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IRS Releases 2008 Circular E

The 2008 Circular E, *Employer's Tax Guide* (Pub. 15), has been released by the IRS. It is available on the APA website at www.payroll.org/i4a/pages/index.cfm?pageid=139.

Circular E addresses the needs of small business employers and provides the basic employment tax information needed by all employers. There are no major changes to Circular E this year, but several "What's New" items are highlighted:

- **Social security and Medicare tax for 2008.** Do not withhold social security tax after an employee reaches \$102,000 in social security wages. (There is no limit on the amount of wages subject to Medicare tax.) Social security and Medicare taxes apply to the wages of household workers you pay \$1,600 or more. Social security and Medicare taxes apply to election workers who are paid \$1,400 or more.

- **Electronic funds withdrawal (EFW).** If you file Form 940 (*Employer's Annual Federal Unemployment (FUTA) Tax Return*), Form 941 (*Employer's Quarterly Federal Tax Return*), or Form 944 (*Employer's Annual Federal Tax Return*) electronically, you can e-file and e-pay (electronic funds withdrawal) the balance due in a single step using tax preparation software or through a tax professional. However, **do not** use EFW to make federal tax deposits. Note that a fee may be charged to file electronically. Go to www.irs.gov and click on the "Electronic IRS" link for more information on paying taxes using EFW.

- **Credit card payments.** You can also use a credit card to pay the balance due shown on Form 940, Form 941, or

Form 944. To pay by credit card, see Circular E, page 4. Note that a convenience fee will be charged based on the amount you are paying. You will be told what the fee is during the transaction and you will have the option to continue or cancel the transaction. Note also that you may not use a credit card to pay taxes that are required to be deposited.

- **Annual employment tax filing for small employers.**

Certain very small employers may have to file Form 944 instead of Form 941 to report their employment taxes. Such employers will be notified by the IRS of their need to file Form 944.

- **Correcting Form 941 or Form 944.** If you discover an error on a previously filed Form 941 or Form 944, make the correction for the quarter (Form 941) or the year (Form 944) in which you discovered the error and attach Form 941c, *Supporting Statement to Correct Information*. For example, in March 2008, you discover that you underreported \$10,000 in social security and Medicare wages on your fourth quarter 2007 Form 941. Correct the error by showing \$1,530 (15.3% x \$10,000) on line 7e of your 2008 first quarter Form 941 and attaching a completed Form 941c.

- **Electronic/magnetic media reporting.** If you file 250 or more Forms W-2 (*Wage and Tax Statement*), you must file them electronically. The SSA will not accept Forms W-2 and W-3 (*Transmittal of Wage and Tax Statements*) filed on magnetic media. If you file 250 or more Forms 1099 (*Miscellaneous Income*), you must file them electronically or on magnetic

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Q. We will be issuing Forms W-2 to employees later this month. Our department has a very high accuracy rate, but occasionally we must issue some corrected forms. We also anticipate that a few employees will lose their W-2s and ask us to replace them. Can we charge employees for issuing Forms W-2, or for correcting or replacing W-2s?

A. Employers cannot charge employees for providing them with an original or corrected Form W-2. However, they *can* charge employees for providing them with additional copies of a form that has been lost or destroyed.

Note: Although there are no penalties under the IRC for refusing to provide an additional copy of Form W-2, refusing to do so may cause unwanted employee relations problems within your organization.

For more information about original, corrected, and reissued Forms W-2, see *The Payroll Source*® beginning at p. 8-54.

media. After December 1, 2008, you cannot file Forms 1099 using magnetic media.

Employers and authorized reporting agents requesting verification of names and social security numbers of more than 50 employees can no longer use magnetic media to submit their requests to the Social Security Administration. Employers can upload a file through the Social Security Number Verification Service (SSNVS) and will usually receive the results the next government business day.

- **Substitute Forms W-4.** After October 10, 2007, you cannot accept substitute Forms W-4 (*Employee's Withholding Allowance Certificate*) developed by employees. An employee who submits an employee-developed substitute Form W-4 after October 10, 2007, should be treated as failing to furnish a Form W-4. However, continue to honor any valid employee-developed Forms W-4 you accepted before October 11, 2007.

- **Ordering employer tax products.** To order 2007 and 2008 tax products and information returns, select "Online Ordering for Information Returns and Employer Returns." You may also order employer tax products and information returns by calling 1-800-829-3676.

