



The Biweekly
Payroll
Compliance
Publication
Of The
American
Payroll
Association

PAYROLL CURRENTLY

Volume 16

Issue # 14

July 11, 2008

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USCIS Updates Expiration Date on Form I-9

U.S. Citizenship and Immigration Services (USCIS) has released a new version of Form I-9, *Employment Eligibility Verification*, with an expiration date of “06-30-09” and no other changes. USCIS has advised APA that both this form and the previous (identical) form with an expiration date of “06-30-08”

are acceptable for use, but that employers are encouraged to begin using the new version of the form as soon as possible. Both versions of the form are available on the APA website at www.americanpayroll.org/members/Forms-Pubs. ■

Reminder: Federal Minimum Wage Goes to \$6.55 Per Hour on July 24

The Fair Minimum Wage Act of 2007 increases the federal minimum wage in three stages (see *The Payroll Source*®, p. 2-35). The second increase – to \$6.55 an hour from the current \$5.85 an hour – will be effective July 24, 2008 (it will increase again, to \$7.25 an hour, effective July 24, 2009).

Note: When the minimum wage rises to \$6.55, the Fair Labor Standards Act (FLSA) tip credit will rise to \$4.42 (\$6.55 - \$2.13). And when the minimum wage rises to \$7.25, the tip credit will rise to \$5.12 (\$7.25 - \$2.13). The minimum cash wage for tipped employees remains unchanged.

State minimum wage rates

Many states are affected by the federal increase because their minimum wage is either tied to changes in the federal rate or lower than the federal rate.

State rates higher than the federal rate. There are 24 states that are not affected by the second increase in the federal minimum wage because their minimum wage rates will exceed \$6.55 an hour on July 24, 2008: Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Iowa, Maine, Massachusetts, Michigan, Missouri, Nevada (except for the lower rate that applies if an employer provides health benefits), New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and West Virginia.

However, these states will have to be reevaluated when the federal minimum wage is increased in 2009. For example, the

federal minimum wage will be higher than the Alaska minimum wage (\$7.15), effective July 24, 2009, unless Alaska enacts legislation increasing its minimum wage.

In the District of Columbia, the minimum wage will increase to \$7.55 an hour, effective July 24, 2008, since the law provides that the rate is \$7.00 or the federal minimum wage plus \$1, whichever amount is greater.

State rates the same as the federal rate. There are 13 states that will have the same minimum wage rates as the federal rate on July 24, 2008: Idaho, Indiana, Kentucky, Maryland, Montana (except for small employers), Nebraska, North Carolina, North Dakota, Oklahoma, South Dakota, Texas, Utah, and Virginia. These states follow the federal rates or provide for the same increase on the same date.

State rates lower than the federal rate. There are eight states and Puerto Rico that will have lower minimum wage rates than the federal rate on July 24, 2008: Arkansas, Georgia, Kansas, Minnesota, New Hampshire, New Mexico, Wisconsin, and Wyoming. When state law requirements are less favorable to an employee than the requirements in the federal Fair Labor Standards Act (FLSA), they apply only to those employees who are not covered by the FLSA. Employees who are covered by the FLSA must be paid at the higher federal rate. However, employees not covered by the FLSA may not be covered by the state minimum wage law either because certain employers or employees may be exempt.

Payroll Solutions

Q. We are a multistate employer, with operations in several states devastated by recent flooding. Many of our employees have offered to donate personal leave time to colleagues in affected areas. Can we set this up so that there are no tax consequences to the donor employees?

A. Yes, by setting up a written “major disaster leave-sharing plan.” Employees depositing leave in an employer-sponsored leave bank under such a plan will not have wages or compensation with respect to the leave deposited, provided that the plan treats payments made by the employer to the leave recipient as wages for purposes of FICA, FUTA, and income tax withholding. A major disaster leave-sharing plan is a written plan that meets the following requirements:

1. The plan allows a leave donor to deposit accrued leave for use by other employees adversely affected by a major disaster. A “major disaster” is a Presidentially-declared disaster. (Information about Presidentially-declared disasters can be found at www.fema.gov/news/disasters.fema.) An employee is considered “adversely affected” by a major disaster if the disaster has caused severe hardship to the employee or a family member of the employee that requires the employee to be absent from work.

2. The plan does not allow a leave donor to deposit leave for use by a specific recipient.

3. The amount of leave that may be donated by an employee in any year generally does not exceed the maximum amount of leave that an employee normally accrues during the year.

4. A leave recipient may receive paid leave at his or her normal rate of compensation from leave deposited in the leave bank, and must use the leave for purposes related to the disaster.

5. The plan must specify a reasonable time after the disaster during which a leave donor may deposit leave in the leave bank and a leave recipient may use leave received from the bank.

6. A leave recipient may not convert leave received under the plan into cash. However, donated leave may be used to eliminate a negative leave balance incurred as a result of the disaster.

