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IRS Issues 2009 Form W-4

The IRS has released the 2009 Form W-4, *Employee's Withholding Allowance Certificate*. The form is available on the APA website at www.americanpayroll.org/members/Forms-Pubs/#tax.

Employees who claimed exempt status in 2008 and wish to continue their exemption for 2009 must submit a new form to the payroll department by February 16, 2009. Those employees should complete only Boxes 1, 2, 3, 4, and 7 and sign the form to validate it. Individuals may not claim exempt status in 2009 if (1) their income exceeds \$950 (\$900 in 2008) and includes more than \$300 (unchanged from 2008)

of unearned income (e.g., interest and dividends) **and** (2) they can be claimed as a dependent on another person's tax return. If an employee whose exemption expires on February 16 does not file a new form, withhold as if the employee were single claiming no withholding allowances until he/she submits a new Form W-4.

HELP FOR PAYROLL PROFESSIONALS – Also for 2009, at APA's request, a sentence has been added to the "Basic instructions" for employees as follows: "For regular wages, withholding must be based on allowances you claimed and may not be a flat amount or percentage of wages." ■

USCIS Issues Rule Requiring Unexpired Documents to Prove Work Authorization

U.S. Citizenship and Immigration Services (USCIS) has issued an "interim rule" amending the regulations governing the types of acceptable identity and employment authorization documents and receipts that employees may present to their employers when completing Form I-9, *Employment Eligibility Verification* [73 F.R. 76505, 12-17-08; <http://edocket.access.gpo.gov/2008/pdf/E8-29874.pdf>].

Under this interim rule, employers will no longer be able to accept expired documents to verify employment authorization in connection with the Form I-9 process. The rule also adds a new document to the list of acceptable documents that evidence

both identity and employment authorization and makes several technical corrections and updates. A copy of a draft of the amended Form I-9 is available on the APA website at www.americanpayroll.org/members/Forms-Pubs/#drafts.

The interim rule is effective February 2, 2009. Comments on the rule must be received by that date. Submit written comments, identified by docket number USCIS-2008-0001, to: Chief, Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Ave., NW, Suite 3008, Washington, DC 20529-2210. Or submit comments electronically at: www.regulations.gov.

Payroll Solutions

Q. We have been deducting 10% from the disposable pay of one of our employees to pay a federal administrative wage (student loan) garnishment, and it looks like the debt will be paid off soon. The employee is paid weekly and has disposable earnings of \$800. We just received another similar garnishment order for this employee, requiring us to deduct 15% from the employee's disposable earnings. Is the 15% amount for the second garnishment correct? Do I have to handle these together, or can I wait to begin deducting for the second one until the first one is paid off?

A. The amount on the second garnishment is correct. Effective July 1, 2006, the Deficit Reduction Act of 2005 raised the limit on the amount that may be deducted for any pay period for repayment of federal loans under the Higher Education Act (HEA) from 10% to 15% of disposable pay (see *PAYROLL CURRENTLY*, Issue No. 6, Vol. 14).

The U.S. Department of Education advises that if a garnishment order is already in effect for 10%, it may issue a new order for withholding at the higher rate. However, employers should continue to honor existing garnishments unless an order is issued with the new rate.

You cannot wait for the first garnishment to be satisfied before applying the second. An employer already honoring one student loan garnishment may be able to honor both simultaneously. Even though the Higher Education Act limits garnishments to 15% of an employee's disposable pay, this limit applies to each individual holder of a student loan. Where an employee faces multiple student loan garnishments, the maximum amount that can be garnished in total is the CCPA limit of 25% of disposable earnings or the excess of the employee's weekly disposable earnings above 30 times the federal minimum hourly wage (\$196.50 = \$6.55 federal minimum wage x 30), whichever is less (see *The Payroll Source*®, p. 9-46).

In this case, the maximum amount that can be garnished is \$200, which represents 25% of the employee's weekly disposable earnings (\$200 = \$800 x 25%) because it is less than the amount of the employee's weekly disposable earnings in excess of 30 times the federal minimum hourly wage (\$603.50 = \$800 - \$196.50). The employee's wages are already being garnished by an order that covers 10% of the employee's disposable earnings, so the entire amount of the second garnishment — 15% of the disposable earnings — can be satisfied simultaneously.

Background

On Form I-9, a newly-hired employee must attest to being a U.S. citizen or national, a lawful permanent resident, or an alien authorized to work in the U.S. The employee then must present to his or her employer a document or combination of documents that establish the employee's identity and employment authorization. The employer must examine the documents, record the document information on Form I-9, and attest that the documents reasonably appear both to be genuine and to relate to the individual presenting them.