Instead of ordering paper Forms W-2 and W-3, consider filing them electronically using the Social Security Administration's (SSA) free e-file service. Visit www.socialsecurity.gov/employer, select "Electronically File Your W-2s," and provide registration information. You will be able to create and file "fill-in" versions of Forms W-2 with SSA and can print completed copies of Forms W-2 for filing with state and local governments, distribution to your employees, and for your records. Form W-3 will be created for you based on your Forms W-2. ■

IRS Issues 2008 Pub 15-B, Employer's Tax Guide to Fringe Benefits

The 2008 supplement to Circular E, *Employer's Tax Guide to Fringe Benefits* (Pub. 15-B), has been released by the IRS. Publication 15-B contains specialized and detailed information on the employment tax treatment of fringe benefits. The publication is available on the APA website at www.payroll.org/i4a/pages/index.cfm?pageid=139. Two items are highlighted this year:

- **Cents-per-mile rule.** The standard mileage rate that an employer can use under the cents-per-mile rule to value the personal use of a company vehicle provided to an employee

in 2008 is 50.5 cents a mile (up from the 48.5 cents-per-mile rate in effect for 2007; see *PAYROLL CURRENTLY*, Issue No. 25, Vol. 15).

- **Qualified transportation fringes.** For 2008, the amounts excluded from gross income for employer-provided "qualified transportation fringe benefits" are \$115 per month for "combined commuter highway vehicle transportation and transit passes" (up from \$110 in 2007) and \$220 per month for "qualified parking" (up from \$215 in 2007; see *PAYROLL CURRENTLY*, Issue No. 22, Vol. 15). ■

IRS Proposes Changes to Employment Tax Adjustment Procedures: Form 941c Would Be Eliminated

The IRS has issued proposed regulations modifying the process for making interest-free adjustments for both underpayments and overpayments of federal income tax (FIT) withholding and FICA (social security and Medicare) and Railroad Retirement Tax Act (RRTA) taxes, as well as the process for filing claims for refund of overpayments of employment taxes [72 F.R. 74233, 12-31-07; <http://a257.g.akamaitech.net/7/1257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/E7-25134.pdf>].

The proposed regulations affect taxpayers that file Form 941 (*Employer's Quarterly Federal Tax Return*), Form 943 (*Employer's Annual Tax Return for Agricultural Employees*), Form 944 (*Employer's Annual Federal Tax Return*), Form 945 (*Annual Return of Withheld Federal Income Tax*), Form CT-1 (*Employer's Annual Railroad Retirement Tax Return*), and any related Spanish-language returns or returns for U.S. possessions.

The regulations, which are proposed to apply to errors

ascertained on or after January 1, 2009, are issued in connection with the IRS's development of new forms to report employment tax adjustments.

Form 941X project

The IRS reports that it is designing new forms for use in correcting employment tax reporting errors. Currently, Form 941c, *Supporting Statement to Correct Information*, which is not an amended return and should not be filed as a stand-alone return, is used to correct employment taxes reported on any Form 941 and other similar forms. Due to the complexity of the form, it is often filed incomplete or incorrectly. The goal is to have the new forms ready for use in 2009 (www.irs.gov/businesses/small/article/0,,id=146223,00.html).

Adjusted return replaces current return process

The proposed regulations change the process by which employers can make interest-free adjustments to correct underpayments or overpayments of employment tax. The

regulations eliminate the existing process that uses the current return to make adjustments and replace it with a new process that uses a separately filed adjusted return to make adjustments. Unlike Form 941c, the new adjusted return will not be filed as an attachment to a current return and will not affect the liability reported on the current return.

Note that the proposed regulations do not affect existing rules on correcting undercollections of employee tax (i.e., the employee share of FICA or RRTA tax), or FIT when an employer discovers the error during the return period in which the undercollection occurred. In such a case, the employer must report and pay the correct amount on a timely basis as if the correct amount of tax had been collected. If the employer fails to report and pay the correct amount, any subsequent correction of that error will not be an interest-free adjustment.

Time for filing adjusted return

Under the proposed regulations, an employer may file an adjusted return as soon as the employer ascertains the underpayment or overpayment error, rather than waiting to report the adjustment with the regularly filed employment tax return.

