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Inside this issue...

<i>Payroll Solutions</i>	2	
<i>DOL Proposes Updates to FLSA Regulations</i>	2	
<i>Housing Stimulus Bill Is Enacted With Information Reporting Provision</i>	4	
<i>Staffing Company Was Not Entitled to FUTA Tax Refund</i>	5	
<i>Wage and Hour Division Website Gets a New Look</i>	6	
<i>Client's Funds Deposited in Payroll Service Provider's Bank Account Were Subject to IRS Levy on Service Provider</i>	6	
<i>USCIS Reaches H-2B Cap for First Half of Fiscal 2009</i>	6	
<i>Employee Could Sue for Unpaid Overtime Without Identifying Hours Worked</i>	6	
<i>Fluctuating Workweek Method Could Not Be Used to Calculate Overtime Pay in Misclassification Case</i>	7	
<i>Employee Who Questioned Schedule Change Was Not Protected by FLSA Anti-Retaliation Provision</i>	7	
<i>State and Local News</i>		
<i>Arkansas – electronic registration, filing, and payment now allowed</i>		
<i>California – meal and rest breaks: employer responsibilities defined</i>		
<i>Kentucky – occupational license tax rules standardized</i>		
<i>Minnesota – mandatory electronic filing of Forms W-2 threshold lowered</i>		
<i>Pennsylvania – paycards permitted, conditions for use defined</i>		8

OCSE Issues Final Regulations on Medical Support

The Office of Child Support Enforcement (OCSE) has issued final regulations revising the federal rules applicable to medical support in IV-D cases (i.e., Title IV-D of the Social Security Act) [73 F.R. 42416, 7-21-08; <http://edocket.access.gpo.gov/2008/pdf/E8-15771.pdf>].

The regulations, which took effect on July 21, 2008, define cash medical support, require that all support orders in the IV-D program address medical support, require that states consider health insurance available to either parent, redefine health insurance that is available at “reasonable cost,” and require health insurance coverage to be “accessible.” The final regulations adopt, with modifications, proposed regulations issued in 2006 (see *PAYROLL CURRENTLY*, Issue No. 21, Vol. 14).

Cash medical support defined

The regulations define cash medical support as “an amount ordered to be paid toward the cost of health insurance provided by a public entity or by another parent through employment or otherwise, or for other medical costs not covered by insurance.” This would include the cost of: (1) premiums when health insurance is provided by another parent or through Medicaid or SCHIP (State Children’s Health Insurance Program); (2) medical care such as orthodontia not covered by available health insurance; or (3) medical costs when no reasonable or accessible insurance is available.

Child support guidelines: address medical support

The regulations require that state child support guidelines

“address how the parents will provide for the child(ren)’s health care needs through health insurance coverage and/or through cash medical support.” Each newly established or modified order must directly address medical support, whether or not private health insurance is currently available.

Child support guidelines: look at both parents

Current regulations specify that health insurance includes coverage under which medical services could be provided to dependent children of noncustodial parents. The final regulations delete the reference to the noncustodial parent and refer instead to either parent. This means that, rather than looking exclusively to the noncustodial parent, private insurance available to both the custodial and noncustodial parent should be considered.

The preamble to the regulations explains that each state’s child support guidelines should address how the cash support award will increase or decrease in order to account for health care premiums, and child support orders should clearly specify how such amounts are to be allocated between the parents.

Appropriate coverage: available at reasonable cost

The regulations remove the conclusion that health insurance through the noncustodial parent’s employer is considered to be available at reasonable cost. The provision has been revised to provide a definition of reasonable cost that considers the parent’s ability to pay: “Cash medical support or private health insurance is considered reasonable in cost

Payroll Solutions

Q. Our company is developing a new tax compliance benefit that will allow employees to use either tax preparation services selected by the company or online software to prepare their taxes. Either way, the company would provide for the electronic filing of employee tax returns. Would this benefit be taxable?

A. According to an IRS Information Letter dated January 22, 2004 (INFO 2004-0035; www.irs.gov/pub/irs-wd/04-0035.pdf), employers may offer electronic filing services limited to the electronic transmittal of employee returns as an excludable de minimis fringe benefit. However, the exclusion does not extend to income tax return preparation services that have a specific market value, nor does it apply to vouchers for tax preparation software with a readily ascertainable market value. Consequently, the value of employer-provided personal income tax preparation services is taxable to the employees receiving it for federal income tax withholding, as well as social security, Medicare, and FUTA taxes (see *The Payroll Source*®, p. 3-7).

if the cost to the *obligated* parent does not exceed 5% of his or her gross income (emphasis added) or, at state option, a reasonable alternative income-based numeric standard.”

