



The Biweekly
Payroll
Compliance
Publication
Of The
American
Payroll
Association

PAYROLL CURRENTLY

Volume 16

Issue # 15

July 25, 2008

Inside this issue...

<i>Payroll Solutions</i>	2
<i>Specifications for Paper Substitutes for Forms W-2 and W-3 Updated for 2008</i>	3
<i>IRS Letter Says There's No Dollar Limit on De Minimis Fringe Benefits</i>	4
<i>Fire Alarm Inspectors Were Not Entitled to Be Paid for Carrying a Briefcase While Commuting</i>	4
<i>IRS Issues Proposed Regulations on Information Reporting Requirements for Statutory Stock Options</i>	5
<i>IRS Updates Specifications for Private Printing of Form 941, Schedule B</i>	6
<i>Truancy Officer Was FLSA-Exempt Learned Professional</i>	6
<i>IRS Revises Electronic Filing Specifications for Form 8027</i>	7
<i>Supreme Court Denies Review of Case Involving Compensability of Time Spent on Security Procedures</i>	7
<i>State and Local News</i>	
<i>Connecticut - minimum wage increases; tip credit increases</i>	
<i>Kansas - mandatory EFT remittance threshold lowered</i>	
<i>New York - electronic filing option for quarterly withholding, wage reporting, and UI return now offered</i>	
<i>Wisconsin - mandatory electronic UI filing and payment threshold lowered</i>	8

IRS Is Considering Changes in Recordkeeping Rules for Employer-Provided Cell Phones

Responding to an inquiry from a member of the U.S. House of Representatives, the IRS Office of Chief Counsel has written a letter acknowledging that changes are under consideration in IRS recordkeeping requirements for employer-provided cell phones treated as working condition fringe benefits [INFO 2008-0012, released 6-27-08; www.irs.gov/pub/irs-wd/08-0012.pdf].

The letter explains that under IRC §132, an employee may exclude from gross income the business use of an employer-provided cell phone as a working condition fringe benefit. However, because cell phones are "listed property" under §280F, strict substantiation requirements must be satisfied for business cell phone use to qualify for the §132 exclusion. Moreover, any personal use of an employer-provided cell phone is a taxable fringe benefit. Thus, the current rules

require documentation of the business and personal use of the cell phone (see **PAYROLL CURRENTLY**, Issue No. 23, Vol. 15).

The letter then acknowledges that "certain aspects of today's business environment make it difficult to document the business and personal use of the phone." Therefore,

- "various changes to the cell phone substantiation requirements are under consideration." In addition,
- "proposed legislative changes that would
 - remove cell phones from the definition of listed property and
 - allow employers to utilize a de minimis personal use policy" have been discussed. Finally,
- "regulatory changes to the existing rules that would provide a more streamlined substantiation process for cell phones" are also being considered. ■

IRS Issues Final Regulations Changing Employment Tax Adjustment Procedures, Eliminating Form 941c

The IRS has issued final 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 [73 F.R. 37371, 7-1-08; <http://edocket.access.gpo.gov/2008/pdf/E8-14947.pdf>].

The 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 apply to errors ascertained on or after January 1, 2009. They are being issued in connection with the

Payroll Solutions

Q. Our company, which operates several resort properties, has been asked by a university with a degree program in hospitality administration, to allow some of the students enrolled in that program to work at one of our hotels this summer so they can get some hands-on experience. The students will perform some work and will be provided with meals and housing by the hotel. Will they be considered employees of our company for purposes of the Fair Labor Standards Act (FLSA)?

A. No. The Department of Labor's *Field Operations Handbook* (§10b21) describes programs at hotels and motels in connection with colleges and universities offering academic programs in hotel administration or hospitality administration in which students must obtain practical experience in order to earn a degree. Typically, students in these programs have some assigned duties and work in different areas to learn the business. Students in these programs are generally paid a nominal sum (e.g., \$100 per month) and given lodging and meals. Where such a "student observer" program is designed to provide the student with professional practice in furtherance of the student's college education, and the training is academically oriented for the student's benefit, the student will not be considered an employee for FLSA purposes of the hotel or motel to which he or she is assigned.

