
Payroll Guide

□ Highlights □

IRS Reconsidering Its Announcement that Taxpayers Will No Longer Be Able to Use High-Low Per Diem Method The IRS is having second thoughts about eliminating this travel substantiation method, because it has now received some feedback from taxpayers who use this method.

IRS to Discontinue Attributed Tip Income Program The program is being discontinued due to the low number of participants.

IRS Provides Guidance on When Form 941, Schedule B, Should Be Amended The rules on when semiweekly depositors should file an amended Schedule B are quite complicated.

Minor Changes Made to 2011 Employer's Tax Guide IRS Publication 15 has been updated to note the expiration of the FUTA surtax and to correct a calculation in a withholding tax example.

IRS Reminds Employers that Their Responsibilities Don't End After Outsourcing Payroll An employer is ultimately responsible for the payment of its employment taxes to the IRS, even if the failure to pay is entirely due to a payroll service provider's negligence or fraud.

DOL Budget Proposal Targets Worker Misclassification A proposed multi-agency worker misclassification initiative would include the DOL's Wage and Hour Division, the Office of Federal Contract Compliance Programs, the Occupational Safety and Health Administration, the Office of the Solicitor, and the Employment and Training Administration.

Employment Tax Relief May Still Be Available to Employers Who Misclassified Workers After the Year of Hire The IRS Office of Chief Counsel has issued guidance on the employment tax relief provisions in Section 530 of the Revenue Act of 1978.

Court Allows IRS Employment Tax Collection Action to Begin After Time Period Generally Allowed by Law Other issues in this ruling included: (a) what evidence the IRS needed to provide to support its assessment, and (b) whether the IRS had misapplied the employer's tax payments.

Several Recent Rulings Issued on Trust Fund Recovery Penalty There have been several recent rulings in which federal courts have decided that corporate officers were liable for the trust fund recovery penalty.

SSA Not Required to Provide Names of Employers Who Received No-Match Letters A federal district court has ruled that the SSA does not have to provide a federal watchdog group with a list of the names and addresses of employers who received the most "no-match letters" during a five-year time period.

Revised H-2B Visa Program Wage Rate Calculation Rules Go Into Effect on September 30 The effective date of the new wage rate calculation rules has been moved up from Jan. 1, 2012 to Sept. 30, 2011. Employers are also reminded that they can't deduct certain fees from H-2A and H-2B workers.

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

IRS Reconsidering Its Announcement that Taxpayers Will No Longer Be Able to Use High-Low Per Diem Method

In Ann 2011-42, 2011-32 IRB 138, the IRS announced that it will soon be discontinuing the high-low method for substantiating lodging, meal, and incidental expenses incurred in traveling away from home because it had not received any feedback from the public on whether it should continue to offer this method when it asked for comments in previous notices (see Payroll Guide Newsletter at ¶ 16.2). Donna Chrisalli from the Office of the IRS Chief Counsel told participants in an August 4 payroll industry conference call that the IRS is having second thoughts about eliminating this travel substantiation method, because the IRS has now received some feedback from taxpayers who use the high-low method. The IRS is encouraging taxpayers who use this method to send it comments. Comments may be transmitted electronically to the IRS at . Taxpayers should include "Rev. Proc. 2010-39" in the subject section of the e-mail. Comments may also be mailed to: Internal Revenue Service, CC:PA:LPD:PR (Rev. Proc. 2010-39), Room 5203, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. The comments should be sent as soon as possible since the General Services Administration (GSA) will be issuing new actual per diem rates next month that will be effective beginning Oct. 1, 2011. If the IRS discontinues the high-low method, it will issue transition rules that will allow the method to be used until the end of the calendar year.

The high-low method is an alternative to reimbursing employees for actual substantiated travel expenses, or paying IRS-approved per diem amounts (actual per diem method). See Payroll Guide at ¶ 3807 for further information on this method.

IRS to Discontinue Attributed Tip Income Program

The IRS has announced that it is discontinuing the Attributed Tip Income Program (ATIP), *effective Dec. 31, 2011*. ATIP is a voluntary tip reporting pilot program that began in 2007. The objective of the program was to simplify the recordkeeping burden for reporting tip income in the food and beverage industry. The IRS is discontinuing the program because it attracted only a small number of participants. Employers who elected to participate in ATIP for the 2011 calendar year, along with their participating employees, may still use the program through the end of the

year. Beginning in 2012, employers may want to consider other IRS voluntary tip reporting programs, such as the Tip Reporting Determination Agreement or the Tip Reporting Alternative Commitment (see Payroll Guide at ¶ 3800), if they are interested in continuing in a voluntary tip reporting program [IRS Headliner 314, 8/8/11].

IRS Provides Guidance on When Form 941, Schedule B, Should Be Amended

The IRS recently issued a June 2011 version of Form 941, Schedule B, *Report of Tax Liability for Semiweekly Schedule Depositors*, and its instructions. The instructions contain detailed information on when Schedule B should be amended.

Background. Semiweekly depositors (i.e., employers who reported more than \$50,000 of employment taxes in the lookback period or who accumulated a tax liability of \$100,000 or more on any given day in the current or prior calendar year) must file Schedule B with Form 941. Semiweekly depositors list their tax liability for each day on Schedule B. This includes the federal income tax they withheld from their employees' paychecks, and both employee and employer Social Security and Medicare taxes. Federal tax deposits should not be reported on Schedule B.