The adjusted return for an underpayment may only be filed within the applicable period of limitations for assessing the underpayment. The adjusted return for an overpayment may only be filed before the 90th day prior to the expiration of the applicable period of limitations on credit or refund. If the original return reporting FICA tax or FIT withholding for the return period in which the wages were paid was timely filed and the taxes were timely paid, then the limitations period for both assessment and credit or refund begins to run on April 15 of the year following the year in which the wages were paid and ends three years after that.

EXAMPLE: If wages are paid on June 6, 2009, an original employment tax return reporting those wages is filed July 31, 2009, and the reported taxes are timely paid, then the period of limitations for assessment or for credit or refund would expire April 15, 2013. An adjusted return reporting an underpayment must be filed by April 15, 2013. An adjusted return reporting an overpayment must be filed by January 15, 2013, the date that is 90 days before the expiration of the period of limitations on credit or refund. A claim for refund for the same overpayment will be timely if filed by April 15, 2013.

Interest-free adjustment. Under the proposed regulations, an adjustment will be interest-free only if it is reported on an adjusted return within a certain amount of time after it is discovered. Specifically, the adjusted return reporting an underpayment must be filed by the due date of the return for the return period in which the error is ascertained; the amount of the underpayment must be paid by the time the adjusted return is filed, or interest will begin to accrue from the date the adjusted return is filed.

Subject to limited exceptions, for underpayments of FIT where the incorrect amount was withheld, an adjusted return may be filed only for errors ascertained during the calendar year in which the wages were paid and must be filed by the due date of the return period in which the error is ascertained.

For overpayments of FIT where the incorrect amount was withheld, the adjusted return may be filed only for errors ascertained during the calendar year in which the wages were paid, the employer must repay or reimburse the employees within the same calendar year that the wages were paid, and the adjusted return must be filed by the due date of the return for the return period following the return period in which the

error is ascertained.

Treatment as interest-free adjustment where original never filed. Under the proposed regulations, interest-free adjustments for underpayments of employment taxes are available under certain circumstances where the underpayment arises because the employer failed to file an original return:

- As in the existing regulations, an interest-free adjustment is available if an employer filed a FICA tax return when a RRTA tax return should have been filed, or vice versa.

- Interest-free adjustment treatment is also available if an employer failed to file a return solely because the employer failed to treat any individuals as employees. *Note:* This provision was originally proposed in 1992 and is being re-proposed here. The earlier proposal will be withdrawn once the new proposed regulations are finalized.

To constitute an interest-free adjustment in these circumstances, the employer must file an original return of the correct type for each return period for which the employer failed to file the correct return and report on the return the additional amount of tax. Generally, this will constitute an interest-free adjustment if the return is filed by the due date of the return for the return period in which the error is ascertained. Note that the amount reported must be paid by the time the original return is filed or interest will accrue from that date.

Repayment or reimbursement of employees required for interest-free adjustments of overpayments

When an overpayment error is ascertained, the proposed regulations retain the rule that the employer must repay or reimburse the employee's share of FICA or RRTA tax before making the overpayment adjustment of both the employees' and employers' taxes. Such repayment or reimbursement must occur by the due date of the return for the return period following the return period in which the error is ascertained and within the applicable period of limitations on credit or refund.

However, the requirement to repay or reimburse does not apply to the extent that taxes were not withheld from the employee or if, after reasonable efforts, the employer cannot locate the employee. In such a case, the employer may make an adjustment for only the employer share of FICA or RRTA tax.

The adjusted return reporting the overpayment may only be filed once the employer has repaid or reimbursed its employees to the extent required. The employer must certify on the adjusted return that it has repaid or reimbursed its employees to the extent required.

Because repayment or reimbursement of overwithheld FIT must be made within the same calendar year, and annual forms (943, 944, and 945) are normally filed after the close of the calendar year, there can be no repayment or reimbursement of FIT after filing such returns. Thus, no overpayment adjustments of FIT can generally be made for such returns, except for administrative errors – errors involving the inaccurate reporting of the amount actually withheld. *Note:* In the case of backup withholding reported on Form 945, repayment of erroneous withholding is not required and is permitted only in certain circumstances.

Deposits, payments, and credits

Under the proposed regulations, an employer making an interest-free adjustment must pay the amount of the adjustment by the time it files an adjusted return; such timely payment will satisfy the employer's deposit obligations with

respect to the adjustment.