Note that the definition recognizes the possibility that one parent may have access to health insurance but the other parent may be ordered to bear a portion or all of the cost of the insurance. Note also that the definition allows states the option of adopting, as part of their child support guidelines, an alternate standard that is reasonable, income-based, and numeric.

The final regulations apply the 5% standard to the incremental cost of covering all children or the difference between self-only and family coverage. The standard would not be applied to the cost of adding each child to the insurance plan but rather the cost of family vs. individual coverage. OCSE comments that the full cost of a family plan is more likely to exceed the reasonable cost standard, making it less likely that the responsible parent will provide coverage through health insurance. As a result, cash medical support would become more prevalent. This may not be the best outcome for children, who may benefit more from health care coverage than from a cash contribution that is insufficient to permit the custodial parent to purchase coverage. Additionally, conditioning coverage on the entire cost of the insurance, rather than on the incremental cost, might encourage obligated parents not to seek incremental coverage in hopes that the cost of family coverage would exceed the 5% or alternative state standard.

Appropriate coverage: accessible

The regulations do not define accessibility in the context

of medical support. This task is left to the states, which are free to incorporate in their support guidelines a definition that addresses only geographic access to services or also to address the continuity problem (i.e., the stability of coverage, based on whether it is likely to be in place for a period of time).

Under the regulations, the state must petition the court or administrative authority to include private health insurance coverage in all support orders if it is accessible to the child and available at reasonable cost to the obligated parent. If private health insurance is not available, then the state IV-D agency must petition to include a provision for cash medical support in all new and modified orders until accessible insurance becomes available at reasonable cost. State law, guidelines, and procedures determine the mechanism to modify the support order when private insurance becomes available (e.g., using administrative adjustment, automatic modifications, or review and modification by the issuing tribunal).

Prioritizing support obligations

The final regulations do not impose a mandated priority with respect to current cash child and spousal support, health insurance and cash medical support, arrearages, and other child support obligations, as the proposed regulations would have done. OCSE comments that it is not necessary to set a federal-level priority for employers to use when the Consumer Credit Protection Act limits prevent satisfaction of all obligations. Individual states have already determined their approach, as they are permitted to do under the regulations applicable to the National Medical Support Notice. ■

DOL Proposes Updates to FLSA Regulations

The U.S. Department of Labor (DOL) has issued proposed regulations updating its current regulations under the Fair Labor Standards Act (FLSA) [73 F.R. 43654, 7-28-08; <http://edocket.access.gpo.gov/2008/pdf/E8-16631.pdf>]. The proposed regulations address provisions that have become obsolete or out of date because of court decisions or legislation. They will be effective when published in final form.

2007 FLSA minimum wage amendments

The Fair Minimum Wage Act of 2007 (Pub. L. No. 110-28; see *PAYROLL CURRENTLY, Issue No. 12, Vol. 15*) increased the federal minimum hourly wage in three stages (\$5.85, effective July 24, 2007; \$6.55, effective July 24, 2008; and \$7.25, effective July 24, 2009), but did not change the definition of “wage” in the FLSA for the purpose of applying the tip credit. Accordingly, the minimum required cash wage for a tipped employee remains at \$2.13 and the tip credit is determined by subtracting \$2.13 from the applicable federal minimum wage.

Regulations referring to the minimum wage are proposed

to be amended to reflect these statutory changes without referring to a specific minimum wage amount. Additionally, the regulations propose revisions to regulations issued under the McNamara-O’Hara Service Contract Act to eliminate outdated references to the federal minimum wage.

Small Business Job Protection Act of 1996

Employee Commuting Flexibility Act of 1996. Enacted as part of the Small Business Job Protection Act of 1996 (SBJPA; Pub. L. No. 104-188), the Employee Commuting Flexibility Act of 1996 (ECFA) amended the Portal-to-Portal Act to make noncompensable the time spent by an employee commuting in a company vehicle, as well as activities “incidental” to that use, if the vehicle is used for travel within the normal commuting area for the employer’s business or establishment and the use of the employer’s vehicle is subject to an agreement between the employer and employee (or a representative of the employee).

To incorporate this amendment, the proposed regulations

would provide that activities incidental to the use of an employer-provided vehicle for commuting are not considered principal activities under the Portal-to-Portal Act, and are therefore not compensable, when they meet the conditions of the ECFA.

