



# PAYROLL CURRENTLY

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**REMINDER** – The Federal Minimum Wage Will Increase to \$5.85 Per Hour on July 24. See **PAYROLL CURRENTLY**, Issue No. 12, Vol. 15 for details.

## IRS Issues Final Regulations Confirming That Employers Are No Longer Obligated to Submit Questionable W-4s for Review

The IRS has issued final regulations that adopt with minor clarifications temporary and proposed regulations issued in 2005 (see **PAYROLL CURRENTLY**, Issue No. 9, Vol. 13) virtually eliminating the requirement to submit copies of certain questionable Forms W-4 (*Employee's Withholding Allowance Certificate*) to the IRS [72 F.R. 38478, 7-13-07]. The regulations are available at [www.payroll.org/i4a/pages/index.cfm?pageid=139](http://www.payroll.org/i4a/pages/index.cfm?pageid=139).

The final regulations require an employer to submit copies of Forms W-4 to the IRS only after the Service requests them in writing, and allow the IRS to issue a notice to an employer specifying the maximum number of withholding exemptions permitted for an employee without first obtaining a copy of the employee's W-4 from the employer.

### Submitting questionable Forms W-4

Under the final regulations, employers

are not required to submit a copy of each Form W-4 on which an employee claims more than 10 withholding exemptions or claims complete exemption from withholding while earning \$200 or more per week. Instead, an employer must submit a copy of any currently effective Form W-4 only if directed to do so in a written notice to the employer from the IRS or under future published guidance (e.g., revenue procedure). *Note:* The regulations do not change the existing rules on when to treat a Form W-4 as invalid.

### IRS notice to the employer (the 'lock-in letter')

The final regulations provide that the IRS may issue a notice (commonly referred to as a "lock-in letter") to an employer specifying the maximum number of withholding exemptions permitted for a specific employee:

- in cases where the IRS has obtained a copy of the employee's Form W-4 from the employer, after determining that the form contains a materially incorrect statement or after the employee fails to respond adequately to a request for verification of the statements on the form; or

- in cases where the IRS has not obtained a copy of the employee's Form W-4 from the employer, after determining that an employee is not entitled to claim complete exemption from withholding or more than a specified number of withholding exemptions based on IRS records.

The IRS has developed a process to use information already reported on Forms W-2, *Wage and Tax Statement*, to identify and address employees with withholding compliance problems.

### Timing provision: implementing the lock-in letter

Under the final regulations, the employer must withhold based on the Form W-4 submitted by the employee unless directed to do otherwise in a lock-in letter. Then the employer must withhold federal income tax in accordance with the lock-in letter beginning on the date specified in the letter, but no earlier, to allow time for the employee to challenge the pending withholding adjustment with the IRS and for the IRS, if warranted, to issue updated instructions to the employer.

The effective date will be at least 45 days after the date of the letter, and a later effective date may be specified.

The final regulations clarify that the notice to an employer will specify both the marital status and the maximum number of withholding exemptions permitted for purposes of calculating the required income tax withholding.

### Timing provision: notice to the employee

The final regulations provide that, in addition to the lock-in letter, the IRS will provide the employer with an "employee notice" (the IRS will also mail a similar notice to the employee's last known address). If the employee is still employed by the employer when the lock-in letter and notice are received, the employer must give the notice to the employee within 10 business days of receipt. If the employee is no longer employed by the employer, the employer must send a written response stating that fact to the IRS office designated in the notice.

The final regulations clarify that the employer may use any reasonable

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business practice to furnish the copy of the notice to the employee – e.g., a paper copy of the notice or a copy transmitted using a secure electronic means of communication.

The final regulations also provide that if the IRS is unable to determine a last known address for the employee, the Service will use other available information as appropriate to provide the notice to the employee.

**Terminated, rehired, and seasonal employees**

The final regulations clarify that the determination of whether an employee is employed by the employer is made as of the date of the notice, and is based on all the facts and circumstances, including whether the employer has treated the employment relationship as terminated for other purposes.

An employee who is not currently performing services is nevertheless employed for purposes of this rule if on the date of the notice:

- the employer pays wages subject to income tax withholding to the employee with respect to prior employment on or after the date specified in the notice,
- the employer reasonably expects the employee to resume performance of services for the employer within 12 months of the date of the notice, or
- the employee is on a bona fide leave of absence if the period of such leave does not exceed 12 months or if the individual retains a right to reemployment with the employer by contract or under an applicable statute, such as the Family and Medical Leave Act.