IRS's development of new forms to report employment tax adjustments or to claim refunds of overpaid employment taxes. The new forms are expected to be ready for use in 2009.

Adjusted return replaces current return process

The 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 (e.g., Form 941X). Unlike Form 941c, the new adjusted return will not be filed as an attachment to a current return and will not affect the tax liability reported on the current return.

Note that the 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 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 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 or incorrect tax reported. Under the regulations, interest-free adjustments for underpayments of FICA, RRTA, and FIT are available under certain circumstances where the underpayment arises because the employer failed to file an original return or failed to report and pay the correct type of tax. The final regulations revise the processes set forth in the proposed regulations to accommodate the various possibilities of errors in these situations and to ensure that the IRS can process the adjustments. The amount erroneously paid must be credited against the tax for which the employer is liable and any balance refunded.

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. The employer can make an interest-free adjustment to report the tax due with respect to the reclassified workers by filing an original return and an attached adjusted return reporting the correct amount of tax, in accordance with the instructions for the adjusted return.

Generally, this will constitute an interest-free adjustment if the original return and/or adjusted return(s) are filed by the due date of the correct 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 and/or adjusted return(s) are 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 within the applicable period of limitations on credit or refund, the regulations require that the employer repay or reimburse the employee's share of FICA or RRTA tax before the expiration of 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.

Once an employer repays or reimburses an employee to the extent required, the employer may report both the employee and employer portions of FICA or RRTA tax as an overpayment on an adjusted return. The employer must certify on the adjusted return that it has repaid or reimbursed its employees to the extent required.

The reporting of the overpayment constitutes an interest-free adjustment if it is reported on an adjusted return filed before the 90th day prior to expiration of the period of limitations on credit or refund. Similar rules apply for making interest-free adjustments for overpayments of FIT, except that an interest-free adjustment of FIT may only be made if the employer ascertains the error and repays or reimburses its employees within the same calendar year that the wages were paid and reports the adjustment on an adjusted return. *Note:* Unlike the proposed regulations, the final regulations do not require the employer to repay or reimburse the employee or to adjust the overpayment by the due date of the return for the return period following the return period in which the error is ascertained.

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 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. The final regulations clarify that new agricultural employers are treated as having employment tax liabilities of zero for any lookback period before the date the employer started or acquired its business. This rule is consistent with the current rule governing the lookback period for Form 941 and Form 944 filers.

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.

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

Specifications for Paper Substitutes for Forms W-2 and W-3 Updated for 2008

In Rev. Proc. 2008-33 [2008-28 IRB 93], the IRS has updated the general rules for the private printing of paper substitutes for Form W-2, *Wage and Tax Statement*, and Form W-3, *Transmittal of Wage and Tax Statements* (see *The Payroll Source*®, p. 8-71), for amounts paid in 2008. A substitute Form W-2 or W-3 must conform to the specifications set out in the revenue procedure to be acceptable to the IRS. The revenue procedure supersedes Rev. Proc. 2007-43 (2007-27 IRB 26).

The revenue procedure identifies the following changes to Forms W-2 and W-3 for tax year 2008:

- The Substitute Forms Unit e-mail address has changed to Substituteforms@irs.gov instead of *taxforms@irs.gov.

- The room number in the address of the Substitute Forms Unit has changed to Room 6526.

- The IRS has received questions concerning whether substitute Forms W-2 and W-3 provided to employees containing logos, slogans, or advertising were valid forms. The IRS originally anticipated responding to these questions by revising the regulations. However, it has been determined that it is not necessary to amend the regulations. Instead, guidance is provided in this revenue procedure.

Some Forms W-2 that include logos, slogans, and advertisements (including advertisements for tax preparation software) may be confused with questionable Forms W-2. An

employee may not recognize the importance of an employee statement for tax reporting purposes due to the use of logos, slogans, and advertisements. Therefore, with the exception of the IRS e-file logo, the IRS has determined that slogans, advertising, and other logos will not be allowed on Forms W-3, Copy A of Forms W-2, or any employee statements reporting wages paid during the 2010 calendar year and thereafter. The IRS e-file logo on the IRS official employee copies may be included, but it is not required, on any of the substitute form copies. *Note:* The prohibition is being announced at this time to provide advance notice. This revenue procedure will be revised at a future date to state other requirements regarding the preparation and use of substitute forms for Form W-2 and Form W-3 for wages paid during the 2010 calendar year.

