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## Inside this issue...

*Tip Jar Amounts Were Not Subject to FICA Tax at the Time of Distribution* ..... 2

*Capitol Hill Update* ..... 2

*IRS Offers Guidance to Reclassified Employees Following a Work Status Determination* ..... 3

*Termination of Employment for Failure to Comply With Call-in Procedures Did Not Violate the FMLA* ..... 3

*Court Discusses Loss of Exempt Status for Improper Salary Deductions* ..... 4

*Employer's Tool Plan Was Accountable Plan* ..... 4

*Wage & Hour Roundup* ..... 5

*Information Reporting Requirement Enacted for Payment Card and Third-Party Network Transactions* ..... 5

*Benefits Paid Under City's Length of Service Award Program Were Not Wages for FICA Tax Purposes* ..... 7

*PBGC Issues Proposed Regulations on Pension Benefits Under USERRA* ..... 7

*Emergency Responder Benefits Excluded From Income* ..... 7

*State and Local News*

*New Hampshire - online UI system established*

*New Jersey - guidelines established for W-2 reporting of state mandated withholding; withholding tables revised*

*Wisconsin - supplemental wage tax rates changed; withholding tables revised* ..... 8

## IRS Responds to APA Questions on Employer Processing of Wage Levies

IRS officials recently provided answers "on the record" to three APA questions on employer processing of wage levies [E-mail to Jim Medlock, APA Director of Education and Training, 7-10-09].

### Where should contact be made when an IRS levy is to be paid off to get the final payment figure?

Call the number of the IRS office listed on the top of the Form 668W, *Notice of Levy*, or call 1-800-829-3903 if you cannot find the *Notice of Levy*. The contact person listed on the *Notice* or other representative will answer your questions regarding the levy. Maintaining an easily accessible original or copy of the *Notice of Levy* will provide a ready reference for the information needed to secure the final payment figure.

### Can large-scale employers send levy proceeds as a single paper check payment to be split?

An employer can send levy payments as a single paper check payment if the following conditions are met:

- The proceeds are being sent in response to an IRS *Notice of Levy*.
- The single paper check payment must be accompanied by a list to ensure proper application of the levy payments. The list must clearly identify:
  - the taxpayer identification number(s) listed on the levy,
  - the name of the taxpayer listed on the levy,
  - all taxes ("Kind of Tax") and all tax periods ("Tax Period Ended") listed on the levy, and

- the payment amount for each taxpayer.

- The list accompanying the payment must include an employer contact name and telephone number. This will ensure the payment processing site has a contact to resolve any questions regarding the application of the payment.
- The payments and lists should be grouped by the IRS return address listed on the *Notice of Levy*. This will ensure there are no delays in processing the payment.
- There must be fewer than 200 taxpayers listed for any single paper check payment.

### Why is there no taxpayer signature on Letter 3676, Payroll Deduction Installment Agreement Fax Letter, and are these valid?

Letter 3676 is used to facilitate the processes of releasing a notice of levy and establishing a payroll deduction installment agreement simultaneously. Letter 3676 contains instructions to implement a payroll deduction installment agreement established by *verbal* agreement. A *verbal* installment agreement is valid without a taxpayer signature. IRS policy does not require a written signature for these payroll deduction installment agreements.

**APA OFFERS GARNISHMENTS FORUM** – To learn more, go to [www.americanpayroll.org/product/7/37](http://www.americanpayroll.org/product/7/37) and sign up to attend the APA's *Garnishments Forum*. This one-day class is taught at locations around the country through August 21. ■

## Tip Jar Amounts Were Not Subject to FICA Tax at the Time of Distribution

The IRS has released Chief Counsel Advice on the proper tax treatment of “tip jar” amounts distributed to employees [IRS Office of Chief Counsel Memorandum No. 200929004, released 7-17-09; [www.irs.gov/pub/irs-wd/0929004.pdf](http://www.irs.gov/pub/irs-wd/0929004.pdf)].

### Scenario

A company engaged in retail sales has multiple locations. At each location, a tip jar is placed near the register. Cash amounts left in the jar by customers cannot be designated for any particular employee. At closing, the day’s tip jar receipts are gathered, logged, and placed in the store safe.

Tip jar receipts are counted and distributed weekly to non-management employees by a “designated employee” who is also non-management. As part of this process, the store manager prints the store’s time sheet for the week, sorted by employee, and provides it to the designated employee. The designated employee then calculates the amount each employee should receive based on his or her share of tippable hours worked.

