (DHS) and Social Security Administration (SSA) records. Earlier this year, USCIS announced that employers will soon be able to use motor vehicle documents to help determine whether individuals are authorized to work in the U.S. under the voluntary "Records and Images from DMVs for E-Verify (RIDE)" initiative. Mississippi is the first state to partner with USCIS to implement RIDE. The E-Verify program will execute the data verification and respond to the E-Verify user on whether the submitted information matches with the motor vehicle agency data or not. Employers that check Mississippi driver's licenses through E-Verify will not have access to the data contained within the Mississippi Department of Public Safety database. The employer will only be notified by USCIS of the result, such as "Employment Authorized" or "Tentative Nonconfirmation."

More than 80% of new hires present driver's licenses to establish their identities when completing Form I-9.

Did You Know?

Did you know that you can set up the "Home" screen on *Checkpoint* to find payroll documents more quickly?

To get to the "Home" screen, click on the word "Home" on the upper left hand side of any *Checkpoint* screen. On the "Home" screen, make sure your "Current View" says "Payroll." Then review the links listed in "My Quick Links" on the left hand side of the "Home" screen to determine if these are the links to laws, regulations, publications, charts, etc. that you want here, and that they are in the order that you want them in.

You can revise the links in "My Quick Links" by clicking on "Edit" to the right of the "My Quick Links" pane. The "Add Links" screen then appears. Select the links you want to add from the "Select Quick Links From" drop-down list. Under "Common Quick Links," you'll find items such as "Find Employment Laws, Regs, Ruls," "Payroll Calculators," and "Search Payroll Guide by State." If you "Select Quick Links From Tools" you will be able to add "Payroll Tax Create-a-Chart" to "My Quick Links." On each of the screens, you need to check the boxes for the items that you want to add to "My Quick Links," and then click "Save." The links to these items will then be added to "My Quick Links."

To rearrange the order of the links in "My Quick Links," click "Edit," and then click on "Organize Links" on the upper left hand side of the screen. You can change the order of your links by choosing the link and then clicking on "Move Up" or "Move Down." You can also delete links that you do not want to appear in "My Quick Links." Click on "Save" to save your changes.

You may want to consider making the "Home" screen the first screen that will open when you first go into Checkpoint. To do this, click on "Options" in the upper middle of any Checkpoint screen and change the "Default Tab" to "Home."

Stateline

New laws and developments are reported from the following states:

ARKANSAS

Withholding. A new Arkansas Department of Finance and Administration (DFA) rule increases the standard mileage rate for employees from 50¢ to 51¢ per mile, *for expenses incurred from Jan. 1, 2011 through Dec 31, 2011.* The DFA is aware that the IRS recently increased the federal standard mileage rate from 51¢ to 55.5¢ per mile, effective July 1. Procedures to change the Arkansas rate are under way, but may take months to complete [Arkansas State Revenue Tax Quarterly 3, 07/01/2011; E-mail from DFA to *RIA,* 7/14/11].

CALIFORNIA

Wage and Hour. The California Supreme Court has ruled that the State's overtime laws apply to work performed in the State by nonresident employees for a California-based employer. The employees worked for Oracle Corporation, a large software company headquartered in California. Their job was to train Oracle's customers on the use of the company's products. The employees believed that they were entitled to overtime for days they worked entirely in California for longer than eight hours, and weeks they worked longer than 40 hours. In issuing its ruling, the Supreme Court noted that California's overtime laws apply to all employment in the

State, without consideration of the employee's place of residence [*Sullivan v. Oracle Corp.,* Cal. Sup. Ct., Dkt. No. S170577, 6/28/11].

The California Court of Appeal has ruled that employees working consecutive overnight shifts that are not interrupted by unpaid, nonworking periods are not entitled to mandatory split-shift pay. The employees' shifts sometimes began on one workday and ended on another workday. Wage Order 4-2001 defines a "split shift" as "a work schedule" that "is interrupted by non-paid non-working periods established by the employer, other than bona fide rest or meal breaks." The court cited Wage Order 4-2001 and said that the fact that a single continuous shift happens to begin on one "workday" and end in another does not result in a "split shift" if the shifts are not interrupted by non-paid, non-working periods [*Securitas Security Services, USA, Inc. v. Superior Court (Holland),* Cal. Ct. App., 4th Cir., Dkt. No. B227950, 7/7/11].