- Editorial changes have been made to eliminate redundancies as much as possible.

Questions

Questions about the red-ink Form W-2 (Copy A) and Form W-3 should be e-mailed to Substituteforms@irs.gov (enter "Substitute Forms" on the subject line) or sent to: Internal Revenue Service, Attn: Substitute Forms Program, SE:W:CAR:MP:T:T:SP, IR 6526, 1111 Constitution Avenue, NW, Washington, DC 20224. *Note:* For purposes of this revenue procedure, the official, IRS-printed red dropout ink Forms W-2 (Copy A) and W-3 and their exact substitutes are referred to as "red-ink."

Questions about the black-and-white laser-printed Form W-2 (Copy A) and Form W-3 should be e-mailed to laser.forms@ssa.gov.

IRS Letter Says There's No Dollar Limit on De Minimis Fringe Benefits

Responding to an inquiry from a member of the U.S. Senate, the IRS Office of Chief Counsel has written a letter explaining that there is no dollar limit on de minimis fringe benefits [INFO 2008-0023, released 6-27-08; www.irs.gov/pub/irs-wd/08-0023.pdf].

The letter characterized an employer's practice of requiring noncash gifts to employees with a value of over \$50 to be processed through payroll as a "rule of convenience," and said the \$50 limit "is not imposed by the Internal Revenue Code."

IRC §132(e)(1) defines a de minimis fringe benefit as any property or service the value of which (after taking into account the frequency with which the employer provides similar fringes to other employees) is so small as to make accounting for it unreasonable or administratively impracticable.

Examples of benefits excludable from gross income as de minimis fringes are included in the regulations implementing this section (26 C.F.R. §1.132-6(e)(1)). No dollar limit is placed on any of these examples:

gov or sent to: Social Security Administration, Data Operations Center, Attn: Laser Forms Approval, Room 235, 1150 E. Mountain Drive, Wilkes-Barre, PA 18702-7997. *Note:* For purposes of this revenue procedure, the SSA-approved, laser-printed, black-and-white Forms W-2 (Copy A) and W-3 are referred to as "laser-printed."

Responses from either the IRS or SSA should be received within 30 days.

Submitting sample forms to SSA

Samples of laser-printed substitute forms must be submitted to the SSA for approval. Only laser-printed, black-and-white substitute Forms W-2 (Copy A) and W-3 for tax year 2008 will be accepted.

Send one set of blank and one set of dummy-data, laser-printed substitute Forms W-2 (Copy A) and W-3 for approval. Sample data entries should be filled in to the maximum length for each box entry, preferably using numeric or alpha data depending on the type required to be entered. Include the name, telephone number, fax number, and e-mail address of a contact person who can answer questions regarding the sample forms.

To receive approval, contact the SSA at laser.forms@ssa.gov to obtain a template and further instructions. Send 2008 sample laser-printed substitute forms to the address given above by private mail carrier or certified mail in order to verify their receipt. Expect approval (or disapproval) by the SSA within 30 days of receipt. ■

- occasional typing of personal letters by a company's secretary;

- occasional personal use of an employer's copying machine, provided that the employer exercises sufficient control and imposes significant restrictions on the personal use of the machine so that at least 85% of the use of the machine is for business purposes;

- occasional cocktail parties, group meals, or picnics for employees and their guests;

- traditional birthday or holiday gifts of property (not cash) with a low fair market value;

- occasional theater or sporting event tickets;

- coffee, doughnuts, and soft drinks;

- local telephone calls; and

- flowers, fruit, books, or similar property provided to employees under special circumstances (e.g., on account of illness, outstanding performance, or family crisis). ■

Fire Alarm Inspectors Were Not Entitled to Be Paid for Carrying a Briefcase While Commuting

The Second Circuit Court of Appeals has affirmed that New York City fire alarm inspectors were not entitled to compensation under the Fair Labor Standards Act (FLSA) for their commuting time. They were required to carry a briefcase with inspection documents but did not engage in any other active employment-related activities while commuting [*Singh v. City of New York*, 524 F.3d 361 (2nd CA, 4-29-08)].

