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**Note:** Starting with this issue of PAYROLL CURRENTLY, references to *The Payroll Source*® refer to the 2009 edition of the book.

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## IRS Issues Corrections to 2009 Form W-5, But No New Form

The IRS has posted a note on its website [item dated 3-6-09; [www.irs.gov/formspubs/article/0,,id=109875,00.html](http://www.irs.gov/formspubs/article/0,,id=109875,00.html)] cautioning taxpayers that the American Recovery and Reinvestment Act of 2009 (ARRA; Pub. L. No. 111-5; see **PAYROLL CURRENTLY, Issue No. 4, Vol. 17**) increased the earned income credit (EIC) for joint filers and for taxpayers with three or more qualifying children. This affects the 2009 Form W-5, *Earned Income Credit Advance Payment Certificate*, and the 2009 Formulario W-5(SP) because it increases the amount of adjusted gross income (AGI) you can have and still receive the advance EIC if you are married filing jointly.

ARRA affects the instructions as follows:

- On page 1, in item 3 under *Who Is Eligible to Get Advance EIC Payments*, the AGI amount of \$38,583 for married filing jointly should be \$40,463.

- On page 2 of Form W-5 and page 3 of Formulario W-5(SP), question 3 should read: *Do you expect that your 2009 earned income and AGI will each be less than \$35,463 (\$40,463 if married filing jointly) if you expect to have 1 qualifying child; \$40,295 (\$45,295 if married filing jointly) if you expect to have 2 qualifying children; or \$43,279 (\$48,279 if married filing jointly) if you expect to have 3 or more qualifying children?*

- On page 2 of Form W-5 and page 3 of Formulario W-5(SP), under the “Yes” answer to question 3, the AGI amount of \$38,583 for married filing jointly should be \$40,463.

**IMPORTANT NOTE** – The IRS advises that the paper and online versions of the form will not be revised. Instead, the form has been reposted with an addendum page containing the update. This latest “version” of Form W-5 is available on the APA website at [www.americanpayroll.org/members/Forms-Pubs/#tax](http://www.americanpayroll.org/members/Forms-Pubs/#tax). ■

## IRS Issues COBRA Premium Subsidy Q&As for Employers: Part 2

In the last issue of **PAYROLL CURRENTLY**, we included questions and answers for employers on the new COBRA premium subsidy under the American Recovery and Reinvestment Act of 2009 (ARRA; see **PAYROLL CURRENTLY, Issue No. 4, Vol. 17**). This article contains questions and answers from an expanded document offering additional guidance. The complete document, *COBRA: Answers for Employers*, is available on the IRS website at [www.irs.gov/newsroom/article/0,,id=204708,00.html](http://www.irs.gov/newsroom/article/0,,id=204708,00.html).

### Reduced payroll tax deposits

**Q.** *Can an employer reduce its payroll tax deposits during the quarter by the amount of the COBRA subsidy it provides during the quarter without incurring a failure-to-deposit penalty?*

**A.** The amount of the COBRA subsidy the employer provides during the quarter (based on the 35% premium payments

## Payroll Solutions

**Q.** Our company would like to enable employees to make charitable contributions through payroll deductions. How can we implement this in a way that enables employees to take an income tax deduction for the amount of their contributions?

**A.** IRC §170(f)(17), added to the Code in 2006, disallows *any* deductions for charitable contributions of money unless they are substantiated by a bank record or a written communication from the charitable organization showing the name of the organization and the date and amount of the contribution.

IRC §170(f)(8) prohibits taxpayers from deducting charitable contributions of \$250 or more without substantiation of the gift and any substantial goods or services received in return. The required substantiation is a “contemporaneous written acknowledgment” (before the taxpayer files his or her personal tax return for the year of the contribution) from the charitable organization that includes the following information: the amount of cash and a description of any noncash property contributed, whether the charitable organization provided any goods or services in return for the contribution, and a description and good faith estimate of the value of these goods or services. The amount withheld from each wage payment is treated as a separate contribution, so these more burdensome substantiation requirements do not apply unless the employer withholds at least \$250 from a single wage payment for purposes of paying it to a charitable organization.

Both §170(f)(8) and §170(f)(17) must be complied with where they apply. Employers that allow employees to make charitable contributions with payroll deductions should provide documentation of all charitable contributions made by their employees, either on the employees’ pay stubs or Forms W-2 (Box 14), or in a separate statement, not just individual contributions of \$250 or more.

To comply with §170(f)(17), they should also provide employees who had any amounts deducted for charitable contributions with a pledge card or other document prepared by the charitable organization (or by the employer if the charitable organization requests it) that contains the name of the charitable organization. To substantiate a contribution of \$250 or more made by payroll deduction for purposes of §170(f)(8), the pledge card or other document must also include a statement to the effect that the organization does not provide goods or services in exchange for contributions made by payroll deduction. Including such a statement on all pledge cards and other documents showing the name of the charitable organization would ensure that employees have the substantiation they need under both Code sections.