**Forms W-4 submitted by the employee after a lock-in letter has been received**

After the IRS has issued a lock-in letter and employee notice, if the

employee wants to claim complete exemption from withholding or more withholding exemptions than the maximum specified by the IRS, he or she must submit to the IRS within 30 days a new Form W-4 and a written statement in support of the claims made on it. *Note:* The option under prior regulations to send these items to the employer for forwarding to the IRS has been removed.

If the employee gives a new Form W-4 to the employer, the employer should disregard it until notified by the IRS to withhold based on that form. However, if, at any time, the employee furnishes the employer with a Form W-4 that results in *more* withholding than would result from applying the marital status and number of withholding exemptions specified in the lock-in letter, then the employer should withhold based on that Form W-4.

**Substitute forms**

The final regulations provide that a substitute Form W-4 developed by the employer may be used if the employer also provides the tables, instructions, and worksheets contained in the Form W-4 in effect at that time. In addition, the regulations provide that employers must refuse to accept a substitute form developed by an employee, and that the employee in such a case will be treated as having failed to furnish a W-4.

**EXCLUSIONS FROM WITH-**

**HOLDING STILL APPLY** – Receipt of an IRS notice does not impose a requirement to withhold income taxes where one does not already exist. For example, an employer does not have to withhold income tax from payments made to an employee who is a U.S. citizen working in a foreign country if the employer reasonably believes that the payments are excluded from taxation under IRC §911. Issuance of a notice to an employer

properly relying on this exclusion does not impose a withholding requirement on amounts covered by the exclusion. However, if withholding is required, such as on wages paid in excess of the amount excludable under §911, or if the exclusion ceases to apply, then the employer must withhold according to the IRS notice.

**STATE RULES STILL**

**APPLY** – Remember that more than 40 states have a state income tax and require withholding from wages to collect it. Of these states, over half accept the federal Form W-4 for state withholding purposes. Some states follow the federal rules on the circumstances when an employer must submit these forms to the state tax department. Other states do not. See *APA's Guide to State Payroll Laws*, Table 3.8, Employee Withholding Allowance Certificates.

**Effective date**

The final regulations are generally effective on April 14, 2005, the date the temporary regulations were published in the Federal Register. However, the following new provisions in the final regulations apply on October 11, 2007 (but may be relied on for notices issued prior to that date):

- the provision that specifies when an employee who is not currently performing services is employed for purposes of the requirements to furnish the employee notice and withhold based on the notice,
- the provision that requires the employer to withhold based on the notice if a terminated employment relationship is resumed within 12 months, and
- the provision that requires employers to refuse to accept substitute withholding exemption certificates developed by employees. **PC**

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## Payroll Solutions

**Q.** Our company pays a prize of \$100 to nonsales employees who refer prospects to the sales department that become customers. The employees eligible for the prize do not work in the sales department and do not perform work in obtaining new business (a duty of the sales employees). Do these prizes have to be treated as bonuses and included in the regular rate of pay for purposes of calculating overtime for nonexempt employees?

**A.** Probably not. U.S. Department of Labor regulations (29 C.F.R. §778.330) require prizes or contest awards to be included in an employee's regular rate of pay for overtime purposes if they are paid as remuneration for employment. Where an award or prize is made for activities outside the customary working hours of an employee, beyond the scope of the employee's customary duties, or away from the employer's business premises, the determination of whether the payment is remuneration for employment depends on such factors as the amount of time, if any, spent by the employee in competing for the prize, the relationship between the contest activities and the usual work of the employee, whether the contest involves work usually performed by other employees for the employer, and whether an employee is specifically urged to participate in the contest or led to believe that he or she will not be promoted or advanced unless he or she participates (29 C.F.R. §778.332(a)).

A prize or bonus paid to a nonsales employee when a sale is made by a company sales representative to a person the employee recommended as a good sales prospect is not regarded as remuneration for employment if the prize-winner performed no work in securing the name of the sales prospect and spent no time on the matter for the company in any way (29 C.F.R. §778.332(b)).

### Forum on Federal Payroll Issues, Part 3

In previous issues of PAYROLL CURRENTLY, we included questions and answers discussed by IRS, SSA, DOL, and OCSE representatives during the *Forum on Federal Payroll Issues* at the APA's 25th Anniversary Congress in Las Vegas, Nevada. This article contains the answers provided by other members of the panel, including Katherine Lotspeich, Education Chief, Verification Division, U.S. Citizenship and Immigration Services, Department of Homeland Security, and John Shofi, Section Chief, U.S. Immigration and Customs Enforcement, Department of Homeland Security.