Background

From Monday to Thursday, New York City fire alarm inspectors begin their days traveling from their homes to their first inspection appointment and commute home after their

last appointment. The city requires inspectors to carry the inspection documents needed for conducting inspections in an approved briefcase. Inspectors are not allowed to store inspection documents overnight at headquarters, or to begin their work on Monday through Thursday at headquarters. On Fridays, the inspectors report to headquarters to turn in the inspection files for the previous four days and get new ones to use in the coming week.

Compensability of the inspectors' commute

The court explained that whether an employee's time constitutes FLSA-compensable work depends on whether the

time is spent primarily for the benefit of the employer or the employee. Here, carrying a briefcase while commuting amounted to a minimal burden on the inspectors, who were free to use their commuting time as they would have if they did not have a briefcase. They could still read, listen to music, eat, or run errands. Although the city benefited from inspectors carrying the briefcases, the city was not the predominant beneficiary of the inspectors' commuting time. "[T]he carrying of a briefcase during a commute without any other employment-related activity does not transform the entire commute into work for purposes of the FLSA."

Compensability of additional commute time

In response to the assertion that the city's requirement to carry briefcases lengthened the inspectors' commuting time, the

court said that any added commuting time was both required by the city and primarily for the benefit of the city; there was no benefit to the inspectors from a longer commute and lost personal time. In addition, the court assumed that carrying inspection documents was an integral and indispensable part of the inspectors' principal inspection duties and therefore theoretically compensable.

In this case, however, the additional commuting time was de minimis and therefore noncompensable. It amounted to only a few minutes on occasional days. The court concluded that it was administratively impractical for the city to monitor additional commuting time for each inspector. The inspectors themselves conceded that their commutes only got longer when they missed a train or bus. ■

IRS Issues Proposed Regulations on Information Reporting Requirements for Statutory Stock Options

The IRS has issued proposed regulations on information statements and returns required to be filed by employers under IRC §6039 in connection with certain stock options [73 F.R. 40999, 7-17-08; <http://edocket.access.gpo.gov/2008/pdf/E8-16177.pdf>]. The IRS will issue two forms later this year with instructions that corporate employers must use to satisfy the information return and statement requirements under §6039:

- Form 3921, *Exercise of an Incentive Stock Option Under Section 422(b)*, and
- Form 3922, *Transfer of Stock Acquired Through an Employee Stock Purchase Plan Under Section 423(c)*.

Background

The Tax Relief and Health Care Act of 2006 (Pub. L. No. 109-432; see **PAYROLL CURRENTLY, Issue No. 1, Vol. 15**) amended §6039 to require an employer to file an information return with the IRS when an employee exercises an incentive stock option (ISO) or when stock that has been acquired under an employee stock purchase plan (ESPP) for an option price of 85% - 100% of the stock's fair market value is later transferred to a third party.

Previously, §6039 required employers to provide information regarding such transactions only to employees. As amended by the Act, however, §6039 now requires employers to file an information return with the IRS following a stock transfer, in addition to providing employees with an information statement. Amended §6039 applies to stock transfers occurring on or after January 1, 2007. *Note:* In Notice 2008-8 (see **PAYROLL CURRENTLY, Issue No. 2, Vol. 16**), the IRS waived the obligation to file an information return for 2007 stock transfers governed by §6039.

The time and manner for filing a return with the IRS, as well as the information to be contained in the return and furnished to employees, is addressed in these proposed regulations.

Returns required with respect to ISOs

When to file. Returns must be filed by January 31 of the year following the calendar year for which the return is made.

Information to be included. This return would include the following information:

- The name, address, and employer identification number of the corporation transferring the stock;
- The name, address, and employer identification number of the corporation whose stock is being transferred (if other

than the corporation identified above);

- The name, address, and identifying number of the person to whom the share or shares of stock were transferred pursuant to the exercise of the option;
- The date the option was granted to the person;
- The exercise price per share;
- The date the option was exercised by the person;
- The fair market value of a share of stock on the date the option was exercised by the person; and
- The number of shares of stock transferred to the person pursuant to the exercise of the option.