The IRS uses Schedule B to determine if an employer deposited its federal employment tax liabilities on time. If an employer does not properly complete and file Schedule B with Form 941, the IRS may propose an "averaged" failure-to-deposit (FTD) penalty. The FTD penalty ranges from 2% to 15%, depending, in most cases, on how late the tax deposit was made (see Payroll Guide at ¶ 4292).

Amending Schedule B. The Schedule B instructions note that if an employer has been assessed a FTD penalty for a quarter, and it made an error on Schedule B that will not change its total tax liability for the quarter, it may be able to reduce that penalty by filing a corrected Schedule B.

Tax decrease on Form 941-X. Employers who filed Form 941-X, *Adjusted Employer's Quarterly Federal Tax Return or Claim for Refund*, may file an amended Schedule B with Form 941-X if both of the following apply: (1) the tax liability decreased, and (2) they were assessed an FTD penalty. The total liability for the quarter that is reported on the corrected Schedule B must equal the corrected amount of tax reported on Form 941-X. If the penalty is decreased, the IRS will include the penalty decrease with the tax decrease.

Tax increase — Form 941-X filed timely. If employers are filing a timely Form 941-X (i.e., by the due date of the return for the filing period of the Form 941 in which they discovered the error), they do not need to file an amended Schedule B unless they were assessed an FTD penalty caused by an incorrect, incomplete, or missing Schedule B. If employers file an amended Schedule B, they should not include the tax increase reported on Form 941-X on Schedule B.

Tax increase — Form 941-X filed late. If employers owe tax and are filing a late Form 941-X, they must file an amended Schedule B with Form 941-X. Otherwise, the IRS may assess an “averaged” FTD penalty. The total tax reported on the “Total liability for the quarter” line of the amended Schedule B must match the corrected tax (i.e., line 10 of Form 941 plus any correction reported on line 21 of Form 941-X for the quarter), less any previous abatements and interest-free adjustments.

Minor Changes Made to 2011 Employer's Tax Guide

There is now a July 28, 2011 version of 2011 Publication 15, (*Circular E*), *Employer's Tax Guide*, on the IRS website. The IRS made a couple of minor corrections to the publication.

Page 29 of the publication has a section called “Computing FUTA tax.” The last paragraph of this section notes that “certain states exempt some types of wages from state unemployment tax, even though they are subject to FUTA tax (for example, wages paid to corporate officers, certain payments of sick pay by unions, and certain fringe benefits).” The sentence immediately following this one has been changed to read: “In such a case, you may be required to deposit more than 0.8% (0.6% after June 30, 2011) FUTA tax on those wages.” The sentence was revised to reflect the expiration of the 0.2% FUTA surtax after June 30, 2011 (see Payroll Guide at ¶ 4070).

Line 5 in the withholding calculation example on page 35 of the publication (immediately below Table 5) has also been revised to change the amount subject to withholding from \$459.62 to \$457.70.

IRS Reminds Employers that Their Responsibilities Don't End After Outsourcing Payroll

The IRS is reminding employers that they are ultimately responsible for the payment of income tax

withheld, and both the employer and employee portions of Social Security and Medicare taxes, even if they outsource their payroll responsibilities to a third party [IRS e-News for Small Businesses, Issue No. 2011-17, 8/3/11].

Outsourcing payroll to a third party can help ensure that filing deadlines and deposit requirements are met and greatly streamline business operations. However, it's the employer's ultimate responsibility to pay these taxes, even if the failure to pay is entirely due to the payroll service provider's negligence or fraud.

The IRS offers the following advice:

(1) It strongly suggests that the address of record with the IRS not be changed to that of the payroll service provider. If there are any issues with an account, the IRS will contact the employer. Changing the address will make it more difficult for employers to be timely informed by the IRS of tax matters involving its business.

(2) It advises employers to make sure that the payroll service provider is using the Electronic Federal Tax Payment System (EFTPS). EFTPS maintains a business's payment history for 16 months and can be viewed on-line. An employer can immediately confirm payments electronically, 24 hours a day, 7 days a week, through the Internet or by phone. Employers should register on the EFTPS system to get their own PIN and use this PIN to periodically verify payments. A red flag should go up the first time a payroll service provider misses or makes a late payment. Employers with an EFTPS account will also be able to make additional tax payments that their payroll service provider isn't making on their behalf (e.g., estimated tax payments).

The IRS cautions that there have been instances of individuals and companies acting under the guise of payroll service providers who have stolen funds intended for the payment of employment taxes. See <http://www.irs.gov/compliance/enforcement/article/0,,id=228085,00.html> for some recent IRS employment tax fraud investigations.

Employers who believe that a bill or notice received is a result of a problem with their payroll service provider should contact the IRS as soon as possible by calling the number on the bill, writing to the IRS office that sent the bill, calling (800) 829-4933, or visiting a local IRS office.

DOL Budget Proposal Targets Worker Misclassification

In its fiscal year (FY) 2012 budget request (Oct. 1, 2011 to Sept. 30, 2012), the Department of Labor (DOL) is asking for \$46 million to combat worker misclassification through a new multi-agency initiative that would include the DOL's Wage and Hour Division, the Office of Federal Contract Compliance Programs (OFCCP), the Occupational Safety and Health Administration (OSHA), the Office of the Solicitor, and the Employment and Training Administration. The DOL's "Misclassification Initiative" is aimed at boosting federal and state efforts to enforce penalties for labor violations resulting from worker misclassification, as well as deterring violations.