#### **U.S. Citizenship and Immigration Services Basic Pilot Program**

**Q.** Has the Basic Pilot Program for employment eligibility verification significantly increased its participation rate? How does the program work, and how can my company take part?

**A.** There are currently about 16,000 employers enrolled in the Basic Pilot Program. That number is increasing by about 1,000 a month because of the popularity of the program and legislation in some of the states (see p.6 of this issue of PAYROLL CURRENTLY).

The way the program works is that an employer registers online. The company submits a memorandum of understanding and registers a person (e.g., from the HR department). The new user has to take a tutorial before

being allowed to access the system, then can use the system to verify Form I-9 information.

The employer takes the employee's Form I-9 and enters information into our system such as the social security number (SSN) as well as information from whatever document or documents the employee presents to prove work authorization. The system checks that information against a series of databases at the Department of Homeland Security and the Social Security Administration.

Currently, 92% of the queries that are run through our system come back as work authorized within three seconds. The remaining 8% come back tagged as a tentative non-confirmation. This is like a yellow light. It doesn't mean the person is not authorized to work, but it means that there's a mismatch in the system (e.g., name, SSN, immigration document presented). The employer is instructed to inform the employee of the mismatch and that he or she has the right to resolve the issue with either the DHS or the SSA.

The employee has up to eight days to begin initiating the resolution of their case. The employee has the right to keep their job while they're trying to resolve things. If they are working with the SSA, they have to go in person to a local SSA office and show documentation to prove that their SSN is valid. If they are working with the DHS because of a mismatch involving an immigration document, we

have a 1-800 number that they can call. Their case will be assigned to a dedicated staff member for resolution.

After the employee resolves the problem, they should report back to the employer that it was resolved, and the employer must run the query through the system again. If an employee decides not to contest a tentative non-confirmation, then the employer has the right to terminate employment.

For more information and to register for the program, visit <https://www.vis-dhs.com/EmployerRegistration/StartPage.aspx?JS=YES>.

#### **Photo Tool Pilot**

**Q.** What is the new Photo Tool Pilot? How does it make employment eligibility verification easier? Does an employer have to participate in the Basic Pilot to take part in the Photo Tool Pilot?

**A.** The Photo Tool Pilot was developed in response to the Swift Meat Packing Company raid in December 2006 (see "[Inside Washington](#)" for [January 2007](#)), where we found that there had been identity theft. Employees had been cleared by the Basic Pilot (Swift was a Basic Pilot user) because they had assumed the identities of other people and all of their records had therefore matched up in our system. The idea was to introduce some biometric features into the system.

We have now developed a pilot program where we're able to pull up the

photo of a green card or an employment authorization document (EAD) so that the employer can compare the photo from our database to the photo that is on the green card or EAD that a new hire presents with his or her Form I-9. The employer is comparing a photo to a photo; the employer is not comparing a person to a photo.

You have to be a Basic Pilot participant to be eligible for the Photo Tool Pilot. We are currently working with about 50 companies. The Photo Tool Pilot is scheduled to conclude at the end of the summer.

#### **Evaluating the Basic Pilot Program**

**Q.** Congress asked USCIS to evaluate the Basic Pilot in terms of, among other things, reducing employment of unauthorized workers, decreasing verification-related discrimination, and preventing undue employer burden. What did the evaluation find?

**A.** The evaluation has not been released to the public yet; it's due out later this summer. One of the very

positive things that we found is that when we switched over to a Web-based system in 2005, the employer burden decreased. It was also a lot quicker. And it reduced the number of mismatches because there weren't as many typos and problems with the coding.

Secondly, we did a series of case studies with employers and found that employers that use the Basic Pilot think that they're more likely to hire a person that they might presume to be foreign born or a noncitizen because of an accent or other features. The Pilot gives them more assurance that they can verify that the person is work authorized. More employers felt that they had a system that would help them make the hires that they needed to make.

A third important finding is that a lot of naturalized U.S. citizens receive a tentative non-confirmation because they don't always update their records with the SSA when they become naturalized citizens. And that's mainly because they just don't know that they're supposed to do that. We've been working closely with the SSA to try to make sure that we don't get these people – who are work authorized – caught up in a tentative non-confirmation.

