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Note: Starting with this issue of PAYROLL CURRENTLY, references to *The Payroll Source*® refer to the 2007 edition of the book.

ICE Charges Criminal Violations of Immigration Laws in New Enforcement Approach

In a fact sheet released February 22, 2007, U.S. Immigration and Customs Enforcement (ICE) describes a new strategy for combating unlawful employment of illegal aliens. In the past, according to the fact sheet, administrative fines imposed by the former Immigration and Nationalization Service did not deter unscrupulous employers that viewed them simply as a “cost of doing business” [www.ice.gov/pi/

[news/factsheets/worksite070222.htm](http://www.ice.gov/pi/news/factsheets/worksite070222.htm)].

ICE now often pursues more serious criminal charges. For example, a felony conviction for harboring illegal aliens can result in a 10-year prison sentence. “ICE has found these criminal sanctions to be a far greater deterrent to illegal employment schemes than administrative sanctions.”

Note: ICE acknowledges that the vast majority of employers want to comply with the immigration laws, and reminds them that the ICE Mutual Agreement between Government and Employers (IMAGE) program can help them with compliance (see **PAYROLL CURRENTLY, Issue No. 18, Vol. 14**).

IFCO

In testimony before the U.S. House Ways and Means Committee on July 26, 2006, Julie L. Myers, Assistant Secretary, Immigration and Customs Enforcement, Department of Homeland Security, cited the IFCO case as an example of ICE’s new approach, which targets businesses and industries that deliberately profit from the wholesale employment of illegal aliens (<http://waysandmeans.house.gov/hearings.asp?formnose=printfriendly&id=1570>; select “109th Congress” from the drop-down list, click the “Change Congress” button, select the link for the July 26 “Hearing on Impacts of Border Security and Immigration on Ways and Means Programs,” and select the link for “The Honorable Julie L. Myers”).

IFCO Systems North America, Inc., a U.S. subsidiary of a Dutch company headquartered in Houston, Texas,

provides a national network of “pallet management services” (procuring, repairing, and distributing wood cargo pallets to and from manufacturing and retail businesses). In 2004, the company opened a facility in Guilderland, New York.

An ICE investigation of the Guilderland facility began in February 2005, when the agency received a tip from an IFCO employee that his Hispanic co-workers had torn up their Forms W-2. The tipster was informed by his manager that the workers had false identification and did not intend to file tax returns.

Investigators found that IFCO managers were hiring workers they knew to be in the U.S. illegally, accepting work authorization documents they knew to be false, and soliciting an employee (who turned out to be a confidential informant) to acquire fraudulent genuine-looking documents for other illegal aliens. A former payroll employee, fired from the Guilderland IFCO facility after voicing concerns over the company’s hiring practices, said:

- The Guilderland facility often hired workers who did not have social security cards or who produced identification cards with photos that were someone else’s.

- The payroll employee was directed to enter eight allowances on the W-4 forms for some Hispanic workers because they were not going to file tax returns anyway.

- IFCO arranged to transport illegal workers from Texas to Guilderland.

- IFCO provided housing for

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illegal aliens in three locations in the Guilderland area, for which it charged them rent.

- IFCO provided the illegal aliens with transportation between the Guilderland facility and the housing.

Investigators found that more than half the SSNs on the IFCO Systems North America payroll were either invalid, did not match the name registered with the SSA, or belonged to children or dead persons. Nearly one-third of the SSNs on the Guilderland facility payroll were similarly defective. SSA sent at least 13 notifications to IFCO Systems North America in 2004 and 2005 about the name and number mismatches, but only about 1 % of the errors were corrected.

As a result of the investigation, seven current and former IFCO managers were arrested in April 2006 on charges of conspiracy to transport, harbor, and encourage illegal aliens to reside in the U.S. in violation of the Immigration Reform and Control Act (8 USC §1324(a)(1)(A)) in connection with IFCO's Guilderland facility. These charges carry a penalty of up to 10 years in prison and a fine of up to \$250,000 for each alien with respect to whom a violation takes place. Two other managers were charged in connection with the use of fraudulent identification documents. (In addition, 1,187 illegal aliens employed by IFCO in 26 states were arrested.)