Three categories of documents. Form I-9 has three categories of documents that may be accepted, alone or in combination, by employers for employment authorization verification:

- *List A* – documents that establish both identity and employment authorization (e.g., U.S. passport; Form I-551, *Permanent Resident Card*; and Form I-766, *Employment Authorization Document*);
- *List B* – documents that establish only identity (e.g., state-issued driver's license or identification card); and
- *List C* – documents that establish only employment authorization (e.g., state-issued birth certificate or social security card).

An individual must present to his or her employer either one document from List A or one document each from List B and List C. The employer may not specify a document or combination of documents that the employee must present.

Receipts. If the employee cannot present an acceptable document from one of the three lists, he or she may present an acceptable substitute document, referred to as a "receipt." The receipt satisfies the document presentation requirement for a short period of time, at the end of which the employee must present the actual document or other document(s) specified in the regulations as acceptable. An employer may accept a receipt only under specific circumstances – for example, if a document acceptable under Lists A, B, or C is stolen or lost, the new hire may provide a receipt for the application for the replacement document, in lieu of the actual document, as long as he or she provides the replacement

document within 90 days of hire.

Re-verification. If the individual is an alien whose employment authorization or employment authorization documentation expires, the employer must re-verify the employee's continued employment authorization by the expiration date by reviewing any acceptable List A or List C document.

Changes to the list of acceptable documents and receipts

Requiring unexpired, valid documents. The interim rule imposes a general requirement that all documents must be unexpired to be acceptable for Form I-9. A document containing no expiration date, such as a social security card, will be deemed unexpired. Note that under current regulations, the U.S. passport and all List B documents are acceptable for the Form I-9 even if they are expired.

Comments are invited on whether the prohibition on the use of expired documents should be modified to permit employers to accept List B identity documents that have expired within the last 90 days (or other limited time period) of the date they are presented to the employer.

Adding reference to U.S. passport card. The interim rule modifies the reference in List A to U.S. passport to include the new U.S. passport card (see *PAYROLL CURRENTLY*, Issue No. 17, Vol. 16), which may be used at U.S. land and sea (but not air) ports-of-entry for U.S. citizens traveling to Canada, Mexico, the Caribbean, and Bermuda.

Adding documentation for FSM and RMI citizens. The interim rule implements 2003 amendments to the Compacts of Free Association between the U.S. and the Federated States of Micronesia (FSM) and the Republic of the Marshall Islands (RMI). These amendments eliminated the need for citizens of the FSM and the RMI to obtain an *Employment Authorization Document*. Under the Compacts, these individuals may present valid FSM or RMI passports with Form I-94 or Form I-94A indicating nonimmigrant admission under the Compacts to satisfy Form I-9 requirements (List A).

Revising references to temporary I-551s. The interim rule modifies the reference in List A to temporary I-551 stamps on

unexpired foreign passports to include a temporary pre-printed I-551 notation on a machine-readable immigrant visa.

Eliminating Forms I-688, I-688A, and I-688B. The interim rule removes Form I-688 (*Temporary Resident Card*) and Forms I-688A and I-688B (*Employment Authorization Cards*) from List A. They are no longer issued, and any that were previously issued have expired. Note that USCIS now issues Form I-766 to those who formerly received Forms I-688, I-688A, or I-688B.

Adding references to Form I-94A. The interim rule updates List A by adding “Form I-94A” wherever there is a reference to Form I-94, *Arrival-Departure Record*. Note that Form I-94A is nearly identical to Form I-94 except that all fields are computer generated rather than being annotated by hand.

Revising reference to social security card. The interim rule replaces the List C reference to “social security number card” with “social security account number card” to track the statutory language.

Technical changes

Correcting reference to employment eligibility. The interim rule replaces the term “employment eligibility” with “employment authorization.” In addition, the rule changes the heading of 8 C.F.R. §274a.2 from “Verification of employment eligibility” to “Verification of identity and employment authorization.”

Replacing references to the former INS. The interim rule replaces references to the former “INS” with “DHS.”

Correcting references to Certificates of Birth Abroad. The interim rule corrects the List C references to Forms FS-545 and DS-1350. Currently, they are incorrectly identified as “Certification

of Birth Abroad.” Form FS-545 is correctly titled “Certification of Birth,” and Form DS-1350 is correctly titled “Certification of Report of Birth.”