Information statements required with respect to ISOs

When to file. Information statements must be furnished by January 31 of the year following the calendar year for which the return is made.

Information to be included. Under the proposed regulations, the information required to be included on the return is generally the same information that is required to be furnished to employees under existing regulations. Note, however, that while existing regulations require that the corporation report the total cost of all shares acquired, the proposed regulations would require instead that the corporation report the exercise price per share.

Returns required with respect to stock purchased under an ESPP

When to file. Returns must be filed by January 31 of the year following the calendar year for which the return is made.

Information to be included. This return would include the following information:

- The name, address, and identifying number of the transferor;
- The name, address, and employer identification number of the corporation whose stock is being transferred;
- The date the option was granted to the transferor;
- The fair market value of the stock on the date the option was granted;
- The exercise price per share;
- The date the option was exercised by the transferor;
- The fair market value of the stock on the date the option was exercised by the transferor;
- The date the legal title to the shares was transferred by the transferor; and
- The number of shares to which legal title was transferred by the transferor.

Information statements required with respect to stock purchased under an ESPP

When to file. Information statements must be furnished by January 31 of the year following the calendar year for which the return is made.

Information to be included. Under the proposed regulations, the information required to be furnished to employees in the information statement includes several items not required under existing regulations:

- The date the option was granted to the transferor;
- The fair market value of the stock on the date the option was granted;
- The exercise price per share;
- The date the option was exercised by the transferor; and
- The fair market value of the stock on the date the option was exercised by the transferor.

Note that under the proposed regulations, essentially the same information would be reported to the IRS/furnished to employees with respect to the transfer of stock pursuant to the

exercise of an ISO and the transfer of stock acquired pursuant to an ESPP.

Effective date

The regulations are proposed to apply to any stock transfer occurring on or after January 1, 2007. However, corporations are not required to comply with the return requirements for stock transfers that occur during the 2007 and 2008 calendar years.

On the other hand, corporations must furnish information statements to employees for such 2007 and 2008 stock transfers. For purposes of furnishing information statements for 2007 and 2008 stock transfers, corporations may rely on the 2004 final regulations or these proposed regulations.

Comments

Comments on the proposed regulations must be received by October 15, 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-103146-08. ■

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

In Rev. Proc. 2008-32 [2008-28 IRB 82], the IRS has published updated rules and specifications for preparing acceptable paper and computer-generated substitutes for the January 2008 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*. A substitute Form 941 or Schedule B must conform to the specifications set out in the revenue procedure to be acceptable to the IRS. The revenue procedure supersedes Rev. Proc. 2007-42 (2007-27 IRB 15).

What's new

- There are new 6 x 10 grid layouts for the 2008 revision of Form 941.
- The Substitute Forms Unit e-mail address has changed to Substituteforms@irs.gov instead of *taxforms@irs.gov.
- The room number in the address of the Substitute Forms Unit has changed to Room 6526.
- The entry space for the third-party designee's name and a telephone number has been separated in Part 4 on page 2. In addition, the text for the "Personal Identification Number" and the fill-in boxes for the number have been moved to the right to line up under "Designee's name and phone number."
- The language "(or yours if self-employed)" has been added to the firm's name space in Part 6.
- The wording of the second line of text for line 12 has been changed from "Follow the Instructions for Form 941-V, Payment Voucher" to "For information on how to pay, see the instructions."

- The language "to avoid a penalty" has been added at the beginning of the Form 941-V instructions section "Making Payments With Form 941."

- The wording in the "Caution" of the 941-V instructions has been changed.

- There are no changes to the January 2006 revision of Schedule B (Form 941), so this revision remains useable.

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 6526, 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.Beard@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. ■

Truancy Officer Was FLSA-Exempt Learned Professional

Stephon Chatfield earned an annual salary of \$35,000 working as a Truancy Prevention Case Manager (TPCM) for Children's Services, Inc., a social services agency providing programs and services to children and families in Philadelphia. When he sued for overtime under the Fair Labor Standards Act (FLSA), he lost because the agency established that he was an FLSA-exempt "learned professional" [*Chatfield v. Children's Svcs., Inc.*, No. 07-2267, 2008 U.S. Dist. LEXIS 40455 (ED Pa., 5-20-08)].