See *The Payroll Source*® pp. 9-54 and 9-55 for more information about charitable contributions made through payroll deductions.

received from assistance eligible individuals during the quarter) will be treated as having been deposited on the first day of the quarter and applied against the employer’s deposit requirements. Therefore, timely deposits up to the amount of the subsidy will be deemed to have been made during the quarter, regardless of the otherwise applicable due dates for deposits. However, in some cases, the amount of the subsidy the employer provides during the quarter will be less than the total amount of the employer’s required deposits during the quarter. In that case, the employer will be required to make timely deposits during the remainder of the quarter to make up the difference.

**EXAMPLE 1:** Employer’s required payroll deposits for the second quarter of 2009 total \$10,000, determined without regard to the COBRA premium subsidy provided by Employer during the quarter. Employer provides assistance eligible individuals with a total COBRA subsidy of \$12,000 during the quarter, based on the 35% premium payments received from the individuals during the quarter, and reports the \$12,000 subsidy on Line 12a of its Form 941 (*Employer’s Quarterly Federal Tax Return*) for the quarter. Employer will be treated as having made a \$12,000 payroll tax deposit on the first day of the quarter and thus will not be subject to a failure-to-deposit penalty for the quarter even if it reduces its deposits during the quarter by the amount of the subsidy. Alternatively, Employer may make some or all of its required deposits during the quarter, determined without regard to the COBRA premium subsidy provided by Employer during the quarter, rather than reducing its total deposits by the subsidy.

**EXAMPLE 2:** Employer’s required payroll tax deposits for the second quarter of 2009 total \$10,000, determined without regard to the COBRA premium subsidy provided by Employer during the quarter. Employer provides assistance eligible individuals with a total COBRA subsidy of \$8,000 during the quarter, based on the

35% premium payments received from the individuals during the quarter, and reports the \$8,000 subsidy on Line 12a of its Form 941 for the quarter. Employer will be treated as having made an \$8,000 payroll tax deposit on the first day of the quarter and thus will not be subject to a failure-to-deposit penalty for the quarter, provided that, once the total of its required deposits exceeds \$8,000, it makes its regularly required deposits for the remainder of the quarter.

### Impact on deposit frequency

**Q.** Will the credit amount taken impact an employer’s current “assigned” deposit frequency or future deposit frequencies?

A. Frequency of deposits and lookback periods are computed from Line 8 of Form 941, before taking into account any credits, including the COBRA credit. Therefore, the COBRA credit will not affect deposit frequency computations.

**APA IS TRACKING ‘FALSE POSITIVE’ CONTACTS** – As we reported in “Inside Washington” for March, the IRS has a “federal tax deposit alert system” that expects deposits from employers based on prior deposit frequency. The IRS wants to know if employers are getting “false positive” contacts through this system due to the application of COBRA credits against deposit liabilities. If this happens to you, please send an e-mail to [smezistrano@americanpayroll.org](mailto:smezistrano@americanpayroll.org).

### No deposit due

**Q.** If the 35% premiums are paid and the subsidy is provided at a point in the quarter where there are no additional federal tax deposits due for the quarter, should the employer claim the credit on the current quarter or the subsequent quarter?

A. Although an employer may reduce its payroll tax deposits during a quarter by the amount of subsidy provided during the

quarter, claiming the credit on Form 941 for the quarter is not dependent on reducing deposits during the quarter. Therefore, even if no additional deposits are due for the quarter, the employer can claim credit for the full amount of the subsidy provided during the quarter on its Form 941 for the quarter. If the amount of the subsidy entered on Form 941 exceeds the employer's tax liabilities for the quarter, the employer can choose to have the excess either refunded or applied to the next quarter.

#### **Notice of refund**

**Q. If the employer chooses to have the excess refunded, will the IRS send a notice before refunding the credit?**

A. If the full amount of the excess is to be refunded to the employer, the IRS will not send a notice before making the refund.

#### **A person other than the employer**

**Q. Is it always the employer that provides the subsidy and takes the credit on its Form 941?**

A. In some cases, a person other than the employer is the proper party to provide the subsidy and take the credit on Form 941. For example, under the legislation, if the COBRA coverage is provided by a multiemployer plan, the plan provides the subsidy and is reimbursed by taking a credit on Form 941.

#### **A form other than the 941**

**Q. Will there be a means other than a quarterly Form 941 for employers to claim credit for the COBRA subsidy provided to assistance eligible individuals? There is some information out there saying the credit can be claimed on a more frequent basis (e.g., weekly).**

A. In all cases, credit for the subsidy must be claimed on the employer's payroll tax return, whether the quarterly filed Form 941 or the annually filed Form 943 (*Employer's Annual Federal Tax Return for Agricultural Employees*) or 944 (*Employer's Annual Federal Tax Return*). A payroll tax return is the only means to claim the credit and be reimbursed for the COBRA subsidy.