Form changes

In implementing the regulatory changes being made by the interim rule, USCIS is also revising Form I-9 itself. Changes to Form I-9, in addition to revisions to the Lists of Acceptable Documents include:

- In Section 1, making “citizen of the United States” and “non-citizen national of the United States” into two separate categories (boxes) in the employee attestation part of the form. A definition of “non-citizen national” is added to the instructions to Form I-9. *Note:* Currently, the first box in Section 1 states: “A citizen or national of the United States.”

- In Section 1, replacing “An alien authorized to work until ___/___/___ (Alien # or Admission _____)” with “An alien authorized to work (A # or Admission # _____) until (expiration date, if applicable – month/day/year) ___/___/___.”

- In the form instructions, including a paragraph clarifying when employers need to re-verify certain employees, as follows: “Note that some employees may leave the expiration date blank if they are aliens whose work authorization does not expire (e.g., asylees, refugees, certain citizens of the Federated States of Micronesia or the Republic of the Marshall Islands). For such employees, re-verification does not apply unless they choose to present in Section 2 evidence of employment authorization that contains an expiration date (e.g., *Employment Authorization Document* (Form I-766)).” ■

IRS Releases 2009 Circular E

The 2009 Circular E, *Employer's Tax Guide* (Pub. 15), has been released by the IRS. It is available on the APA website at www.americanpayroll.org/members/Forms-Pubs/#pubs.

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

- **Social security and Medicare tax for 2009.** Do not withhold social security tax after an employee reaches \$106,800 in social security wages. (There is no limit on the amount of wages subject to Medicare tax.) Social security and Medicare taxes apply to the wages of household workers you pay \$1,700 or more. Social security and Medicare taxes apply to election workers who are paid \$1,500 or more.

- **New employment tax adjustment and claim for refund process in 2009.** If you discover an error on a previously filed Form 941 (*Employer's Quarterly Federal Tax Return*) or Form 944 (*Employer's Annual Federal Tax Return*) after December 31, 2008, make the correction using new Form 941-X, *Adjusted Employer's Quarterly Federal Tax Return or Claim for Refund*, or Form 944-X, *Adjusted Employer's Annual Federal Tax Return or Claim for Refund*. For errors discovered before January 1, 2009, taxpayers make corrections to Forms 941 and 944 using Form 941c (*Supporting Statement to Correct Information*) that is filed with Form 941 or Form 944 or by requesting a claim for refund or abatement on Form 843 (*Claim for Refund and Request for Abatement*).

Forms 941-X and 944-X are stand-alone forms, meaning taxpayers can file them when an error is discovered, rather than wait until the end of the quarter or year to file Form 941c with Form 941 or 944.

Lines 7d, 7e, 7f, and 7g will be deleted from Form 941 beginning with the first calendar quarter of 2009, and Lines

6b, 6c, 6d, and 6e will be deleted from Form 944 for 2009. Adjustments previously made on those lines are now made on the new Forms 941-X and 944-X. In addition, claims for refund or abatement previously made on Form 843 are now made on Forms 941-X and 944-X. *Note:* Form 843 will continue to be used for abatements and refunds of assessed penalties and interest.

- **Disregarded entities and qualified subchapter S subsidiaries (QSubs).** The IRS has published final regulations (72 F.R. 45891, 8-16-07) under which QSubs and eligible single-owner disregarded entities are treated as separate entities for employment tax purposes. Under these regulations, eligible single-member entities that have not elected to be taxed as corporations must report and pay employment taxes on wages paid to their employees after December 31, 2008, using the entity’s own name and EIN. The disregarded entity will be responsible for its own employment tax obligations on wages paid after December 31, 2008.

- **Credit card payments.** You can pay the balance due shown on Form 940 (*Employer's Annual Federal Unemployment (FUTA) Tax Return*), Form 941, Form 943 (*Employer's Annual Federal Tax Return for Agricultural Employees*), Form 944, and Form 945 (*Annual Return of Withheld Federal Income Tax*) by credit card. Do not use a credit card to make federal tax deposits. Note that a convenience fee will be charged by the service provider based on the amount you are paying.

- **Social Security Administration and magnetic media.** Employers and authorized reporting agents requesting verification of names and social security numbers of between 51 and 250,000 employees can no longer use magnetic media to submit their requests to the Social Security Administration. Instead, employers can upload a file through the Social Security Number Verification System (SSNVS) and will usually receive the results the next

government business day.

- **Paid preparers must sign Forms 941 and 944.** The paid preparer's section is no longer optional and is included in Part 5 of Forms 941 and 944.

- **Differential wage payments.** Differential wage payments are wages for income tax withholding, but are not subject to social security, Medicare, or FUTA taxes, beginning with wages paid after December 31, 2008. Employers should report differential wage payments on Form W-2 in Box 1.