7. The employer must make a reasonable determination, based on need, about how much leave each approved recipient may obtain under the plan.

8. Leave deposited because of one major disaster may be used only for employees affected by that major disaster. Except for an amount so small as to make accounting for it unreasonable or administratively impracticable, any leave deposited under a major disaster leave-sharing plan not used by leave recipients by the end of the time period specified in the plan must be returned within a reasonable period of time to the leave donors (or, at the employer’s option, to leave donors still employed by the employer) so that the donors will be able to use the leave.

For more information about leave-sharing plans, see *The Payroll Source*®, pages 3-78 and 3-79.

No state minimum wage law. Five states do not have minimum wage laws: Alabama, Louisiana, Mississippi, South Carolina, and Tennessee. Therefore, all employees in these states covered by the FLSA who are not otherwise exempt must be paid at least the applicable federal minimum wage for all hours worked.

Note: For detailed information on state minimum wage rates, see *APA’s Guide to State Payroll Laws*, Table 1.1.

Creditor garnishments

The increases in the federal minimum wage will significantly affect the calculation of the amount that can be garnished to repay a debt. Creditor garnishments are governed by both federal and state laws. For example, the Consumer Credit Protection Act (CCPA)

states that the maximum amount of an employee’s “disposable earnings” that can be garnished to repay a debt is the lesser of:

- 25% of the employee’s disposable earnings for the week; or
- the amount by which the employee’s disposable earnings for the week exceed 30 times the federal minimum hourly rate then in effect.

The garnishment limits in the CCPA preempt state laws to the extent the state laws allow greater amounts to be garnished. But state law applies if the maximum amount subject to garnishment is lower than the federal maximum or if the state does not allow creditor garnishments at all. *Note:* For detailed information on state garnishment limits, see *APA’s Guide to State Payroll Laws*, Table 7.1.

AMOUNT SUBJECT TO GARNISHMENT, EFFECTIVE JULY 24, 2008 – JULY 23, 2009			
Weekly	Biweekly	Semimonthly	Monthly
Disposable earnings are \$196.50 or less: NONE	Disposable earnings are \$393.00 or less: NONE	Disposable earnings are \$425.75 or less: NONE	Disposable earnings are \$851.50 or less: NONE
Disposable earnings are more than \$196.50 but less than \$262.00: AMOUNT ABOVE \$196.50	Disposable earnings are more than \$393.00 but less than \$524.00: AMOUNT ABOVE \$393.00	Disposable earnings are more than \$425.75 but less than \$567.67: AMOUNT ABOVE \$425.75	Disposable earnings are more than \$851.50 but less than \$1,135.33: AMOUNT ABOVE \$851.50
Disposable earnings are \$262.00 or more: MAXIMUM 25%	Disposable earnings are \$524.00 or more: MAXIMUM 25%	Disposable earnings are \$567.67 or more: MAXIMUM 25%	Disposable earnings are \$1,135.33 or more: MAXIMUM 25%

Capitol Hill Update

The following are some recent payroll-related federal legislative developments. All information is current through July 1, 2008.

Note: The status of legislation discussed in PAYROLL CURRENTLY, Issue Nos. 5 and 10, Vol. 16, is unchanged.

Renewable Energy and Job Creation Act: nonqualified deferred compensation

H.R. 6049 was passed by the House of Representatives (263-160) on May 21, 2008. To date, efforts to bring the measure to

a vote in the Senate have not succeeded.

The House version of the bill includes two provisions – on combat pay and the earned income tax credit, and qualified reservist distributions from retirement plans – that duplicate provisions of the recently enacted Heroes Earnings Assistance and Relief Tax (HEART) Act (see [PAYROLL CURRENTLY, Issue No. 11, Vol. 16](#)).

The House bill also includes a provision to add a “qualified bicycle commuting reimbursement fringe benefit” that duplicates a provision in H.R. 5351 (see [PAYROLL CURRENTLY, Issue No. 5, Vol. 16](#)).

The bill also includes a provision to restore the income exclusion for amounts received under qualified group legal services plans for taxable years beginning “after December 31, 2007, and before January 1, 2009.” *Note:* The exclusion expired in 1992 (see *The Payroll Source*®, p. 3-40).

The bill would also limit the ability to defer service provider (i.e., employee) compensation by providing that any compensation (including, for example, stock appreciation rights) deferred under a nonqualified deferred compensation plan of a nonqualified entity (e.g., certain foreign corporations and certain foreign and domestic partnerships) is includible in the service provider’s gross income when there is no substantial risk of forfeiture of the right to such compensation. This provision would apply in addition to IRC §409A.

Alternative Minimum Tax Relief Act: information reporting and backup withholding

H.R. 6275 was passed by the House of Representatives (233-189) on June 25, 2008. It is currently in the hands of the Senate Finance Committee.

