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USCIS Delays New Form I-9 and Rule Requiring Unexpired Documents to Prove Work Authorization

U.S. Citizenship and Immigration Services (USCIS) has postponed the effective date of an "interim final 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* (see **PAYROLL CURRENTLY, Issue No. 26, Vol. 16**) from February 2, 2009, until April 3, 2009 [74 F.R. 5899, 2-3-09; <http://edocket.access.gpo.gov/2009/pdf/E9-2360.pdf>]. The comment period

has been extended until March 4, 2009.

The rule, which makes changes to the lists of acceptable documents and receipts and requires unexpired documents, was accompanied by a revised Form I-9. In light of the delay in the rule's effective date, the revised form (dated February 2, 2009) should not be used by employers until April 3. Before that date, employers should use the form with a revision date of June 5, 2007. It is available on the APA website at www.americanpayroll.org/members/Forms-Pubs/#non. ■

House Approves Stimulus Bill That Could Mean New Withholding Tables and COBRA Discount Funded by Payroll Taxes

On January 28, the U.S. House of Representatives voted 244-188 to approve H.R. 1, known as the "American Recovery and Reinvestment Act of 2009." The centerpiece of the bill is a \$500 individual "Making Work Pay" income tax credit (\$1,000 for joint filers) that would be distributed via reduced withholding. This and other provisions of interest to payroll professionals are itemized below.

Note: At press time, the Senate had begun debating its own version of a stimulus bill with some similar provisions, but also some significant differences. Eventually, the two bills will have to be reconciled and the reconciled version approved before the bill can be enacted into law.

Making Work Pay income tax credit

The bill would provide eligible individuals a refundable

income tax credit for 2009 and 2010. The credit would be the lesser of (1) 6.2% of an individual's earned income or (2) \$500 (\$1,000 in the case of a joint return) for each year.

The credit would be phased out at a rate of 2% of the eligible individual's modified adjusted gross income above \$75,000 (\$150,000 in the case of a joint return). To be eligible for the credit, an individual would have to provide a valid social security number. Nonresident aliens and those who can be claimed as a dependent by another taxpayer would not be eligible for the credit.

According to the Joint Committee on Taxation, taxpayers' reduced liability under the proposal would be implemented through revised income tax withholding tables. These revised tables would reduce taxpayers' income

Payroll Solutions

Q. I just discovered that an employee who has worked for our company for several years has the wrong social security number in our payroll system. The employee provided a correct SSN when he was hired and never noticed our error. We issued Forms W-2 (*Wage and Tax Statement*) to the employee with the erroneous SSN for tax years 2005, 2006, 2007, and 2008. We have not yet filed the 2008 form with the Social Security Administration. How do we correct this?

A. W-2 for 2008. Prepare a new 2008 Form W-2 for this employee. Write “CORRECTED” on the employee’s new copies (B, C, and 2), and give them to the employee.

Electronic Filers. Simply correct the social security number in the employee’s record within the electronic file (EFW2) that you will be submitting to the SSA. In the eyes of the SSA, no error ever occurred.

Paper Filers. Since Copies A of paper Forms W-2 are sent two-employees-to-a-page, and you still want to submit the W-2 for the other employee, simply check the “Void” box at the top of this employee’s W-2, and it will not be processed by SSA. Prepare a new Copy A with the correct information for this employee and include it in your submission. Do not write “CORRECTED” on Copy A of Form W-2.

W-2s for 2005, 2006, and 2007. You must file Form W-2c (*Corrected Wage and Tax Statement*), even though the only corrections needed are to the employee’s SSN. According to SSA speakers at APA events, you only need to file a W-2c for the most recent year for which you submitted a W-2 (in this case, 2007), so long as the other years contain the same erroneous combination of name and SSN. SSA will review its records for all such erroneous combinations and correct them all.

Electronic W-2c. To correct the erroneous SSN electronically, you can upload a file through SSA’s Business Services Online formatted according to the Specifications for Filing Forms W-2c Electronically (EFW2C) format (www.ssa.gov/employer/bsobhnew.htm#w2conline). *Note:* BSO also has a W-2c Online service that allows you to complete up to five Forms W-2c on your computer, electronically submit them to SSA, and print copies for employees, but this can only be used to correct Forms W-2 for the immediately previous tax year, which currently is 2008, and for which, in this situation, you don’t need to file a correction with SSA.