#### **Schedule B (Form 941)**

**Q. Will Schedule B (Form 941) continue to reflect the total payroll tax liabilities for the quarter, or will the liabilities reported be reduced by the COBRA subsidy credits?**

A. Schedule B (Form 941), *Report of Tax Liability for Semiweekly Schedule Depositors*, is used to report an employer's payroll tax liability for each payroll period, not the amount of the employer's payroll tax deposits. Therefore, when the employer reduces a deposit by the amount of the COBRA subsidy, this has no effect on the liabilities the employer reports on Form 941, Schedule B (or the monthly totals in Part 2 of Form 941). The employer should still reflect on Schedule B (or in Part 2, Form 941) the total liabilities for all wages reported on Form 941.

**EXAMPLE:** Employer is a semiweekly schedule depositor with a total liability of \$75,000 for the payroll period that ended on February 27, 2009. Employer's regular deposit of \$75,000 would be due on March 4, 2009. Because of a COBRA subsidy obligation of \$5,000, Employer is allowed to reduce the deposit amount to \$70,000. Employer makes a timely deposit of \$70,000 by March 4, 2009. When Employer completes Schedule B (Form 941) for the first quarter of 2009, Employer must enter the total liability, \$75,000, on Day 27 of Month 2. As always, the total liability reported on Schedule B must equal the total taxes reported on Line 10 of Form 941. Employer will reflect the total COBRA subsidy for the quarter on Line 12a of Form 941.

#### **Choosing when to claim the credit**

**Q. Is the employer required to claim the credit on Form 941 for the quarter during which the COBRA subsidy is provided to assistance eligible individuals?**

A. No. Instead of claiming the credit on Form 941 for the quarter during which the COBRA subsidy is provided, the employer may choose to claim the credit for a later quarter in the same calendar year. Alternatively, if the employer has not claimed the credit on the original Form 941 for the quarter during which the COBRA subsidy was provided, the employer can file Form 941-X (*Adjusted Employer's Quarterly Federal Tax Return or Claim for Refund*) for that quarter.

In all cases, however, if an employer chooses to reduce its payroll tax deposits during a quarter by the amount of subsidy provided during the quarter (or during a previous quarter), it must claim the credit for that subsidy amount on Form 941 for the quarter during which its payroll tax deposits were reduced.

#### **The end of the credit**

**Q. Is there a specific date when employers can no longer take this credit?**

A. An individual can be eligible for the COBRA subsidy based on an involuntary termination of employment that occurs as late as December 31, 2009 (the qualifying event), and the subsidy can apply for up to nine months of COBRA coverage, which generally begins shortly after the qualifying event. It is therefore expected that eligibility for the subsidy will be exhausted by the end of 2010 and Form 941 for the fourth quarter of 2010 will be the last time to take the subsidy credit.

#### **Payroll service providers**

**Q. Is there anything that payroll service providers will have to provide to employers and/or the IRS?**

A. Payroll service providers need to communicate with their clients and ensure they maintain proper supporting documentation for the credit claimed, including:

- information on the receipt, including dates and amounts, of the assistance eligible individuals' 35% share of the premium;
- in the case of an insured plan, a copy of an invoice or other supporting statement from the insurance carrier and proof of timely payment of the full premium;
- in the case of a self-insured plan, proof of the premium amount and proof of the coverage provided to the assistance eligible individuals;
- attestation of involuntary termination, including the date of the involuntary termination (which must be during the period from September 1, 2008, to December 31, 2009), for each covered employee whose involuntary termination is the basis for eligibility for the subsidy;
- proof of each assistance eligible individual's eligibility for COBRA coverage at any time during the period from September 1, 2008, to December 31, 2009, and election of COBRA coverage;
- a record of the social security numbers of all covered employees, the amount of the subsidy reimbursed with respect to each covered employee, and whether the subsidy was for one individual or for two or more individuals; and
- other documents necessary to verify the correct amount of reimbursement.

Note that this documentation must be maintained, but will not be required to be submitted to the IRS with Form 941.

#### **Extension of time to file**

**Q. It might be difficult to make the April 30, 2009 deadline for filing the new Form 941. Who should we contact if we want to request an extension of time to file?**

A. No extensions are available for filing of employment tax returns.

#### **Insurance coverage and the COBRA benefit**

**Q. In order to be an assistance eligible individual, must the**

**individual actually have coverage under the group health plan at the time of the involuntary termination of employment?**

A. Yes. The individual must have actual group coverage at the time of the qualifying event, i.e., the involuntary termination of employment. The qualifying event must occur between September 1, 2008, and December 31, 2009, and the individual must be eligible for COBRA coverage at any time during that period.