The bill includes a provision that would require annual information reporting on payment card and third-party payment (above a de minimis activity threshold) transactions for calendar years beginning after December 31, 2010. Information reporting would be required for “payment settlement entities” (merchant banks that settle credit and debit card sales or third-party networks that facilitate such transactions).

Reportable transactions subject to information reporting generally would be subject to backup withholding requirements. These requirements would apply to amounts paid after December 31, 2011.

Airline Flight Crew Technical Corrections Act: family and medical leave

H.R. 2744 was passed by the House of Representatives (402-9) on May 20, 2008. It is currently in the hands of the Senate Committee on Health, Education, Labor, and Pensions.

The bill would amend the Family and Medical Leave Act with respect to hours-of-service requirements for airline flight crews. A flight attendant or pilot would be eligible for FMLA leave if she or he has been paid for or worked at least 60% of the employer’s

monthly hour or trip guarantee (or the equivalent annualized) over the preceding 12-month period. *Note:* On average, a full-time flight attendant is scheduled for 960 in-flight hours a year; and under FAA regulations, pilots are prohibited from flying more than 1,000 hours a year. The bill therefore closes a loophole in the FMLA, which has a 1,250 hours-of-service eligibility requirement.

Reimbursing Our American Drivers (ROAD) Act: mileage rates

S. 3032, introduced in the Senate on May 19, 2008, would increase the standard mileage rate for business, medical, and moving deduction purposes (and for federal employees) to 70 cents for 2008. In addition, it would permanently increase the mileage rate for charitable deduction purposes from 14 to 40 cents. The bill is currently in the hands of the Senate Finance Committee.

Earned Income Credit Information Act

H.R. 6371, introduced in the House on June 25, 2008, would require employers to notify “potential EIC-eligible employees” (annual wages from the employer less than the amount of earned income at which the credit phases out for an individual) of the availability of the earned income tax credit other than through Form W-2, which has such language on the back of Copy B. The requirement could be met by providing a copy of IRS Notice 797, and there would be an exemption for small employers (up to 25 employees). The bill is currently in the hands of the House Ways and Means Committee.

Family-Friendly Workplace Act: private sector comp time

H.R. 6025, introduced in the House on May 13, 2008, would amend the Fair Labor Standards Act to provide that private sector employees may receive compensatory time off in lieu of monetary overtime compensation, subject to certain conditions (e.g., voluntary agreement) and limitations (e.g., 160-hour maximum accrual). The bill is currently in the hands of the House Committee on Education and Labor.

Employee Misclassification Prevention Act

H.R. 6111, introduced in the House on May 21, 2008, would require employers to keep records of non-employees who perform labor or services for remuneration, provide a notice to each individual classified as a non-employee (including the address and phone of the applicable local office of the Department of Labor and a referral to a DOL employee rights website) and would provide a special penalty (doubling of liquidated damages and a fine of up to \$10,000 for each violation) for employers that misclassify employees as non-employees. The bill is now in the hands of the House Committee on Education and Labor.

Electronic pay stubs for federal employees

H.R. 6073, introduced in the House on May 15, 2008, provides that federal employees receiving their pay by electronic funds transfer would be given the option of receiving their pay stubs electronically. The bill is currently in the hands of the House Subcommittee on Government Management, Organization, and Procurement. ■

SSA ‘No-Match’ Letters Did Not Give Employer Constructive Knowledge of Immigration Violations

The Ninth Circuit Court of Appeals has confirmed an order for reinstatement and back pay for 33 employees fired by Aramark Facility Services. The employees were given three days to correct information reported in SSA “no-match” letters but failed to do so. The court said the no-match letters and the fired employees’ responses did not put Aramark on constructive notice that it was employing undocumented workers [*Aramark Facility Svcs. v. Service Employees Int’l Union, Local 1877*, No. 06-56662, 2008 U.S. App. LEXIS 12704 (9th CA, 6-16-08)].

Background

Aramark Facility Services received letters in early 2003 from the Social Security Administration indicating that the social security numbers of 48 of its employees at the Staples Center in Los Angeles did not match those in the SSA’s database. Aramark reacted to these “no-match” letters by telling the employees that they had three days to produce either a new social security card or verification that a new card was being processed. Fifteen employees obtained the requested documentation in time and

continued to work. However, 33 employees did not timely comply and were fired.

Aramark suspected immigration violations, even though each of the fired employees had, at the time they were hired, properly completed Form I-9 (*Employment Eligibility Verification*) and provided the company with facially valid documents establishing their identity and eligibility to work in the U.S. Moreover, Aramark was not notified by any federal agency that its workers were suspected of being undocumented.

WHAT THE LAW SAYS – Under 8 USC §1324a(a)(2), it is unlawful for an employer, after hiring an alien, to continue to employ the alien in the U.S. “knowing” the alien is (or has become) unauthorized with respect to such employment. An employer can violate this section by having either actual or constructive knowledge (i.e., knew or should have known) that an employee is unauthorized to work.