Withholding. The Employment Development Department (EDD) is reminding employers that each quarter they are now required to file Form DE 9, *Quarterly Contribution Return and Report of Wages,* and Form DE 9C, *Quarterly Contribution Return and Report of Wages (Continuation).* Form DE 9 reconciles wages reported and taxes paid for the quarter. Form DE 9C is used to report quarterly wage information for each employee. Employers with 250 or more employees must submit their wage reports electronically. Both forms are delinquent if not filed by May 2, August 1, October 31, and January 31 following the end of the quarter [EDD Tax Branch News #137, 07/13/11].

The California Franchise Tax Board (FTB) has announced that, *beginning on August 29,* it will no longer accept a faxed Form 589, *Nonresident Reduced Withholding Request.* The form will only be accepted online or by mail. Forms submitted online are processed within 10 business days. Forms submitted by mail are processed within 21 business days. Additional documentation is required if Form 589 is sent electronically (i.e., IRS Form 8804-C, Schedule E, expense breakdowns, etc.) [FTB Notice, *Processing Changes to California Withholding Forms and Payments,* 7/14/11].

CONNECTICUT

Wage and Hour. Governor Malloy has signed legislation that, *effective Jan 1, 2012,* requires all employers, other than certain manufacturing companies and nonprofit organizations, that employ 50 or more employees in any one quarter in the previous year, to provide paid sick leave annually to service workers who receive an hourly wage. Service workers include a variety of occupations in the federal Bureau of Labor Statistics Standard Occupational Classification system (e.g., waiters, cashiers, security workers). Service workers may earn one hour of paid sick time for every 40 hours worked, with the number of paid sick days capped at five per year. See Payroll Guide at ¶ 19,055 for further information on this legislation [Public Act No. 11-52; L. 2011, S913].

Withholding. A new Connecticut Department of Revenue Services (DRS) publication provides guidance on the withholding rules that go into effect on *Aug. 1, 2011.* The withholding tables and withholding calculation rules were revised, *effective Aug. 1, 2011,* to take into account recent legislation that retroactively raised personal income tax rates, effective Jan. 1, 2011. The new withholding tables include catch-up withholding amounts. The new publication cautions employers (question and answer 10) not to use the August withholding tables for recently-hired employees (i.e., employees beginning work after Jan. 1, 2011) because the tables take into account both the new rates and the catch-up withholding amount. If a recently-hired employee will receive his or her first paycheck prior to Aug. 1, 2011, the employer must use the withholding calculation rules in effect prior to Aug. 1, 2011 (see Payroll Guide at ¶ 23,801). On Aug. 1, 2011, the employer should use the revised 2011 withholding calculation rules with certain modifications (see Payroll Guide at ¶ 23,802). An employer should use the revised withholding calculation rules in Payroll Guide at ¶ 23,802 if a recently-hired employee will receive his or her first paycheck on or after Aug. 1, 2011. The new publication modifies and supersedes Connecticut Information Publication 2011(10), dated May 25, 2011 [Connecticut Informational Publication 2011(10.1), 07/13/2011].

Effective Oct. 1, 2011, taxpayers required to file or submit payments electronically may make a written request to waive the electronic reporting requirement due to undue hardship, no later than 30 days prior to the date the filing or payment is due. If granted, the taxpayer may file a paper tax return and submit payments without using electronic fund transfer (EFT). The waiver will be effective for 12 months from the date it is granted. Return preparers may not apply for a waiver from these requirements [L. 2011, H6561].

DELAWARE

Unemployment. The Delaware General Assembly has passed an appropriations bill that earmarks $3.7 million to help the State pay back interest on its federal unemployment insurance loans. As a result, experienced-rated employers will not have to pay a special assessment [L. 2011, H190].

Withholding. New legislation reduces the personal income tax rate on taxable income in excess of $60,000 from 6.95% to 6.75% in tax years 2012 and 2013. The

rate is further reduced to 5.75% in tax years beginning after Dec. 31, 2013 [L. 2011, H128].

FLORIDA

Unemployment. Employers filing and paying their second quarter unemployment taxes electronically must initiate payment *no later than 5 p.m., EST, on Friday, July 29, 2011.* Paper returns and payments must be postmarked or hand delivered *by Monday, Aug. 1, 2011.* Employers making installment payments must make their second installment payment for the first quarter of 2011 *by July 31, 2011* [Florida Department of Revenue e-mail, 7/14/11].