Workers are generally misclassified as independent contractors for a variety of reasons, either intentionally to save costs, or unintentionally because of a lack of knowledge. Employees who are misclassified as independent contractors are deprived of benefits and protections to which they are legally entitled. For example, independent contractors do not receive overtime and are not eligible to receive unemployment benefits.

The first component of the DOL initiative, which was included in the FY 2011 budget, would provide states with the opportunity to compete for grants to: increase their capacity to participate in data-sharing activities with the IRS and other federal and state agencies; implement targeted audit strategies; establish a cross-state agency task force to target egregious employer schemes to avoid taxation through misclassification; and develop education and outreach programs.

The new proposed component of the initiative would introduce a high performance awards program to encourage states to improve their misclassification efforts. The awards program would be modeled after the highly successful food stamps program and would provide a "high performance bonus" to the most successful states. These states would receive incentive funds to upgrade their misclassification detection and enforcement programs. In both components, states would be required to capture and report outcomes and cost/benefit information to enable evaluation and analysis of new strategies.

The budget proposal includes \$15 million for personnel at the Wage and Hour Division to investigate worker misclassification.

The DOL believes that the initiative "will help level the playing field for employers who abide by the law and provide employees with their rightful pay and

benefits" [DOL website, *FY 2012, Department of Labor, Budget in Brief*].

Employment Tax Relief May Still Be Available to Employers Who Misclassified Workers After the Year of Hire

The IRS Office of Chief Counsel has issued a Program Manager Technical Advice (PMTA) which says that an employer who misclassified a worker as an independent contractor may still be able to qualify for employment tax relief under Section 530 of the Revenue Act of 1978, even though the employer did not meet all of the requirements to qualify for relief until the tax period at issue [PMTA 2011-15].

Section 530 of the Revenue Act of 1978. Employers are generally required to withhold and pay employment taxes on wages paid to their employees. For this purpose, "employment taxes" are the employer and employee shares of FICA tax, FUTA tax, and withheld income taxes. However, Section 530 of the Revenue Act of 1978 (Section 530), as amended, provides employment tax relief to employers who have treated workers as nonemployees for the tax periods at issue if certain requirements are met, including that the employer had a "reasonable basis" for not treating the workers as employees. The "reasonable basis" safe harbors include judicial precedent or IRS rulings, a past IRS audit, or a long-standing practice of a significant segment of the relevant industry (industry practice).

The PMTA addresses the timing of when an employer must have known about, and reasonably relied on, a safe harbor. Chief Counsel concludes that, depending on the facts and circumstances of each case, an employer may be able to qualify for employment tax relief under Section 530 if it reasonably relied on the asserted safe harbor to treat workers as independent contractors *sometime after it first engaged the workers but prior to the tax periods at issue*.

The PMTA makes reference to the U.S. Tax Court's ruling in *Peno Trucking, Inc. v. Commissioner*, T.C. Memo 2007-66, Dkt. No. 21070-03, 3/21/07 (see Payroll Guide Newsletter at ¶ 10.6), that to come within the safe harbor, "the taxpayer must have relied on the alleged authority during the periods in issue, at the time the employment decisions were being made." Chief Counsel notes that this standard is most clearly met when the employer can demonstrate actual and reasonable reliance on the asserted reasonable basis prior to engaging the services of the workers at issue. However, the employer may be able to satisfy the

reasonable basis requirement by establishing that it actually and reasonably relied upon the safe harbor prior to making the decision about a worker's employment status in a later tax period.

The PMTA may not be used or cited as precedent.

Court Allows IRS Employment Tax Collection Action to Begin After Time Period Generally Allowed by Law

A federal district court has ruled that: (1) the IRS may begin a collection action against an employer even though the action began after the time period generally allowed by law; (2) the IRS produced sufficient evidence to establish that the employer had an outstanding tax liability on its third quarter 2001 Form 941; and (3) the IRS did not improperly apply the employer's tax payments [*U.S. v. Booher, et al.*, DC NV, 108 AFTR 2d 2011-5434, 7/22/11].

The facts. Michael Booher owns Hillcrest Enterprises (Hillcrest), a remodeling and renovation business which he operates as a sole proprietorship. Throughout the relevant time period, Booher filed quarterly Forms 941, *Employer's Quarterly Federal Tax Return*, and reported owing federal employment taxes. Based on these returns, the IRS made an assessment against Hillcrest for the relevant tax periods. However, Booher did not pay the amounts owed. Booher conceded that the company owed federal taxes on certain quarterly returns. However, he contested the total amount owed based on his claims in (1) through (3) above.

Collection action initiated after time period allowed by law. Code Sec. 6502 generally requires the IRS to commence a civil action to collect federal tax within 10 years of the tax assessment. The return at issue was Hillcrest's third quarter 1998 Form 941. The tax assessment on this return was made on Sept. 14, 1998. The IRS collection action began on Sept. 30, 2009, which was more than 10 years after the tax assessment. However, under Code Sec. 6331(i)(5), the 10-year statute of limitations period is temporarily suspended while there is a pending offer in compromise (OIC). In this instance, Booher had submitted two OICs that took more than a year for the IRS to reject. As a result, the district court ruled that the IRS could still collect the unpaid tax, since the 10-year statute of limitations period had not expired.