Analysis

In order for an employer to have constructive knowledge that an employee is not authorized to work, the employer must have positive information about the employee’s undocumented status. Here, the court said neither the SSA no-match letters nor the employees’ responses to them was positive information provided to Aramark about the employees’ immigration status.

The no-match letters. The court explained that an SSN discrepancy does not automatically mean that an employee is undocumented or lacks proper work authorization. In fact, the SSA tells employers that the information it provides them “does not make any statement about ... immigration status” and “is not a basis, in and of itself, to take any adverse action against

the employee.” In addition to misuse by undocumented workers, SSN mismatches can be caused by typographical errors, name changes, compound last names, and faulty employer records. The SSA itself admits that nearly 18 million of the 430 million entries in its database contain errors.

Notably, neither the SSA nor the IRS imposes sanctions based on no-match letters. Further, employers are not required to solicit an employee’s SSN, other than when the employee is first hired, unless the IRS sends a “penalty notice.” Finally, even recently issued Department of Homeland Security regulations, which use no-match letters in the enforcement of immigration laws, would not treat a no-match letter, by itself, as creating constructive knowledge of an immigration violation. *Note:* The DHS regulations were adopted well after Aramark received the letters from the SSA and are currently subject to a preliminary injunction (see **PAYROLL CURRENTLY**, Issue No. 7, Vol. 16).

The employees’ reactions. The court said that the failure of the 33 Aramark employees to return quickly with documents from SSA was not constructive notice of unauthorized status. It was likely that many of the employees concluded that they could not meet the three-day deadline and simply decided not to try.

The court noted that Aramark’s reverification policy was much more accelerated than the one provided in the pending DHS regulations. As currently written, the regulations provide that an employer would not be subject to prosecution on a “constructive knowledge” theory so long as the employee was asked to provide further documentation from the SSA within 90 days of the employer’s receipt of a no-match letter. ■

IRS Offers Guidance on Teacher Contracts for 12-Month Pay Covering Shorter Terms

The IRS has released interim guidance describing regulations expected to be proposed under IRC §457(f), which deals with ineligible deferred compensation plans of tax-exempt organizations and state and local governments [Notice 2008-62, released 7-1-08; www.irs.gov/pub/irs-drop/n-08-62.pdf].

The regulations to be proposed are expected to address certain types of arrangements involving recurring part-year compensation, including common arrangements involving public school employees who provide services during a 10-month school year and elect to be paid over 12 months. It is expected that the regulations will provide that if certain conditions are satisfied, then §457(f) would not apply to such arrangements. It is also expected that a conforming change will be proposed for regulations under IRC §409A, so that §409A also would not apply to such arrangements if the conditions are met.

Taxpayers may rely on Notice 2008-62 immediately, for purposes of both §457(f) and §409A.

Anticipated regulations

It is anticipated that the regulations to be proposed under §457(f) will specify that an arrangement in which an employee or independent contractor receives recurring part-year compensation does not provide for deferred compensation for purposes of §457(f) if the arrangement:

- does not defer payment of any of the recurring part-year compensation beyond the last day of the 13th month following the beginning of the service period; and
- does not defer from one taxable year to the next taxable year the payment of more than the applicable dollar amount under §402(g)(1)(B) in effect for the calendar year in which the

service period begins (\$15,500 for 2008).

Typical situation: school district employee

In a typical case of a school teacher, the recurring part-year compensation consists of the compensation the teacher earns during a service period consisting of a school year comprising 9 or 10 months that begins in one calendar year and ends in the next calendar year. Under a common arrangement, the school system pays all of its teachers (or allows individual teachers to elect to be paid) based on a 12-month payment schedule, so that some of the compensation that the teacher earns for working during one calendar year is paid in the next calendar year at or after the end of the school year. Under the anticipated rule in this situation, none of the compensation paid to a teacher would be deferred compensation if the amount the teacher earns during the first calendar year that is paid in the second calendar year does not exceed the dollar amount under §402(g)(1)(B) applicable for the first calendar year.

Example 1. Assume a school district employee works during a school year that begins on August 1, 2008, and ends on May 31, 2009 (a 10-month school year). The employee is paid over the 12-month period beginning August 1, 2008 (either because the school system pays over a 12-month period or because the employee may elect to be paid over a 12-month period and has made such an election). In this case, the arrangement would not provide for deferred compensation for purposes of §457(f) unless the employee earns more than \$186,000 for the school year. Since five months of the school year are in 2008 and five months are in 2009, an employee whose salary for the school year is \$186,000 earns \$93,000 in 2008 and \$93,000 in 2009. Under the

12-month payment schedule, the employee receives \$77,500 in 2008 and \$108,500 in 2009. Because the amount the employee earns during 2008 that is paid in 2009 (\$93,000 - \$77,500, or \$15,500) does not exceed the applicable dollar amount under §402(g)(1)(B) for 2008, the arrangement would not provide for deferred compensation for purposes of §457(f).