With respect to agricultural employers filing Form 943, note that for purposes of determining the amount of accumulated taxes in the employer's lookback period (which determines the employer's deposit schedule), adjustments to tax liability made pursuant to the filing of adjusted returns or claims for refund will not be taken into account. This rule is consistent with the rule already in effect with respect to Form 941 and Form 944 filers that adjustments to prior return periods are not taken into account in determining the employment tax liability for the prior return period.

For interest-free adjustments of underpayments, the amount must be paid when the adjusted return is filed. If the amount is not paid when the adjusted return is filed, interest will begin to accrue from that date.

The adjusted overpayment amount will be applied as a credit toward payment of the employer's liability for the calendar quarter (or calendar year for annual returns being adjusted) in which the adjusted return is filed, unless the IRS notifies the employer that the credit will be applied to a different return period or that the employer is not entitled to the adjustment under applicable laws or procedures.

Refunds for overpayments

As under existing regulations, instead of making an interest-free adjustment for an overpayment, employers may file a claim for refund for the amount of the overpayment. If an employer cannot make an interest-free adjustment with

respect to an overpayment because the period of limitations for claiming a credit or refund for such overpayment will expire within 90 days or because the IRS has otherwise notified the employer that it is not entitled to the adjustment, the employer may recover the overpayment only by filing a claim for refund.

The proposed regulations continue to provide that an employer can only file a claim for refund for FIT that was not withheld from the employee.

Prior to filing a claim for FICA or RRTA tax, employers must either repay or reimburse the employee or obtain the employee's consent to the allowance of the refund, except to the extent that the overpayment does not include taxes withheld from the employee or, after reasonable efforts, the employer cannot locate the employee or the employee will not provide the requested consent. The employer must certify that it has either repaid or reimbursed the employee or obtained the employee's consent to the extent required.

Under the proposed regulations, Form 941c will no longer be used as an attachment to a claim for refund.

Comments

Comments on the proposed regulations must be received by March 27, 2008. Send written comments to: CC:PA:LPD:PR, Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Or submit comments electronically at: www.regulations.gov. Be sure to reference IRS-REG-111583-07. ■

Wage and Hour Division Recovered Over \$220 Million in Back Wages in Fiscal Year 2007

The U.S. Department of Labor's Wage and Hour Division reports that it recovered \$220,613,703 in back wages for 341,624 workers in fiscal year 2007 (10-1-06 through 9-30-07). While the number of complaints registered with the Wage and Hour Division decreased to 24,950 (from 26,256), the amount collected was up over \$48 million from \$171,955,533 in fiscal year 2006, and the number of workers receiving back wages was up 94,750 (from 246,874).

Fair Labor Standards Act

The overwhelming majority of cases handled by the Wage and Hour Division involve the FLSA. In 2007, \$180,678,826 in back wages was collected for FLSA violations, up from \$135,729,003 in 2006. Of the FLSA back wages collected in 2007, nearly \$16 million was collected for violations of the white collar exemption regulations (up from \$13.2 million in 2006). The violation most frequently cited was one in which the employee's primary duty was not "the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers." This violation of the administrative employee duty test was cited in 296 cases and affected approximately 2,500 employees. Back wages resulting from determinations that management was not an employee's primary duty were over \$4.5 million.

Employers were assessed \$3.9 million in civil money penalties in 2007, up from \$2.9 million in 2006.

Family and Medical Leave Act

In 2007, the Wage and Hour Division collected \$1,573,501 in back wages for FMLA violations, down from \$1,772,342 collected in 2006. The number of violation cases decreased slightly to 1,087 (from 1,092), while the number of employees

affected by FMLA violations increased to 1,675 (from 1,200).

According to the DOL, termination of employees seeking FMLA leave continues to be the primary reason that complaints are filed. Of 1,983 complaints filed in 2007, 764 alleged termination violations.

Low-wage industries

The Wage and Hour Division continues to pursue FLSA compliance in low-wage industries that employ young and immigrant workers.

- Back wages collected for restaurant workers totaled \$17,432,805 in 2007 (up from \$16,945,668 in 2006), while the number of restaurant workers receiving back wages was 27,661 (down from 29,102).

- Back wages collected for health care workers were \$9,899,417 in 2007 (down from \$10,094,948 in 2006), and the number of workers receiving back wages was 17,488 (down from 24,227).

- Back wages collected for janitorial service workers increased to \$6,972,362 in 2007 (from \$3,253,038 in 2006), and the number of workers receiving back wages increased to 8,420 (from 4,349).