Evidence to support outstanding tax liability on third quarter 2001 Form 941. The IRS had submitted Form 4340, *Certificate of Assessments and Payments*, as proof that Hillcrest had an outstanding tax liability on

its 2001 third quarter Form 941. Booher claimed that, because the IRS did not submit the original third quarter 2001 Form 941 with its motion for summary judgment, there was no evidence before the court that Hillcrest had a tax obligation in this quarter.

The district court ruled in favor of the IRS on this issue. It cited the U.S. Court of Appeals for the Ninth Circuit's ruling in *U.S. v. Jones*, CA9, 74 AFTR 2d 94-6128, 8/29/94, that Form 4340 is a self-authenticating document establishing a "prima facie case" of a tax liability. Once the IRS establishes its prima facie case of a tax obligation, the burden shifts to the taxpayer to provide "countervailing proof" that there is no such obligation. In this instance, Booher did not submit any evidence that the IRS assessment for this period was inaccurate or not owed.

Misapplied payments. For the remainder of the tax periods at issue, Booher did not contest the tax assessments themselves, but claimed that the payments he made were not properly applied to certain assessments which would have reduced the company's overall tax liability and eliminated related interest and penalties. The district court reviewed the documents and pleadings on file and found that Booher's claim was without merit. Code Sec. 6402 allows the IRS to apply a taxpayer's overpayment of a tax obligation to any federal tax liability of the taxpayer, as long as the statute of limitations for collecting on that liability has not expired. In addition, the IRS has the authority to allocate proceeds from tax levies or other involuntary payments, including tax reimbursements, among any unpaid assessments in any manner it sees fit. The district court also noted that Booher had not submitted any evidence that he made specific, directed payments to any particular tax obligation, or any evidence that his overpayments for certain tax quarters were not applied within the IRS's statutory authority.

Several Recent Rulings Issued on Trust Fund Recovery Penalty

There have been several recent rulings in which federal courts have decided that corporate officers were liable for the trust fund recovery penalty.

Code Sec. 6672 imposes the trust fund recovery penalty on any person who: (1) is responsible for collecting, accounting for, and paying over payroll taxes; and (2) willfully fails to perform this responsibility. The amount of the penalty is equal to the amount of the tax that was not collected and paid. The penalty is imposed on a "responsible person." A responsible

person may be anyone in a business entity who has the duty to collect, account for, or pay over the tax.

Agreements with creditors didn't shield president from trust fund recovery penalty. The U.S. Court of Appeals for the Fourth Circuit, affirming the district court, has ruled that Robert Newbill, who was the president, treasurer, and majority shareholder of NCI, was liable for the trust fund recovery penalty under Code Sec. 6672, even though NCI had signed agreements that gave creditors joint control over the company's accounts. The Fourth Circuit rejected Newbill's argument that he had no significant authority over NCI's management or finances after Wachovia Bank seized the balance of NCI's Wachovia account, and Atlantic Mutual Company assumed joint control over the company's operations. The court reasoned that both Wachovia and Atlantic acquired their rights to exercise control over NCI's finances through voluntary contractual agreements that Newbill personally negotiated and willingly executed. While the agreements delegated certain authority to Wachovia and Atlantic when NCI was unable to meet its obligations, the court concluded that the delegation didn't relieve a taxpayer of his responsibility under Code Sec. 6672. The court noted that signatures from both Newbill and Atlantic were required for Cardinal Bank to honor checks drawn on NCI's joint control trust account. Thus, Newbill could have exercised considerable power over the payment of NCI's creditors by simply withholding his countersignature [*Newbill v. U.S.*, CA4, 108 AFTR 2d ¶ 2011-5128, 7/29/11].

Reasonable cause for not paying trust fund taxes. The U.S. Court of Appeals for the Eleventh Circuit has upheld the assessment of the trust fund recovery penalty against Terri Lynn Brown, who was the president, only officer, and only director of Safe-Deposit, Incorporated. The company failed to turn over payroll taxes to the IRS that had been withheld from its employees' wages for various tax periods between 1999-2001. Brown argued that she was not liable under Code Sec. 6672 because she had "reasonable cause" for not paying the trust fund taxes — namely, her own and her family's health problems, and an alleged pattern of tortious interference against Safe-Deposit by the local police department. The Eleventh Circuit has never decided whether there is a "reasonable cause" defense to a finding of willfulness under Code Sec. 6672. But the court concluded that even if there were, it would not apply to Brown because "no such defense may be asserted by a responsible person who knew that the withholding taxes were due, but who made a conscious decision to use

corporate funds to pay creditors other than the government." Whatever the cause of Safe-Deposit's financial woes, Brown, by her own admission, "used the corporate income to pay payroll and business expenses rather than to pay fully the taxes due first." Therefore, she was liable for the trust fund recovery penalty [*Brown v. U.S.*, CA11, 108 AFTR 2d ¶ 2011-5122, 7/28/11].

Can be subject to trust fund recovery penalty even if not aware of responsible person status. A federal district court has ruled that an individual may qualify as a responsible person even if he does not have knowledge that he has the requisite duty and authority. "The crucial inquiry is whether a party . . . by virtue of his position in (or vis-a-is) the company, could have had 'substantial input' into such decisions, had he wished to exert his authority."