#### **Seeing a new hire's social security card**

**Q.** Do we need to actually see each new hire's social security card?

**A.** The answer to that is "it depends." If a person shows you a List A document on the Form I-9, then they don't have to show you their social security card because it isn't required as part of the I-9 document review. But you need the SSN to run a query in the Basic Pilot Program. You would at least have to ask the new hire for the number.

Remember that if you are a Basic Pilot participant you need to have a poster hung up at your hiring site that indicates that you are participating in the program so employees are aware of this.

If a person has applied for an SSN but doesn't have it yet, when you review the Form I-9 as you normally would, you can delay the query, although our rules say that you must query within three days of hire. Our current policy states that you can wait until the SSN is assigned and just make a note in the person's file and run the query later.

Then you can note on the printout of the query why you ran it late.

#### **Mandating use of the program**

**Q.** What are the issues facing USCIS and employers if and when Congress mandates that employers electronically verify the work eligibility of all new hires? How is USCIS preparing for this possibility?

**A.** The electronic eligibility verification program has been included in all of the immigration reform bills that have been debated for the past two years. For fiscal year 2007, we were given \$114 million to add new staff and make program enhancements. Previously, our budget was about \$4 million. We've grown from a staff of 10-15 people to nearly 100, and we'll probably grow to 200 by the end of next year. So we're taking it very seriously.

The biggest issue facing employers if Congress mandates that you electronically verify the work eligibility of all your new hires would be instituting a new business practice. You would have to learn our system. It's a very simple system. It's a screen that has the same fields as the Form I-9. You fill it out along with the Form I-9 and send it to us. Within three seconds you get a response indicating whether the person is work authorized or there is a mismatch.

We're currently working with 16,000 employers, and there are about seven million employers in the United States. There have been some concerns raised about our system's ability to handle that many queries. I want to assure you that we can handle up to 25 million queries. In fiscal year 2006 we ran two million queries, so there's a lot of room to grow.

The real challenge for us is to ensure proper usage of the system. One of the things that we're working on is a monitoring and compliance program so that we can keep an eye on the system and pinpoint issues that we need to resolve. For example, if we saw an SSN that was being run 80 different times in a month with 80 different people in 10 different states, then we'd be able to look into whether there's fraud going on with that particular identity. We want to be more involved in figuring out where there's fraud that people may not even realize is happening.

#### **News Notes...**

### **IRS Eliminates Schedule P of Form 5500 Series**

On July 21, 2006, the U.S. Department of Labor issued final regulations mandating electronic filing of Form 5500, *Annual Return/Report of Employee Benefit Plan*, under Title I of ERISA (see [PAYROLL CURRENTLY, Issue No. 18, Vol. 14](#)). To reduce administrative burdens and in anticipation of the transition to a wholly electronic filing environment under the ERISA Filing Acceptance System (EFAST), Schedule P, *Annual Return of Fiduciary Benefit Trust*, which may be completed by a trustee of an employee benefit trust in connection with the filing of a plan's Form 5500, is being eliminated.

The elimination of Schedule P is effective for the 2005 and later plan years of Form 5500-EZ filers. For all other Form 5500 series filers, the elimination of Schedule P is effective for the 2006 and later plan years [Ann.2007-63, 6-29-07].

Another thing that would be good about a monitoring and compliance program is that we want to make sure that employers aren't using the Basic Pilot to prescreen employees. For example, if we noticed that an employer was only running non-citizen queries and none of the tentative non-confirmations that were issued got contested, we might wonder whether the employer was telling them or was using it as a prescreening tool. We don't have the authority to do any kind of enforcement in this area, but we would be able to do some outreach and education.

Finally, we are preparing for mandated electronic employment eligibility verification by trying to reduce the occurrence of mismatches or tentative non-confirmations. We're always working to get new databases into our system. We have an integrated system that checks against other databases. We check with the SSA and then we check with many DHS databases that house naturalized citizen data or data on adjustment status, green cards, etc. We're working to get access to the student visa database and others.

#### **Expired Form I-9**

**Q.** Form I-9, *Employment Eligibility Verification*, has an expiration date of March 31, 2007. May we still use it, and does USCIS have plans for a new form?

**A.** Yes, you should use the expired Form I-9. There's a note on our Web site telling employers to continue using the form even though it has expired. We're working on an updated form, but we're going to wait to see what happens with the pending immigration reform legislation before we go much further with it.