- Back wages collected for guard service workers totaled \$7,545,704 in 2007 (down from \$10,684,509 in 2006), while the number of workers receiving back wages was 11,584 (up from 10,670).

Child labor

The Wage and Hour Division continues to pursue targeted enforcement of the FLSA's child labor provisions. In 2007, child labor investigations increased to 1,285 (from 952 in 2006), the number of violations found increased to 1,249 (from 1,083), and the number of minors found illegally employed increased

to 4,672 (from 3,723).

Hazardous Occupation (HO) violations were found in a third of the cases with violations. Violation of HO No. 12 (paper balers) was the most common violation, followed by

violation of HO No. 2 (driving).

Employers were assessed \$4.4 million in child labor civil money penalties in 2007, up from \$3 million in 2006. ■

IRS Corrects Error in AEIC Wage Bracket Tables for 2008

The IRS has posted a note on its website (www.irs.gov/formspubs/article/0,,id=109875,00.html) advising employers about an error in Notice 1036, *Early Release Copies of 2008 Income Tax Withholding and Advance Earned Income Credit Tables*.

In the AEIC wage bracket tables – under biweekly payroll

period, single or head of household – the entry should read: “Wages at least \$805, but less than \$815, payment to be made \$47.”

The corrected version of Notice 1036 has been posted on the APA website at www.payroll.org/i4a/pages/index.cfm?pageid=139. ■

IRS Issues New FICA Tax Form for Employees Treated as Independent Contractors

The IRS has developed new Form 8919, *Uncollected Social Security and Medicare Tax on Wages*, for employees who have been misclassified as independent contractors by an employer (www.irs.gov/newsroom/article/0,,id=176666,00.html).

Generally, workers who receive a Form 1099-MISC, *Miscellaneous Income*, for services provided as an independent contractor must report the income on Schedule C and pay self-employment tax on the net profit, using Schedule SE. However, sometimes a worker is incorrectly treated as an independent contractor when he or she is actually an employee, and the employer does not withhold the worker's share of FICA (social security and Medicare) tax.

When this happens, workers should use Form 8919 beginning with tax year 2007 to figure and report the employee's share of uncollected FICA tax due on their compensation.

In addition, the worker must meet one of the following criteria:

- The worker has filed Form SS-8, *Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding*, and has received a determination letter from the IRS stating that he or she is an employee of the firm.
- The worker was designated as a §530 employee by the employer or the IRS prior to January 1, 1997.

• The worker has received other correspondence from the IRS stating that he or she is an employee.

• The worker was previously treated as an employee by the employer and is performing services in a similar capacity and under similar direction and control.

• The worker's co-workers are performing similar services under similar direction and control and are treated as employees.

• The worker's co-workers are performing similar services under similar direction and control, have filed Form SS-8, and have received a determination that they are employees.

• The worker has filed Form SS-8 with the IRS and has not yet received a reply.

Note: By using Form 8919, the worker's FICA wages will be credited to his or her social security record. To facilitate this process, the IRS will electronically share Form 8919 data with the Social Security Administration.

FORM 4137 – In the past, misclassified workers were asked to use Form 4137, *Social Security and Medicare Tax on Unreported Tip Income*, to report their share of FICA taxes. However, many of these individuals filed Form 1040 Schedules C and SE instead and incorrectly paid both the employer and employee shares of FICA taxes. Misclassified workers should no longer use this form. Instead, Form 4137 should now only be used by tipped employees to report FICA taxes on allocated tips and tips not reported to their employers. ■

CVS Agrees to Pay Over \$250,000 in Penalties and Back Wages Following DOL Investigation

Following an investigation by the Wage and Hour Division of the U.S. Department of Labor, Woonsocket, Rhode Island-based CVS Pharmacy, Inc., has agreed to pay civil money penalties and back wages totaling \$264,749 for violations of the wage and youth employment provisions of the Fair Labor Standards Act (FLSA).

A total of 63 stores throughout the Northeast were checked for compliance with the FLSA; 43 stores had violations.

Investigators found that 78 minors had been exposed

to the hazards of loading/unloading/operation of cardboard compactors/balers at various CVS locations, and seven minors had been employed in violation of time standards. In addition, 51 employees were owed back wages, mostly because of the improper editing of their timecards by store managers.