Note: Differential wage payments are any payments made by an employer to an individual for a period during which the individual is performing service in the uniformed services while on active duty for a period of more than 30 days and represent all or a portion of the wages the individual would have received from the employer if the individual were performing services for

the employer.

- **Ordering employer tax products.** To order 2008 and 2009 tax products and information returns, select "Online Ordering for Information Returns and Employer Returns" at www.irs.gov/businesses. You may also order employer tax products and information returns by calling 1-800-829-3676.

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

IRS Reissues 2008 Form 940 Instructions With Correction

The IRS has posted a note on its website [www.irs.gov/formspubs/article/0,,id=109875,00.html (12-19-08)] advising taxpayers that the *2008 Instructions for Form 940* have been reissued. Anyone who downloaded them before December 19 is alerted that they have been modified. The following sentence – Paid preparers must sign paper returns

with a manual signature. – has been added to the paragraph on "Paid preparers" (page 10, Part 7: Sign Here).

The corrected version of the *2008 Instructions for Form 940* is available on the APA website at www.americanpayroll.org/members/Forms-Pubs/#tax. ■

IRS Issues Guidance on Reporting and Withholding Requirements for Nonqualified Deferred Compensation

The IRS has issued a notice providing interim guidance to employers and payers on their reporting and wage withholding requirements for 2008 with respect to deferrals of compensation and amounts includible in gross income under IRC §409A. In addition, the notice provides guidance to service providers on their income tax reporting and tax payment requirements with respect to amounts includible in gross income under §409A [Notice 2008-115, 12-10-08; www.irs.gov/pub/irs-drop/n-08-115.pdf]. The notice generally extends guidance provided in Notice 2006-100 (see *PAYROLL CURRENTLY*, Issue No. 25, Vol. 14) and Notice 2007-89 (see *PAYROLL CURRENTLY*, Issue No. 23, Vol. 15) applicable to calendar years 2005, 2006, and 2007.

The interim guidance provided in Notice 2008-115 is effective for calendar year 2008 and will remain in effect for subsequent calendar years until the IRS issues further guidance. The IRS does not anticipate that further guidance will be issued until the recently proposed regulations addressing the calculation of the amount includible in income under §409A(a) and the calculation of additional taxes are finalized (see *PAYROLL CURRENTLY*, Issue No. 25, Vol. 16). Further, the IRS anticipates that with respect to annual deferral reporting (Form W-2, Box 12, Code Y; Form 1099-MISC, Box 15a), such guidance will not be made effective before the calendar year beginning after such regulations are finalized.

Annual deferrals – amounts reportable on Form W-2 or Form 1099-MISC

Until the IRS issues further guidance, employers are not required to report amounts deferred during the year under a nonqualified deferred compensation (NQDC) plan subject to §409A on Form W-2 in Box 12 with Code Y (employees) or on Form 1099-MISC in Box 15a (independent contractors).

Reporting and withholding – amounts includible in gross income under §409A

An employer must treat amounts includible in gross income under §409A as wages for income tax withholding purposes. The

amounts must be reported as wages paid on Line 2 of Form 941 (*Employer's Quarterly Federal Tax Return*) and in Box 1 of Form W-2. An employer must also report such amounts as §409A income in Box 12 of Form W-2 using Code Z.

Amounts includible in gross income under §409A are supplemental wages for purposes of determining how much income tax to withhold regardless of whether the employer has paid the employee any regular wages during the calendar year of the payment. The amount required to be withheld is not increased on account of the additional income taxes imposed under §409A. Employees should thus be aware that estimated tax payments or increased withholding from regular wages may be required to avoid penalties.

For nonemployees, a payer must report amounts includible in gross income under §409A and not treated as wages as nonemployee compensation in Box 7 of Form 1099-MISC. A payer must also report such amounts as §409A income in Box 15b of Form 1099-MISC.

Calculating amounts includible in income. For purposes of Notice 2008-115, the amount includible in gross income because of a plan failure under §409A(a) and required to be reported by the employer or payer equals the portion of the total amount deferred under the plan that, as of December 31 of the applicable calendar year, is not subject to a substantial risk of forfeiture and has not been included in income in a previous year, plus any amounts of deferred compensation paid or made available to the employee or payee under the plan during the applicable calendar year. An employer or payer may treat an amount as previously included in income if it was properly reported by the employer or payer on a Form W-2, Form 1099-MISC, or Form W-2c or corrected Form 1099-MISC for a prior calendar year. Amounts previously reported and included in income should not be reported again.