Paper W-2c. To correct the employee’s SSN using a paper W-2c, complete Boxes a to h. Box c must be checked because the employee’s SSN on a prior Form W-2 was incorrect. The employee’s previously reported incorrect SSN must also be reported in Box h. Do not complete Boxes 1 to 20. Note that you must also file a Form W-3c (*Transmittal of Corrected Wage and Tax Statements*) to accompany a submitted paper Form W-2c – even though you are submitting only one W-2c and even though you are only correcting the employee’s SSN.

See *The Payroll Source*® beginning at p. 8-76 for more information about corrections to Forms W-2.

tax withheld for each remaining pay period in 2009 by an amount equal to the amount that withholding would have been reduced had the provision been reflected in income tax withholding tables for the entire taxable year.

Definitions. The definition of *earned income* would be the same as for the earned income tax credit with two modifications:

- Earned income for these purposes would not include net earnings from self-employment that are not taken into account in computing taxable income;
- Earned income for these purposes would include combat pay excluded from gross income under IRC §112.

Modified adjusted gross income would be the eligible individual’s adjusted gross income increased by any amount excluded from income under IRC §§911, 931, or 933.

COBRA premium subsidies from payroll taxes

The bill provides that, for up to 12 months, if an assistance eligible individual pays 35% of the COBRA continuation premium, the group health plan would have to treat the individual as having paid the full premium required for COBRA continuation coverage, and the individual would be entitled to a subsidy of 65% of the premium.

Assistance eligible individual. An assistance eligible individual would be any qualified beneficiary who elects COBRA continuation coverage and satisfies two additional requirements. First, the qualifying event would have to be a loss of group health plan coverage on account of an involuntary termination of the covered employee’s

employment (other than an involuntary termination for gross misconduct). Second, the qualifying event would have to occur during the period beginning September 1, 2008, and ending December 31, 2009, and the qualified beneficiary would have to be eligible for COBRA continuation coverage during that period and elect such coverage.

Income includability. Any subsidy provided would be excluded from the gross income of the covered employee and any assistance eligible individuals. However, for purposes of determining the gross income of the employer and any welfare benefit plan of which the group health plan is a part, the amount of the premium reduction would be treated as an employee contribution to the group health plan.

Termination of eligibility for reduced premiums. The assistance eligible individual’s eligibility for the subsidy would end with the first month beginning on or after the earlier of (1) the date that is 12 months after the first day of the first month for which the subsidy applies, (2) the end of the maximum required period of continuation coverage for the qualified beneficiary under the IRC or other state or federal law or regulation, or (3) the date the assistance eligible individual becomes eligible for Medicare benefits or health coverage under another group health plan.

Note that eligibility for coverage under another group health plan would not terminate eligibility for the subsidy if the other group health plan provides only dental,

vision, counseling, or referral services, is a health flexible spending account or health reimbursement arrangement, or is coverage for treatment that is furnished in an on-site medical facility maintained by the employer that consists primarily of first-aid services, prevention and wellness care, or similar care.

Reimbursement of group health plans. The bill provides that the entity to which premiums are payable will be reimbursed for the 65% discount on the premium for COBRA continuation coverage that is not paid by an assistance eligible individual. An entity would not be eligible for subsidy reimbursement, however, until the entity has received the reduced premium payment from the assistance eligible individual.

To the extent that the entity has liability for income tax withholding from wages or FICA taxes with respect to its employees, the entity would be reimbursed by treating the amount that is reimbursable as a credit against its liability for these payroll taxes. To the extent that such amount exceeds the amount of the entity's liability for these payroll taxes, the Secretary (of the Treasury) would reimburse the entity for the excess directly.

Any entity entitled to such reimbursement would be required to submit specified reports, including an attestation of the involuntary termination of employment of each covered employee on the basis of whose termination entitlement to reimbursement of premiums is claimed, as well as a report of the amount of payroll taxes offset for a reporting period and the estimated offsets of such taxes for the next reporting period. This report would be provided at the same time as the deposits of the payroll taxes would have been required, absent the offset, unless otherwise specified.

Extension of minimum COBRA continuation coverage

The bill would provide extended COBRA coverage periods for covered employees who qualify for COBRA continuation coverage due to termination of employment or reduction in hours, and who are age 55 or older or have 10 or more years of service with the employer at the time of the qualifying event. Such individuals would be permitted to continue their COBRA coverage until the earlier of enrollment for Medicare benefits or termination of all health plans sponsored by the employer offering the COBRA coverage. The extended coverage period would apply to all qualified beneficiaries of the covered employee.