The Wage and Hour Division assessed \$215,378 in penalties for the youth employment violations and \$11,220 in penalties for the wage violations. Total back wages owed were \$38,151. ■

E-Verify Laws in Arizona and Illinois Are Challenged in Court

Payroll professionals need to be aware of new developments regarding E-Verify laws in Arizona and Illinois. The E-Verify program, formerly known as the Basic Pilot, is a free web-based system administered by the Department of Homeland

Security (DHS) through U.S. Citizenship and Immigration Services and the Social Security Administration (SSA). It allows participating employers to verify whether newly hired employees are authorized to work in the U.S. by comparing

information provided by employees on Form I-9, *Employment Eligibility Verification*, against DHS and SSA databases. E-Verify also features a new photo-screening tool (see **PAYROLL CURRENTLY, Issue No. 21, Vol. 15**).

Arizona employer sanctions are in effect

On December 21, 2007, a U.S. District Court denied a request for a temporary restraining order to block implementation of the Legal Arizona Workers Act (LAWA; see **PAYROLL CURRENTLY, Issue No. 15, Vol. 15**). As a result, LAWA went into effect on January 1, 2008. On January 16-17, 2008, the court will hold a hearing on a motion to permanently bar enforcement of LAWA. *Note:* Learn more about LAWA and follow the progress of this litigation at www.maricopacountyattorney.org/lawa/index.html.

Under LAWA, Arizona employers must verify the employment eligibility of newly hired employees through E-Verify. Employers that employ an unauthorized alien are subject to the following penalties:

- License suspension for up to 10 days and a three-year probation period for an employer that knowingly employs an unauthorized alien;
- License suspension of at least 10 days and a probation period of five years for an employer that intentionally employs an unauthorized alien; and
- License revocation for an employer that knowingly or intentionally employs an unauthorized alien while on probation for previously knowingly or intentionally employing an unauthorized alien.

Proof that an employer has verified an employee's employment authorization through E-Verify will create a

rebuttable presumption that the employer did not violate LAWA.

Illinois prohibition is on hold; employers can use E-Verify

In August 2007, Illinois enacted a law that would have prohibited employers from enrolling in E-Verify as of January 1, 2008 (see **PAYROLL CURRENTLY, Issue No. 21, Vol. 15**). It amended the state's Right to Privacy in the Workplace Act by adding new Section 12: Restrictions on Use of Employment Eligibility Verification System.

In September 2007, DHS sued Illinois seeking to invalidate the law, and Illinois has agreed not to enforce Section 12(a) until the lawsuit is resolved [www.dhs.gov/xnews/releases/pr_1197585316378.shtm]. *Note:* The Illinois legislature is considering possible changes to the law.

Illinois employers that were already enrolled in E-Verify may continue to use E-Verify on or after January 1, 2008, without fear of state enforcement action. The state's decision also allows employers planning to enroll in E-Verify to do so without threat of state enforcement action against them. An employer should call DHS at 888-464-4218 if an Illinois official attempts to enforce Section 12(a). This would include any attempt by the state to:

- Prevent an employer from enrolling in E-Verify;
- Requiring an employer to stop using E-Verify; or
- Bringing or threatening to bring any legal action, including fines, against an employer simply for participating in E-Verify.

DHS intends to post future developments regarding the Illinois law on the E-Verify website at www.dhs.gov/E-Verify. ■

Supreme Court Denies Review of Case Involving Compensability of Time Spent on Security Procedures

The U.S. Supreme Court has refused to hear the appeal of a case involving the compensability of time spent by workers at an airport construction site going through security procedures at the beginning and end of the workday [*Bonilla v. Baker Concrete Construction, Inc.*, No. 07-554 (U.S. Sup. Ct., 12-10-07)].

The Portal-to-Portal Act provides that activities which are "preliminary or postliminary" to an employee's principal work activity are not compensable work time unless a contract or custom of the employer makes them compensable. This means that time spent by employees to get ready for work or to get ready to leave work is not work time unless the activities engaged in are essential to the employee's principal work activity. An employee's principal activity includes all activities that are "integral and indispensable" to the principal activity (see *The Payroll Source*®, pp. 2-58 and 2-59).

Baker Concrete Construction, Inc., employed workers at a construction project at Miami International Airport. In order to

reach the secured worksite inside the airport, the workers had to pass through a single checkpoint and then ride authorized buses or vans to the site.