#### **U.S. Immigration and Customs Enforcement**

##### **Electronic Forms I-9**

**Q.** In order to reduce our reliance on paper, may we use an electronic method to prepare and sign Forms I-9 for employment eligibility verification? Can we scan our existing paper Forms I-9 and discard the originals?

**A.** The answer to both questions is yes. We issued an interim rule last year (see [PAYROLL CURRENTLY, Issue No. 13, Vol. 14](#)) that allows employers to store or prepare electronic I-9s. We

basically follow IRS guidelines for storage of paperwork, giving a lot of leeway to businesses to decide how they want to do this.

If you make it a practice to take List A-B-C documents and make copies of them, be sure you include these documents in your electronic process. And remember that you need to be consistent in your treatment of everyone who comes in the door so you don't create any discrimination problems for your company.

#### **IMAGE program**

**Q.** What are the "best practices" in preventing the hiring and employment of unauthorized workers?

**A.** We have a compliance and outreach program called IMAGE (ICE Mutual Agreement between Government and Employers; see [PAYROLL CURRENTLY, Issue No. 18, Vol. 14](#)). We want to give you the tools and the education you need so that we don't have to come in and do audits.

We've signed agreements with nine private sector entities, and we have others waiting to sign up; we're looking for the best of the best. One of the biggest benefits of partnering with us in this program is that it stabilizes your workforce. It cuts down turnover rates and takes a lot of the guesswork out of the hiring process from an immigration perspective.

The first best practice is to sign up for the Basic Pilot Program to electronically verify the employment eligibility of your new hires. It takes a lot of the burden off the employer, and we highly recommend it.

The second thing we recommend is that you should have an internal training program on filling out I-9s. Everyone that's doing hiring in your business should know how to fill out I-9s, should understand the process, and should also have anti-discrimination training. You'd be surprised how many companies think that their HR department knows what an I-9 is and how to fill one out properly. We'll provide the necessary training.

Third, do a dual review of your I-9 process. Don't just have one person filling out I-9s, taking the documentation, and doing the hiring. You have no idea

how many investigations we have done where a company has gotten into trouble because of a rogue manager who directed job applicants to buy documents in the wrong places. A dual review process catches a lot of this and keeps people in line.

Fourth, on an annual basis, we recommend that you do an internal audit of your I-9 process. The review should be done by someone who's not part of the hiring process. You may want

#### **News Notes...**

### **FLSA Applies to H-2B Workers**

Daniel Castellanos-Contreras and other workers were brought into New Orleans following Hurricane Katrina on H-2B visas to work at the hotel properties of Decatur Hotels, L.L.C. When they sued Decatur under the Fair Labor Standards Act (FLSA) for failing to reimburse them during their first week of employment for expenses they incurred in migrating to the U.S. (i.e., travel, visas), Decatur argued that H-2B workers are not covered by the FLSA.

*Note:* Agricultural guest workers are issued H-2A visas, while nonagricultural guest workers are issued H-2B visas. Employers of H-2A workers are required to comply with applicable federal, state, and local employment-related laws, but there is no comparable requirement applicable to employers of H-2B workers.

The court said that the FLSA applies to non-immigrant alien workers temporarily entering the U.S. under H-2B visas. It does not matter that H-2B statutes and regulations do not expressly make the FLSA applicable. The FLSA (29 USC §203(e)) applies to an "employee," a term defined as "any individual employed by an employer," and this has been interpreted to mean citizens and aliens alike, whether they are documented or undocumented. "If undocumented workers are entitled to the protections of the FLSA, the court sees no rational reason to preclude documented H-2B guestworkers from asserting the same rights under the Act" [*Castellanos-Contreras v. Decatur Hotels, L.L.C.*, 06-4340 Section "L" (1), 2007 U.S. Dist. LEXIS 36324 (ED La., 5-16-07)].

to hire a professional to do this (i.e., an immigration attorney or a consultant).

Fifth, if you receive a no-match letter from the SSA, take some action.

#### News Notes...

### Supreme Court Denies Review of Firefighters' Claim for Overtime for Shifts Worked by Substitutes

The U.S. Supreme Court has refused to hear the appeal of a pay dispute involving public sector employees substituting for one another on overtime shifts [*Senger v. City of Aberdeen*, No. 06-1093 (U.S. Sup. Ct., 5-14-07)].

Firefighters working for the city of Aberdeen, South Dakota agreed to substitute for one another on scheduled overtime shifts. The city paid straight time and credited seniority to the firefighter originally scheduled, but refused to pay overtime that the firefighter would otherwise have been entitled to if he or she had worked the shift. The firefighters sued to recover the unpaid overtime under the Fair Labor Standards Act (FLSA).