On February 27, 2007, five of the managers entered guilty pleas. In exchange for their continued cooperation with the ongoing federal investigation, two of them pled guilty to a single misdemeanor count each of "unlawful employment of illegal aliens" in violation of 8 USC §§1324(a)(1)(A), and 1324a(a)(2), which carries a maximum prison term of six months and a \$3,000 fine for each unauthorized alien with respect to whom a violation occurs; another manager pled guilty to the same charge. James Rice, IFCO's regional general manager, pled guilty to one felony count of "conspiracy to transport and harbor illegal aliens." Finally, Robert Belvin, who served as general manager of the Guilderland facility, pled guilty to one felony count of conspiracy to transport and harbor illegal aliens and one felony count of conspiring to possess identification documents with the intent to use them unlawfully.

RCI

Three Florida residents, doing business as Rosenbaum-Cunningham International, Inc. (RCI), operated a cleaning and grounds-maintenance service that contracted with theme restaurant chains and hospitality venues throughout the country – including Planet Hollywood, Hard Rock Café, Dave and Busters, ESPN Zone, and others.

The three men were indicted on

February 22, 2007, charged with conspiracy to defraud the U.S., harboring illegal aliens for profit, and evading payment of federal employment taxes. According to the indictment, RCI evaded payment of over \$18 million in employment taxes between 2001 and 2005 and obstructed the IRS from performing its government functions by creating several shell companies and bank accounts to hide funds (which the three used to pay personal expenses and live extravagant lifestyles).

Knowingly harboring illegal aliens for profit is a felony carrying a maximum sentence of 10 years' imprisonment (8 USC §1324(a)(1)(A)(iii)), and evading collection and payment of employment taxes is a five-year felony (26 USC §7202). If convicted, the owners of RCI may also be ordered to pay restitution to the U.S. Treasury of the \$18 million.

In connection with the indictments, ICE announced the arrest of 195 immigration status violators and said that guilty pleas had been entered by several RCI managers to an assortment of related charges – harboring of illegal aliens and making a false statement on a tax return, aiding and abetting the unlawful employment of aliens, and trafficking in means of identification (www.ice.gov/pi/news/newsreleases/articles/070222grandrapids.htm). **PC**

OCSE Releases Draft of Revised Standardized Income Withholding Form

The Office of Child Support Enforcement (OCSE) has released a draft of a revised federal standardized income withholding order (IWO) [72 F.R. 6735, 2-13-07]. The draft *Income Withholding for Support*, together with *Instructions*, both dated

January 25, 2007, are available on the APA Web site at www.payroll.org/i4a/pages/index.cfm?pageid=139 under "Draft Forms and Instructions."

Comments on the form are invited and must be received by April 14, 2007. Submit comments at: [\[acf.hhs.gov\]\(mailto:acf.hhs.gov\). When commenting, be sure to reference "OMB 0970-0154." *Note:* The APA will be submitting comments on the draft form. Provide your input for this submission to Bill Dunn, APA Manager of Government Relations, at \[wdunn@americanpayroll.org\]\(mailto:wdunn@americanpayroll.org\).](mailto:infocollection@</p>
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Payroll Solutions

Q. Management has decided to allow employees to purchase extra vacation time, which they can use instead of time off without pay after their allotted vacation time is gone. Can we offer this benefit through our cafeteria plan?

A. Yes, you can. Note, however, that employees must make irrevocable benefit elections under a cafeteria plan before each plan year begins. Also, while a cafeteria plan may offer employees the option of purchasing additional vacation leave with pre-tax dollars, the leave becomes taxable when taken and is subject to several restrictions related to the ban on deferred compensation:

- The plan must prohibit employees from carrying over to a later year any purchased vacation days that go unused at the end of a plan year.
- The plan must prohibit employees from receiving cash for such unused purchased vacation days after the end of the plan year. Employees may “cash out” purchased vacation days they do not think they will use, but they must do so before the end of the plan year or their individual tax year, whichever is earlier.
- Purchased vacation days may not be used until all an employee’s regular vacation leave has been used (see *The Payroll Source*®, p. 4-48).

EXAMPLE: An employee has accrued 10 vacation days under her employer’s vacation policy and purchases 3 more under a cafeteria plan. By the end of the year, the employee has used 11 vacation days. Because the employee’s accrued vacation leave must be used first when determining whether she will forfeit any purchased vacation days, the employee has 2 purchased vacation days that remain unused at the end of the year. The employee must forfeit the 2 unused days or take cash for them before the end of the plan year or her tax year (whichever is earlier).