Child support incentive funds for states

The bill would resume the incentive funding to state

child support enforcement agencies that was cut by the Deficit Reduction Act of 2005 (see [PAYROLL CURRENTLY, Issue No. 6, Vol. 14](#)). The resumption would be temporary – from October 1, 2008, to September 30, 2010. *Note:* The APA has lobbied on behalf of restoration of this funding, which provides much needed revenue to the state agencies (see “Inside Washington,” for [March 2007](#) and [November 2007](#)).

Earned Income Tax Credit

The bill would increase the EITC percentage for families with three or more qualifying children to 45% for 2009 and 2010. For example, in 2009 taxpayers with three or more qualifying children could claim a credit of 45% of earnings up to \$12,570, resulting in a maximum credit of \$5,656.50.

The bill would also increase the threshold phase-out amounts for married couples filing joint returns to \$5,000 above the threshold phase-out amounts for singles, surviving spouses, and heads of households for 2009 and 2010. For example, in 2009 the maximum credit of \$3,043 for one qualifying child would be available for those with earnings between \$8,950 and \$16,420 (\$21,420 if married filing jointly). The credit would begin to phase out at a rate of 15.98% of earnings above \$16,420 (\$21,420 if married filing jointly). The credit would phase out to \$0 at \$35,463 of earnings (\$40,463 if married filing jointly).

Finally, the bill would increase the refundable portion of the credit by modifying the earned income formula for determining the credit so that it applies to 15% of earned income in excess of \$0 for taxable years beginning in 2009 and 2010.

Repeal of withholding tax on government contractors

The bill would repeal IRC §3402(t), which generally requires information reporting and withholding at the rate of 3% on payments made after December 31, 2010, to persons providing property or services to a state or local government entity with \$100 million or more of covered annual expenditures. The requirement was included in the Tax Increase Prevention and Reconciliation Act of 2005 (see [PAYROLL CURRENTLY, Issue No. 12, Vol. 14](#)), and implementing regulations were recently proposed (see [PAYROLL CURRENTLY, Issue No. 1, Vol. 17](#)).

Work Opportunity Tax Credit

The bill would create a new targeted group – unemployed veterans and disconnected youth – who begin working for the employer in 2009 or 2010. ■

New Administration Delays Federal Contractors' Mandatory Use of E-Verify

The applicability date for Federal Acquisition Regulation (FAR) amendments requiring insertion of a clause into federal contracts committing contractors to use the E-Verify system to verify that new hires and current employees working on government contracts are eligible to work in the U.S. has been postponed from February 20, 2009, until May 21, 2009 [74 F.R. 1937, 1-30-09; <http://edocket.access.gpo.gov/2009/pdf/E9-2060.pdf>]. Previously, the date was postponed from January 15, 2009, to February 20, 2009.

On or after May 21, 2009, contracting officers:

- Must include the clause in solicitations issued and contracts awarded; and
- Must modify existing indefinite-delivery/indefinite-quantity contracts to include the clause for future orders

if the remaining period of performance extends beyond August 20, 2009, and the amount of work or number of orders expected under the remaining performance period is substantial.

Note: The FAR amendments were issued on November 14, 2008 (see [PAYROLL CURRENTLY, Issue No. 24, Vol. 16](#)). On December 23, the U.S. Chamber of Commerce filed a lawsuit seeking (1) a declaration that the regulations, and the executive order they implement, are illegal and void, and (2) an injunction barring their enforcement (see [PAYROLL CURRENTLY, Issue No. 1, Vol. 17](#)). Proceedings in the case have been stayed until May 21, 2009 (*Chamber of Commerce USA v. Napolitano*, No. 8:08-CV-03444-AW (D Md., order signed 1-28-09)). ■

IRS Issues Final Regulations on Tax Return Preparer Penalties

The IRS has issued final regulations implementing amendments to the tax return preparer penalties under IRC §§6694 and 6695 and related provisions reflecting statutory amendments made by the Small Business and Work Opportunity Tax Act of 2007 (see *PAYROLL CURRENTLY*, Issue No. 12, Vol. 15) and the Emergency Economic Stabilization Act of 2008 (see *PAYROLL CURRENTLY*, Issue No. 21, Vol. 16). The regulations are applicable to returns and claims for refund filed (and advice given) after December 31, 2008 [73 F.R. 78430, 12-22-08; <http://edocket.access.gpo.gov/2008/pdf/E8-29750.pdf>].

Note: The Small Business and Work Opportunity Tax Act of 2007 broadened the scope of tax return preparer penalties to cover preparers of employment tax returns, and increased first-tier penalties from \$250 to the greater of \$1,000 or 50% of the income derived (or to be derived) from the preparation of the return or claim with respect to which the penalty is imposed. It increased second-tier penalties from \$1,000 to the greater of \$5,000 or 50% of the income derived (or to be derived) by the tax return preparer.