In deciding that the security screening time was not compensable, the Eleventh Circuit Court of Appeals said that three factors are considered in determining whether preliminary activities are integral and indispensable: (1) whether the activity is required by the employer; (2) whether the activity is necessary for the employee to perform his or her duties; and (3) whether the activity primarily benefits the employer.

Here, the security screenings were required by the Federal Aviation Administration. They did not primarily benefit the employer, which had no control over whether its employees would be screened. "The fact that certain pre-shift activities are necessary for employees to engage in their principal activities does not mean that those pre-shift activities are 'integral and indispensable' to a principal [work] activity." ■

USCIS Reaches H-2B Cap for Second Half of Fiscal 2008

U.S. Citizenship and Immigration Services (USCIS) has announced that it has received enough H-2B petitions to reach the limit of 33,000 for the second half of fiscal year 2008 [www.uscis.gov/files/presrelease/H-2B_3jan08.pdf].

January 2, 2008, was the "final receipt date" for new H-2B worker petitions requesting employment start dates prior to October 1, 2008. To select the number of petitions needed

to meet the cap, USCIS will apply a computer-generated random selection process to all petitions subject to the cap and received by that date. USCIS will reject all cap-subject petitions not randomly selected (and return the fees). USCIS will also reject petitions for new H-2B workers seeking employment start dates prior to October 1, 2008, that are received after January 2, 2008.

Petitions for workers currently in H-2B status do not count toward the H-2B cap. USCIS will continue to process petitions filed to:

- Extend the stay of a current H-2B worker in the U.S.;
- Change the terms of employment for current H-2B workers and extend their stay; or
- Allow current H-2B workers to change or add employers

and extend their stay.

Note: An H-2B nonimmigrant is an alien employed to perform temporary nonagricultural labor or services. According to USCIS, H-2B workers typically fill labor needs in occupational areas such as construction, health care, landscaping, lumber, manufacturing, food service/processing, and resort/hospitality services. ■

Travel Time to Distant Worksites Was Compensable

BGS Construction, Inc., is a “traveling construction company” headquartered in West Virginia that builds coal and stone processing plants. BGS generally hires West Virginia residents as employees because they have the necessary skills and accreditation, but most of the company’s construction work takes place outside West Virginia.

Employees are responsible for their transportation to worksites. An employee working locally (in southern West Virginia) drives to the worksite at the beginning of the day and returns home at the end of the day. Employees assigned to work at distant worksites (outside West Virginia) work a modified two-week schedule of eight consecutive 10-hour work days, followed by six days off during which time they travel to and from their homes in West Virginia.

Former and current employees of BGS sued the company for violating the overtime requirements of the Fair Labor Standards Act (FLSA). The question for the court was whether the employees were entitled to be paid for their travel time from southern West Virginia to BGS worksites beyond the range of a daily commute. The court said yes.

Analysis

Normal travel from home to work is not work time,

whether the employee works at a fixed location or at different job sites. However, travel that keeps an employee away from home overnight is travel away from home, and is work time when it cuts across the employee’s work day because the employer is simply substituting travel time for other duties (29 C.F.R. §785.39).

Here, the employees’ “homes” for purposes of §785.39 were their permanent residences in West Virginia, not their temporary lodgings near the worksites. The fact that BGS paid \$5 per hour extra as a per diem to employees working at distant worksites, but not to employees working in West Virginia, was an acknowledgment that the employees were away from home when working outside the state, said the court. And BGS admitted that relocating employees to the out-of-state worksites was not practical, given the short duration of its projects.

Accordingly, the court, citing §785.39, ordered BGS to pay its employees for their travel time from their homes in southern West Virginia to distant worksites when that travel requires an overnight stay [*Treadway v. BGS Construction, Inc.*, No. 5:06-cv-00191, 2007 U.S. Dist. LEXIS 71149 (SD W.Va., 9-25-07)]. ■

Teenager’s Employment on Fishing Boat Violated FLSA Child Labor Provisions

Ronald and Debbie Halsey run a set net salmon fishing operation in Cook Inlet, Alaska. During the 2001 and 2002 fishing seasons, Samuel Gammon worked as a crew person for their business. He helped set and pull nets at the opening and closing of fishing periods, picked fish from the nets and placed them in the 22-foot fishing boat, and sometimes unloaded the fish when the boat came to shore. Gammon was 13 years old during the 2001 season and 14 years old during the 2002 season. He died when the fishing boat capsized in 2002 while he and the Halseys were pulling nets from the water.