Amounts includible in gross income under §409A(a) include only amounts deferred that are subject to §409A and not, for

example, amounts deferred that were earned and vested prior to January 1, 2005, and that are not otherwise subject to §409A due to the application of the effective date provisions.

Wage payment date of includible amounts. Amounts includible in gross income under §409A(a) in 2008 that are either actually or constructively received by an employee are considered wages paid when received by the employee for purposes of withholding, depositing, and reporting income tax.

Amounts includible in gross income under §409A(a) that are neither actually nor constructively received by the employee during the applicable calendar year, are treated as a payment of wages on December 31 of that calendar year for purposes of withholding, depositing, and reporting income tax.

If, as of December 31 of the applicable calendar year, the employer does not withhold income tax from the employee on such wages, or withholds less than the amount of income tax required to be withheld, the employee will receive credit for that calendar year on his or her personal income tax return if the employer:

- withholds or gets from the employee the amount of the undercollection before February 1 of the subsequent calendar year, and reports the wages for the quarter ending December 31 of the applicable calendar year, on Form 941 and in Box 1 of the employee's Form W-2; or

- pays the income tax withholding liability on behalf of the employee and reports the gross amount of wages and the employer-paid taxes for the quarter ending December 31 of the applicable calendar year, on Form 941 and in Box 1 of the employee's Form W-2.

For purposes of the employment tax deposit rules, if the income tax withholding liability for such wages is paid to the IRS by the due date of the Form 941 for the quarter ending on December 31 of the applicable calendar year, on which the wages are reported, then failure-to-deposit penalties will not be imposed.

Calculating deferrals. The rules for determining the total amount deferred under a NQDC plan for purposes of calculating the amount required to be included in income under §409A(a) are similar to the rules for calculating the amount to include in income under a NQDC plan for purposes of social security and Medicare taxation under IRC §3121(v)(2) (see *The Payroll Source*®, pp. 4-116 to 4-118).

- **Account balance plans.** For account balance plans, the amount deferred as of December 31 of a calendar year equals the amount that would be treated as an amount deferred on that date if the entire account balance (including all principal amounts, adjusted for income, gain, or loss credited to the employee's account) as of December 31 of that calendar year were treated as a principal amount credited to the employee's account on that date. Note that these same rules apply for purposes of determining the amount reported on Form 1099-MISC for 2008 with respect to a nonemployee.

- **Nonaccount balance plans.** For nonaccount balance plans, where the amount deferred is reasonably ascertainable, the amount deferred as of December 31 of a calendar year equals the present value of all future payments to which the employee has obtained a legally binding right as of that date, calculated as if the employee had obtained all of such rights on December 31 of that calendar year. An amount deferred is considered reasonably ascertainable on the first date on which the amount, form, and commencement date of the benefit payments attributable to the amount deferred are known, and the only actuarial assumptions needed to determine the amount are interest and mortality. Note

that these same rules apply for purposes of determining the amount reported on Form 1099-MISC for a calendar year with respect to a nonemployee.

- **Stock rights.** For a plan that is a stock right under Reg. §1.409A-1(c)(2)(i)(H), the amount deferred as of December 31 of a calendar year equals the amount that the service provider would be required to include in income if the stock right were immediately exercisable and exercised on December 31 of that calendar year. In general, this will mean with respect to a stock right outstanding as of December 31 of a calendar year, the amount deferred as of December 31 of that calendar year equals the fair market value of the underlying stock less the sum of the exercise price and any amount paid by the service provider for the stock right.

- **Other deferred amounts.** For all deferred amounts not addressed by the account balance, nonaccount balance, and stock right plan rules, the amount deferred as of December 31 of a calendar year must be determined under a reasonable, good faith application of a reasonable, good faith method. This method must reflect reasonable, good faith assumptions with respect to any contingencies as to the timing or amount of any payment.

Assumptions that result in the amount deferred being the lowest potential value of the future payment will be presumed not to be reasonable, good faith assumptions unless clear and convincing evidence demonstrates otherwise.

Protection from future additional reporting or withholding

An employer or payer that complies with Notice 2008-115 regarding computing amounts includible in gross income under §409A and withholding and reporting those amounts for a calendar year will not be liable for additional income tax withholding or penalties, or be required to file any subsequent forms as a result of future published guidance with respect to the computation of amounts includible in gross income under §409A.

If it is subsequently determined that the employer did not apply Notice 2008-115 in determining amounts includible in gross income or wages for a calendar year, any recalculation of these amounts may result in additional liability for income tax withholding for these years, plus any applicable penalties. In addition, the employer or payer will be required to file an original or corrected information return and furnish an original or corrected payee statement.