The designated employee places the weekly amount determined for each employee in a sealed envelope in the store safe until the employee is available to take possession of it. The company does not request and employees do not provide reports of amounts distributed from the tip jar.

### Question

Should the amounts placed in the tip jars be treated as (1) wages subject to FICA tax at the time they are distributed, or (2) as tips under IRC §3121(q) so that unreported tips will not be subject to the employer share of FICA tax until the IRS makes a notice and demand for the taxes from the company?

### Analysis

Under §3121(q), tips received by an employee in the course of the employee’s employment are considered

remuneration for that employment (and are deemed to have been paid by the employer for purposes of the employer portion of FICA taxes imposed by §3111). The remuneration is deemed to be paid when a written statement including the tips is furnished to the employer by the employee pursuant to §6053(a). However, if the employee either does not furnish the statement or the statement furnished is inaccurate or incomplete, then in determining the employer’s liability in connection with the FICA tax imposed by §3111 with respect to the tips, the remuneration is deemed to be paid on the date on which notice and demand for the taxes is made to the employer by the IRS.

Tips are not defined in the Internal Revenue Code or IRS regulations. However, published guidance (Revenue Ruling 59-252) provides three criteria that indicate when amounts received are tips:

- The contributions of money must be made “free from compulsion”;
- The customer must have the “unrestricted right to determine the amount thereof”; and
- The contributions “should not be subject to negotiation or dictated by employer policy.”

### Answer

Here, the contribution of money by customers to the tip jars meets these criteria. Therefore, the contributions are tips. Moreover, the contributions do not lose their identity as tips by either the use of a tip jar to collect them or the procedures by which they are stored and distributed. Because the tip jar amounts are tips under §3121(q), unreported amounts will not be subject to the employer share of FICA tax until the IRS makes a notice and demand for the taxes from the company. ■

## Capitol Hill Update

The following are some of the payroll-related bills introduced in the 111th Congress from May 1 to August 1, 2009.

### Minimum wage

**Tipped employees.** H.R. 2570 would establish a base minimum wage for tipped employees of \$3.75 an hour beginning 90 days after the date of enactment and increasing to \$5.00 an hour on July 1, 2011. On July 1, 2012, and as necessary thereafter, this special minimum wage would be adjusted so that it was 70% of the federal minimum wage but in no case less than \$5.50 an hour.

**Poverty threshold.** H.R. 3041 would provide for calculation of the minimum wage based on the federal poverty threshold as determined by the Census Bureau. By June 1, 2010, and every four years thereafter, an adjusted rate would be calculated. It would be published in the Federal Register and take effect by the following October 1. If the calculation resulted in a lower minimum wage than that then in effect, the minimum wage would not be adjusted.

### Property tax abatements: employment tax exemption

H.R. 2208 would allow individuals who have attained age 60 or are disabled an exemption from income and employment taxes for real property abatements received under a state or local program in which such individuals have provided services in exchange for such abatements. *Note:* The IRS takes the position that such property tax abatements are wages because they are compensation for services, and that

payment of the employee portion of FICA tax (necessary in these situations because the workers receive no cash from which the government employer can withhold) is *also* wages (see FSA 200132035, 7-10-01).

### PEO certification

H.R. 2447 would treat professional employer organizations (PEOs) certified by the IRS as employers for employment tax purposes – thus allowing such PEOs to pay wages and collect and remit payroll taxes on behalf of an employer. The bill sets out the certification requirements for PEOs, including bond and independent financial review requirements. A PEO would be required to post a bond, up to \$1 million, to guarantee payment of employment taxes; the bond would be limited to \$50,000 for a newly created PEO during its three-year startup period.

### Expanded definition of ‘medical expenses’

**Qualified sports and fitness expenses.** H.R. 2105 would amend IRC §213 to define as medical expenses up to \$1,000 (\$2,000 for married couples filing jointly or heads of household) of “qualified sports and fitness expenses” (i.e., amounts paid for fitness center memberships, physical exercise programs, and exercise equipment).

**Special dietary foods.** H.R. 3263 would amend §213 to define as medical expenses amounts paid for foods for special dietary use, dietary supplements (as defined by the Federal Food, Drug, and Cosmetic Act), and medical foods.