Youth opportunity wage. The SBJPA amended the FLSA to permit an employer to pay a new employee under age 20 a “youth opportunity wage” of \$4.25 per hour for the first 90 consecutive days the employee is initially employed by the employer. The proposed regulations would add a new subpart to the FLSA regulations to cover the youth opportunity wage.

Minimum Wage Increase Act of 1996. The Minimum Wage Increase Act of 1996, which was enacted as part of the SBJPA, established the required hourly cash wage payment by an employer to tipped employees at \$2.13 per hour. The proposed regulations would eliminate obsolete references in the regulations to the pre-SBJPA tip credit of 50% of the minimum wage and reflect the current tip credit provisions.

Irrigation exemption

The FLSA (29 USC §213(b)(12)) exempts from its overtime requirements “any employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a sharecrop basis, and which are used exclusively for the supply and storing of water, at least 90% of which was ultimately delivered for agricultural purposes during the preceding calendar year.” In 1997, §213(b)(12) was amended. Previously, the irrigation exemption did not contain the 90% delivery requirement, but applied where the water was exclusively used for agricultural purposes. The proposed regulations would update the regulations to include the 90% delivery requirement.

Volunteers at food banks

The Amy Somers Volunteers at Food Banks Act (Pub. L. No. 105-221) amended the FLSA in 1998 to exempt from the definition of “employee” an individual volunteering solely for humanitarian purposes at a private nonprofit food bank who receives groceries from the food bank based on need, and not in exchange for services. The proposed regulations would add provisions excluding such volunteers from FLSA coverage.

Fire protection activities exemption

The FLSA provides a limited overtime exemption for any employee engaged in fire protection activities (29 USC §207(k); see *The Payroll Source*[®], p. 2-54). In 1999, Congress amended the FLSA to define “an employee in fire protection activities.” Construing the FLSA amendment and FLSA regulations, courts have decided that the 1999 amendment made FLSA regulations governing fire protection activities obsolete (see *PAYROLL CURRENTLY*, Issue No. 21, Vol. 14). The proposed regulations would conform the FLSA regulations to the statutory amendment and court decisions by deleting current provisions specifying that employees engaged in fire protection activities are not FLSA-exempt if they spend more than 20% of their workweek performing other duties (the “20/80 rule”).

Stock options

The Worker Economic Opportunity Act (Pub. L. No. 106-202), enacted in 2000, excluded the value or income derived from employer-provided stock options from an employee’s regular rate of pay. The proposed regulations would incorporate the statutory language and increase the number of items excluded when computing the regular rate of pay from seven to eight.

Fair Labor Standards Act Amendments of 1974

Boat salespersons and vehicle dealership service advisors. The FLSA was amended in 1974 to add an overtime exemption for boat salespersons. The proposed regulations would make changes to reflect this exemption.

Under the FLSA (29 USC §213(b)(10)(A)), any salesperson, parts person, or mechanic engaged in selling or servicing automobiles, trucks, or farm implements employed at a dealership for such vehicles is exempt from the overtime requirements of the FLSA. Current FLSA regulations provide that service advisors working at these establishments are nonexempt employees. The proposed regulations would make such service advisors exempt employees to conform to court decisions involving the exempt status of such service advisors (see *PAYROLL CURRENTLY*, Issue No. 15, Vol. 12).

Tipped employees. The proposed regulations would update provisions governing the tip credit to eliminate references to tips as the property of the employer and requirements for employees to turn over tips to employers. The proposed regulations would clarify that the availability of the tip credit under the FLSA requires that all tips received must be paid out to tipped employees. Finally, the proposed regulations would eliminate provisions made obsolete by the Fair Labor Standards Act Amendments of 1974, under which an employee could petition the Wage and Hour Administrator for review of the tip credit claimed by an employer, and would clarify that the burden is on the employer to prove the amount of the tip credit to which it is entitled.

Fair Labor Standards Act Amendments of 1977

In 1977, Congress amended the definition of a tipped employee by raising the amount an employee must regularly and customarily receive in tips each month from \$20 to \$30. The proposed regulations would make conforming changes to reflect this revised threshold.

Meals provided to employees

Under the FLSA, an employee’s “wage” includes the reasonable cost to the employer of furnishing the employee with board, lodging, or other facilities (29 USC §203(m)). Current FLSA regulations state that in order for an employer-provided facility to be used as a wage credit, the employee’s acceptance of the facility must be “voluntary and uncoerced.” After a number of courts rejected this position with respect to the meal credit, the DOL adopted an enforcement position under which an employer may take a wage credit for the actual cost of a meal provided by the employer to the employee, even if the employee’s acceptance of the meal is not voluntary. The proposed regulations would update the regulations to reflect the court decisions and the DOL’s current enforcement position concerning employer-provided meals. (*Note:* The proposed regulations retain the “voluntary and uncoerced” requirement for facilities provided to employees other than meals.)