The proposed revisions to the IWO form include the following:

- **Title of form.** The new form has been modified to have one title. This is a change from the current form, where you must select from two title lines, *Order* or *Notice* to Withhold Income for Child Support. The new form alleviates this and incorporates both *Order* and *Notice*. (Field 1a)

- **Original or amended form.** The new form allows the issuing entity to indicate whether the IWO is original or amended. Marking the *Income Withholding Order/Notice for Support* checkbox indicates an original form. (Field 1a)

- **Identifying the sender.** The new form provides a clearer indication of the entity submitting the IWO (i.e., Child Support Enforcement (CSE) agency, court, private entity, etc.) at the beginning of the document. Note that “Private individual/entity” includes tribes that are not operating under a CSE program. (Field 1d)

- **Note.** This has been moved to the top of the form in the same area where the issuer of the form is identified. It clearly explains the requirement that anyone other than a state CSE agency or court must provide a copy of the underlying order. (Field 1d)

- **Blank box for barcodes.** The new form has a blank space in the top right corner to accommodate court

stamps or barcodes added to the IWO.

- **Lump sum.** A *One-Time Order/Notice – Lump Sum Payment* checkbox has been added to allow the issuer of the IWO to indicate that a lump sum should be attached to satisfy an arrearage. In addition, a line has been added to allow the issuer to indicate the amount of the lump sum and that the request is for a one-time only payment.

The form includes specific instructions to the employer to continue payments for ongoing IWOs. The employer is directed to contact the issuer if it has any questions. (Fields 1b and 13)

- **Case identifier.** This field has replaced the *Case Number* used on the current form.

- **Order identifier.** This field has been added so that a state can identify a specific order. It is to be used at the state’s discretion and may be used for, e.g., the court number, docket number, or other issuer’s identifier.

- **Child’s name.** The fields for the child’s name and date of birth have been moved to the front of the form. This allows the employer to easily identify who the IWO is for and to avoid implementing duplicate orders. (Fields 3d-3o)

- **Remittance information.** A “Remittance Identifier” field has been added in this section. The current IWO requires that states use the Case

Identifier. However, some states use a social security number, participant identification number, or other identifier, which may now be appropriately entered in this field. (Field 21)

The EFT/EDI bank routing number and bank account number have been removed from this section.

- **Signature.** The signature fields have been compressed from two lines to one – for signature (if required), printed name, and title. (Fields 24, 25, and 26)

- **Document tracking identifier.** This field has been added to the footer of the document for use by states participating in OCSE’s electronic IWO (eIWO) application. This is an optional field for other users of the form. (Field 28)

- **Identifying information.** Fields have been added for identification at the top of the second page – for employee/obligor’s name, case identifier, order identifier, and employer’s name – to allow the employer to return this page to report the termination of employment of the employee.

New fields have been added – last known phone number, date final payment made to SDU, final payment amount – in the “Notification of Termination of Employment” section.

- **Withholding limits.** This section has been revised to provide a clearer explanation of the federal Consumer

Credit Protection Act, as well as clearer guidance on tribal orders and withholding for cases with arrears greater than 12 weeks.

- **Contact information.** Contact information for the employer and employee-obligor has been added, including e-mail or Web site information

as well as an address where the employer can send correspondence or a *Notification of Termination of Employment*. (Fields 36-44) **PC**

DOL Wage & Hour Roundup

The U.S. Department of Labor's Wage & Hour Division recently concluded the following Fair Labor Standards Act (FLSA) enforcement actions:

News Notes...

Payroll Service Provider Sentenced to Prison for Embezzling Client Funds

The Department of Justice has announced that Angela Smiley, owner of American Payroll Service (APS), has been sentenced to 36 months in federal prison on charges of embezzling from client accounts money intended for payment of quarterly federal tax liabilities.

From January 2000 through September 2004, Smiley drafted in excess of \$600,000 directly from APS business clients' bank accounts, but failed to forward the money to the IRS. Instead, she used it to pay employee payroll, her own salary, her husband who was not an APS employee, general operating expenses of APS, and her own personal expenses.

As Power of Attorney for APS business clients, Smiley was contacted by the IRS and questioned about the failure of her clients to pay their federal tax liabilities. She lied to the IRS to conceal her scheme and then failed to advise her clients of the IRS contacts.