LOUISIANA

Unemployment. "SUTA dumping" is a form of tax avoidance or tax rate manipulation through which employers attempt to "dump" higher unemployment tax rates for lower ones. For example, a business with a large payroll and high unemployment tax rate may transfer its payroll to a corporate shell that has a low tax rate. The Louisiana Workforce Commission (LWC) has announced that it has a new statewide detection system that uses automation and predictive modeling to help it more quickly spot suspected SUTA dumping. Employers may be assigned the highest tax rate for the year in which the SUTA dumping violation occurred or was attempted, as well as for the following three years [LWC Press Release, 7/7/11].

MICHIGAN

Withholding. Recently-enacted legislation, *effective July 12, 2011,* authorizes the Department of Treasury (DOT) to accept major credit cards or debit cards for payment of taxes. The DOT may add a processing fee to the transaction, but the fee can't exceed charges the DOT incurs because of the use of the cards [L. 2011, S28].

MINNESOTA

Unemployment. The Minnesota Unemployment Insurance Program has been deemed a critical service and is operating normally during the state government shutdown [Minnesota Unemployment Insurance website, *What's New*].

MISSOURI

Unemployment. New legislation allows a claimant who has left work to follow his or her spouse on active military duty to still be eligible for unemployment benefits. The benefits are not chargeable against the employer's account [L. 2011, H136].

NEVADA

Unemployment. A spokesperson for the Nevada Employment Security Division has told *RIA* that the taxable wage base will decrease from $26,600 to $26,400 in 2012.

NEW JERSEY

Disability. Governor Christie has signed legislation that, *beginning in 2012,* allows for annual adjustments in the amount paid by employees to the State disability benefits fund. Currently, employees contribute 0.5% of their wages received during the calendar year, up to the taxable wage base, to the State disability benefits fund. Employers will continue to contribute 0.5% to the fund in 2012 [L. 2010, S2609].

Unemployment. New legislation requires employers to provide separated workers with a printed copy of their unemployment benefit instructions at the time they become unemployed, regardless of the reason or whether the separation is permanent or temporary. The benefit instructions must include the date of unemployment (or expected recall date if the unemployment is temporary), and notification that workers may lose some or all of their unemployment benefits if they fail to file a timely unemployment claim [L. 2010, S2580].

Withholding. Employees contribute 0.985% to the unemployment/disability fund, up to the taxable wage base limit of $29,600, through Dec. 31, 2011. The 0.985% rate is allocated as follows: 0.3825% to the unemployment contribution fund, 0.0425% to the Workforce Development/Supplemental Workforce Funds, 0.5% to the disability fund, and 0.06% to the family leave insurance program [New Jersey Department of Workforce Development website, *Division of Employer Accounts 2012 Rates*].

NEW YORK

Employer Tax. A spokesperson for the Waterfront Commission of New York Harbor has told *RIA* that the payroll assessment fee levied on employers will remain at 2% during the July 1, 2011 to June 30, 2012 fiscal year.

Unemployment. All employers (except reimbursing employers) must pay an interest assessment surcharge (IAS) to help New York State pay the interest due on its federal loans. The assessment is computed on 0.25% of taxable wages from the fourth quarter of 2009 through the third quarter of 2010. The payment is due on *Aug. 15, 2011.* New York State must make the interest payment to the federal government by September 30. New York State will either credit the employer's account or refund the money paid, if Congress were to enact legislation that waived the interest due on the federal loans [NYS Department of Labor (DOL) website, *Interest Assessment Surcharge (IAS) FAQ's*].

NORTH CAROLINA

Unclaimed Property. *Effective Oct. 1, 2011,* unpaid and unclaimed salaries, wages, and other compensation that remain unclaimed for more than one year are presumed abandoned for unclaimed property reporting purposes (more than two years prior to Oct. 1, 2011). In addition, holders of unclaimed property with a cumulative value of $250 or less in a reporting year are not required to report the property in that year, but must report the property in any year when the value or aggregate value exceeds $250 [L. 2011, H692].

Withholding. The North Carolina Department of Revenue (DOR) has created the Small Business Taxpayer Recovery Program to help businesses with 200 or fewer employees during the economic downturn. The program offers penalty and fee waivers, as well as payment plans, to companies that have fallen behind on sales, withholding, and other trust fund taxes. Businesses taking advantage of the program must agree to use counseling services provided by either the Small Business and Technology Development Center (SBTDC) or the NC Small Business Center Network (SBCN). Businesses that complete counseling, and file and pay all outstanding taxes, will be eligible for longer repayment plans than normal, and penalties and collection fees may be waived. The DOR has published a list of frequently asked questions (FAQs) on the program. The program is scheduled to run until June 2013 [*State Launches Program to Help Small Businesses with Trust Taxes,* 7/11/11; *DOR Frequently Asked Questions about the Small Business Taxpayer Recovery Program,* 7/12/11].