Compensatory time off for public employees

Under the FLSA (29 USC §207(o)), public agencies may grant employees compensatory time off in lieu of cash overtime compensation pursuant to an agreement with the employees or the employees’ representatives. Court decisions have interpreted this provision to mean that once an employee requests compensatory time off, the employer has a reasonable period of time to allow the employee to use the time, unless doing so would be unduly disruptive (see *PAYROLL CURRENTLY*, Issue No. 23, Vol. 15).

The proposed regulations would clarify that §207(o) does

not require a public agency to allow the use of compensatory time on the day specifically requested by the employee, but only requires that the agency permit the use of the time within a reasonable period after the employee makes the request, unless the use of the compensatory time would unduly disrupt the agency's operations.

Fluctuating workweek method of computing overtime

Under the fluctuating workweek method of computing overtime compensation, any unpaid overtime is calculated: first, by dividing the worker's regular salary for the week by the number of hours actually worked in that week to arrive at the regular rate of pay; and second, by awarding the worker an amount equal to half the regular rate for that particular week multiplied by the number of hours in excess of 40 worked for that particular week (see *The Payroll Source*®, pp. 2-49, 2-50).

Many employers pay additional bonus supplements and premium payments to employees as an incentive for working undesirable hours, but these payments represent challenges

to employers and the courts in applying the current FLSA regulations. In order to eliminate any disincentive for paying additional bonuses or other premiums to employees, the proposed regulations would clarify that bona fide bonus or premium payments to the employee do not invalidate the use of the fluctuating workweek method, but such payments must be included in the calculation of the employee's regular rate of pay unless they are specifically excluded by the FLSA.

Comments

Comments on the proposed regulations are invited and must be received by September 11, 2008. Mail comments to: Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, NW, Washington, DC 20210. Or submit comments electronically at: www.regulations.gov. Be sure to include the following identifying code on all comments: RIN 1215-AB13. ■

Housing Stimulus Bill Is Enacted With Information Reporting Provision

On July 30, President Bush signed into law H.R. 3221, the Housing and Economic Recovery Act of 2008 (Pub. L. No. 110-289). The Act includes a provision from the President's fiscal 2009 budget proposal (see **PAYROLL CURRENTLY, Issue No. 4, Vol. 16**) requiring information reporting on payment card and third-party payment transactions.

Terms defined in the Act that are applicable to both types of transactions include the following:

- **Reportable payment transaction.** This means any payment card transaction and any third-party network transaction.

- **Participating payee.** In the case of a payment card transaction, this means any person who accepts a payment card as payment; in the case of a third-party network transaction, it means any person who accepts payment from a third-party settlement organization in settlement of such a transaction.

The term includes governmental units, agencies, and instrumentalities. However, except as may be provided in future guidance, it does not include any person with a foreign address.

- **Payment settlement entity.** In the case of a payment card transaction, this means a merchant acquiring entity; in the case of a third-party network transaction, it means a third-party settlement organization.

Payment card transactions

The Act requires any payment settlement entity making payment to a participating payee in settlement of reportable payment transactions to report annually to the IRS and to the participating payee the gross amount of such reportable payment transactions, as well as the name, address, and TIN of the participating payees.

Thus, under the Act, a bank that enrolls a business to accept credit cards and contracts with the business to pay on credit card transactions is required to report to the IRS the business's gross credit card transactions for each calendar year. The bank is also required to provide a copy of the information report to the business.

Terms defined in the Act that are applicable to payment card transactions include the following:

- **Payment card.** This means any card (e.g., a credit card

or debit card) issued pursuant to an agreement or arrangement that provides for: (1) one or more issuers of such cards, (2) a network of persons unrelated to each other and to the issuer, who agree to accept such cards as payment, and (3) standards and mechanisms for settling the transactions between the merchant acquiring entities and the persons who agree to accept such cards as payment.

- **Payment card transaction.** This means any transaction in which a payment card is accepted as payment.

- **Merchant acquiring entity.** This means the bank or other organization that is contractually obligated to pay participating payees in settlement of payment card transactions.

Third-party network transactions

An organization generally is required to report if it provides a network enabling buyers to transfer funds to sellers who have established accounts with the organization and have a contractual obligation to accept payment through the network.