After a client discovered that its funds had not been paid to the IRS, Smiley used funds from other client accounts to pay the complaining client's obligation.

According to U.S. Attorney Catherine Hanaway, "Many businesses and organizations in the St. Louis area were victimized by Ms. Smiley's fraudulent conduct, including the St. Louis Archdiocese. . . [Her] victims are left holding the bag, having to pay substantial taxes after already having those funds taken from their businesses" [News Release, 1-19-07].

Big payouts

- ABC Professional Tree Services, Inc., of Houston, Texas, has agreed to pay \$1,801,507 in back wages to 2,501 current and former employees in 16 states who were not properly paid for overtime hours worked. The employer provides tree cutting, tree trimming, and clean-up services around power lines for utility companies primarily during and after natural disasters. A portion of the back wages will go to workers who worked for the company in the aftermath of Hurricane Katrina.

- Following a Wage & Hour investigation of 181 security guard companies in Puerto Rico, 139 were found in violation of the FLSA. A spokesman explained that "security guard companies in Puerto Rico have a chronic history of requiring employees to work over 40 hours per week and then paying them straight time for all hours worked." So far, a total of \$1,287,044 has been paid to 4,995 workers as a result of this enforcement initiative. In addition, 17 of the employers have been assessed \$440,967 in civil money penalties.

Misclassification

- Missouri-based Vaterott Educational Centers, Inc., has paid \$191,246 to 304 employees in nine states – Illinois, Iowa, Kansas, Missouri, Nebraska, Ohio, Oklahoma, Tennessee, and Texas – in back overtime. W-H investigators found that nonexempt office employees were misclassified as exempt, hourly employees were not paid for overtime that was not "authorized," and some employees were simply paid straight time for

overtime hours worked.

Overtime

- Reuben's Garment Cutting and Marking of San Francisco, California, has paid \$66,066 in back overtime wages to 57 employees. W-H investigators found that the company used a second time card for each employee on Saturdays and paid employees at a straight time rate in cash for work performed that day.

- Direct Supply, Inc., of Milwaukee, Wisconsin, has paid \$96,875 in back overtime wages to 228 workers. W-H investigators found that the medical supply company failed to include bonuses in the regular rate of pay when calculating overtime and failed to pay overtime to some employees during a three-month training period. In addition, the company has paid \$990 in youth employment penalties for employing two minors under age 16 in violation of hours and time standards.

Making false statements to investigators

- P. Mata, owner of El Mariachi restaurants in Fairmont and Austin, Minnesota, has entered a guilty plea to a criminal charge of making false statements to W-H investigators. After being notified that he was responsible for back wages owed to employees, Mata submitted back wage receipts to the DOL as proof of payment, when in fact he required employees to sign the receipts without receiving the back wages they were owed. Under the court order, a total of \$39,931 will be paid to 21 workers for unpaid overtime, minimum wages, and liquidated damages. **PC**

Employer That Required Worker to Provide SSN Documentation Was Not Guilty of Employment Discrimination

The Tenth Circuit Court of Appeals has affirmed (see **PAYROLL CURRENTLY**, Issue No. 17, Vol. 12) that an employer that required an employee

of Mexican origin to produce social security number (SSN) documentation from the Social Security Administration (SSA) in order to continue working

did not violate Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of race, nationality, or national origin [*Zamora v. Elite Logistics, Inc.*, No. 04-3205, 2007 U.S. App. LEXIS 4434 (10th CA., 2-26-07)].

Background

When Ramon Zamora, a permanent legal resident of the U.S., was hired by Elite Logistics, Inc., he completed Form I-9 and presented an alien registration card and a social security card. Several months later, acting on a tip that the Immigration and Naturalization Service (now U.S. Immigration and Customs Enforcement) might be conducting an inspection of its Kansas City grocery warehouse facility, the company hired two independent contractors to check the SSNs of all of its approximately 650 employees.

One of the contractors reported that Zamora's SSN had been used by someone else for credit purposes, but could not verify Zamora's SSN through the SSA (that can only be done by the employer). On receiving the contractors' report, Elite asked Zamora to provide documentation of his right to work in the U.S. and suspended him from work until he did so.