OHIO

Withholding. New legislation requires the Tax Commissioner to conduct a tax amnesty program from May 1, 2012, to June 15, 2012, that will include state and school district income taxes. The program only applies to unreported or underreported taxes that were due and payable as of May 1, 2011, and which remain unpaid when the program commences [Ohio Revised Code §§ 757.40 and 757.41, as amended by L. 2011, H153; official summary, p. 675].

Taxpayer service centers located in Akron, Cincinnati, Cleveland, Dayton, Toledo, Youngstown, and Zanesville were closed on June 24, 2011. Employers with tax questions may call (888) 405-4039 for assistance, or send an e-mail through "Contact Us" at the Ohio Department of Taxation's (DOT) website, tax.ohio.gov [DOT Notice, 7/6/11].

PENNSYLVANIA

Withholding. *Effective Jan. 1, 2012,* Jordan Tax Services will be collecting the earned income tax for the Allegheny County Central Tax Collection District (ACCTCD). The ACCTCD includes the City of Pittsburgh, the school district of Pittsburgh, and Mount Oliver Borough. Jordan Tax Services will collect the taxes due on Form WT-1 (Pittsburgh quarterly wage tax), Form WTD (monthly wage tax), Form NP-5 (net profit tax), Form WT-4 (individual wage tax), Form WTE-3 (year-end reconciliation), and Form PGH-40 (individual earned income tax) that are due on or after Jan. 1, 2012, and prior taxes either due or sent in after Jan. 1, 2012. The City of Pittsburgh will still collect current and prior taxes for Form ET-1 (payroll expense tax), Forms LS-1 and LS-3 (local services tax), and Form UF (facility usage fee) [Pittsburgh 2012 Tax Bulletin, 7/1/11].

RHODE ISLAND

Unemployment. New legislation, *effective beginning in the 2012 tax year,* revises the taxable wage base computation. The taxable wage base for most employers in a tax year beginning after 2011 will be equal to 46.5% of the average annual wage in covered employment during the calendar year immediately preceding the computation date for that year. The calculation will take place each September 30. The Rhode Island Division of Taxation (DOT) is projecting that the taxable wage base will either be $19,600 or $19,800 in 2012. It is currently $19,000. The taxable wage base for employers with reserve account percentages of negative 24.0% or less will be $1,500 higher than the taxable wage base for all other employers [L. 2011, H5894; DOT notice, *Summary of Legislative Changes,* 6/30/11].

Withholding. Gov. Chafee has signed a civil union bill. The same rights, benefits, protections, and responsibilities that spouses have in a marriage are extended to partners in a civil union. The law is effective *July 1, 2011* [L. 2011, H6103].

UTAH

Withholding. The Utah State Tax Commission has updated Publication 32, *Online Filing and Paying of Withholding and Mineral Production Forms,* to note that filers should now be using Taxpayer Access Point (TAP), rather than the WEBExpress system, to file, pay, and manage withholding taxes (file, pay, and upload). Filers must register before using TAP. Following registration, filers will receive an authorization code by email to access TAP. Tax liabilities may be paid electronically through ACH credit or ACH debit. Alternatively, taxpayers can submit their payments by check (using payment coupon Form TC-941PC). Publication 32 outlines the process for filing W-2 and W-2c data through TAP. Employers will be able to browse the W-2 data and correct errors. Scheduled reporting deadlines and file layouts are included in the publication [Utah Informational Publication 32, 06/01/2011].

WISCONSIN

Unemployment. The Wisconsin Department of Workforce Development (DWD) has sent letters to certain Wisconsin employers regarding a special assessment to help the State pay the interest on its federal unemployment insurance loans. Employers whose taxable payrolls were greater than $25,000 in the 2010 calendar year are subject to the special assessment. The DWD is estimating that the assessment will be computed on 0.2% of an employer's taxable payroll (maximum of $24 per employee). Reimbursing employers will pay the assessment on 0.15% of their taxable payroll (maximum of $18 per employee). Employers will receive a bill in August. The assessment must be paid by *Sept. 30, 2011* [DWD website, *Special Message to Employers: Information on Special Assessment for Interest*].

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