The taxpayer who was the subject of this ruling was vice-president of M.S. Patrol, a now-defunct company, and one of only three members of its board of directors. The taxpayer had testified that he and the other directors made major decisions about the company together. He also had testified that he had the authority to hire, fire, and manage employees. In addition, he had the authority to authorize paying bills, authorize payroll checks, make bank deposits, deal with major customers and suppliers, and negotiate contracts. The court cited the taxpayer's testimony and said that he was a responsible person even if he did not have the sole or final power or authority, and even if another director was considered to be more "responsible" than he was [*U.S. v. Kennedy*, DC TX, 108 AFTR 2d 2011-5142, 7/5/11].

SSA Not Required to Provide Names of Employers Who Received No-Match Letters

A federal district court has ruled that the Social Security Administration (SSA) does not have to provide a federal watchdog group with a list of the names and addresses of employers who received the most "no-match" letters during a five-year time period [*Judicial Watch, Inc. v. Social Security Admin.*, DC Dist Col, 108 AFTR 2d ¶ 2011-5135, 8/1/11].

The SSA issues a "no-match" letter to an employer when it detects a mismatch between an employee's name and Social Security number. The Freedom of Information Act (FOIA) allows the public to gain access to records from a federal administrative agency. There are nine exemptions in the FOIA that allow an agency to withhold all or parts of a document. FOIA Exemption 3 allows an agency to withhold documents that have been specifically exempted from disclosure

by another statute if certain requirements are met. The relevant statute at issue here is Code Sec. 6103, which grants an agency the authority to withhold a document in its entirety simply because it pertains to a confidential tax return or “return information.” The Supreme Court and the District of Columbia Circuit Court of Appeals have held that Code Sec. 6103 qualifies as a FOIA Exemption 3 statute (see *Church of Scientology of Calif. v. IRS*, U.S. Sup. Ct., 60 AFTR 2d 87-5832, 11/10/87).

Code Sec. 6103(b)(2) defines “return information” as “a taxpayer’s identity, the nature, source or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer’s return was, is being or will be examined or subject to other investigation or processing, or any other data received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence or possible existence of liability”

The district court said that the definition of “return information” in this case hinges on a determination of who qualifies as a “taxpayer.” Since Code Sec. 7701(a)(14) defines a “taxpayer” as “any person subject to an internal revenue tax,” an employer qualifies as a “taxpayer” if it meets the statutory definition of a “person.” Code Sec. 7701(a)(1) defines a “person” as an “individual, trust, estate, partnership, association, company or corporation.” The district court said that the watchdog group’s employer list is undoubtedly comprised of companies, corporations, and associations that constitute “persons” under Code Sec. 7701(a)(1). Therefore, the SSA is prohibited from releasing this list because employers are “taxpayers” and revealing their identity would violate Code Sec. 6103.

Revised H-2B Visa Program Wage Rate Calculation Rules Go Into Effect on September 30

The Department of Labor (DOL) has announced that the effective date for the final rule revising the H-2B visa program wage rate calculations has been moved up from Jan. 1, 2012 to Sept. 30, 2011 [Fed. Reg. Vol. 76, p. 45667-45673, 08/01/2011].

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

versely affect the wages and working conditions of similarly employed U.S. workers.

Final regulations, originally effective on Jan. 1, 2012 (now Sept. 30, 2011), revised the calculation of wage rates for workers in the H-2B visa program. The final regs require employers to pay H-2B and American workers recruited in connection with an H-2B job application a wage that meets or exceeds the highest of: the prevailing wage rate, the federal minimum wage rate, the state minimum wage rate, or the local minimum wage rate.

The prevailing wage rate will be based on the highest of the following:

- Wages established under an agreed-upon collective bargaining agreement.
- A wage rate established under the Davis-Bacon Act (see Payroll Guide at ¶ 18,760) or the Service Contract Act (see Payroll Guide at ¶ 18,780) for that occupation in the area of intended employment.
- The arithmetic mean wage rate established by the Occupational Employment Statistics wage survey for that occupation in the area of intended employment.

Other H-2A/H-2B visa news. The U.S. Citizenship and Immigration Services (USCIS) is also reminding employers that certain fees may not be collected from H-2A and H-2B workers. Fees that workers may not pay include, but are not limited to, government-mandated fees that are prohibited under DOL rules, petition fees, attorney fees, recruitment costs, and any fees that are conditions of employment [USCIS News Release, 8/1/11].

In addition, USCIS has issued further guidance (in the form of questions and answers) on what is considered a valid employer-employee relationship for H-1B petition purposes. An employer who seeks to sponsor a temporary worker in an H-1B specialty occupation is required to establish a valid employer-employee relationship. USCIS has interpreted this term to be the “conventional master-servant relationship as understood by common-law agency doctrine.” The common law test requires that all incidents of the relationship be assessed and weighed with no one factor being decisive. The new guidance includes further information on the employer-employee relationship with respect to independent contractors, self-employed beneficiaries, and beneficiaries placed at third-party worksites. There is also additional information on the types of evidence petitioners may provide to establish that an employer-employee relationship exists [USCIS Memorandum, *Determining Employer-Employee Relationship for Adjudication of H-1B Petitions*, In-

cluding *Third-Party Site Placements*, as revised on 8/2/11].

Stateline

New laws and developments are reported from the following states:

ALABAMA

Unemployment. The Alabama Department of Industrial Relations (DIR) is sending letters to employers to let them know that they will be subject to a 0.07% unemployment tax assessment on their 2010 taxable wages to help the State repay the interest on its federal unemployment insurance (UI) loans. The assessment totals approximately \$5.60 for each employee and must be paid by *Sept. 9, 2011*. The assessment will help ensure that Alabama employers will be eligible to receive the maximum amount of state unemployment credits on their 2011 federal Form 940 [DIR News Release, *Alabama Employers to Receive Tax Assessment to Avoid Loss of FUTA Credit*, 8/8/11].