Elite rejected Zamora's naturalization certificate (obtained since his hiring) showing his U.S. citizenship and insisted on seeing documentation

from the SSA. Eventually, Zamora produced documentation from the SSA that matched his name to the information he had provided to the company when he was hired, and Elite then called him to return to work. Zamora was fired when he refused to return without a written apology and explanation.

Analysis

The court said that Elite had a legitimate nondiscriminatory reason for suspending Zamora until he provided employment authorization documentation, namely fear of the consequences under the Immigration Reform and Control Act of 1986 for knowingly hiring or continuing to employ undocumented workers.

Elite also had a legitimate nondiscriminatory reason for firing Zamora – the HR manager believed that he would not return to work without an apology, which the manager refused to provide. For example, when the company informed Zamora that he could return to work, he instead went to the HR manager's office to deliver a letter demanding a written apology. Additionally, because Zamora asked that the apology be sent to his home, it was reasonable for the company to believe that he would not return to work without one.

The fact that Elite offered Zamora his job back was evidence that there was no discrimination. Zamora, in

fact, could have returned to work on the day Elite asked him to come back. Moreover, the company was under no legal obligation to proffer an apology, and there was no evidence that Elite had ever treated other employees differently. **PC**

News Notes...

Pilot's Reserve-Duty Hours Did Not Count Toward FMLA Leave Eligibility

America West Airlines granted pilot Susan Knapp's request for leave under the Family and Medical Leave Act (FMLA) in October 1999 but denied her subsequent requests. After Knapp left America West in 2000, she sued the company for violating the FMLA.

A U.S. District Court said that Knapp's active duty hours, training time, and layover hours counted as hours worked in determining her FMLA eligibility, but that her reserve-duty time did not. Without inclusion of the reserve-duty time, Knapp did not meet the 1,250 hours-of-service eligibility requirement for FMLA leave.

The Tenth Circuit Court of Appeals has now affirmed that Knapp's reserve-duty time did not count as hours of service. The court said the analysis is the same for purposes of determining hours of service under the FMLA and hours worked under the Fair Labor Standards Act (FLSA).

Here, Knapp could not drink alcohol, had to be reachable by telephone, and had to report to the airport within one hour of being called – i.e., be in uniform, be parked in the airport parking lot, and have cleared security – while on reserve duty.

The court noted that in FLSA cases, employees' on-call time has been found not to be compensable work time even where similar or more restrictive conditions are placed on employees. The fact that America West paid Knapp a guaranteed minimum for her reserve-duty time did not, by itself, convert that time into compensable hours worked [*Knapp v. America West Airlines*, No. 05-4322, 2006 U.S. App. LEXIS 29116 (10th CA, 11-24-06)].

Pay Deductions for Full-Day Absences Under State Leave Act Do Not Jeopardize Exempt Employees' Status

In a Wage-Hour opinion letter, the U.S. Department of Labor (DOL) discusses whether an employer may reduce an employee's salary for leave taken under a state's Leave Act without affecting the employee's status as an exempt executive, administrative, or professional employee under the Fair Labor Standards Act (FLSA) [W-H Op. Ltr., FLSA2007-6 (2-8-07)].

State Leave Act

The state Leave Act provides that an eligible employee is entitled to 24 hours of unpaid leave during any 12-month period to participate in a child's

school activities, to accompany a child or elderly relative to routine medical or dental appointments, or in connection with other services related to an elderly relative's care. Under the Leave Act, employees can take leave in full-day or partial-day increments.

Salary basis rules

The DOL explains that the salary basis requirement for the executive, administrative, and professional exemptions requires that an employee regularly receive each pay period a predetermined amount constituting all or part of the employee's

compensation, which amount is not subject to reduction because of variations in the quantity or quality of

News Notes...

IRS Extends Sign-Up Period for New Tip Reporting Pilot Program

PAYROLL CURRENTLY recently reported that the IRS was extending the sign-up period for the Attributed Tip Income Program through June 30, 2007 (ATIP; see [PAYROLL CURRENTLY, Issue No. 5, Vol. 15](#)). Following up on the announcement, which came during the February edition of the IRS's *Tax Talk Today* Webcast, the Service has now provided further details [IR-2007-44, released 2-28-07].