The Emergency Economic Stabilization Act of 2008 modified the standard of conduct that must be met to avoid imposition of a tax return preparer penalty – from “reasonable belief” of success on the merits to “substantial authority” (for undisclosed positions) for returns prepared after May 25, 2007.

The standard for disclosed positions remains “reasonable basis” for the position.

Exception for reporting agents

Under the regulations, “persons who are not tax return preparers” include individuals providing “only typing, reproduction, or other mechanical assistance in the preparation of a return or claim for refund.” This mechanical assistance exception is illustrated with two examples:

• **Example 1.** A reporting agent received employment tax information from a client from the client’s business records. The reporting agent did not render any tax advice to the client or exercise any discretion or independent judgment on the client’s underlying tax positions. The reporting agent processed the client’s information, signed the return as authorized by the client pursuant to Form 8655, *Reporting Agent Authorization*, and filed the client’s return using the information supplied by the client. The reporting agent is not a tax return preparer.

• **Example 2.** A reporting agent rendered tax advice to a client on determining whether its workers are employees or independent contractors for federal tax purposes. In return for compensation, the reporting agent received employment tax information from the client, processed the client’s information, and filed the client’s return using the information supplied by the client. The reporting agent is a tax return preparer. ■

Because of Improper Salary Deductions Supermarket Managers Were Not FLSA-Exempt

Department managers and co-managers at Gristedes Food Stores, a chain of more than 50 grocery stores in New York City and its suburbs, brought a class action lawsuit to recover unpaid overtime under the Fair Labor Standards Act (FLSA). Gristedes said the managers were exempt from the overtime pay requirements of the FLSA as either administrative or executive employees, but a U.S. District Court disagreed. The court said that the managers were not exempt because they were not compensated on a salary basis [*Torres v. Gristedes Operating Corp.*, No. 04 Civ. 3316 (PAC), 2008 U.S. Dist. LEXIS 66066 (SD N.Y., 8-28-08)].

Managers were not paid on a salary basis

To qualify for either the administrative or executive employee exemption, an employee must be paid at least \$455 a week on a salary basis (see *The Payroll Source*®, pp. 2-9 and 2-13), among other things. An employee is paid on a salary basis if the employee receives a predetermined amount each pay period that is not subject to reduction because of variations in the quality or quantity of work performed (29 C.F.R. §541.602(a)).

Here, the managers’ compensation met the minimum amount for exemption, but they were not paid on a salary basis. They were treated as hourly employees for certain purposes (Gristedes docked them for hours not worked during a workweek) but as “salaried” for other purposes (Gristedes did not pay overtime compensation for hours worked in excess of 40 in a workweek). Gristedes’ payroll director and other employees responsible for payroll acknowledged that the managers were paid only for the hours they worked.

The deductions here were not inadvertent, given their sheer number, said the court. And therefore they did not

fall within the FLSA’s “window of correction” (29 C.F.R. §541.603(c)) exception. An analysis of over 31,000 paychecks issued to 188 managers showed that paychecks for less than 40 compensable hours were issued to 84% of the managers at 96% of the company’s stores during 97% of the workweeks at issue. Partial-day absences were deducted from 78% of the store managers at 96% of the company’s stores during 84% of the workweeks at issue. Gristedes could not identify even one instance where a manager worked fewer than the scheduled hours but still received a full salary. Further, an employer must demonstrate that it reimburses employees for improper deductions in order to invoke the window of correction, and Gristedes could not point to a single improper deduction that was corrected.

Liability for overtime compensation

Gristedes did not dispute that the managers often worked more than 40 hours in a workweek. However, the company argued that it did not have to pay the managers overtime compensation because it had a policy of not paying managers for unauthorized overtime hours. The court explained that an employer must compensate an employee for any work it “suffers or permits.”

Here, the employer refused to pay the managers any compensation for overtime work, but took only minimal steps to ensure compliance with its policies. In fact, store managers observed managers working overtime hours and then altered their time records to “correct” the hours for the payroll. The court said this policy was unlawful and could not be used to avoid paying overtime.

Liquidated damages

An employer violating the FLSA (i.e., required to pay back

minimum wages and overtime) must pay an additional equal amount in liquidated damages unless it can show good faith and a reasonable basis for believing that it was not in violation of the FLSA. Here, the court said that liquidated damages were warranted because Gristedes could not show it took any active steps to determine the requirements of the FLSA and comply with them.