**Q. Is the COBRA benefit based on the former employee's insurance coverage?**

A. In general, COBRA coverage is based on the same coverage that the individual had at the time of the qualifying

event. However, under the COBRA subsidy provision, an employer may offer an assistance eligible individual the option of choosing other coverage that is also offered to active employees and that does not have higher premiums than the coverage the individual had at the time of the qualifying event.

**Assistance eligible individual's share of the premium**

**Q. Is the assistance eligible individual's share of the premium always 35% of the amount of the total premium, or are there other elections the individual can make?**

A. The assistance eligible individual is required to pay 35% of the amount of the total premium for the coverage he or she elects. This percentage is fixed by statute. ■

## IRS Releases Revised Forms W-2c and W-3c

The IRS has released revised versions of Forms W-2c, *Corrected Wage and Tax Statement*, and W-3c, *Transmittal of Corrected Wage and Tax Statements*, dated February 2009. These forms, along with revised instructions for Forms W-2c and W-3c, are available on the APA website at [www.americanpayroll.org/members/Forms-Pubs/#not](http://www.americanpayroll.org/members/Forms-Pubs/#not). Items to note include the following:

### Form W-2c

Changes have been made to the basic design layout of Form W-2c to reduce the potential risk of exposing taxpayer personal data when this form is mailed using standard window envelopes and to clarify the information reported on the form.

- New Box a – Employer's name, address, and ZIP code (was Box g).
- New Box b – Employer's Federal EIN (was Box d).
- New Box c – Tax year/form corrected (was Box a).
- New Box d – Employee's correct SSN (was Box b).
- New Box e – Corrected SSN and/or name (was Box c).
- New Box f – Employee's previously reported SSN (was Box h).
- New Box g – Employee's previously reported name (was Box i).
- New Box h – Employee's first name and initial, Last name, and Suffix (was Box e).
- New Box i – Employee's address and ZIP code (was Box f).

### Instructions for Forms W-2c and W-3c

The first sentence of the second paragraph has been

changed to read as follows: Corrections reported on Form W-2c may require you to make corrections on your previously filed employment tax returns using the new adjusted return or claim for refund (e.g., Form 941-X, *Adjusted Employer's Quarterly Federal Tax Return or Claim for Refund*).

### Form 843

The IRS has also released a revised version of Form 843, *Claim for Refund or Request for Abatement* ([www.irs.gov/app/picklist/list/formsInstructions.html?value=843&criteria=formNumber](http://www.irs.gov/app/picklist/list/formsInstructions.html?value=843&criteria=formNumber)). The instructions at the top of the form have been modified.

The first two items under "Use Form 843..." have been changed to read as follows:

"(a) a refund of one of the taxes (other than income taxes and an employer's claim for FICA tax, RRTA tax, or income tax withholding), shown on line 3,

"(b) an abatement of FUTA tax or certain excise taxes."

The first item under "Do not use Form 843..." has been changed to read as follows:

"(a) an overpayment of income taxes or an employer's claim for FICA tax, RRTA tax, or income tax withholding (use the appropriate amended return)."

*Note:* Form 941-X has replaced Form 843 for employers requesting a refund or abatement of overreported employment taxes. However, continue to use Form 843 when requesting a refund or abatement of assessed interest or penalties. ■

## USCIS Issues Final Regulations on Employment of Alien Enlistees by the Armed Forces

U.S. Citizenship and Immigration Services (USCIS) has issued final regulations effective February 23, 2009, on the employment authorization and employment eligibility verification of aliens enlisting in the U.S. Armed Forces [74 F.R. 7993, 2-23-09; <http://edocket.access.gpo.gov/2009/pdf/E9-3801.pdf>].

### Employer-specific employment authorization

The regulations provide that any person lawfully enlisted in the U.S. Armed Forces has employer-specific work authorization to serve in the Armed Forces. The new employer-specific work authorization is for those aliens who do not otherwise have work authorization that would permit enlistment, either because they do not have work authorization at all, or because their work authorization is employer-specific for an employer other than the Armed Forces.

In short, if a branch of the Armed Forces lawfully enlists any alien who is not otherwise work authorized, the alien enlistee will

be considered to have work authorization only for the purpose of that enlistment. *Note:* The requirement for lawful enlistment means that the regulations do not provide work authorization to any alien who is falsely or fraudulently enlisted through error or misrepresentation of a qualifying status under 10 USC §504.

The regulations also provide the same limited employment authorization to certain aliens prior to their enlistment, so that they may complete the enlistment process.

The regulations provide work authorization to serve in the Armed Forces as an alien, during which time the alien may apply for naturalization. The regulations do not authorize employment for any employer other than the Armed Forces or for any purpose other than lawful enlistment in the Armed Forces.