For purposes of determining any amount includible in income under §409A in a subsequent year, an amount will not be treated as previously included in income unless the amount has been reported appropriately on an information return and payee statement, or has been included in income by the service provider in a previous year.

Service provider requirements

A service provider must report as income and pay any taxes due relating to amounts includible in gross income under §409A for a calendar year.

For purposes of determining the amount required to be included in income under §409A, the same standards apply to a service provider as apply to an employer or payer when calculating the amount required to be reported, provided that an amount is treated as previously included in income only if the amount has been included in the service provider's income in a previous taxable year.

If the service provider does not report and pay taxes due with respect to amounts includible in gross income under §409A in accordance with Notice 2008-115, the IRS may assert additional income taxes and penalties if it is determined that the amount of taxes reported and paid for 2008 was underreported or underpaid.

Interest will also apply to any underpayments.

Comments

The IRS advises that Notice 2008-115 is intended as interim guidance only. The IRS has proposed regulations under §409A(a) on (1) the calculation of the amount includible in income and (2) the calculation of the additional taxes. When the regulations are

finalized and become effective, they will obsolete this notice with respect to those topics. Accordingly, comments on those topics should be submitted according to directions given in the preamble to the proposed regulations (see [PAYROLL CURRENTLY, Issue No. 25, Vol. 16](#)). ■

IRS Announces Quarterly Interest Rates

The IRS has announced that the interest rates for the first quarter of 2009 (i.e., the calendar quarter beginning January 1, 2009) will decrease. The rates will decrease to:

- 5% (4% in the case of a corporation) for tax overpayments;

- 5% for tax underpayments;
- 7% for large corporate underpayments; and
- 2.5% for the portion of a corporate overpayment exceeding \$10,000 [Rev. Rul. 2008-54, released 12-10-08]. ■

Changes for Correcting Employment Tax Errors Coming in Early 2009

The IRS reminds employers that Form 941c, *Supporting Statement to Correct Information*, will soon be replaced by a new set of five dual-purpose forms for adjustments and refunds. The new forms will be used to correct errors on employment tax returns starting in January 2009.

Forms 941-X, 943-X, 944-X, 945-X, and CT-1 X will be stand-alone forms. Each form will correspond to, and relate line-by-line with, the employment tax return it is correcting.

Under the new procedures, when an employer discovers an underpayment or overpayment error on a previously filed Form 941, it will now use the new Form 941-X to make a correction. For corrections to Form 943, a Form 943-X will be

filed, and so on.

These forms should be used for errors discovered on or after January 1, 2009. To avoid interest and penalties, payment should be sent with the form or paid on or before the date the form is mailed.

The IRS advises that Form 941-X will be available on January 5, 2009. The remaining forms, which correspond to annual returns, are scheduled for release in February 2009. Final regulations on the new employment tax adjustment procedures are discussed in [PAYROLL CURRENTLY, Issue No. 15, Vol. 16](#). ■

IRS Issues 2009 Pub 15-B, Employer's Tax Guide to Fringe Benefits

The 2009 supplement to Circular E, *Employer's Tax Guide to Fringe Benefits* (Pub. 15-B), has been released by the IRS. Publication 15-B contains specialized and detailed information on the employment tax treatment of fringe benefits. The publication is available on the APA website at www.americanpayroll.org/members/Forms-Pubs/#annual. The following items are highlighted this year:

- **Cents-per-mile rule.** The standard mileage rate that an employer can use under the cents-per-mile rule to value the personal use of a company vehicle provided to an employee in 2009 is 55 cents a mile (down from the 58.5 cents-per-mile rate in effect for the second half of 2008; see [PAYROLL CURRENTLY, Issue No. 25, Vol. 16](#)).

- **Qualified transportation fringes.** For 2009, the amounts excluded from gross income for employer-provided "qualified transportation fringe benefits" are \$120 per month for "combined commuter highway vehicle transportation and transit passes" (up from \$115 in 2008) and \$230 per month

for "qualified parking" (up from \$220 in 2008; see [PAYROLL CURRENTLY, Issue No. 22, Vol. 16](#)).

- **Volunteer firefighter and emergency medical responder benefits.** After 2007, gross income of volunteer firefighters and emergency medical responders who are part of a qualified volunteer emergency response organization does not include any qualified state and local tax benefit (i.e., rebate or reduction of property or income taxes provided by a state or local government for providing services as a member of a qualifying emergency response organization; see [PAYROLL CURRENTLY, Issue No. 11, Vol. 16](#), "Military Tax Relief Bill Includes Payroll Provisions").