**Paid time off: minimum standards**

**Paid sick time.** H.R. 2460 (S. 1152) would require employers with 15 or more employees to permit each employee to earn at least one hour of paid sick time for every 30 hours worked. Accrued time would carry over from one year to the next, but employers would not be required to permit accruals of more than 56 hours. Employees would be allowed to use such time to: (1) meet their own medical needs, (2) care for the medical needs of specified family members, or (3) seek medical attention, take legal action, or engage in other specified activities relating to domestic violence, sexual assault, or stalking.

**Paid vacation.** H.R. 2564 would require employers with 100 or more employees to provide employees at least one week of paid vacation during each 12-month period. Three years after the date of enactment, this would increase to two weeks of paid vacation during each 12-month period, beginning on the first anniversary of an employee's employment. In addition, three years after the date of enactment, employers with 50 or more employees would have to provide employees at least one week of paid vacation during each 12-month period.

**Expansion of FMLA leave**

**Domestic violence.** H.R. 2515 would amend the Family

and Medical Leave Act to allow leave to address domestic violence, sexual assault, or stalking, and their effects, and to include domestic partners under the Act.

**Organ donations.** H.R. 2776 would amend the Family and Medical Leave Act to allow leave for individuals to provide living organ donations – including pre-transplant tests, evaluations, and other services, post-operative recuperation and services, and travel in connection with these items.

**Dependent care assistance**

H.R. 2298 would increase the amount that may be excluded from an employee's income under a dependent care assistance program from \$5,000 (\$2,500 for married individuals filing separately) to \$7,500 (\$3,750), and would adjust this amount for inflation each year after 2010.

**Telecommuters**

H.R. 2600 would prohibit a state from imposing an income tax on the compensation of a nonresident individual for any period when the individual is not physically present in or working in such state or from deeming such nonresident individual to be present in or working in such state on the grounds that: (1) the individual is present at or working at home for convenience, or (2) the individual's work at home fails any convenience of the employer test or any similar test. ■

## IRS Offers Guidance to Reclassified Employees Following a Work Status Determination

The IRS has posted guidance for reclassified employees on its website. The guidance is in the form of answers to questions on how to complete and file income tax returns to deal with the change in employment status to employee from independent contractor. *Commonly Asked Questions When IRS Determines Your Work Status is "Employee"* [Notice 989, 7-09; [www.irs.gov/pub/irs-pdf/n989.pdf](http://www.irs.gov/pub/irs-pdf/n989.pdf)] include the following:

- What should I do now?
  - If I haven't filed a federal tax return yet;
  - If I have already filed a federal tax return, but did not report the Form 1099-MISC income;
  - If I have already filed a federal tax return and reported the income but did not compute the FICA tax on the income; or
  - If I have already filed a federal tax return, but reported my Form 1099-MISC income as self-employment income and not wages.
- What if I already paid my portion of FICA tax with my

original return using Form 4137 or Form 8919?

- What if my employer provides me with a corrected Form W-2 that reflects payment of my portion of FICA tax?
- How do I get money back if I already filed my return?
- What if I reported my Form 1099-MISC income on Schedule C and claimed expenses?
  - What if I still have other unrelated business income to report on Schedule C?
  - Will I get back all the Self Employment Tax I paid?
  - What if I'm getting bills for my taxes that will be affected by my new status as an employee?
  - How do I amend my tax return?
  - What if I filed the request for a determination as a result of contact from the IRS Automated Under-Reporter (AUR) operation?
  - What if I filed the request for a determination as a result of an audit of my tax return? ■

## Termination of Employment for Failure to Comply With Call-in Procedures Did Not Violate the FMLA

Melody Bacon, a janitor at the Hennepin County Medical Center (HCMC), went out on intermittent and indefinite leave under the Family and Medical Leave Act (FMLA). HCMC's call-in policy required an employee on indefinite sick leave to call in absences every day, and Bacon did so for about a month. Under the union contract governing Bacon's employment with HCMC, three consecutive days of absence without notice was considered a voluntary termination of employment. On Bacon's fourth consecutive day of absence without calling in, her department director wrote a letter notifying her that she was deemed to have resigned. Bacon sued HCMC for interfering with her FMLA rights by terminating

her employment while she was on FMLA leave.

The Eighth Circuit Court of Appeals said that even though Bacon was entitled to FMLA leave at the time she was fired, HCMC was still entitled to fire her for violating the call-in policy. The court explained that Bacon's employment would have been terminated for violation of the call-in policy regardless of whether the absences were related to FMLA leave, so there was no interference with her FMLA rights.

Bacon argued that HCMC violated the FMLA's notice requirements because it failed to provide her with specific written notice of the call-in requirement at the time she filed for FMLA leave. There was no violation here, said the court.