Example 2. Similarly, a school district employee working during a school year that begins on September 1, 2008, and ends on June 30, 2009 (a 10-month school year), that paid the employee over the 12-month period beginning September 1, 2008, would not provide for deferred compensation for purposes

of §457(f) if the employee earns less than \$232,500 for the school year. Since four months of the school year are in 2008 and six months are in 2009, an employee whose salary for the school year is \$232,500 earns \$93,000 in 2008 and \$139,500 in 2009. Under the 12-month payment schedule, the employee receives \$77,500 in 2008 and \$155,000 in 2009. Because the amount the employee earns during 2008 that is paid in 2009 (\$93,000 - \$77,500, or \$15,500) does not exceed the applicable dollar amount under §402(g)(1)(B) for 2008, the arrangement would not provide for deferred compensation for purposes of §457(f). ■

Forum on Federal Payroll Issues, Part 3

In previous issues of *PAYROLL CURRENTLY*, we included questions and answers by IRS, SSA, and OCSE representatives during the *Forum on Federal Payroll Issues* at the APA's 26th annual Congress in Austin, Texas. This article contains the answers provided by other members of the panel, including Sonja Barnes, Chief, Consumer Relationship and Learning Management Branch, Verification Division, U.S. Citizenship and Immigration Services, Department of Homeland Security, Martin Barrow, Regional Manager, Southwest Region, Wage and Hour Division, Department of Labor, and Linda Buehring, Senior Special Agent, U.S. Immigration and Customs Enforcement, Department of Homeland Security.

Department of Labor

Supplemental payments and the regular rate of pay

Q. Do the following supplemental payments get included in the calculation of the regular rate of pay for overtime purposes – vehicle allowance, officer-in-charge pay, tool allowance, uniform allowance, and flex out (cash in lieu of benefits)? What about noncash fringe benefits such as awards and prizes?

A. A vehicle allowance would not be included in the regular rate because it's an offset against an employee expense. A tool allowance would likewise generally not be included because, again, it's an offset against an employee expense. And the same answer applies to a uniform allowance.

Officer-in-charge pay would be included because you're paying for the employee's time at a higher rate. Flex out, money paid to an employee who chooses not to participate in some benefit, would be for hours worked and would be included in the regular rate. It's pay for hours worked because you are not just paying the person because their name appears on your payroll. They're doing something to earn the money.

Whether you should include noncash awards and prizes in the regular rate will depend on the reason the employee got the award or the prize. It may very well be includable in the regular rate, and you may have to look at fair market value in order to establish what to include.

Let's say that you've decided to give an employee a plasma television for perfect attendance. The item has a fair market value and because it's for perfect attendance – showing up for work for however many days – then it would be included in the regular rate.

Mandatory hours and exempt status

Q. May FLSA-exempt employees be required to work certain hours without violating their exempt status?

A. Yes. You can set whatever schedule you want for these employees. They're exempt from overtime, so if you want them to work 12 hours a day, 7 days a week, you can do that. And if your normal workday is 9 to 5, but you require all employees to be in the office during certain core hours, that's okay, too. In short, you

can require them to work as many hours as you want, so long as you pay their salary.

Civilians working on federal property

Q. For civilians working for private companies on federal land such as military bases, does federal or state wage-hour law prevail?

A. To answer this question, you need to know more than just whether the person is working on federal land. You would need to know whether there is a contract with a federal agency, and also the type of work that's involved. Is it a construction project? Is it a service contract? In the event that it's either of those two, then there are specific laws that require the employer to have stipulated wage rates that may be higher than both federal and state minimum rates.

Exempt employees and sick leave

Q. Must FLSA-exempt employees be allowed some "sick days"?

A. The short answer to this is no, but there is more to it than that. You don't have to allow sick days, but you do have to continue paying the regular salary for the person to stay exempt. If the person works one hour in one week, they are due their salary for the entire week.

Most employers set up a time off plan, a sick leave plan. Once the employee has exhausted that sick leave, then you can begin to deduct from the employee's salary for full days missed. If an employee works one minute in one day, they get paid for the full day. You can't deduct for partial days missed.

You can take the time out of the sick leave plan provided you have a bona fide sick leave plan, and you have to have some days in there for the plan to be considered bona fide.

Recovering overpayments to employees

Q. If we mistakenly pay a salaried employee twice for one pay period and are unable to recover the funds, which have been paid by direct deposit, can we treat the overpayment as an advance on wages and simply skip the employee's next regularly scheduled payment? If the employee were to leave our employ prior to his next payment, what recourse would we have to recoup our funds?