If an eligible employer has already filed Form 8027, *Employer's Annual Information Return of Tip Income and Allocated Tips*, without electing ATIP participation, but now desires to participate, the employer should file a duplicate Form 8027 before June 30, 2007, with a notation "Duplicate Filing to Elect ATIP Participation" prominently displayed on the form. A copy of the duplicate filing must also be sent to the attention of the Employment Tax/ATIP Coordinator in Covington, Kentucky, as prescribed in Revenue Procedure 2006-30 (see [PAYROLL CURRENTLY, Issue No. 17, Vol. 14](#)).

A pilot program, ATIP offers employers in the food and beverage industry a third optional tip reporting program. Employers are invited to participate on a calendar year basis for each of the three calendar years beginning on or after January 1, 2007.

The IRS explains that the extension until June 30 is only applicable to the 2007 calendar year and does not affect the Form 8027 filing deadline. In addition, safe-harbor audit protection will not be retroactive; it will begin (1) as soon as the employer has notified the IRS (via Form 8027) that it is electing to participate in the program, and (2) with the first payroll period that the participating employer attributes tips based on the formula in the revenue procedure.

the work performed. The "no deduction rule" provides exceptions for leave taken under the Family and Medical Leave Act (FMLA) in full- or partial-day increments (29 C.F.R. §541.602(b)(7)), and for absences of one or more full days for personal reasons other than sickness or disability (29 C.F.R. §541.602(b)(1)).

Opinion

Leave allowed under the state Leave Act is not the same type of leave that would justify salary deductions under the FMLA. However, such leave is leave for personal reasons other than sickness or disability. Thus, the DOL concludes that the employer in this scenario may make deductions from

an exempt employee's pay pursuant to the Leave Act only for full-day absences. Partial-day deductions not expressly allowed by FLSA regulations would violate the salary basis test and jeopardize the employee's exempt status.

Where an employer has a benefits plan, the employer may reduce the employee's accrued leave for partial day absences provided the employee nevertheless receives his or her guaranteed salary. The DOL cautions, however, that the exempt employee must still be paid that guaranteed salary even if he or she has no accrued benefits – or a negative balance – in the leave plan. **PC**

DOL Says New Home Salespersons Are Exempt Outside Sales Employees, Timeshare Sales Employees Are Not

In three Wage-Hour opinion letters bearing the same date, the U.S. Department of Labor (DOL) discusses the application of the outside sales exemption from the minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA) to employees selling real estate interests. The DOL concludes that employees selling newly constructed homes qualify for exemption [W-H Op. Ltr., FLSA2007-1 (1-25-07); W-H Op. Ltr., FLSA2007-2 (1-25-07)], but employees selling timeshares do not [W-H Op. Ltr., FLSA2007-2 (1-25-07)].

WHAT THE LAW SAYS – To qualify for the exemption:

1. The employee's primary duty must be:

a. making sales of tangible or intangible items such as goods, insurance, stocks, bonds, or real estate; or

b. obtaining orders or contracts for services or the use of facilities; and

2. The employee must customarily and regularly work away from the employer's place or places of business in performing his/her primary duty (see *The Payroll Source*®, p. 2-20).

Employees selling new homes

The employees work from model homes or trailers located on or near the subdivision from which homes are sold. They meet with prospective

clients, contact real estate brokers and salespeople to generate interest in the properties, show the properties and communities to prospective clients, perform follow-up contacts with clients, complete sales-related paperwork, and attend company sales meetings. They also travel in the community so they can answer prospective clients' questions about the surrounding area.

The DOL explains that the employees satisfy the first requirement for the outside sales exemption because their primary duty is the sale of homes. Real estate salespersons generally meet the primary duty test because "sales" for purposes of the exemption include obtaining contracts of sale. Activities such as following up with clients, scheduling appointments, and learning about the homes in the surrounding area are activities that further their sales work and therefore qualify as exempt work.

The employees also satisfy the second requirement that they customarily and regularly work away from the employer's place or places of business while performing their primary duty of selling. In one scenario, the employees spend one or two hours twice a week outside the model home or trailer sales office engaged in selling; in the other scenario, they spend as much time out of the sales office as they do

inside it.

The DOL points out that it has long said that real estate salespersons working from a model home on a tract from which parcels of land are sold, whether or not they are improved, who leave the model home to show homes and engage in other sales activities are making sales “away from” the employer’s place of business – even if all the property shown to prospects is within the tract on which the model home is located.