- **Qualified bicycle commuting reimbursement.** After 2008, qualified transportation fringe benefits include any qualified bicycle commuting reimbursement (see [PAYROLL CURRENTLY, Issue No. 21, Vol. 16](#), "Emergency Economic Stabilization Legislation Enacted"). ■

IRS Releases 2009 Form W-5

The IRS has released the 2009 Form W-5, *Earned Income Credit Advance Payment Certificate*. This form, along with two pages of instructions, is available on the APA website at www.americanpayroll.org/members/Forms-Pubs/#tax.

Advance Earned Income Credit

Eligible employees who want to receive advance payments of the earned income credit (see *The Payroll Source*®, beginning at p. 6-40) must submit a completed Form W-5 to their employer. Employees who received advance payments of the EIC in 2008 must submit the 2009 Form W-5 to their employer before the first wage payment of 2009 in order to

continue receiving the payments.

Credit amount

For 2009, employees are eligible to receive advance EIC payments only if they meet all four of these conditions:

- have a valid social security number (the employee's spouse also must have a valid social security number if they expect to file a joint return for 2009);
- expect to have a qualifying child;
- expect that their 2009 earned income and adjusted gross income will each be less than \$35,463 (\$38,583 if they expect to file a joint return for 2009); and

- expect to be able to claim the EIC for 2009.

The total of advance EIC payments for the year cannot exceed \$1,826. For most people, adjusted gross income includes tax-exempt interest and certain nontaxable pensions, annuities, and IRA distributions (for further details, see

Publication 596, *Earned Income Credit*). Workfare payments (certain cash public assistance payments) are not included in earned income. For most people, “investment income” is the total of their taxable interest, ordinary dividends, capital gain distributions, and tax-exempt interest. ■

SSA Updates ‘Critical Links’ to Help Employers Match Names, SSNs

According to APA members, correct presentation of employee names and social security numbers (SSNs) on Forms W-2 is one of the biggest challenges for employers.

The overarching rule is that the name and SSN on a W-2 should match whatever is on the social security card. However, there are a couple of exceptions and some tricky situations. To address these, APA worked closely with the Social Security Administration (SSA) to flesh out SSA’s “Critical Links” web page (www.socialsecurity.gov/employer/critical.htm).

Here are a few helpful hints from SSA. Note that “paper filers” refer to the requirements for Copy A of Forms W-2 submitted on paper to the SSA.

- Don’t use a nickname, shortened name, or any changed name on a W-2 unless it has also been changed with the SSA.
- If the social security card contains a middle name, you can include it (up to 15 characters) if filing electronically. Paper filers should insert only the middle initial, without a period after it.
- Do not include titles or academic degrees before or after the name (but see below).

• Suffixes, such as Jr., Sr., etc., are allowed on paper W-2s in the sub-box within box “e,” and they are allowed in the electronic filing record layout.

• If the employee still does not have an SSN at the time W-2s are being prepared, paper filers should insert “applied for” in W-2 box “d,” and electronic filers should insert zeroes in the record layout. Inserting zeroes on the W-2 given to the employee is fine.

• If you find out that the SSN provided by the employee is incorrect (such as by using SSNVS), you should ask the employee for corrected information and document this request. However, if no corrected information is provided by the time W-2s must be filed, you should report the SSN as originally given to you by the employee.

In December 2008, the Critical Links web page was updated to encourage employers to use SSA’s Social Security Number Verification Service (SSNVS; www.socialsecurity.gov/employer/ssnv.htm), which is available for free over the Internet to all employers. ■

Congress Votes to Delay Enactment of Mental Health Parity in Certain Group Health Plans

The Emergency Economic Stabilization Act of 2008 (EESA; see *PAYROLL CURRENTLY*, Issue No. 21, Vol. 16) included a provision amending existing laws (i.e., ERISA, Public Health Service Act, IRC) to require equity in the provision of “mental health or substance use disorder benefits” under group health plans. Now, legislation approved by the lame duck 110th

Congress in December has extended the effective date for amendments prescribed by EESA – for group health plans maintained pursuant to collective bargaining agreements ratified before October 3, 2008 – from January 1, 2009, to January 1, 2010 (S. 3712, presented to the President for signature 12-12-08). ■

IRS Offers Relief From §403(b) Written Plan Requirement

The IRS has issued a notice providing relief during 2009 for sponsors of §403(b) plans with respect to the requirement to have a written §403(b) plan in place by January 1, 2009 [Notice 2009-3, 12-11-08; www.irs.gov/pub/irs-drop/n-09-03.pdf]. Note: The relief under Notice 2009-3 applies solely with respect to the 2009 calendar year and may not be relied on with respect to the operation of the plan or correction of operational defects in any prior or subsequent year.