Siding with the firefighters, the Eighth Circuit Court of Appeals (see [PAYROLL CURRENTLY, Issue No. 24, Vol. 14](#)) explained that under the FLSA (29 USC §207(p)(3)), two individuals employed in the same capacity by the same public agency may agree, solely at their option and with the approval of the agency, to substitute for one another during scheduled work hours. The hours worked by the substituting employee are excluded from the calculation of hours for which that employee is entitled to overtime.

Further, U.S. Department of Labor (DOL) regulations provide that each employee in a substitution arrangement is credited as if he or she had worked his or her normal schedule for that shift (29 C.F.R. §553.31(a)). The DOL has consistently interpreted this requirement to mean that the employee who was scheduled to work must receive credit (and compensation) as if he or she had actually worked. The court said the DOL's interpretation was reasonable.

Check your internal records first to make sure you didn't make a mistake and then send the affected employee to the local SSA office to get the matter resolved.

Sixth, establish an employee tip line for immigration-related problems. Your employees have a lot of good information.

And finally, tell your contractors and people you do business with that you expect that they are doing the right thing. If a contractor gets in trouble and we come in and make arrests, the company that hired the subcontractor will be portrayed as the "bad guy."

#### USICE enforcement focus

**Q.** Where is U.S. Immigration and Customs Enforcement focusing its enforcement effort?

**A.** Identity theft is a priority for us. We're arresting aliens every day, as well as U.S. citizens who sell their identities.

Worksite enforcement is another priority. We're focusing on critical infrastructure – e.g., airports, nuclear plants, chemical plants, and refineries. And we follow up on tips we receive that people are knowingly hiring and employing illegal aliens and taking advantage of them or harboring, transporting, and smuggling them.

Finally, we've hired forensic auditors. They will be conducting targeted I-9 compliance audits. They will focus on critical infrastructure and on industries that employ large numbers of illegal aliens.

#### No-match procedures

**Q.** What is USICE's proposed

rule on steps an employer should take following a no-match letter from the Social Security Administration?

**A.** A proposed rule was issued last June (see [PAYROLL CURRENTLY, Issue No. 13, Vol. 14](#)), there was a comment period, and we're now waiting for finalization of the rule.

The rule is designed to give clear guidance to employers on what DHS expects you to do if you receive a no-match letter. What the rule says is that we would like you to take certain steps with respect to a no-match letter. Don't just put it away and take no action. If you are investigated, that could lead to a finding of constructive knowledge of unauthorized status of the named worker.

The receipt of a no-match letter in and of itself does not constitute constructive knowledge. So if you get one, don't panic. Check your internal records within 14 days. Make sure that the SSNs were entered properly, etc. If you see a problem, just fix it. If you do not see a problem, then inform your employee of the situation and give the employee time to go to the local SSA office and get it resolved. A period of 60 days is allotted for this.

If the employee can't resolve the problem, you can do a new I-9. You should not just fire a person because they can't resolve the situation. You should give them a chance to present different documents than the ones they presented the first time (i.e., other than a social security card). **PC**

## States Act on Immigration After U.S. Congress Cannot

On July 2, 2007, Arizona Gov. Janet Napolitano signed the Legal Arizona Workers Act, which imposes penalties on employers that knowingly employ undocumented workers. "Because of Congress' failure to act, states like Arizona have no choice but to take strong action to discourage the further flow of illegal immigration through our borders," said Gov. Napolitano. In 2006, Colorado and Georgia enacted immigration legislation. Recently, Oklahoma and Tennessee have followed suit.

#### Arizona employers can lose business licenses

Effective January 1, 2008, Arizona employers are required to verify the employment eligibility of newly hired employees through the federal Basic Pilot Program. Employers must not intentionally or knowingly employ an unauthorized alien. A first violation may result in an employer's business licenses being suspended; however, a second violation will result in the permanent revocation of all business licenses. Proof

of verifying an employee's employment authorization through the Basic Pilot Program will create a rebuttable presumption that the employer did not violate the new state law [H.B. 2779, L. 2007].

#### **Oklahoma public and private employers affected**

*Public employers.* Effective November 1, 2007, every public employer in Oklahoma (the state or a political subdivision) must register and use a status verification system to verify the federal employment authorization status of all new employees. A "status verification system" includes the Basic Pilot Program, the Social Security Number Verification Service, or any other independent, third-party system with an equal or higher degree of reliability. After July 1, 2008, a public employer may not enter into a contract for the physical performance of services in Oklahoma unless the contractor registers and participates in a status verification system to verify the work eligibility status of all new employees.