Willfulness

An employer that willfully violates the FLSA is subject to a three-year statute of limitations on violations instead of the usual two-year limit. Here, the court applied a three-year limitations period because of Gristedes' failure to determine whether its conduct violated the FLSA.

Retaliation

During the course of the managers' litigation, they

amended their complaint to assert personal liability for the FLSA violations against Gristedes' owner and CEO, as well as a District Manager and Vice President. A month later, the company asserted counterclaims against one manager charging sexual harassment and another manager for fraudulent use of a customer's credit card.

A baseless claim or lawsuit designed to deter employees from asserting statutory rights constitutes retaliation even though the claim or lawsuit does not arise precisely in an employment context. Here, the court said that the timing of the counterclaims and the fact that they were "completely baseless" showed that they were made to punish the managers for joining the lawsuit and for naming Gristedes' officers personally. Accordingly, the counterclaims violated the FLSA's anti-retaliation provision (29 USC §215(a)(3)). ■

Bonus Paid After Union OK Was Excluded From Regular Rate of Pay

In a Wage-Hour opinion letter, the U.S. Department of Labor (DOL) discusses whether a bonus payment may be excluded from the regular rate of pay for overtime purposes under the Fair Labor Standards Act [W-H Op. Ltr., FLSA2008-12 (12-1-08)].

A city decided to pay full-time emergency communications operators employed since October 1, 2005, a \$1,000 bonus in recognition of the high stress level of their jobs. The city had made no prior promise to pay such a bonus, but the employees' union had to approve the bonus before the city could pay it. On December 14, 2005, the city signed an agreement with the union approving the bonus, which was paid eight days later.

The DOL explains that a bonus cannot be excluded from the regular rate of pay if it is paid pursuant to any prior contract, agreement, or promise. Here, the city decided

to pay the bonus after the event giving rise to the bonus occurred – full-time employment as of a specific date. The city had discretion both as to the fact and amount of the bonus because it alone decided to pay the bonus, and set the terms and conditions.

Neither the union nor the employees could have compelled the city to decide to pay a bonus, much less dictate the amount. The agreement with the union simply formalized a decision the city had previously made. Moreover, all union involvement in the matter occurred (1) after that decision had been made, and (2) close enough to the end of the period for which the bonus was paid, so that no advance expectation of payment was established. Therefore, the bonus the city provided to its operators was discretionary and excludable from their regular rate of pay. ■

IRS Issues Final Regulations on Disaster Relief

The IRS has issued final regulations implementing the Victims of Terrorism Relief Act of 2001 (Pub. L. No. 107-134) and the Emergency Economic Stabilization Act of 2008 (Pub. L. No. 110-343), and clarifying the rules on the postponement of certain tax-related acts (e.g., filing tax returns, paying taxes, or filing a claim for credit or refund of tax) either due to service in a combat zone or due to a federally declared disaster in light of current IRS practice [74 F.R. 2370, 1-15-09; <http://edocket.access.gpo.gov/2009/pdf/E9-767.pdf>]. The regulations were effective on January 15, 2009.

Under the final regulations, the period of time the Secretary of the Treasury may postpone certain tax-related acts has been increased from 90 days to one year. Additionally, the Secretary is authorized to suspend interest, penalties, additional amounts, and additions to tax that would normally accrue during the time the tax-related act is postponed.

The final regulations set forth how the IRS generally implements postponements of time. The regulations also provide that the IRS may grant further relief to taxpayers by revenue ruling, revenue procedure, notice, announcement, news release, or other guidance published in the Internal Revenue Bulletin in addition to the relief provided by the final regulations.

Although specific tax-related acts may be due on different dates within the postponement period, the acts may be

postponed until the last day of the period. And when an affected taxpayer is required to perform a tax-related act by a due date that falls within the postponement period, the taxpayer is entitled to postponement of the act and is eligible for relief from interest, penalties, additional amounts, and additions to tax during the postponement period.

The final regulations provide that the postponement period runs concurrently with extensions of time to file or pay, if any. For example, when the original due date falls within the postponement period, an affected taxpayer has until the last day of the postponement period to file for an extension of time to file or pay, but any resulting extension runs from the original due date.

The final regulations provide that, where the extended due date, but not the original due date, falls within the postponement period, relief is specific to the type of extension received. For example, an affected taxpayer who received an extension of time to file, but not an extension of time to pay, is eligible for a postponement of time to file and relief from penalties relating to the failure to file. The taxpayer is not eligible for penalty and interest relief relating to the failure to pay, as the payment due date was not extended.

The final regulations clarify that a postponement of time to perform a tax-related act does not extend the due date to perform the act, but instead merely allows the IRS to disregard a time period of up to one year for performance of the act.