The question for the court was whether Chatfield's primary duty involved (1) the performance of work requiring advanced knowledge (2) in a field of science or learning (3) customarily acquired by a prolonged course of specialized intellectual instruction (29 C.F.R. §541.301(a)).

Work requiring advanced knowledge: exercise of discretion and judgment. The advanced knowledge work requirement is met where the employee's work is "predominantly intellectual" and involves "the consistent

exercise of discretion and judgment.”

The Department of Labor (DOL) has determined that social workers are exempt professionals, and Chatfield’s TPCM position was very similar, said the court. As a TPCM, he had to assess whether truancy was occurring, visit the child’s school and home regularly, talk to the child’s family and assess their needs, and ensure they received the appropriate resources. The fact that Chatfield was subject to some supervision did not mean that he did not exercise discretion and judgment.

Field of science or learning. The DOL has found that social work requires advanced knowledge in a field of science or learning (see **PAYROLL CURRENTLY, Issue No. 5, Vol. 14**). Here, Children’s Services, Inc. provided services “sufficiently similar” to persuade the court that the TPCM position requires knowledge in a field of science or learning.

Specialized instruction. Children’s Services, Inc. required persons holding the TPCM position to have a bachelor’s degree in social work, human services, or a related field plus three years of work providing community-based social support. Alternatively, the requirements for the TPCM position could

be satisfied with seven years of work experience providing community-based social support.

Chatfield had a bachelor’s degree in psychology with a minor in sociology, and more than three years of social work experience. However, he argued that his position was not exempt because it did not require an advanced degree and because the required degree was in a “related field,” not a specific field. He pointed out that in its earlier ruling, the DOL said that caseworkers whose only job requirement was a bachelor’s degree in “the social sciences” were not exempt learned professionals.

The court said that although a general degree in a non-related field will not satisfy the specialized instruction element, even where there is no degree a person with a substantial amount of relevant experience can qualify for the exemption. Here, both the agency’s education plus three years of work experience requirement and the alternative seven years of work experience requirement were enough to qualify TPCMs for the learned professional exemption. ■

IRS Revises Electronic Filing Specifications for Form 8027

The IRS has announced updates to Publication 1239, *Specifications for Filing Form 8027, Employer’s Annual Information Return of Tip Income and Allocated Tips Electronically* [Rev. Proc. 2008-34, 2008-27 IRB 13; www.irs.gov/pub/irs-irbs/irb08-27.pdf]. The updates are effective for Forms 8027 due March 2, 2009.

Large food or beverage establishments (more than 10 employees) where tipping is customary must file Form 8027 to determine if tips have been underreported and must be allocated. A separate Form 8027 must be filed for each establishment owned by the restaurant, and if 250 or more forms must be filed, they must be filed electronically (see *The Payroll Source*®, p. 8-99).

The following important changes are highlighted:

- IRS/ECC-MTB no longer accepts any form of magnetic media. Electronic filing through the FIRE system is the only method to report Form 8027 to IRS/ECC-MTB.
- The title of Publication 1239 has been changed to reflect the elimination of magnetic media (see above).
- Form 4804, *Transmittal of Information Returns Reported Magnetically*, is obsolete. This form was only required for magnetic media reporting.
- Form 8809, *Application for Extension of Time to File Information Returns*, is available as a fill-in form on the FIRE system and its use is highly encouraged in place of the paper

Form 8809 (see Part B, Section 1).