*Right of action for discrimination.* It will be a discriminatory practice for any employer to discharge an employee who works in Oklahoma and is a U.S. citizen or permanent resident alien while retaining an employee that the

employer knew, or reasonably should have known, was an unauthorized alien hired after July 1, 2008, and who is working in Oklahoma in a job category that requires equal skill, effort, and responsibility, and which is performed under similar working conditions, as the job held by the discharged employee. However, if on the date of the discharge, the employer was enrolled in and using a status verification system to verify the employment eligibility of its employees in Oklahoma hired after July 1, 2008, the employer will be exempt from liability, investigation, or lawsuits.

*Independent contractors.* Effective November 1, 2007, when an individual independent contractor performing physical services in Oklahoma fails to provide the employer documentation to verify his or her employment authorization, the employer will be required to withhold state income tax at the top marginal income tax rate. This penalty will apply to any compensation that exceeds the minimum amount of compensation that the employer is required to report as income on Form 1099-MISC. An employer that fails to withhold as required is liable for the taxes that should have been withheld unless the employer is exempt from withholding with

respect to the individual independent contractor pursuant to Form 8233 [H.B. 1804, L. 2007].

#### **Tennessee employers must comply with federal law**

Effective January 1, 2008, a Tennessee employer must not knowingly employ, recruit, or refer for a fee for employment, an illegal alien. The penalty for a first violation is suspension of the employer's license until the employer is no longer employing illegal aliens. For a second or subsequent violation occurring within three years from the first violation, the employer's license will be suspended for one year.

An employer has not violated the requirement not to knowingly employ, recruit, or refer an illegal alien with respect to a particular employee if the employer: (1) requested from the employee, received, and documented in the employee's record, at least 14 calendar days after employment began, lawful resident verification information (i.e., Form I-9), and the information provided by the employer was later determined to be false; or (2) verified the immigrant status of the employee, at least 14 calendar days after employment began, by using the Basic Pilot Program [H.B. 729, L. 2007]. **PC**

## **IRS Urges Use of New Agent Appointment Form**

Employers, payers, and their agents are advised to begin using a new, improved version of Form 2678 (*Employer/Payer Appointment of Agent*) immediately, to avoid delays in having the IRS approve agent appointments [IR-2007-121, issued 6-20-07].

All versions prior to the May 2007 form are now obsolete. The IRS will return any obsolete versions of Form 2678 that are filed and ask senders to submit the May 2007 version instead. The form is available at [www.irs.gov](http://www.irs.gov).

Form 2678 authorizes an agent to file tax returns and deposit and pay employment or other withholding taxes on an employer or payer's behalf. *Note:* When the IRS approves Form 2678, both the employer or payer and the agent are liable for the employer's employment tax under federal law. However, the form does not apply to

Form 940 (*Employer's Annual Federal Unemployment (FUTA) Tax Return*), and the employer retains responsibility for filing Form 940 and depositing and paying FUTA tax.

The form has been redesigned. It contains several enhancements to clarify the form and simplify the authorization process:

- Plain language instructions;
- Signature lines for both the employer/payer and the agent to request the agent's authority, eliminating the need for any additional authorization requests;
- Easier revocation, with only one signature – either the employer's/payer's or the agent's – required to revoke authority;
- Check boxes that clearly establish which form(s) the agent is authorized to file on the employer's/payer's behalf;

• A check box for the agent to indicate whether the employer is a disabled individual or other welfare recipient receiving home-care services through a state or local program; and

• Disclosure language, authorizing the IRS to disclose information about the taxes and periods covered to the agent and any third party the agent may contract with, such as a reporting agent or CPA.

Employers, payers, and agents should complete and send Form 2678 to the address in the self-contained instructions 60 days before the date they want an appointment to become effective. Those with appointments already on file with the IRS do not need to take any action unless, using the new form, they wish to revoke an existing appointment. **PC**

## IRS Updates Specifications for Private Printing of Form 941, Schedule B

In Rev. Proc. 2007-42 [2007-27 IRB 15], the IRS has published updated rules and specifications for preparing acceptable paper and computer-generated substitutes for the January 2007 revision of Form 941, *Employer's Quarterly Federal Tax Return*, and for the January 2006 revision of Schedule B (Form 941), *Report of Tax Liability for Semiweekly Schedule Depositors*. The forms are available at [www.payroll.org/i4a/pages/index.cfm?pageid=139](http://www.payroll.org/i4a/pages/index.cfm?pageid=139). The revenue procedure is available at [www.irs.gov/irb/2007-27\\_irb/ar13.html](http://www.irs.gov/irb/2007-27_irb/ar13.html).