In addition, the final regulations:

- Replace the term “Presidentially declared disaster” with “federally declared disaster”; and
- Expand the definition of “affected taxpayer” to include:
 - any individual, business entity, or sole proprietorship

not located in a covered disaster area, but whose records necessary to meet a deadline for a specified act are located in the disaster area; or

- any individual visiting the covered disaster area who was killed or injured as a result of the disaster. ■

Temporary Worker Visa Rules Revised

Over the past several weeks, the Department of Homeland Security and the Department of Labor have issued a variety of guidance of interest to employers on H-2A and H-2B visas for foreign nationals.

H-2A (temporary agricultural workers)

The Department of Labor has issued final regulations effective January 17, 2009, modifying the labor certification process for nonimmigrant temporary or seasonal agricultural workers, and the enforcement of the contractual obligations applicable to employers of such workers [73 F.R. 77110, 12-18-08; <http://edocket.access.gpo.gov/2008/pdf/E8-29309.pdf>]. The regulations streamline the process by requiring employers to file H-2A applications directly with the federal Employment and Training Administration rather than with state agencies. The regulations also increase the length of time employers are required to recruit domestic workers before they are permitted to apply for H-2A workers. In addition, new tools and enhanced penalties are provided, including audits, revocation of certifications, increased debarment authority, and increased fines.

The Department of Homeland Security has issued related final regulations that are also effective January 17, 2009 (73 F.R. 76891, 12-18-08; <http://edocket.access.gpo.gov/2008/pdf/E8-29888.pdf>). These regulations:

- Extend from 10 to 30 days the time a temporary agricultural worker may remain in the U.S. after the end of employment;
- Reduce from six months to three months the time a temporary agricultural worker must wait outside the U.S. before he or she is eligible to reenter the country under H-2A status;
- Permit H-2A workers who are changing from one H-2A employer to another to begin work with the new petitioning employer before the change is approved by U.S. Citizenship and Immigration Services, provided the new employer participates in the E-Verify employment eligibility verification program;
- Require an employer attestation regarding the scope of the H-2A employment and the use of recruiters to locate H-2A workers;
- Crack down on employers and recruiters that impose fees on prospective H-2A workers;
- Eliminate the ability of employers to file an H-2A petition without an approved temporary labor certification;
- Identify foreign countries whose nationals are eligible to participate in the H-2A visa program (see the notice at 73 F.R. 77043, 12-18-08; <http://edocket.access.gpo.gov/2008/pdf/E8-29785.pdf>);
- Establish a land-border exit system pilot program, under which H-2A visa holders admitted through a participating port of entry would also depart through a participating port of entry and present designated biographical information, including biometric identifiers (see the notice at 73 F.R. 77049, 12-18-08; <http://edocket.access.gpo.gov/2008/pdf/E8-29787.pdf>); and
- Require that after an H-2A petition has been granted,

the petitioner notify the Department of Homeland Security, (1) when an H-2A worker fails to report to work within five days of the employment start date on the petition or within five days of the start date established by the petitioner, whichever is later, (2) when the labor or services for which the worker was hired is completed more than 30 days early, (3) when the worker absconds from the worksite or is terminated before completing the labor or services for which he or she was hired, or (4) of any information obtained about the prospective worker's payment or agreement to pay a prohibited fee (see the notice on the required procedures for these notifications at 73 F.R. 77047, 12-18-08; <http://edocket.access.gpo.gov/2008/pdf/E8-29786.pdf>).

H-2B (temporary non-agricultural workers)

A roughly parallel array of regulations and other guidance applicable to H-2B workers was effective on January 18, 2009. The Department of Labor issued final regulations on the labor certification process and enforcement [73 F.R. 78020, 12-19-08; <http://edocket.access.gpo.gov/2008/pdf/E8-29995.pdf>]. Under the regulations, H-2B applications are submitted directly to the Department of Labor rather than being filed with state agencies. Prevailing wage determinations, previously performed by state workforce agencies, are federalized. The regulations also require recruitment efforts to include two advertisements, one of those to be placed on a Sunday. Finally, the regulations implement enhanced compliance enforcement tools such as targeted and random audits, adverse rulings, supervised recruitment, reinstatement of illegally laid off U.S. workers, back wage awards, and fines.