Note that an organization operating a network that merely processes electronic payments (e.g., wire transfers, electronic checks, and direct deposit payments) between buyers and sellers, but that does not have contractual agreements with sellers to use the network, is not required to report under the Act. Similarly, an agreement to transfer funds between two demand deposit accounts will not, by itself, constitute a third-party network transaction.

A third-party payment network does not include any agreement or arrangement that provides for the issuance of payment cards. In addition, a third-party settlement organization is not required to report unless the aggregate value of third-party network transactions for the year exceeds \$20,000 and the aggregate number of such transactions exceeds 200. In fact, note that if a payment is made **to** a third-party settlement organization by means of a payment card (i.e., as part of a transaction that is a payment card transaction), the \$20,000 and 200 transaction de minimis rule continues to apply to any reporting obligation with respect to payment of such funds to a participating payee **by** the third-party settlement organization made as part of a third-party network transaction.

Terms defined in the Act that are applicable to third-party

network transactions include the following:

- **Third-party network transaction.** This means any transaction that is settled through a third-party payment network.

- **Third-party settlement organization.** The central organization that is contractually obligated to pay participating payees of third-party network transactions.

- **Third-party payment network.** This means any agreement or arrangement that: (1) involves the establishment of accounts with a central organization by a substantial number of persons who are unrelated to that organization, who provide goods or services, and who have agreed to settle transactions for the provision of such goods or services pursuant to the agreement or arrangement; (2) provides for standards and mechanisms for settling such transactions; and (3) guarantees persons providing goods or services pursuant to the agreement or arrangement that they will be paid.

Intermediaries

The Act also imposes reporting requirements on intermediaries who receive payments from a payment settlement entity and distribute the payments to one or more participating payees. Such intermediaries are treated as participating payees with respect to the payment settlement entity and as payment settlement entities with respect to the participating payees to whom the payments are distributed.

For example, in the case of a corporation that receives payment from a bank for credit card sales at the corporation's independently-owned franchise stores, the bank is required to

report the gross amount of reportable payment transactions settled through the corporation – even though the corporation does not accept payment cards and would not otherwise be treated as a participating payee. In turn, the corporation, as an intermediary, would be required to report the gross amount of reportable payment transactions allocable to each franchise store. The bank would have no reporting obligation with respect to payments made by the corporation to its franchise stores.

If a payment settlement entity contracts with a third party to settle reportable payment transactions on behalf of the payment settlement entity, the Act requires the third party to file the annual information return instead of the payment settlement entity.

Backup withholding rules and failure-to-file penalties

Under the Act, reportable payment transactions subject to information reporting generally are subject to backup withholding requirements. In addition, existing penalties for failure to file correct information returns apply to the new information reporting requirements.

Effective date

The Act is effective for information returns for reportable payment transactions for calendar years beginning after December 31, 2010. The amendments to the backup holding requirements apply to amounts paid after December 31, 2011, except that for purposes of carrying out any TIN matching program, the amendments are effective on the date of enactment (July 30, 2008). ■

Staffing Company Was Not Entitled to FUTA Tax Refund

In a recently released legal memorandum, the IRS Office of Chief Counsel has concluded that a staffing company was not entitled to a refund of FUTA taxes it paid with respect to workers performing services for its clients, because the staffing company was not the common law employer of the workers [ILM 200827007, 3-10-08; www.irs.gov/pub/irs-wd/0827007.pdf].

Background

The staffing company offered client businesses multiple employee benefit and payroll services, including withholding, depositing, and reporting all applicable state and federal employment-related taxes. Client companies authorized the staffing company to process payroll and perform other administrative functions on their behalf. The staffing company paid FUTA taxes with respect to the wages paid to workers on behalf of its client companies.

After a state judge determined that the staffing company was the employer of the workers for purposes of the state's unemployment insurance law, the company sought to obtain a refund of FUTA taxes, reasoning that the state determination meant that it was also the workers' employer for FUTA tax purposes. Alternatively, the staffing company argued the workers should be considered its statutory employees.

Analysis

Whether a worker is considered an employee of an employer is determined by common law principles. Here, the IRS said the state's determination that the staffing company was the workers' employer was not based on common law principles, and therefore had no bearing on whether the workers were employees of the staffing company for FUTA tax purposes.

Statutory employee status. A statutory employee is a worker who is not a common law employee but is treated as such for certain employment tax purposes. The Service explained that even if the staffing company was the statutory employer of its employees, a statutory employer is considered an employer only for purposes of withholding, reporting, and payment of employment taxes. The common law employer remains the workers' employer for purposes of determining whether there is liability for employment tax and, if so, how much tax is owed.