### Form I-9 and alien enlistees

For Armed Forces employers only, the Form I-9 (*Employment Eligibility Verification*) document list is modified. The regulations

provide that in the case of an individual lawfully enlisted for military service, a military identification card issued by the Armed Forces may now serve as a List A document to establish both

identity and work authorization. For other employers, a military identification card may continue to be accepted only as a List B identification document. ■

## USCIS Reports on E-Verify Program Enhancements for Foreign-Born Citizens

On March 4, 2009, U.S. Citizenship and Immigration Services (USCIS) reported that more than 112,000 employers now participate in the E-Verify employment authorization program, with an average of 1,000 signing up each week. More than three million queries have been run through the system since October 2008; of those, more than 96% were automatically verified as employment authorized [[www.uscis.gov/files/article/e-verify\\_passport\\_4Mar09.pdf](http://www.uscis.gov/files/article/e-verify_passport_4Mar09.pdf)].

### Targeted program enhancements

In response to a September 2007 E-Verify program evaluation that found foreign-born citizens were more likely to receive mismatches, known as Tentative Non-confirmations (TNCs), than U.S.-born citizens, USCIS has pursued a number of initiatives aimed at those individuals.

**Department of State passport records.** Most recently, in February 2009, USCIS incorporated Department of State passport data into the E-Verify program. If the Department of Homeland Security or the Social Security Administration (SSA) is

unable to immediately confirm a citizen's work eligibility, USCIS can now check State Department records prior to issuing a TNC. If citizenship information provided on Form I-9 (*Employment Eligibility Verification*) matches those records, E-Verify will now seamlessly confirm the individual's work authorization.

**USCIS naturalization databases.** Previously (in May 2008), USCIS added an automated check against USCIS naturalization databases for all newly hired employees claiming U.S. citizenship who were not automatically employment authorized during the SSA check. This enhancement has reduced E-Verify U.S. citizenship-related TNCs by 39%.

**Problem resolution by phone.** Additionally, foreign-born U.S. citizens who receive TNCs may call USCIS directly, rather than visiting an SSA office to resolve their cases. More than 60% of foreign-born U.S. citizens who have received a TNC have chosen this option and, of those, more than 90% have received a final determination of "work-authorized" over the telephone. ■

## IRS Letter Discusses Tax Treatment of Transit Reimbursement Account Balances

Responding to an inquiry from members of the U.S. Senate, the IRS Office of Chief Counsel has written a letter explaining why employees who terminate employment cannot receive any of the balance remaining on their transit reimbursement accounts as taxable compensation [INFO 2009-0008, 12-15-08; [www.irs.gov/pub/irs-wd/09-0008.pdf](http://www.irs.gov/pub/irs-wd/09-0008.pdf)].

The letter begins by explaining that under IRC §132(a)(5) the term "qualified transportation fringe" includes cash reimbursement for (1) transportation in a commuter highway vehicle, (2) any transit pass, and (3) qualified parking.

The regulations allow an employer to provide qualified transportation fringes to employees either as a benefit in addition to an employee's regular compensation or under a compensation reduction agreement (§1.132-9(b) Q/A-11). In these agreements, an employee agrees to contribute pre-tax earnings into an account that he or she can use to pay for qualified transportation fringes. Once the employee elects to convert a portion of pre-tax earnings into a tax-free qualified transportation fringe benefit, the

treatment cannot be reversed (Q/A-14(d)).

Participation in a compensation reduction agreement for the provision of qualified transportation fringe benefits is completely voluntary. However, once the employee has agreed to reduce his or her compensation to pay for commuting expenses, the employee is no longer entitled to receive that compensation. Instead, the employee is entitled to receive nontaxable qualified transportation fringe benefits.

If an employee has a choice between cash compensation or an employer-provided benefit, the law treats the benefit as provided directly by the employer rather than purchased by the employee with the amount of the compensation reduction. It is this treatment that allows the value of the benefit to be excluded from income for tax purposes. If the employee could choose to receive the benefit at any time in the form of cash rather than qualified transportation fringe benefits, then the employee would be treated as constructively receiving the benefits as compensation and would be taxed on the full value. ■

## IRS Announces Quarterly Interest Rates

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

- 4% (3% in the case of a corporation) for tax overpayments;

- 4% for tax underpayments;
- 6% for large corporate underpayments; and
- 1.5% for the portion of a corporate overpayment exceeding \$10,000 [Rev. Rul. 2009-07; [www.irs.gov/pub/irs-drop/rr-09-07.pdf](http://www.irs.gov/pub/irs-drop/rr-09-07.pdf)]. ■

## Capitol Hill Update

The following are some of the payroll-related bills introduced in the 111th Congress from January 6 to March 6, 2009.

### Cell phones as 'listed property'

S. 144, introduced in the Senate on January 6, 2009, would amend IRC §280F to remove cell phones from the items designated as "listed property." *Note:* An identical bill (H.R. 690)

was introduced in the House on January 26, 2009.