ARIZONA

Unemployment. Arizona law exempts certain experience-rated employers and new employers from paying the 0.1% job training tax (JTT) only when the federal unemployment tax (FUTA) rate at the time the taxable wages were paid is above 6.0%. Effective July 1, 2011, the FUTA tax rate is not above 6.0%. As a result, *effective with taxable wages paid beginning on July 1, 2011*, all experience-rated and new employers are subject to this tax. If an employer was exempt from the JTT in the first two quarters of 2011, and the employer did not meet the \$7,000 taxable wage base threshold for an employee in the first or second quarter, the employer will be subject to JTT only on taxable wages paid to that employee in the third and fourth quarters. If an exempt employer did meet the taxable wage base threshold for an employee in the first or second quarter, the employer is not subject to JTT on wages paid to that employee in the third or fourth quarter. Reimbursement employers are not subject to the JTT [Arizona Department of Employment Security website, *Change in FUTA Rate and Job Training Tax Exemptions*].

Withholding. The Arizona Department of Revenue (DOR) has issued a notice on its Tax Recovery Program, which runs from Sept. 1 through Oct. 1, 2011, and provides an opportunity for taxpayers who live, work, or do business in Arizona to pay any back taxes owed to the State without penalty or criminal prosecution, and at a reduced interest rate. The program includes monthly and quarterly withholding taxes in tax periods between Jan. 1, 2005 and Dec. 31, 2009. There is information in the notice on eligibility requirements, and on how to partici-

pate in the program [Arizona Tax Recovery Program, 8/1/11; L. 2011, S1616 (c. 28)].

CALIFORNIA

Unemployment. New legislation removes the Jan. 1, 2012 sunset date on the law that allows a motion picture payroll services company to be treated as the employer of motion picture production workers for unemployment tax purposes (see Payroll Guide at ¶ 11,601). The motion picture payroll services company must file a statement with the Employment Development Department (EDD) that indicates its intent to be treated as the employer of the aforementioned workers [L. 2011, AB55].

Wage and Hour. The Court of Appeal has issued a ruling that distinguishes between “vacations” and “sabbaticals.” Vacation is deferred compensation. Earnings are not conditioned upon anything other than the employee rendering services for the employer. Sabbaticals, on the other hand, are a conditional type of leave in that the employee is expected to use the time for a certain purpose. To be eligible for a sabbatical, an employee must generally work for the employer for a certain number of years. Under California law, an employer may not require an employee to forfeit vested vacation pay. An employer does not have to pay employees for sabbatical time that they have earned, but not used, prior to leaving the company. The ruling states that leave is more likely to be a sabbatical if: (1) the leave is granted infrequently; (2) the length of the leave is longer than that normally offered for a vacation; (3) it is granted in addition to a regular vacation; and (4) it incorporates some feature that proves that the employee taking the sabbatical is expected to return to work for the employer after the leave is over [*Paton v. Advanced Micro Devices, Inc.*, Cal. Ct. App., 6th Dist., Dkt No. H034618, 8/5/11].

The California Court of Appeal has ruled that a home builder was not liable for a subcontractor’s violation of California’s minimum wage and overtime laws. The court found that the contract price was sufficient to allow the subcontractor to pay the employees the minimum wage and comply with other applicable laws [*Castillo v. Toll Bros., Inc.*, Cal. Ct. App., 1st Dist., Dkt No. A128605, 7/28/11].

Withholding. Foreign non-U.S. partners can now request reduced or no withholding of California tax. Foreign partners can request reduced withholding on an annual basis by submitting California Form 589, *Nonresident Reduced Withholding Request*, to the Franchise Tax Board (FTB), along with a signed copy of IRS Form 8804-C, *Certificate of Partner-Level Items to Reduce Section 1446 Withholding*. The foreign partner must first sign and send IRS Form 8804-C to the partnership or limited liability company [California FTB Public Service Bulletin 11-14, 07/22/2011].

CONNECTICUT

Unemployment. *Effective Oct. 1, 2011*, the deadline to appeal certain state unemployment benefit rulings may be extended beyond 21 days if there is good cause or the appeal is postmarked prior to the deadline [L. 2011, H6096].

Withholding. The Connecticut Department of Revenue Services (DRS) is advising employers that the year-to-date withholding (Step 13) in the Aug. 1, 2011 withholding calculation rules (see Payroll Guide at ¶ 23,802) is the amount of tax withheld based on the employee's withholding tax code only. This amount does not include any additional or reduced withholding requested by the employee on Line 2 or 3 of Form CT-W4, *Employee's Withholding Certificate*. The DRS has become aware that automated payroll processing software systems are unable to distinguish between additional voluntary withholding amounts and regular withholding when computing catch-up withholding for the current tax year in accordance with recent personal income tax legislative changes. This may result in underwithholding. Employers who, in good faith, and solely due to this problem, do not correctly withhold and pay in the taxes due for their employees will not be penalized in the event of an audit. Employees in this situation will not be subject to interest and penalties because of underwithholding. Employees can protect themselves from the risk of underpayment, penalties, and interest by making estimated tax payments on their personal income tax returns that are large enough to ensure that enough tax is paid to meet the "safe harbor" of paying in at least as much as the amount of their last annual Connecticut personal income tax liability. The 2011 estimated income tax worksheet and an updated 2011 income tax calculation schedule are now on the DRS website [DRS Press Release, *Payroll Processing Software Limitations May Impact Income Tax Withholding*, 8/10/11].