Note: In 2006, a U.S. District Court in Georgia (*Billingslea v. Brayson Homes, Inc.*, see **PAYROLL CURRENTLY, Issue No. 9, Vol. 14**) rejected this reasoning, which is found in the DOL’s Field Operations Handbook and a 1964 opinion letter, saying that it failed “the common sense test” to the extent that it suggested that a real estate sales employee walking out of a model home a few yards to show a new home on the same subdivision site was traveling away from the employer’s place of business.

The DOL also reasons that the sales office (e.g., a model home on the subdivision) is the employer’s principal place of business for purposes of the exemption because it is a fixed site used as a headquarters for making sales; however, “the lots for sale are not part of the employer’s place of business but rather are the products to be sold by the sales associates.”

Employees selling timeshares

An employer has three groups of employees whose primary duty is to promote and sell timeshare interests in resort properties owned by the employer. All three groups of employees perform the same duties: greeting prospects, showing them an introductory film describing the resort, giving a tour of the property and other facilities the resort property offers, closing the deal on a successful sale, and taking part in occasional sales training.

Group One employees do not have an office at the employer’s sales office, but instead meet at the office just prior to a scheduled appointment with prospective clients. Group Two employees meet prospects directly at the resort, instead of the off-site sales office. Group Three employees sell to prospects who are already staying at the resort as guests.

Noting that it has not previously considered the issue, the DOL concludes that the outside sales exemption does not apply to employees who sell timeshares on site at resorts because they are not engaged away from the employer’s place or places of business. Resorts in which timeshares are sold are generally maintained on a permanent basis as a location of the employer and are staffed with the personnel necessary to maintain the resort facilities. The employer maintains a continuing

business interest in the resort facilities not sold as timeshare units, and in timeshare units not yet sold.

The DOL notes that it has taken a similar position with respect to employees selling developed campsites in a “condominium” campground and apartment rental agents who do not leave the apartment community, because they never leave their employer’s place of business. In contrast, says the DOL, real estate agents selling lots from a model home in a subdivision who customarily and regularly leave the model home *are* exempt outside sales employees because the employer does not maintain a continuing interest in the subdivision lots once they are sold, or in other facilities within the subdivision, so these areas are not part of the employer’s place of business.

Here, although Group One employees do not have an office at the sales office, it appears that their office is part of the employer’s property and they do return to the employer’s sales office to close deals. It appears that Group Two and Group Three employees begin their sales presentations from a sales office or area that is analogous to a model home. Thus, none of the employees in these groups ever leave the employer’s place of business – the resort – and cannot qualify for the outside sales exemption. **PC**

IRS Offers Interim Guidance on Filing Form 8851 Electronically

Archer Medical Savings Accounts (MSAs) allow favorable tax treatment of money saved by certain taxpayers covered by high deductible health plans. Employers can offer Archer MSAs if they employed no more than 50 employees during either of the preceding two calendar years (see *The Payroll Source*®, beginning on p. 4-8).

The Tax Relief and Health Care Act of 2006 (Pub. L. No. 109-432; see **PAYROLL CURRENTLY, Issue No. 26, Vol. 14**), which was enacted on December 20, 2006, extends the availability of Archer MSAs through December 31, 2007, and requires trustees/custodians to file Form 8851, *Summary of Archer MSAs*. This was a retroactive two-year extension, closing a gap that existed after the last extension

expired on December 31, 2005.

The IRS has announced that changes are being made to Revenue Procedure 2001-31 (2001-20 IRB 1170; www.irs.gov/pub/irs-irbs/irb01-20.pdf), which contains procedures for filing Form 8851 [Ann. 2007-15, 2007-8 IRB 596]. Because the revised revenue procedure will not be available by March 20, 2007, the due date of Form 8851, the announcement describes the major changes in store so that filers can use the announcement along with Revenue Procedure 2001-31 to file Form 8851 electronically. The changes are:

- The name of the Martinsburg Computing Center has been changed to Enterprise Computing Center – Martinsburg (ECC-MTB).

- The due date for filing Forms 8851 has been changed to March 20, 2007. This date is effective for both filing periods – January 1, 2005 through June 20, 2005, and January 1, 2006 through June 20, 2006. A separate transmission is required for each filing period.