Common law employee status. The Service explained that a common law employer-employee relationship exists if the person for whom the services are performed has the right to direct and control the individual who performs the services.

Here, the staffing company did not appear to be the common law employer of the individuals performing services for its clients. The staffing company operated like an employee leasing company. When a client business hired the staffing company, the client company fired its employees on one day, and the next day leased the same employees from the staffing company. From the affected employees' perspective, there was no change in their relationship with the client company. The client company, not the staffing company, continued to control the daily performance of its workers' duties.

The staffing company's clients were spread across multiple states and engaged in a variety of businesses. The staffing company had the expertise and capacity to provide payroll, benefits, and human resource functions, but there was no indication it was able to direct and control workers in such diverse workplaces that were so geographically dispersed. ■

Wage and Hour Division Website Gets a New Look

The U.S. Department of Labor has launched a redesigned Wage and Hour Division (WHD) website. Previously, the WHD home page (www.dol.gov/esa/whd) presented news items in full in the center of the page and links to department resources in the margins. Now news headlines appear as links in a small “Highlights” box and links to department resources appear in the center of the page.

The links are grouped topically under the following

headings: “Most Requested” (e.g., state minimum wage laws), “Wages” (e.g., overtime pay), “Youth Employment,” “Special Employment” (e.g., student learners), “Family and Medical Leave,” “Agricultural Employment,” “Government Contracts,” “Laws & Related Materials,” “Resources” (e.g., publications, posters, forms), “Interpretive Guidance,” “Audiences” (foreign language-speaking, by industry), “Immigration” (e.g., H-1B workers), and “Lie Detector Tests.” ■

Client’s Funds Deposited in Payroll Service Provider’s Bank Account Were Subject to IRS Levy on Service Provider

DT Floormasters, Inc. leased employees from Innovative Personnel Services, Inc. (IPS). Under the leasing agreement, IPS was responsible for paying the employees’ wages, all employment taxes, withholding for federal, state, and local income taxes, workers’ compensation insurance, medical insurance, vacation pay, and benefits. Before IPS issued direct deposits and paychecks, DT would transfer the required funds to an IPS checking account.

On July 21, 2005, DT deposited more than \$105,000 into the IPS checking account for the payroll to be paid the next day. On July 22, after making only a little more than \$16,000 in direct deposit payments to the employees’ accounts, the bank received an IRS levy requiring it to hold all funds in IPS accounts. More than \$91,000 remained unpaid to the employees as a result of the levy, so DT arranged for another payroll service to make the payments. When the IRS rejected DT’s application for a return of wrongfully levied property, DT sued.

The U.S. can levy (seize) the property of a delinquent taxpayer to satisfy an outstanding tax debt (IRC §6331). However, the U.S. is not permitted to levy or seize property belonging to any person (other than the person against whom

the tax is assessed out of which the levy arose) who has an interest in or lien on the seized property (IRC §7426). Here, DT argued that the levy was wrongfully applied because it was the owner of the funds deposited at the bank, which held them as a trustee.

The court said that no trust relationship existed under which DT was the owner of the deposited funds. The service agreement in place between DT and IPS did not create a trust. The checking account into which DT deposited its funds was described as a “payroll” account, but was inconsistent with a trust because funds could be moved in and out of the account at any time and for any reason.

Although DT argued that it never intended for IPS to have a “beneficial interest” in the funds it deposited, the relationship was a typical contractual relationship between two companies. The court said that when DT transferred its funds to the bank, they became the property of the bank and DT became an ordinary creditor to the extent of its deposit. Accordingly, once the funds were deposited, they became subject to the tax levy imposed as a result of IPS’s tax obligations [*DT Floormasters, Inc. v. U.S.*, No. 4:07-cv-0112-DFH-WGH, 2008 U.S. Dist. LEXIS 52827 (SD Ind., 7-10-08)]. ■

USCIS Reaches H-2B Cap for First Half of Fiscal 2009

U.S. Citizenship and Immigration Services (USCIS) has announced that it has received enough H-2B petitions to reach the limit of 33,000 for the first six months of fiscal year 2009 [www.uscis.gov/files/article/H-2B_%20Cap_1st_FY09.pdf].

July 29, 2008, is the “final receipt date” for new H-2B worker petitions requesting employment start dates prior to April 1, 2009. To select the number of petitions needed to meet the cap, USCIS will apply a computer-generated random selection process to all petitions subject to the cap and received by that date. USCIS will reject all cap-subject petitions not randomly selected (and return the fees). USCIS will also reject petitions for new H-2B workers seeking employment start dates prior to April 1, 2009, that are received after July 29, 2008.