A. Let's start with an exempt employee. An exempt employee must be paid a salary on a weekly basis, and the minimum weekly salary is \$455. If the salary is \$1,000 a week, then you must pay the employee \$1,000 a week. You would not be allowed to take that salary back from the employee in subsequent weeks. You would have to arrange with that employee a payback plan of some other kind, assuming that you're going to do a deduction. If the employee says that you can take out \$100 a week until you've gotten the money back, and the agreement is voluntary, then you can deduct \$100 a week. I would recommend

that you get something signed – just to establish that it was a voluntary arrangement. If the employee leaves, you will probably have to go to small claims court. So the reality is that you are probably going to lose that money.

If this were an hourly employee, you would have a bit more recourse. You are required to pay the minimum wage. However, if you are currently paying more than that, you can deduct the difference between the minimum wage and the hourly rate you pay for as many weeks as it takes to recoup the money, and you can do that with or without the employee's permission. Once you cross the 40-hour barrier, you are obligated to pay the regular rate at time and a half for all hours worked and you cannot incorporate those hours into the difference between the minimum wage and the actual hourly rate.

Fluctuating workweek

Q. In a recent audit, we had a number of employees reclassified from exempt to nonexempt for FLSA purposes. The employees are still salaried, and we have discovered that the more hours they work, the lower their hourly overtime premium rates become. Can you explain this?

A. One of the methods for paying an employee is a salary method. Salaries paid to nonexempt employees are straight time payments. For employees who work a fluctuating workweek, you are allowed to spread that straight time payment over all hours worked, but if you divide the hours into the salary and the hourly rate falls below minimum wage, you have to revert to minimum wage.

For example, an employer and an employee agree that the employee will be paid \$1,000 a week no matter how many hours are worked, and the employee's hours worked differ from week to week. This employee is not exempt. That means that overtime must be paid to this employee for the hours worked over 40 in a workweek. You can use that \$1,000 to pay all straight time pay owed. Overtime is a premium penalty required for the hours after 40, and it's based on one-half of the regular rate. So if you've paid all of the straight time for the hours zero to whatever point where it becomes minimum wage, then the only thing left for you to pay is the half time premium for the hours after 40 in the workweek.

In our example, say the employee works 50 hours in a workweek. The regular rate of pay in that week is \$20 an hour. The half time premium is \$10 an hour times the 10 overtime hours, so you owe that employee \$1,000 straight time plus \$100 overtime. Gross pay is \$1,100.

If the same employee the very next week works 60 hours, then you have to divide the \$1,000 by 60 to get the regular rate of pay (\$16.67). Half of that rate becomes the premium (\$8.34), times the additional 20 overtime hours (\$166.80).

As the rate drops when the hours increase, the overtime pay increases, but not proportionately.

DOL audits

Q. In which industries is the DOL focusing its targeted audits in the coming year, and why?

A. We haven't gone through our summer planning process yet, so all I can tell you is that we will be focusing as we have in the past on low wage industries and on historic violators. One of our goals is to reduce the recidivism rate relative to audits that we make during the course of the year. Low wage industries we have targeted include restaurants, daycare centers, security guards, and others. So if your industry was listed in the DOL news release in the last year or two, you might expect a return visit.

U.S. Citizenship and Immigration Services

E-Verify participation

Q. As employer participation in E-Verify increases, what

is USCIS doing to keep up with the demand and to improve the accuracy and timeliness of the data in the E-Verify system?

A. Over the past year, we have gone through a series of drills. There have been several legislative proposals to make this program mandatory, and because of that possibility, we've performed very robust testing of our system.

Participation has grown quite a bit over the last year. At the end of 2006, about 10,000 employers nationwide had signed up for E-Verify. We now have close to 65,000 employers, and the number is increasing at the rate of about 1,000 employers per week. In a mandatory environment, we would be looking at approximately 7.4 million employers.

The testing that was carried out recently anticipated this number. We had the contractor that supports the system perform load testing, working with the Social Security Administration to make sure that we were ready for a mandatory environment, and I'm very confident in saying that we're ready.

Social security card and Form I-9

Q. Is an employee required to provide his or her social security number on Form I-9? If an employer uses E-Verify, must the employee actually present his or her social security card?

A. An employer cannot tell an employee what documents to submit in connection with Form I-9. The employee has the right to submit either a document from List A or one each from List B and List C.

What E-Verify requires is that the employee have a social security number. It's not required that you actually have a card, but it is required that you submit a number. That number is necessary to process an individual in the E-Verify system.

For employment eligibility verification, then, it is not permitted to ask to see a social security card. For tax purposes, the rule may be different.

Acquisitions and E-Verify

Q. If one company acquires another, and the employees of the acquired company are going to become new hires of the successor employer, may the successor employer use E-Verify on all the "new" employees? If the successor employer is generally using E-Verify on its new hires, would it, in fact, be required to use E-Verify on these newly acquired employees?