The Connecticut Department of Revenue Services (DRS) has issued a revised version of Form CT-588, *Athlete or Entertainer Request for Reduced Withholding*. The DRS must receive Form CT-588 at least 14 days before the date of the first payment or the date of the performance, whichever is earlier, in order to authorize a reduction in withholding [DRS-E-NEWS, *New Forms and 2011 Legislative Update*, 7/29/11].

IDAHO

Unemployment. The Idaho Department of Labor (DOL) is notifying the State's 30,000 corporate officers that they can immediately terminate unemployment insurance (UI) coverage, instead of waiting until 2012. The wages of officers who elect to immediately terminate unemployment coverage will not be subject to unemployment tax in the third and fourth quarters of 2011. The

wages of officers electing to opt out by Dec. 15, 2011 will not be subject to UI tax through 2013. Corporate officers opting out of Idaho UI tax will remain liable for federal unemployment tax. Employers will not be able to claim the state unemployment credit on federal Form 940 on wages of corporate officers who opt out. This raises the employer's federal tax liability from \$42 (i.e., $\$7,000 \times .006$) to \$434 (i.e., $\$7,000 \times .062$) per year for each corporate officer opting out who makes \$7,000 or more per year. Corporate officers will be given the opportunity to reconsider their decision every other year. The opt-out form and instructions are available on the DOL website. Legislation, effective July 1, 2011, requires corporate officers to show that they are not legally associated with their company to be eligible for UI benefits [Idaho DOL Press Release, 7/15/11; L. 2011, H80].

ILLINOIS

Unclaimed Wages. Unclaimed wages, payroll, and salary are now presumed abandoned after more than one year for unclaimed property reporting purposes (previously, more than five years) [L. 2011, H1560].

INDIANA

Withholding. The Department of Revenue may require a person who is on a payment plan for outstanding withholding tax liabilities to make periodic payments by electronic funds transfer (EFT) through an automatic withdrawal from the person's account at a financial institution [Indiana Commissioners Directive 33, 08/01/2011].

MICHIGAN

Unemployment. The Michigan Unemployment Insurance Agency (UIA) is advising employers that Michigan expects to be a credit reduction state in the 2011 tax year for federal unemployment tax purposes. If so, Michigan employers will pay federal unemployment tax (federal Form 940) for the 2011 tax year at a higher tax rate than all other employers due to the State's failure to repay its outstanding federal loans for three consecutive years since 2009. Most employers are allowed to claim 5.4% in state unemployment tax credits against the FUTA tax rate if they timely pay their state unemployment taxes. Michigan employers will only be able to claim a maximum of 4.5% in state unemployment tax credits against the FUTA tax rate in 2011. To offset the added cost, Michigan offers a state unemployment tax credit to fully experienced employers (unemployment experience of five years or more) who have a positive reserve balance [UIA Fact Sheet #139, August 2011].

Withholding. *Effective Jan. 1, 2012*, employers must deduct 4.35% withholding on the taxable portion of pension and retirement benefits. Withholding is not required on any part of a distribution that is not expected to be

includable in the recipient's gross income. Pension and retirement benefits include payments made from a pension, individual retirement account, annuity, profit sharing, stock bonus, or other deferred compensation plan [L. 2011, H4361].

The Michigan Tax Tribunal has ruled that a corporate vice president was not a "responsible person" who was personally liable for the unpaid withholding taxes from five limited liability companies (LLCs) that the company owned. The Michigan Department of Treasury failed to show that the vice president: (1) had control over the filing of the corporation's withholding tax returns and payments; (2) supervised the tax returns or payments; or (3) was responsible for filing the corporation's withholding tax returns and payments [*Regester v. Mich. Department of Treasury*, Mich. Tax Tribunal, Dkt. No. 379034, 06/22/2011].

MINNESOTA

Withholding. The Minnesota Department of Revenue (DOR) has issued a release that summarizes recent legislative developments, including: (1) Minnesota's conformity with the Internal Revenue Code in effect on April 14, 2011 (see Payroll Guide Newsletter at ¶ 16.11); (2) a new law requiring certain third-party payers of sick pay to file an annual report with the DOR, effective for benefits paid after Dec. 31, 2010 (see Payroll Guide Newsletter at ¶ 12.11); and (3) a new law that exempts nonresident entertainers from withholding, beginning in 2012, if they receive compensation that is less than \$600 (see Payroll Guide Newsletter at ¶ 16.11) [DOR Release, *What's New for Employers for Tax Year 2011*, 8/5/11].

NEW HAMPSHIRE

Wage and Hour. Effective Aug. 13, 2011, the New Hampshire Department of Labor (DOL) is required to issue a warning before imposing penalties for State wage and hour violations. Upon receipt of the warning, the employer will have 30 days to cure the defect causing the violation. However, the DOL is not required to issue a warning if the employer intends to cause harm, the violation presents a threat to public safety, or there are other specified violations, such as a failure to pay an employee in full and on time, or the employer fails to pay an employee's final wages [L. 2011, S86].