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

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

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

Employee Could Sue for Unpaid Overtime Without Identifying Hours Worked

Family Dollar Stores hired Vivian Brown as a cashier/stock clerk and later promoted her to the position of assistant manager. When the store manager left, Brown assumed some of the manager’s duties, but remained an hourly employee eligible for overtime pay. Eventually, Brown became the store manager.

When Brown sued Family Dollar for failing to pay her overtime in violation of the Fair Labor Standards Act (FLSA), the court dismissed her case because she did not specify the overtime hours she had worked. The Seventh Circuit Court of Appeals reinstated Brown’s lawsuit even though she could not specifically identify the

hours – or even the days – during which she worked overtime and was not properly paid [*Brown v. Family Dollar Stores of Indiana, LP*, No. 06-3529, 2008 U.S. App. LEXIS 14997 (7th CA, 7-15-08)].

The court explained that it is generally the responsibility of the employee to prove that the employer has violated the FLSA. However, where the employer has failed to keep accurate records as required by the FLSA, the employee can establish the employer's FLSA violation by showing that he or she has performed work that was not properly compensated and by providing evidence of the amount and extent of the work performed "as a matter of just and reasonable inference."

Here, Brown provided evidence that records were accurate when submitted by employees but were improperly altered by management prior to the issuance of paychecks. As a manager, Brown observed employees receiving paychecks that did not reflect the time submitted to the payroll department. When Brown reported an employee's paycheck was short, she was told that the

employee was not going to get paid. Brown herself had received short pay when she worked under a prior store manager.

The alteration of employee records would have been enough to let Brown's lawsuit proceed, but she was also able to show that Family Dollar's time records could not be accurate because they did not match the hours she would have had to have been at the store, consistent with the store's operating hours. Brown had the only key to the store and had to be on hand to open and close it.

During most of the year, the store closed at 6 p.m. on Sunday and 8 p.m. during the rest of the week. It required up to 1 ½ hours to open the store and as much as two hours to close the store. However, Family Dollar's time records showed Brown clocking out between six and 30 minutes after the store closed.

Finally, during the holiday season, the store's operating hours were extended, but Family Dollar's time records still showed Brown clocking out during the same time frame, which meant Brown would have had to clock out even before the store closed. ■

Fluctuating Workweek Method Could Not Be Used to Calculate Overtime Pay in Misclassification Case

A U.S. District Court in Texas has ruled that the "fluctuating workweek" method of calculating overtime pay may not be used to calculate the overtime pay of employees who have been improperly classified as exempt from the overtime pay requirements of the Fair Labor Standards Act (FLSA) [*In re: Texas EZPawn FLSA Litigation*, No. 1:07-cv-00553-AWA, 2008 U.S. Dist. LEXIS 53636 (WD Tex., 6-18-08)].

The court said that the FLSA regulation outlining the fluctuating workweek method (29 C.F.R. §778.114) was adopted to address a very specific situation – whether an employer may satisfy the overtime requirements of the FLSA while paying a nonexempt employee on a flat weekly or monthly basis. This method may be consistent with the FLSA when an employer uses it to pay an employee according to an open and mutual agreement between the employer and an employee whose work hours regularly fluctuate, but its use in a misclassification case would be contrary to the remedial purposes of the FLSA.

The FLSA requires that when a nonexempt employee has been wrongly classified as exempt, damages must be

assessed at two times the "unpaid overtime compensation" (29 USC §216(b)). "Unpaid overtime compensation" is 1½ times the employee's regular rate of pay (29 USC §207(a)). For a nonexempt employee paid a salary, the regular rate of pay is determined by dividing the salary for a week by the number of hours worked the salary is intended to compensate (e.g., 40, 35).

Note: The fluctuating workweek arrangement contemplates that an employee's overtime hours have already been compensated on a straight-time basis in the employee's fixed weekly salary. When the fluctuating workweek method applies, any unpaid overtime is calculated: first, by dividing the worker's regular salary for the week by the number of hours actually worked in that week to arrive at the regular rate of pay; and second, by awarding the worker an amount equal to half the regular rate for that week multiplied by the number of hours worked in excess of 40. (The regular rate of pay for an employee paid under a fluctuating workweek arrangement goes down as the number of overtime hours worked by the employee goes up.) ■

Employee Who Questioned Schedule Change Was Not Protected by FLSA Anti-Retaliation Provision

When the general manager of Echostar Satellite, LLC, told managers that the company was changing technicians' work schedules, several managers, including Robin Hagan, questioned the potential loss of overtime pay to the technicians. When the new schedule was announced at an all-team meeting, Hagan told his technicians their overtime pay would be reduced under the new schedule. He referred technicians' questions about the legality of the change to the human resources manager, who was with him at the meeting.