A. With a new hire, you are going to go through the entire verification process and you are going to get an I-9 from each employee that you take on in this acquisition. Under those circumstances, if you are an E-Verify employer, you would then take each one of those new I-9s and put those individuals through the system.

Remember to always be consistent, and do not pick and choose which employees you are going to take back through the verification process. The answer to the question is going to depend on whether or not an employee is defined as a new hire.

E-Verify and discrimination

Q. If an employer uses E-Verify to validate the work eligibility of some new hires, must it do so for all new hires to avoid claims of discrimination? Now that there are some states that require E-Verify for certain employers, should multi-state employers use it for all new hires, or just all new hires in those states?

A. E-Verify allows an employer to decide where it wants to use the program. If you are a Texas company, for instance, and you use E-Verify in Texas, and you have sites in California and New York, there is no requirement that you use E-Verify in those other states, though many companies do so as a matter of policy. With that said, if a company decides to use E-Verify for employees in a particular state, the expectation is that it will verify all new hires in that state.

I-9 documents and student visa holders

Q. Is it true that an employee who holds either an F-1 or J-1 visa and who wants to satisfy Form I-9 with documents from List A (documents that establish both identity and work eligibility) actually must provide three List A documents?

A. The short answer is no, they are not required to submit three List A documents. An F-1 is a student, and a J-1 is an exchange student. An F-1 student would typically have a passport, which is a List A document. This person might also have an arrival-departure record attached to that passport indicating what their classification is; the duration of their stay might also be indicated on that record. They might also have a Form I-20, which would be endorsed to indicate that they were employment authorized. Those are the documents that an F-1 student would submit.

A J-1 student would have similar documents. This person would have a passport, and might also have an arrival-departure record inside that passport. And they might have a DS-2019, which is very similar to the I-20; it gives details about the person's status and will show that the individual is employment authorized.

U.S. Immigration and Customs Enforcement**Worksite enforcement efforts**

Q. What can you tell us about your stepped-up worksite enforcement efforts and increased fines against employers for unauthorized workers and improper I-9 procedures?

A. ICE has increased the number of worksite enforcement cases it is pursuing, and what I can share with you are some statistics on how arrests have increased over the years.

We're an agency that handles both criminal and administrative arrests – criminal meaning violators of immigration and customs laws, and administrative meaning violators of immigration status who are sometimes subject to deportation.

When we were a new agency in 2003, our criminal arrests for the year were at 72 and our administrative arrests were at 445. We were just getting our feet wet with the whole process then, and there have been significant increases every year since. In 2007, we had 863 criminal arrests and 4,077 administrative arrests.

Fines are also increasing, and those fines are based on two things – hiring of unauthorized workers and improper I-9 procedures. What this means is that if you've completed Form I-9, we may fine you for administrative verification violations and we may also be able to fine you for knowingly hiring those unauthorized workers.

Fines have increased in the last few years because the agency has hired forensic field auditors to look a little further into those issues. These auditors do all ICE I-9 audits, and they also follow through on notices of intent to fine.

IRS Issues Proposed Regulations on Qualified Nonpersonal Use Vehicles

The IRS has issued proposed regulations adding clearly marked public safety officer vehicles as a new category of qualified nonpersonal use vehicles not subject to the substantiation requirement of IRC §274(d) [73 F.R. 32500, 6-9-08; <http://edocket.access.gpo.gov/2008/pdf/E8-12805.pdf>].

IRC §274(d) provides that a taxpayer is not allowed a deduction or credit for certain expenses unless the expense is substantiated. However, §274(d) does not apply to any "qualified nonpersonal use vehicle" as defined in §274(i). Also, under IRS Reg. §1.132-5(h), 100% of the value of the use of a qualified nonpersonal use vehicle is excluded from income as a working

No-match safe-harbor regulations

Q. Under the no-match safe harbor regulations, if an employer and employee are unable to resolve a name/SSN mismatch with SSA, the employee may submit new documents for Form I-9 (documents that do not contain the SSN in question and that contain a photo to prove identity, such as a combination of a driver's license and a birth certificate). Then the employee may remain employed, and the employer has a safe harbor from a penalty. However, a mismatch still exists, and SSA may issue another no-match letter in the following year. Will the employer and employee have to perform these procedures again? If so, could the employee satisfy Form I-9 using the same documents (e.g., the same driver's license and birth certificate)?

A. We are precluded from addressing or speaking on this issue due to a court injunction. The next hearing is scheduled for sometime in June [as this issue of PAYROLL CURRENTLY went to press, the hearing was scheduled for August 1], and hopefully we'll be able to address some of these issues at that time.

Federal contractors

Q. If a company does contract work for the federal government, is it under greater obligation to use E-Verify?

A. E-Verify is currently a voluntary program for most employers – except certain federal government employers, violators of immigration laws ordered to participate, and employers in a few states. It is the best means available for employers to electronically verify the employment eligibility of their newly hired employees.