NEW YORK

Employer Tax. The New York State Department of Taxation and Finance (DTF) has issued an advisory opinion on the applicability of the Metropolitan Commuter Transportation Mobility Tax (MCTMT) to employees on temporary staffing assignments. The DTF reached the conclusion that when "billable" employees perform distinct, consecutive job assignments for the same employer, the determination as to whether an employee is a "covered employee" for MCTMT liability

purposes should be determined separately for each of the employee's assignments. Employees are considered to be covered employees for purposes of the MCTMT if they perform services in the Metropolitan Commuter Transportation District (i.e., New York (Manhattan), Bronx, Kings (Brooklyn), Queens, Richmond (Staten Island), Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk, and Westchester counties). The DTF uses the following factors (tests) to determine where employees are performing services: (1) localization; (2) base of operations; (3) place of direction and control; and (4) residence. The tests are applied in numerical order. If the application of the first test results in an employee's services being allocated to the Metropolitan Commuter Transportation District, no additional tests are required. The DTF analyzed two different fact patterns in the advisory opinion [New York Advisory Opinion TSB-A-11(1)MCTMT, 07/21/2011].

Withholding. The Marriage Equality Act legalized same-sex marriages in New York State, effective July 24, 2011. The New York State Department of Taxation and Finance (DTF) is advising same-sex couples who married before Jan. 1, 2012 to use a "married filing jointly" status in New York State, even though their marital status is not recognized for federal tax purposes, and even if the marriage took place outside of New York State. Same-sex couples may want to file a new Form IT-2104, *Employee's Withholding Allowance Certificate*, with their employer to note that they will be using the married filing jointly filing status. The DTF is advising employers to not withhold New York State, New York City, or Yonkers income tax on certain benefits provided to same-sex married employees, such as domestic partner health benefits, even though the amount may be subject to federal withholding. When reporting the annual wage totals on Form NYS-45, *Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Return*, Part C, Column d, employers should report the federal wages less the value of any benefits discussed above for which New York withholding wasn't deducted (plus any amount of taxable Code Sec. 414(h) retirement contributions and any Code Sec. 125 amounts from a New York City flexible benefits program for governmental employees). Employers should continue to use the rules described in New York Department of Taxation and Finance Publication New York Department of Taxation & Finance Publication NYS-50, 05/01/2011, *Employer's Guide to Unemployment Insurance, Wage Reporting, and Withholding Tax*, for reporting state and local wages on federal Form W-2 [New York Technical Service Bureau Memorandum TSB-M-11(8)C, 07/29/2011, DTF Guidance, *Withholding Tax Information Regarding Same-Sex Married Employees*].

The New York State Department of Taxation and Finance (DTF) has updated Publication 72, *Electronic Reporting of NYS-45 Information*. The new document supersedes the previous version, dated March 2007. The publication describes specifications, formats, and layouts for the file upload of Form NYS-45, *Quarterly Combined Withholding, Wage Reporting, and Unemployment Insurance Return*, using the DTF's Online Services at <http://www.tax.ny.gov>. Payroll services that report for at least 50 employers may voluntarily use the Form NYS-45 upload, but must receive prior approval from the DTF. Employers must retain a copy of the uploaded files, or be able to reconstruct the data, for at least four years after the due date of the returns submitted in the upload [New York Department of Taxation and Finance Publication New York Department of Taxation & Finance Publication 72, 08/01/2011].

PENNSYLVANIA

Withholding. Pennsylvania Act 32 of 2008 created a new local income earned income tax (EIT) collection system that will be fully operational on Jan. 1, 2012 (see Payroll Guide Newsletter at ¶ 14.3). The Act will reduce the number of local EIT collectors (tax officers) from approximately 560 to 21, beginning in 2012. Employers and tax officers must utilize political subdivision (PSD) codes prescribed by the Department of Community and Economic Development (DCED). The DCED has now posted a list of PSD codes on its website for each tax collection district, school district, and municipality. The PSD codes will help ensure that employee earned income tax withholdings are remitted and distributed to the proper taxing authority.

SOUTH CAROLINA

Unemployment. Recent legislation will lower unemployment tax rates for many employers, retroactive to

Jan. 1, 2011. The South Carolina Department of Employment and Workforce (DEW) has mailed notices to employers with preliminary estimates of the revised tax rates. Employers will subsequently receive additional correspondence notifying them of their final revised rate. Any credits resulting from the lower tax rates can be applied to future quarters. Second quarter contributions should have been paid using the tax rate received in January 2011 [DEW notice, *UPDATE: Important Tax Rate Information (August 2011)*].

TEXAS

Unclaimed Wages. *Effective Jan. 1, 2012*, the due date for annual unclaimed property reports is changed from November 1 to July 1 [L. 2011, H257].

VERMONT

Unemployment. The Vermont fiscal year 2012 budget provides appropriations from the general fund to the Vermont Department of Labor for payment of federal loan interest due Sept. 30, 2011. The appropriation will not be made if the federal government waives the interest payment [L. 2011, H441].

WISCONSIN

Withholding. The Wisconsin Department of Revenue has adopted IRS increases (see Ann 2011-40, 2011-29 IRB 56) to the optional standard mileage rate for business purposes (now 55.5¢ per mile) and the optional standard mileage rate for medical and moving expense purposes (now 23.5¢ per mile) that went into effect on July 1, 2011 [Wisconsin Dept. Rev. Tax Bulletin 172, 07/01/2011].



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