The Department of Homeland Security issued related final regulations (73 F.R. 78104, 12-19-08; <http://edocket.access.gpo.gov/2008/pdf/E8-30094.pdf>) that:

- Remove the requirement for H-2B petitioners to state on petitions the names of prospective H-2B workers who are outside the U.S.;
- Reduce from six months to three months the waiting period for an H-2B worker who has reached his or her maximum three-year period of stay in that status before such worker may seek an extension of status, a change of status, or readmission in another status;
- Revise the definition of “temporary services or labor,” which is generally defined as a period of one year but could be for a specific one-time need of up to three years;
- Eliminate the ability of employers to file an H-2B petition without a temporary labor certification;
- Prohibit H-2B petitioners from requesting an employment start date on the petition that is different from the date of need listed on the approved temporary labor certification;
- Require H-2B petitioners to notify the Department of Homeland Security when the H-2B worker fails to report for work, is terminated prior to the completion of the work for which he or she was hired, or absconds from the worksite (for the required procedures for these notifications, see the notice at 73 F.R. 77816, 12-19-08; <http://edocket.access.gpo.gov/2008/pdf/E8-30094.pdf>).

[gov/2008/pdf/E8-30098.pdf](http://www.dhs.gov/2008/pdf/E8-30098.pdf));

- Prohibit employers from passing the cost of fees charged by an employment service on to prospective H-2B workers as a condition of an offer of employment;
- Identify foreign countries whose nationals are eligible to participate in the H-2B visa program (see the notice at 73 F.R. 77729, 12-19-08; <http://edocket.access.gpo.gov/2008/pdf/>

[E8-30114.pdf](http://www.dhs.gov/2008/pdf/E8-30114.pdf)); and

- Establish a temporary worker exit pilot program that requires certain H-2B workers to register with the Department of Homeland Security when they leave the U.S. (see the notice at 73 F.R. 77817, 12-19-08; <http://edocket.access.gpo.gov/2008/pdf/E8-30093.pdf>). ■

IRS Offers Advice on Reporting Gift Card Redemptions on Form 8027

The IRS has released Chief Counsel Advice on how amounts redeemed with a gift card should be reported on Form 8027, *Employer's Annual Information Return of Tip Income and Allocated Tips* [IRS Chief Counsel Advice, 1-23-08].

Scenario

Taxpayers sell gift cards that customers may redeem for food and beverages. Whether any amount of a gift card may be used to pay a tip typically depends on the policy of the establishment. Thus, when customers redeem gift cards, the gift cards may cover the food and beverage and the tip costs in part or in full. When gift cards cover the food and beverage and tip costs in part, customers may leave additional cash or use a credit card to cover these costs.

Advice

IRC regulations (§31.6053-3(j)) define the terms necessary to complete Form 8027. Although the regulations do not specifically address the treatment of gift cards, receipts from the sale of gift cards are not included in the definition of

gross receipts. Customers use the amounts redeemed with gift cards as cash to cover meal costs. Accordingly, because gross receipts include all cash sales from the provision of food or beverages, the amounts redeemed should be treated as gross receipts for purposes of Form 8027. To the extent that customers may redeem gift cards for tipping, the tip amounts should be treated as cash tips paid to the servers.

(1) Customers who use gift cards may also use credit cards and cash to leave tips and cover meal costs. Taxpayers should report these amounts appropriately as gross receipts, charge receipts, or charged tips.

(2) When customers use gift cards and credit cards to leave tips or cover meal costs, taxpayers should report the credit card amounts that cover meal costs as charge receipts and the tip amounts as charged tips.

(3) When customers use gift cards and cash to leave tips or cover meal costs, taxpayers should report the value of the gift cards and cash amounts as gross receipts on Form 8027. ■

DOL Discusses Compensability of On-Call Time

In a pair of Wage-Hour opinion letters, the U.S. Department of Labor (DOL) offers guidance about the compensability of on-call time under the Fair Labor Standards Act (FLSA) [W-H Op. Ltr., FLSA2008-8NA (5-23-08); W-H Op. Ltr., FLSA2008-14NA (12-18-08)].

Facts

FLSA2008-8NA. A nonprofit ambulance rescue service has two paid employees and 23 volunteers. The employees are required to report to the squad house from 8:00 a.m. to 4:00 p.m. and are paid an hourly wage for this time. In addition, the employees are on call five days a week without compensation from 6:00 a.m. to 8:00 a.m. and from 4:00 p.m. to 6:00 p.m. If an emergency occurs during the on-call period, the employee must drive to the squad house, pick up the ambulance, and then respond to the call. The on-call employee must stay within a specific area and must respond – with the ambulance – to the call within eight minutes. During the winter, emergency calls may occur every day, but at other times, there may be between zero and two emergencies in an entire week.