Final regulations under IRC §403(b) were published in 2007 (see *PAYROLL CURRENTLY*, Issue No. 16, Vol. 15). Effective January 1, 2009, sponsors of §403(b) plans are generally required to maintain a written plan that satisfies, in both form and operation, the requirements of the final regulations. Although many sponsors of §403(b) plans have already adopted a written §403(b) plan, the IRS is extending the deadline for plan sponsors to adopt new written plans or amend existing plans to comply with the final §403(b) regulations because of difficulties expressed by numerous plan administrators in meeting the current deadline of January 1, 2009. The extension will give plan sponsors additional time to put their plan documents in place.

Rev. Proc. 2007-71 (see *PAYROLL CURRENTLY*, Issue No. 25, Vol. 15) is modified. The IRS will not treat a §403(b) plan as failing to satisfy the requirements of §403(b) and the final regulations during the 2009 calendar year, provided that:

- On or before December 31, 2009, the plan sponsor has adopted a written §403(b) plan that is intended to satisfy the requirements of §403(b) and the final regulations;
- During 2009, the plan sponsor operates the plan in accordance with a reasonable interpretation of §403(b) and the final regulations; and
- By the end of 2009, the plan sponsor makes its best efforts to retroactively correct any operational failure during the 2009 calendar year to conform to the written plan.

Note: There is no current program under which a plan sponsor can obtain assurance that the written form of its plan satisfies §403(b), other than through a private letter ruling. The IRS therefore plans to issue a revenue procedure establishing programs for §403(b) plans to obtain IRS approval of the plan document and allowing these plans to make remedial amendments to retroactively fix plan provisions under rules similar to those that apply for §401(a) qualified plans. ■



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.

2009 withholding tables issued by several states

Several states have recently issued withholding tables for employers to use in determining the amount of state income tax to withhold from their employees' wages in 2009. These states include California, Colorado, Connecticut, District of Columbia, Kentucky, Maine, Maryland, Michigan, Minnesota, New Mexico, North Carolina, Ohio, Oklahoma, Rhode Island, and Vermont.

Connecticut

Tax amnesty program announced. A tax amnesty program will take place from 5-1-09 to 6-25-09, during which all civil penalties will be waived and no criminal prosecutions will be sought if back taxes are paid in full by 6-25-09. Interest will apply. The amnesty program will apply to all state taxes collected by the Department of Revenue Services [H.B. 7601E, L. 2008].

Indiana

Requirement to report withholding taxes by county established. Effective 1-1-09, employers must report withholding taxes by county. In January 2009, the Department of Revenue (DOR) will mail a new batch of Forms WH-1, *Withholding Tax Voucher*, to employers. Employers must use these forms to report withholding taxes monthly by county, along with making monthly tax payments. Electronic funds transfer (EFT) filers will need to file a monthly Form WH-1 that includes withholding taxes by county, along with making monthly tax payments. The first return is due 2-20-09. Note that Forms WH-1 may also be filed electronically through the INTax program at <https://www.intax.in.gov/Web>. In addition, payroll providers and businesses may use the new file upload method, which allows bulk filing (visit www.in.gov/dor/4002.htm for instructions) [DOR, *Tax Dispatch*, Vol. 11, No. 2].

Wisconsin

Paid sick leave approved by Milwaukee voters. In November, voters in Milwaukee approved a referendum that requires private employers to provide paid sick leave to employees who work in the city. Employees do not begin to accrue paid sick leave until 2-10-09. Paid sick leave may be used for: an employee's own physical or mental illness, injury, or health condition; care of a family member with a physical or mental illness, injury, or health condition; or an absence – if the employee or a family member is a victim of domestic abuse, sexual assault, or stalking – related to social or legal services. Employers must provide a minimum of one hour of paid sick leave for every 30 hours worked by an employee, up to 72 hours per calendar year. Employees of small businesses (fewer than 10 employees) may accrue up to 40 hours per calendar year. Employees begin accruing paid sick leave at the start of employment and are entitled to use such leave after 90 calendar days. Paid sick leave may be carried over to the following calendar year, but its use is limited to the 72-hour/40-hour cap. Unused, accrued paid sick leave does not have to be reimbursed upon an employee's termination, resignation, or retirement [City of Milwaukee, Ordinance File No. 080420].

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