- ECC-MTB no longer accepts magnetic media for the filing of Forms 8851. The only acceptable method for those with over 250 forms is electronic filing via the Filing Information Returns Electronically System (FIRE) at <http://fire.irs.gov>. See Publication 3609, *Filing Information Returns Electronically*, for more information. Filers of Form 8851 must call ECC-MTB at 1-866-455-7438, ext. 3 (toll-free), for log-on instructions. **PC**

Prospective Seasonal Salary Reductions Did Not Affect Pharmacists' Exempt Status

A U.S. District Court in Colorado has dismissed a class action lawsuit brought by Wal-Mart pharmacists seeking overtime under the Fair Labor Standards Act (FLSA) [*In re Wal-Mart Stores, Inc.*, No. 96-cv-91139-ZLW-CBS, 2007 U.S. Dist. LEXIS 5019, (D Colo., 1-23-07)].

The pharmacists argued that they were not FLSA-exempt as professional employees because they were not paid on a salary basis. The company had a practice of reducing their salaries when business was slow, e.g., during the summer. The pharmacists said this violated the principle that an employee must receive each pay period “a predetermined amount constituting all or part of

his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed” (29 C.F.R. §541.602(a)).

In an earlier ruling in the case, the Tenth Circuit Court of Appeals (see **PAYROLL CURRENTLY, Issue No. 7, Vol. 13**) said that FLSA regulations only prohibit reductions in pay made in response to events in a period for which the pay has been set, not salary reductions that are to take effect in future pay periods. Thus, an employer may *prospectively* reduce an employee's salary to accommodate the employer's business needs without converting exempt employees into nonexempt hourly employees.

On the other hand, an employer cannot manipulate payments to make a sham of the salary requirement.

In light of this ruling, the District Court dismissed the case, saying the pharmacists had not established that Wal-Mart changed salaries so often that they were paid the functional equivalent of an hourly wage. The U.S. Department of Labor has determined that yearly adjustments are an acceptable way for businesses to respond to changing market conditions. The “sham exception” did not apply here, said the court, because the pharmacists experienced no more than four salary changes over a period averaging four years and five months. **PC**



STATE AND LOCAL NEWS

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Alaska Effective 3-25-07, employers must use the Internet to file quarterly unemployment insurance (UI) contribution reports with wage schedules or a combination of wage schedules listing 100 or more employees in a calendar quarter or \$1 million or more in taxable wages in the current or preceding calendar year (this updates *The Payroll Source*®, p. 7-35). Currently, employers must use the Internet or magnetic media to file quarterly contribution reports with wage schedules or a combination of wage schedules listing 250 or more employees. The Employment Security Tax Section encourages all employers and agents to file reports, submit payments, and view accounts online at www.labor.state.ak.us/estax [8 Ak. Adm. Code 85.020; *Unemployment Insurance Tax*, First Quarter 2007].

Arizona Effective 1-25-07 through 7-24-07, emergency rules have been issued to implement Proposition 202, which was approved by voters in November 2006. This initiative established a state minimum wage of \$6.75 an hour and a tip credit of \$3.00 an hour, effective 1-1-07. According to the Industrial Commission of Arizona, the rules attempt to mirror the requirements of the federal Fair Labor Standards Act (FLSA). Adoption of permanent rules will begin soon and will include the opportunity for public comment [Ariz. Adm. Reg. §§R20-5-1201 – R20-5-1220].

North Dakota The Department of Human Services (DHS) has unveiled a redesigned child support enforcement Web site at <http://childsupportnd.com>. In addition to remitting child support payments to the State Disbursement Unit online, employers can now use the site to report terminations and temporary absences of employees for whom income withholding orders are received. Employers that registered for DHS's previous site will not have to re-register, as existing user IDs and passwords will continue to work. The site also features a secure and encrypted method that allows an employer to report individual new hires or send a file with multiple new hires.

West Virginia On 3-6-07, Larry Walker, Director of the Wage and Hour Section for the Division of Labor (DOL), responded to the Paycard Subcommittee of the APA's Government Affairs Task Force that payroll debit cards are not allowed as a method of wage payment under the West Virginia Wage Payment and Collection Act. In August 2006, the Paycard Subcommittee contacted the DOL and urged it to reconsider whether paycards, with appropriate disclosures and consumer protections, are a permissible method of wage payment under the Act. Alternatively, it requested that the DOL consider engaging in the rulemaking process to permit the use of paycards.