The U.S. Department of Labor (DOL) said the Halseys had employed Gammon in violation of the child labor provisions of the Fair Labor Standards Act (FLSA) and assessed a civil money penalty of \$11,700. The DOL action was affirmed by a U.S. District Court when the Halseys challenged it [*Halsey v. Administrator, Wage and Hour Div.* No. 3:06-cv-00205-JWS, 2007 U.S. Dist. LEXIS 85225 (D. Alaska, 11-16-07)].

Individual coverage under the FLSA

Under the FLSA enterprise coverage test, a business is an “enterprise engaged in commerce” and all of its employees are covered and protected by the FLSA if, among other things, the business has at least \$500,000 in annual gross volume of sales made or business done, excluding separately stated excise taxes at the retail level (see *The Payroll Source*®, pp. 2-4 and 2-5). Enterprise coverage did not apply here because the Halseys’ gross sales volume was less than \$14,000 for 2001 and less than \$12,000 for 2002.

Even where an employer does not meet the requirements for enterprise coverage, however, an individual employee may still be covered by the FLSA if he or she is engaged in interstate commerce or in the production of goods for interstate commerce. Here, the court said Gammon was covered by the FLSA because he was engaged in commerce. He picked and unloaded fish as part of his paid duties in Alaska, and those fish were sold to a seafood company that shipped them to Seattle, Washington.

Child labor provisions of the FLSA

The FLSA prohibits commerce involving “oppressive child labor,” which is the employment of any child under age 18 in violation of the child labor restrictions of the FLSA and DOL regulations (see *The Payroll Source*®, p. 2-59). As an individual covered by the FLSA, Gammon was entitled to the protection of its child labor provisions, said the court.

Gammon’s employment at age 13 was illegal because under the FLSA and DOL regulations the employment of minors under 14 years of age is not permissible in any circumstances if the employment is covered by child labor provisions and not specifically exempt.

Occupations that involve the transportation of persons or property by water are prohibited for minors 14 and 15 years old, and this specifically includes occupations involving the performance of duties on vessels (29 C.F.R. §570.33(f)(4)).

The court explained that these restrictions do not prohibit any work in the fishing industry – just work that involves the

performance of duties on vessels. For example, office work or sales work in connection with the transport of persons or property that is not on a vessel is permitted. Here, the Halseys

violated the FLSA by knowingly employing Gammon when he was 13 and 14 years of age in an occupation that involved the transportation of fish by water. ■



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/paystate.html for more information.

New state withholding tables for 2008

The following states have issued new withholding tables, effective for wages paid on or after 1-1-08: California, Connecticut, District of Columbia, Kentucky, Maine, Maryland, Michigan, Minnesota, Missouri, Nebraska, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, Utah, Vermont, and Virginia.

California

EITC notice. The Employment Development Department has answered frequently asked questions about the new federal Earned Income Tax Credit (EITC) notification law at www.edd.ca.gov/eddeitc.htm. A sample notice that may be provided to employees is also available at the website. Any employer that is subject to the law and required to provide unemployment insurance to employees must notify *all* employees that they may be eligible for the EITC (see **PAYROLL CURRENTLY, Issue No. 23, Vol. 15**). Employers must notify employees within one week before or after, or at the same time that employees receive Form W-2, *Wage and Tax Statement*.

Missouri

Direct deposit/paycards for state employees. Effective 1-1-08, all state employees who are expected to be employed for longer than three months are required to participate in the state Payroll Direct Deposit program as a condition of employment. State departments may temporarily or permanently waive this requirement with approval from the Office of Administration. Employees are allowed to select the financial institution that will receive the direct deposit. If an employee does not have a checking or savings account, the state has contracted to make available a choice of banks that will assist in setting up an account. If the employee chooses not to open a checking or savings account, a payroll card account must be chosen [1 Mo. Code State Reg. §10-8.010].

Wisconsin

Forms W-2 filed electronically. Employers may submit Forms W-2 files created on the Social Security Administration website in PDF format to the Department of Revenue (DOR) through its existing file transfer site at www.revenue.wi.gov/eserv/w-2.html (in the EFW2 format). PDF-generated Forms W-2 that are scanned or created with any other software product cannot be accepted by DOR through this website. Employers that file 250 or more Forms W-2 must file electronically or on magnetic media with the DOR (see *The Payroll Source*®, p. 8-105) [Pub. CO-001, rev. 12-07].

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