Listed property includes items obtained for use in a business but lending themselves easily to personal use. A letter from the IRS Office of Chief Counsel discusses the tax treatment of cell phones (see *PAYROLL CURRENTLY*, Issue No. 23, Vol. 15), explaining that in order to ensure that an employee's business

use of an employer-provided cell phone is excludable from gross income, the employee must keep a record of each call and its business purpose.

#### **Withholding tax on government contractors**

H.R. 275, introduced in the House on January 7, 2009, would repeal IRC §3402(t), which generally requires information reporting and withholding at the rate of 3% on payments to persons providing property or services to a state or local government entity with \$100 million or more of covered annual expenditures. *Note:* A similar bill (S. 292) was introduced in the Senate on January 21, 2009.

Subsection 3402(t) was originally effective for payments made after December 31, 2010. The American Recovery and Reinvestment Act of 2009 (see **PAYROLL CURRENTLY, Issue No. 4, Vol. 17**) delayed the effective date of §3402(t) for one year, to payments made after December 31, 2011.

#### **Charitable mileage rate**

H.R. 345, introduced in the House on January 8, 2009, would amend IRC §170 to increase the mileage rate for the charitable use of passenger automobiles from “14 cents per mile” to “the standard mileage rate for business purposes” as prescribed by the Secretary of the Treasury (i.e., 55 cents per mile in 2009).

H.R. 524/S. 243, introduced on January 14, would amend §170 to provide that the rate would be “determined by the Secretary,” and that it could “not be less than” the rate used for deducting travel expenses related to medical care (i.e., 24 cents per mile in 2009).

#### **Flexible spending arrangements (FSAs)**

**Health FSAs.** H.R. 544, introduced in the House on January 14, 2009, would allow up to \$500 of unused benefits in a health FSA to be carried forward to the next plan year or be contributed to a health savings account or qualified retirement plan.

**Transportation FSAs.** H.R. 971, introduced on February 10, 2009, would amend IRC §125 to allow qualified transportation fringe benefits to be offered through an FSA in a cafeteria plan.

**Dependent care FSAs.** H.R. 1279, introduced on March

3, 2009, would amend IRC §125 to allow qualified dependent care benefits up to \$3,750 per year (\$7,500 in the case of a joint return) to be offered through an FSA in a cafeteria plan. The bill would also allow unused dependent care benefits to be carried over to the next plan year.

#### **Transportation fringe benefits for bicycle commuters**

H.R. 863, introduced in the House on February 4, 2009, would amend IRC §132(f) to equalize the treatment of transportation fringe benefits for bicycle commuters. For example, the definition of “qualified bicycle commuting month” would be amended by eliminating the provision that a qualified month is any month for which the employee does *not* receive any other qualified transportation fringe benefit.

#### **Private sector comp time**

H.R. 933, introduced in the House on February 10, 2009, would amend the Fair Labor Standards Act to provide that private sector employees may receive compensatory time off in lieu of monetary overtime compensation, subject to certain conditions (e.g., prior voluntary agreement) and limitations (e.g., 160-hour maximum accrual). *Note:* the bill is virtually identical to earlier proposals analyzed by the Congressional Research Service (see **PAYROLL CURRENTLY, Issue No. 20, Vol. 14**).

#### **Family and Medical Leave Act (FMLA)**

H.R. 389, introduced in the House on January 9, 2009, would eliminate the hours-of-service requirement – i.e., that an employee have served at least 1,250 hours during the 12-month period before an FMLA leave request. Employment for at least 12 months by a covered employer would make an employee eligible for coverage under the FMLA.

H.R. 824, introduced in the House on February 3, 2009, would expand the FMLA to allow employees to take up to an additional 24 hours of leave during a 12-month period for “parental involvement” (e.g., to participate in or attend their children’s or grandchildren’s educational and extracurricular activities) and “family wellness” (e.g., for routine family medical care needs or the care needs of elderly relatives) purposes. ■

## **Totalization Agreements With the Czech Republic and Poland Enter Into Force**

Since **PAYROLL CURRENTLY** last reported on the subject (see **Issue No. 19, Vol. 16**), social security “totalization” agreements with the Czech Republic and Poland entered into force on January 1, 2009 [73 F.R. 80505, 12-31-08; <http://edocket.access.gpo.gov/2008/pdf/E8-31136.pdf>], and March 1, 2009 [74 F.R. 8833, 2-26-09; <http://edocket.access.gpo.gov/2009/pdf/E9-4104.pdf>], respectively.

As with most totalization agreements, the new agreements provide that a worker sent by an employer in one country to work in the other country for five or fewer years remains covered only by the sending country. The agreements also include additional rules that eliminate dual coverage in other work situations.