FLSA2008-14NA. The employer in question requires on-call employees to be reachable at all times, abstain from alcohol or other “substances,” and report to work within one hour of being called.

☞ **WHAT THE LAW SAYS** – An on-call employee who is not required to remain on the employer's premises but is only required to notify the employer about where he or she may be reached is not working while on call if the employee is free to engage in personal activities during that time. On-call time is compensable, however, when the conditions imposed are so restrictive or the calls so frequent that the employee cannot effectively use the time for personal purposes.

The compensability of on-call time must be decided on a case-by-case basis. Various factors are important in determining whether an employee can use on-call time for personal purposes, such as: whether there are excessive geographical limitations on an employee's movement; whether the frequency of the calls received or the response time is unduly restrictive; whether the employee could easily trade on-call responsibilities; whether the use of a pager could ease on-call restrictions; and whether the policy is based on an agreement between the parties.

Rulings

FLSA2008-8NA. The DOL concludes that the employees' on-call time during the winter season is compensable under the FLSA. The extremely short in-person response time precludes the effective use of on-call time for all but the narrowest range of personal purposes, all of which must take place within a restricted geographic area to allow for such a rapid response. The high number of call-ins requires a response every four hours. The employees cannot trade on-call time because both are on call five days a week, and they cannot turn down any of the call-ins. Finally, the use of a pager would provide only limited relief, given the very short in-person response time.

On the other hand, the on-call time during the non-winter months would not be compensable because the frequency of the calls is considerably less (once or twice a week, sometimes none in a week).

FLSA2008-14NA. Here, the DOL concludes that the on-call periods are not compensable under the FLSA because (1) the employer's requirements are not so restrictive as to convert the on-call periods into hours worked, and (2) the call-backs are rare. ■



STATE AND LOCAL NEWS

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Alabama

Tax amnesty program announced. From 2-1-09 through 5-15-09, the Department of Revenue (DOR) is offering a tax amnesty program called "Operation Clean Slate." The DOR will waive penalties and not seek criminal prosecution for delinquent filers that remit all taxes due. Most taxes are eligible for the program, including withholding taxes, provided the employer is unregistered with the DOR. Employers with existing withholding accounts are not eligible. For more information, visit www.ador.state.al.us/cleanslate.html or call 866-326-6755 or 334-242-1055 [DOR, *Revenue Review*, 1st Quarter 2009].

New Jersey

Electronic reporting and payment of employment-related taxes required for all employers. Beginning with the first quarter of 2009, all employers are required to electronically file combined quarterly reports for withholding, unemployment insurance (UI), temporary disability insurance (TDI), and family leave insurance (FLI) purposes – Form WR-30, *Employer Report of Wages Paid*, and Forms NJ-927, NJ-927-W, NJ-927-H, *Employer's Quarterly Report* (this updates *The Payroll Source*®, p. 7-36). Previously, electronic reporting was required for employers with more than four employees. Contributions must also be remitted by electronic means.

West Virginia

State income tax filing and payment requirements revised. Under recent legislation, the due dates for returns and payments to the State Tax Department (STD) will closely follow the IRS schedule as follows:

- **Monthly payments.** Income tax withheld in a given month must be remitted by all employers on or before the 15th of the next succeeding month using a monthly payment voucher (new Form WV/IT-101V). However, employers may remit income tax withheld the same day employees are paid. The first monthly payment is due 2-15-09 for tax withheld in January.
- **Quarterly returns.** A quarterly return (new Form WV/IT-101Q) must be filed by all employers by the last day of the month following the end of each quarter. The first quarterly return is due 4-30-09. Employers that file a quarterly return for 250 or more employees must file electronically at <https://mytaxes.wvtax.gov>.
- **Exceptions.** Employers that withhold less than \$600 annually or employ certain domestic and household employees will continue to file an annual return (new Form WV/IT-101A) and pay the withheld amount annually, and are not required to file a quarterly return. The due date for the annual return remains January 31 of the year after the year for which tax was withheld [STD, Administrative Notice 2009-02, 1-7-09].

Wisconsin

New online tax service introduced. Starting 2-2-09, employers can register and begin using My Tax Account. This free online service from the Department of Revenue (DOR) allows employers to file withholding tax reports and annual reconciliation returns, initiate payments via electronic funds transfer or credit card, send notices of address changes, request extensions to file, or deactivate accounts. Employers that are using the DOR's EFT Registration and Payment System to make withholding tax payments must transition to using My Tax Account by 12-31-09. For more information, visit www.dor.state.wi.us/faqs/my_tax_account.html [DOR, *Withholding Tax Update*, 12-08].

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