- Additional and clarifying information concerning good faith agreements and determination letters has been added to Part A, Section 4.
- Several sections have been deleted due to the elimination of magnetic media filing, and others have been combined for greater clarity.
- Test files can be submitted through the FIRE system (see Part B, Section 3).
- Special characters of any kind in name and address fields are not acceptable (see Part C, Section 01).
- The following changes have been made to the record layout:
 - An additional indicator has been added to the Final Return Indicator field (position 371);
 - An additional indicator has been added to the Liable/Not Liable Indicator field (position 374);
 - A new field, Tax Year, has been added (positions 375-378);
 - A new field, Prior Year Indicator, has been added (position 379);
 - A new field, Test File Indicator, has been added (position 380); and
 - A new field, Record Sequence Number, has been added (positions 411-418). ■

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 the Indian Point nuclear power plant going through multiple layers of security and donning and doffing protective gear at the beginning and end of the workday [*Gorman v. Consolidated Edison Corp.*, No. 07-1019 (U.S. Sup. Ct., 6-9-08)].

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).

In rejecting the workers’ claims, the Second Circuit Court of Appeals said that although the activities for which the workers sought compensation were necessary because they served the essential purpose of security, they were not integral

to the employees' principal work activities because they were analogous to the activities specifically exempted from compensation by the Portal-to-Portal Act, especially travel time. Moreover, the fact that security procedures were rigorous and time consuming did not convert them into principal employment activities, particularly because such procedures were applicable to everyone who entered the plant.

In addition, said the court, the donning and doffing of generic protective gear (such as a helmet, safety glasses, and work boots) was not integral to the employees' principal work activities. And it did not matter that the equipment might have been required by the employer or by government regulation. ■



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 for more information.

Connecticut

Minimum wage increases. Effective 1-1-09, the state minimum wage will increase to \$8.00 an hour from \$7.65 an hour (this updates *The Payroll Source*®, p. 2-66). Effective 1-1-10, it will increase again to \$8.25 an hour [H.B. 5105, L. 2008].

Tip credit increases. Effective 1-1-09, the tip credit will increase to 31 % of the state minimum wage (\$2.48 an hour) from 29.3 % (\$2.24 an hour) for hotel and restaurant employees and to 11 % of the state minimum wage (\$0.88 an hour) from 8.2 % (\$0.63 an hour) for bartenders who customarily and regularly receive tips (this updates *The Payroll Source*®, p. 2-67). Because the state minimum wage will increase, effective 1-1-10, the tip credit amounts will also increase to \$2.56 an hour for hotel and restaurant employees and \$0.91 for bartenders [S.B. 55, L. 2008].

Kansas

Mandatory EFT remittance threshold lowered. Effective 7-1-08, employers with a total withholding tax liability in excess of \$45,000 (previously \$100,000) for the calendar year must remit taxes by electronic funds transfer (EFT) [H.B. 2434, L. 2008].

New York

Electronic filing option for quarterly withholding, wage reporting, and UI return now offered. Employers may now file Form NYS-45, *Quarterly Combined Withholding, Wage Reporting, and Unemployment Insurance Return*, through the Department of Taxation and Finance's (DOTF) Online Tax Center at www.tax.state.ny.us/nyshome/online.htm [DOTF, News, 7-08].

Wisconsin

Mandatory electronic UI filing and payment threshold lowered. Beginning with reports required to be filed for the third quarter of 2008, an employer that has 25 or more employees (currently 50 or more employees) must file quarterly unemployment insurance (UI) reports electronically (this updates *The Payroll Source*®, p. 7-37). An employer agent that files reports on behalf of employers (currently 25 or more employers) must file quarterly UI reports electronically.

Effective 1-1-09, an employer that has net total contributions paid or payable for any 12-month period ending on June 30 that are at least \$10,000 must pay all contributions using electronic funds transfer (EFT) beginning with the next calendar year. An employer that becomes subject to the electronic payment requirement must continue to pay all contributions by means of EFT unless the requirement is waived by the Department of Workforce Development. An employer agent must pay all contributions on behalf of each employer by means of EFT [S.B. 431, L. 2008].

PAYROLL CURRENTLY

**Publisher,
Executive Director**
Dan Maddux

**Senior Director of
Publications and
Government Relations**
Michael P. O'Toole, Esq.

Managing Editor
Anne S. Lewis, Esq.

Editors
Laura Lough, Esq.
Edward Kowalski, Esq.

Inside Washington
Scott Mezistrano, CPP
William Dunn, CPP

**Manager,
Art Department**
Jennifer Sanfilippo

Graphic Designer
Judith Aquino

Web Implementation
Rosemary Birardi

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.