*Note:* Totalization agreements relieve U.S. workers and their employers from the burden of contributing to the social security systems of two countries. Under these agreements, U.S. employers and employees contribute to either the U.S. or foreign social security system, but not both, depending on how long they are in the country where they are working. Without a totalization agreement in place, it is possible for workers dividing their time between the U.S. and another country to fail to qualify for social security benefits from either country because they do not meet minimum eligibility requirements.

**Czech Republic agreement.** Under the agreement with the

Czech Republic, it is expected that over 5,000 people will qualify for benefits once the agreement has been in force for five years.

**Poland agreement.** Under the agreement with Poland, it is expected that as many as 13,000 people will qualify for benefits this year.

#### **U.S.-Mexico agreement awaiting approval**

An agreement between the U.S. and Mexico, signed on June 29, 2004, is still awaiting review by the U.S. Congress and approval by the Mexican Senate before it can take effect. Over the first five years of this agreement, the Social Security Administration (SSA) estimates that nearly 3,000 U.S. workers and their employers will realize approximately \$140 million in tax savings. After five years, the SSA estimates that nearly 50,000 workers in the U.S. and Mexico will be eligible to receive benefits.

A fact sheet issued by the SSA on the date the agreement with Mexico was signed points out that:

- A totalization agreement does not change existing immigration laws. The agreement with Mexico does not require the U.S. to pay benefits to undocumented aliens, has no effect on the prohibition against the payment of benefits to illegal aliens in the U.S., and would be no different in this regard than the other totalization agreements now in effect.
- The agreement with Mexico would have a negligible effect

on the social security trust funds. It would cost the U.S. social security system only about \$105 million per year over the first five years.

- Benefits under a totalization agreement are paid on a prorated basis. Aliens working for a short time in the U.S. do not receive full social security benefits under a totalization agreement.

#### **24 agreements currently in effect**

As of March 1, 2009, the U.S. has totalization agreements in effect with 24 countries – Australia, Austria, Belgium, Canada, Chile, the Czech Republic, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Japan, Luxembourg, the Netherlands, Norway, Poland, Portugal, South Korea, Spain, Sweden, Switzerland, and the United Kingdom.

The U.S. has negotiated and signed agreements with 8 of its 10 largest trading partners. By law, agreements with the other two (China and Taiwan) are not permitted because those countries do not have generally applicable social security systems in place that pay periodic benefits (or the actuarial equivalent).

#### **Benefits under a totalization agreement**

**Temporary foreign assignment.** Under a totalization agreement, expatriate employees working “temporarily” in the foreign country (generally up to five years) are subject to U.S. social security and Medicare taxes only, to the same extent their compensation would be subject to those taxes had they remained in the U.S. On the other hand, wages earned by employees working “permanently” in the foreign country are subject only to the foreign country’s social security taxes.

Under all but two of the agreements currently in force, a “temporary” assignment can last no more than five years. Under the agreement with Germany, the limit is nine years, while the

agreement with Italy allows temporary assignments to run for an indefinite period of time.

**Establishing exemption from foreign tax.** To establish that an employee’s wages are subject to U.S. social security and Medicare taxes but are exempt from foreign social security tax, the employer must get a “Certificate of U.S. Coverage” from the SSA. To establish that a foreign employee’s wages are exempt from U.S. social security and Medicare taxes under a totalization agreement, the employee or the employer should get a statement from an authorized social security official or agency of the foreign country (see *The Payroll Source*®, p. 14-4).

#### **Online resources for employers**

To find out more information about totalization agreements, go to the SSA website ([www.socialsecurity.gov](http://www.socialsecurity.gov)), select “International” from the “Other Useful Links” dropdown list, click the “Go” button, and click “International Agreements” for links to:

- *General Overview.* Look here to learn how the bilateral agreements program helps people who work in the U.S. and abroad.

- *Description and Text of Each Agreement.* Look here for online versions of SSA pamphlets describing each of the U.S. agreements, as well as the complete text of each.

- *Certificates of Coverage.* Look here to learn how to request the documentation needed to avoid social security taxes in a foreign country under an agreement and to access the SSA’s online Certificate of Coverage service, which allows employers to request certificates via the Internet.

- *Status Table.* Look here for a table showing the signing date, effective date, and legal citation for all agreements in force and the status of pending agreements. ■

## **IRS Ends Private Debt Collection Experiment**

The IRS has announced that it will not renew its contracts with two private debt collection agencies [IR-2009-019; [www.irs.gov/newsroom/article/0,,id=205021,00.html](http://www.irs.gov/newsroom/article/0,,id=205021,00.html)].

IRS Commissioner Doug Shulman said that the work “is best done by IRS employees,” who have more flexibility handling cases. He also noted that the IRS anticipates hiring over 1,000 new collection personnel.

Shulman cited the results of a cost-effectiveness study of the private debt collection program – supported by an independent review – showing that when working similar inventory, IRS collection is more cost effective than the

contractors.