[Note: See PAYROLL CURRENTLY, Issue No. 13, Vol. 16, "Executive Order Mandates Use of E-Verify by Federal Contractors."]

Photocopying I-9 documents

Q. May an employer photocopy the identity and work authorization documents a new worker presents with Form I-9? What if an employee objects? If the employer does copy the documents, may the copies be kept with the form itself? Do you recommend this as a best practice?

A. The revised *Handbook for Employers* states that the law does not require you to photocopy documents. If you wish to make photocopies, however, do so for all employees, and retain each photocopy with the Form I-9. Photocopies must not be used for any other purpose. Photocopying documents does not relieve you of your obligation to fully complete Section 2 of the Form I-9, nor is it an acceptable substitute for completing the I-9 itself. If documents are photocopied, it does clarify what documents were certified on the I-9. Thus, minor corrections during an audit can be made on the spot.

If the employee objects, you can say (since the *Handbook* says photocopying is not mandatory) that it is your company policy to do so and that you photocopy I-9 documents for all employees. ■

condition fringe benefit so long as the use of the vehicle meets the requirements under IRC §274(i) and the regulations interpreting it.

Clearly marked vehicles provided to federal, state, and local government workers who respond to emergency situations do not satisfy the current regulations governing qualified nonpersonal use vehicles if the individual workers are not employed by either the fire department or police department. Accordingly, the proposed regulations add clearly marked public safety officer vehicles to the list of qualified nonpersonal use vehicles so that emergency responders receive the same treatment whether they work for the police department, fire department, or another department of

state or local government.

Definitions

A “clearly marked public safety officer vehicle” is:

- a vehicle owned or leased by a governmental unit or any governmental agency or instrumentality,
- that is required to be used for commuting by a public safety officer who, when not on a regular shift, is on call at all times,
- provided that any personal use (other than commuting) of the vehicle outside the limit of the public safety officer’s obligation to respond to an emergency is prohibited.

A public safety officer vehicle is “clearly marked” if, through painted insignia or words, it is readily apparent that the vehicle is

a public safety officer vehicle.

A “public safety officer” is an individual serving a public agency in an official capacity, with or without compensation, as a law enforcement officer, a firefighter, a chaplain, or as a member of a rescue squad or ambulance crew.

Comments

Comments on the proposed regulations must be received by September 8, 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-106897-08. ■



STATE AND LOCAL NEWS

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Maryland

Percentage method withholding tables revised. Effective 7-1-08, the state has revised the percentage method withholding tables to reflect a new state income tax rate of 6.25%. This rate applies to income in excess of \$1 million, effective for tax years 2008 through 2010. Employers are not required to do “catch-up withholding” for the first half of 2008 for affected employees. Download the tables at <http://business.marylandtaxes.com/default.asp> [S.B. 46, L. 2008; Comptroller of Maryland, Maryland Employer Withholding Tax, Tax Alert 06-08, 6-13-08].

Nevada

Tax amnesty program announced. Effective 7-1-08 through 9-30-08, the Tax Commission has established a tax amnesty program that will waive all penalties and interest on eligible taxes paid during that period, including the modified business tax and business license fees. Instructions for the program are available on the Department of Taxation’s (DOT) website at <http://tax.state.nv.us/amnesty.htm> [DOT, *Nevada Tax Notes*, 7-08].

Pennsylvania

Local earned income tax collection reformed. On 7-2-08, Gov. Ed Rendell signed legislation that will establish a tax collection district for earned income tax (EIT) in 65 counties and four tax collection districts in Allegheny County by 2012. The legislation also establishes uniform withholding and remittance requirements, effective for tax years beginning on and after 1-1-12 or earlier if specified by a tax collection district. APA members have actively supported reform legislation for several years. See “*Inside Washington*” for July 2008 [S.B. 1063, L. 2008; Pennsylvania Office of the Governor, News Release, 7-2-08].

West Virginia

Child support withholding limit on employment-related bonuses established. Effective 6-6-08, the Bureau of Child Support Enforcement may order withholding of up to 50% of any earnings denominated as an employment-related bonus when an employee owes child support arrearages [S.B. 504, L. 2008].

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PAYROLL CURRENTLY NEWSLETTER

Payroll Currently (ISSN 1065-6529) is published biweekly by the American Payroll Institute Inc., in cooperation with The American Payroll Association, 30 East 33rd Street, 5th Floor, New York, NY 10016-5386; Tel: 212-686-2030; Fax: 212-686-4080. Payroll Currently is designed to provide authoritative information in regard to the subject matter covered. It is provided with the understanding that the publisher is not engaged in rendering legal, accounting or other professional service. If legal advice or other expert assistance is required, the services of a competent professional person should be sought. © Copyright 2008 American Payroll Association. All rights reserved. Printed in the USA.