When Hagan later met separately with his technicians, he again told them that the change would reduce their overtime hours, but said that the company made the change to eliminate inefficiencies in the old schedule. Two days later, Echostar terminated Hagan's employment. Hagan sued Echostar for retaliation in violation of the Fair Labor Standards Act (FLSA) and lost [*Hagan v. Echostar Satellite, LLC*, No. 07-20191, 2008 U.S. App. LEXIS 11599 (5th CA, 5-30-08)].

Under the FLSA's anti-retaliation provision (29 USC §215(a)(3)), it is unlawful for an employer "to discharge ... any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to [the FLSA]."

Did Hagan file a complaint?

Hagan did not file a formal complaint, but the Fifth Circuit Court of Appeals, noting that courts have decided the issue both ways (see *PAYROLL CURRENTLY, Issue No. 10, Vol. 16*), said that making an informal internal complaint is activity protected by §215(c)(3). Hagan's actions were not protected, however, because they were not informal complaints.

The court explained that an informal complaint requires an employee to raise a concern about some violation of law. Hagan's comments that technicians would receive less overtime pay were not objections that the schedule change was illegal.

The court said that Hagan's referral of technicians' questions about the legality of the schedule change to the human resources manager with him at the all-team meeting would only be considered an informal complaint if he had "stepped out of his normal job role." The job of a middle manager like Hagan is to act as an intermediary between subordinates and upper management, so Hagan did not step outside his role by passing along technicians' concerns to the human resources manager.

To step outside of one's job role, a management employee like Hagan would need to file (or threaten to file) an action adverse to the employer, assist other employees in asserting their FLSA rights, or otherwise act to assert protected FLSA rights. Hagan's referral to the human resources manager was not personal advocacy of his technicians' statutory rights because he did not believe the schedule change was illegal and he was not concerned enough to stay and listen to the manager's answer to the technicians. ■



STATE AND LOCAL NEWS

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Arkansas

Electronic registration, filing, and payment now allowed. Employers may now use the Arkansas Withholding Tax System at <https://www.state.ar.us/dfa/withholding/index.php> to register for an account, file returns (including zero returns), and make full, partial, or zero payments with an ACH debit transaction [Department of Finance and Administration, *Arkansas State Revenue Tax Quarterly*, July-Sept. 2008].

California

Meal and rest breaks: employer responsibilities defined. A California appeals court has ruled that employers are required only to make meal and rest breaks available to employees and do not need to ensure employees actually take the breaks. Employers, however, cannot "impede, discourage, or dissuade" employees from taking meal and rest breaks [*Brinker Restaurant Corp. v. Superior Court of San Diego County*, No. D049331, 2008 Cal. App. LEXIS 1138 (Cal. App. Ct., 7-22-08)].

Kentucky

Occupational license tax rules standardized. Effective 7-15-08, a state law provides a uniform definition of "compensation" for purposes of calculating the occupational license tax. It also standardizes occupational license tax rules and requirements regarding returns and payments, employee refunds, penalties, and recordkeeping. The new law applies to any county, city, or school district that assesses an occupational license tax. The original effective date of the law was 1-1-06, but it was changed by legislation in 2005 to 7-15-08 [H.B. 107, L. 2003; H.B. 116, L. 2005].

Minnesota

Mandatory electronic filing of Forms W-2 threshold lowered. Effective for Forms W-2 filed in 2009, an employer must file electronically if required to send more than 100 (was 250 or more) Forms W-2 to the state (this updates *The Payroll Source*®, p. 8-104). The threshold is reduced to 50 for Forms W-2 filed in 2010; to 25 for Forms W-2 filed in 2011; and to 10 for Forms W-2 filed in 2012 and thereafter [H.B. 3201, L. 2008].

Pennsylvania

Paycards permitted, conditions for use defined. Employees may elect to receive their wages via paycard, in addition to direct deposit or paper check, so long as they authorize this payment method. According to an official with the Department of Labor and Industry (DOLI), the Pennsylvania Banking Code allows an employer to pay wages via paycard if an employee voluntarily consents to this payment method in writing [DOLI Bureau of Labor Law Compliance, Letter to APA, 7-2-08].

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