“In these challenging economic times, I have asked all IRS employees to go the extra mile to help financially distressed taxpayers,” Shulman said. “IRS employees have more options available to them to resolve difficult collection cases.”

*Note:* The American Jobs Creation Act of 2004 (see **PAYROLL CURRENTLY, Issue No. 22, Vol. 12**), which authorized the IRS to use private debt collection contractors, spelled out limited steps those contractors could take and provided that cases still open after a certain time would be turned back over to the IRS. ■

## **IRS Announces Expanded TIN Matching Program Availability**

The IRS has announced that payers who will be required to file returns under IRC §6050W may now match Taxpayer Identification Numbers (TINs) under the IRS’s TIN Matching Program [Ann. 2009-6, 2-6-09; [www.irs.gov/pub/irs-drop/a-09-06.pdf](http://www.irs.gov/pub/irs-drop/a-09-06.pdf)].

The Housing and Economic Recovery Act of 2008 (see **PAYROLL CURRENTLY, Issue No. 16, Vol. 16**) added §6050W to the Internal Revenue Code. The new section requires information returns to be filed for each calendar year by merchant acquiring entities and third-party settlement organizations with respect to payment card transactions and third-party payment network transactions occurring in that calendar year. The requirement applies to returns for calendar years beginning after December 31, 2010.

The Act expanded the meaning of “other reportable payments” subject to backup withholding to include payments required to be shown on an information return under §6050W.

Backup withholding with respect to amounts reportable under §6050W applies to amounts paid after December 31, 2011.

*Note:* A payer may be required to perform backup withholding by deducting and withholding income tax from a reportable payment if the payee fails to furnish its TIN or if the IRS notifies the payer that the TIN furnished by the payee is incorrect.

The TIN Matching Program permits program participants to verify the payee TINs required to be reported on information returns and payee statements. Prior to filing an information return, a participant may check the TIN furnished by a payee against the name/TIN combination in the IRS program database, and the IRS will inform the participant whether or not it matches a name/TIN combination in that database. This information will help avoid TIN errors, reduce the number of backup withholding notices required, and provide participants with “reasonable cause” relief from penalties. ■



## STATE AND LOCAL NEWS

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### California

**Menu of work schedule options refined.** Existing California law allows an employer to propose an alternative workweek schedule that may be either a single, standard work schedule or part of a menu of work schedule options offered to employees. Approval by a secret ballot election of at least two-thirds of the affected employees in a work unit is required for adoption of an alternative workweek schedule. Effective 5-22-09, the menu of work schedule options may include a regular schedule of eight-hour days. Employees who adopt a menu of work schedule options may, with employer consent, move from one schedule option to another on a weekly basis. A "work unit" is defined as a division, department, job classification, shift, separate physical location, or a recognized subdivision thereof, and may consist of an individual employee as long as the standard of an identifiable work unit is met [A.B. X2 5, L. 2009].

### Massachusetts

**New bank announced for child support payments sent via EFT.** Effective 4-1-09, child support payments submitted to the Department of Revenue, Child Support Enforcement Division (CSED), via electronic funds transfer (EFT) must be sent to the Bank of America. Payments submitted via EFT to Citizens Bank after 3-31-09 may not be processed on time and may be returned to the employer. The new bank routing number is 011000138 and the bank account number is 4618089707 [CSED letter, 3-13-09].

### Oregon

**Mandatory electronic W-2 filing threshold lowered.** Effective with 2009 Forms W-2 filed in 2010, employers with 250 or more employees and all payroll service providers must electronically file Forms W-2. Effective with 2010 Forms W-2 filed in 2011, the threshold for employers not using a payroll service provider will decrease to 50 or more employees. Effective with 2011 Forms W-2 filed in 2012, all employers must electronically file Forms W-2 (this updates *The Payroll Source*®, p. 8-105). The due date for electronic filing of Forms W-2 is March 31 following the close of the calendar year [Or. Adm. R. §150-316.202(3)].

### Wisconsin

**Minimum wage and tip credit increases anticipated.** Effective 7-24-09, the minimum wage will increase to \$7.25 an hour from \$6.50 an hour (this updates *The Payroll Source*®, p. 2-68). Also effective 7-24-09, the minimum wage for minor employees (any person under age 18) will increase to \$7.25 an hour from \$5.90 an hour. The minimum wage for opportunity employees will remain \$5.90 an hour. An "opportunity employee" means an employee who is under age 20 during the first 90 consecutive days of employment.

The minimum wage for a tipped employee (except an opportunity employee) remains \$2.33 an hour. Because of the state minimum wage increase, the tip credit will increase to \$4.92 an hour from \$4.17 an hour, effective 7-24-09 (this updates *The Payroll Source*®, p. 2-69). The minimum wage for a tipped opportunity employee remains \$2.13 an hour; the tip credit is \$3.77 an hour [Wis. Adm. Code DWD §272.03].

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