### Approval

Forms should not be submitted to the IRS for specific approval. If you are uncertain of any specification and want it clarified, you may submit a letter citing the specification and your understanding of the specification, and enclose an example (if appropriate) of how the form would appear if produced using your understanding to: Internal Revenue Service, Attention: Substitute Forms

Program, SE:W:CAR:MP:T:T:SP, IR-6406, 1111 Constitution Ave., NW, Washington, DC 20224. Be sure to include your name, complete address, phone number, and, if applicable, your e-mail address. Allow at least 30 days for the IRS to respond.

Software developers and form producers should send a blank copy of their substitute Form 941 and Schedule B (Form 941) in pdf format to Dorene.Bearde@irs.gov. Because the purpose of this submission is to assist the IRS in preparing to scan these forms, submitters will receive comments only if a significant problem is discovered. Submitters are not expected to delay marketing their forms in order to receive feedback. *Note:* Submitters should not include "live" taxpayer data.

### What's new

- There are new 6x10 grid layouts for the 2007 revision of Form 941.
- The year has been added to the heading for the "Report for this Quarter" box in the upper right corner of page 1.
- A space has been added between

line 13 and the instructions below it.

- The entry space for the third-party designee's telephone number in Part 4 on page 2 has been deleted. In addition, the text "Personal Identification Number" and the fill-in boxes for the number have been moved to the left to line up under "Designee's Name."
- The signature section in Part 5 on page 2 has been reformatted to conform to the signature areas of new Form 944.
- On the payment voucher, Form 941-V, the first sentence of the third paragraph in the section "Making Payments With Form 941" has been revised.
- The wording of the second line of text for line 12 has been changed from "Make checks payable to the United States Treasury" to "Follow the Instructions for Form 941-V, Payment Voucher."
- There are no changes to the January 2006 revision of Schedule B (Form 941), so this revision remains useable. **PC**



## STATE AND LOCAL NEWS

For more state and local news, subscribe to APA's *PayState Update*, the biweekly newsletter devoted exclusively to state and local payroll compliance. Call 210-224-6406 or visit [www.americanpayroll.org](http://www.americanpayroll.org) for more information.

**Georgia** Effective 7-1-07, the Office of Child Support Services (OCSS) charges noncustodial parents a \$1.50 administrative fee for each payment processed by the Family Support Registry (FSR). Beginning with the first pay period following 7-1-07, employers must withhold the \$1.50 fee from each payment submitted on behalf of an employee. The OCSS has notified employers of this fee and instructed them to provide a copy of the notice to employees. The OCSS is authorized under state law to establish such an administrative fee and decided to start collecting the fee to partially replace federal funding that will be cut in the fall under the Deficit Reduction Act of 2005 (Pub. L. No. 109-171). Call 866-836-6434 with any questions.

**Oregon** Effective 1-1-08, an employer and an employee may agree that wages will be paid through a direct deposit system, automated teller machine (ATM) card, payroll card, or other means of electronic transfer, provided the employee may: (1) make an initial withdrawal of the entire amount of net pay without cost to the employee; or (2) choose to use another means of payment of wages that involves no cost to the employee. The agreement must be made in the language that the employer principally uses to communicate with the employee.

Currently, the Bureau of Labor and Industries allows employers to pay wages via debit cards under certain conditions. However, one burdensome condition is that an employee must be able to withdraw his or her pay without a fee in the county where the paycard is issued. The Paycard Subcommittee of the APA's Government Affairs Task Force successfully convinced lawmakers that this condition should not be included in the new paycard legislation [H.B. 2256, L. 2007].

**Vermont** Effective 7-1-07, a tipped employee is any worker in a hotel, motel, tourist place, or restaurant who customarily and regularly receives more than \$120 per month in tips for direct and personal customer service (previously more than \$30 per month in tips). Effective 1-1-08, the minimum cash wage for a tipped employee will increase annually by the same percentage rate as the state minimum wage rate, which is increased annually based on the rate of inflation or 5%, whichever is smaller [S.B. 27, L. 2007; News Release, 7-1-07].