Although FMLA regulations require an employer to provide written notice about the expectations and obligations required of an employee on FMLA leave, the regulations explicitly state that the employer's notice is *not* required to specify that the employer will require periodic reports of the employee's status and intent to return to work (former 29 C.F.R. §825.301(b); now 29 C.F.R. §825.300(c)). Moreover, HCMC gave explicit

notice in other ways that employees were required to follow its call-in policy even when on FMLA leave: the company's FMLA leave form notified employees that its human resources rules or labor agreements applied to FMLA absences; and the employee handbook specified that the FMLA did not change the company's leave procedures [*Bacon v. Hennepin County Medical Center*, 550 F.3d 711 (8th CA, 12-22-08)]. ■

## Court Discusses Loss of Exempt Status for Improper Salary Deductions

The Sixth Circuit Court of Appeals has ruled that employees otherwise exempt from the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA) lost their exempt status from the beginning of 2004, when their employer's policy on salary deductions went into effect, until August 23, 2004, when new FLSA regulations issued by the U.S. Department of Labor (DOL) went into effect. After the effective date of the new regulations, the employees' exempt status was only lost for three pay periods in 2005 when improper deductions were actually made [*Baden-Winterwood v. Life Time Fitness, Inc.*, 566 F.3d 618 (6th CA, 5-19-09)]. *Note:* This ruling reverses an earlier decision in the case (see **PAYROLL CURRENTLY, Issue No. 20, Vol. 15**).

### Compensation plan

Senior management and department heads at Life Time Fitness were covered by a bonus plan, under which employees were paid a predetermined amount of compensation as a base salary on a semimonthly basis and were eligible to receive monthly bonus payments based on year-to-date performance. Under the program, it was possible for a department head to be on track to meet annual goals early in the year, but then fall behind later in the year.

**Right to make deductions.** Effective January 1, 2004, Life Time Fitness altered the bonus plan to include language whereby the company "reserved the right" to make deductions from a covered employee's base salary to recover earlier bonus overpayments on a year-to-date basis. During 2004, the company made no deductions from covered employees' salaries.

**Actual practice of making deductions.** In 2005, Life Time Fitness again reserved the right to make salary deductions to recover bonus overpayments. For three pay periods in November and December 2005, the company reduced the base salaries of eight employees to recover unearned bonus payments they had received earlier in the year.

### Salary basis test

Among other things, the test for exemption as an administrative, executive, or professional employee under the FLSA includes a salary basis test (see *The Payroll Source*®, p. 2-6). Under FLSA regulations, an employee is paid on a salary basis if the employee "regularly receives each pay period ... a predetermined amount constituting all or part of [the employee's] compensation, which amount is not subject to reduction because

of variations in the quality or quantity of the work performed" (former 29 C.F.R. §541.118(a); now 29 C.F.R. §541.602(a)). Here, the Sixth Circuit said Life Time's bonus policies and salary reductions were governed by the law in effect during the pay periods in question.

**Pay periods prior to August 23, 2004.** In 1997, the U.S. Supreme Court, in *Auer v. Robbins* (519 U.S. 452), adopted the then-DOL position that an employee is not paid on a salary basis if (1) there is an actual practice of salary deductions, or (2) an employee is compensated under a policy that "clearly communicates a significant likelihood" of deductions.

For pay periods before August 23, 2004, the court said the "actual practice" test was not satisfied because Life Time made no actual deductions from employees' salaries between January 1 and August 23, 2004. However, there was a "significant likelihood" of deductions between January 1 and August 23, 2004, so the employees were not exempt during this period.

Life Time's compensation plan in 2004 plainly stated a policy under which the company would make salary deductions, and it took affirmative steps to enforce the policy through a performance pay committee that administered the company's bonus plan, monitored employee performance, and determined whether or not to make deductions. The fact that the company did make actual deductions from employee pay in 2005 indicated that employees' pay was "subject to reduction" under the 2004 company bonus plan.

**Pay periods on and after August 23, 2004.** The 2004 regulations governing improper salary deductions do not include a provision that a "significant likelihood" of improper deductions causes an employee to lose the exemption. Under these regulations, only an "actual practice" of making improper deductions from salary demonstrates that an employer did not intend to pay employees on a salary basis and, if there has been an actual practice, the exemption is only lost only during the time when the improper deductions were made (29 C.F.R. §541.603).

Here, because employee salaries were actually reduced three times in 2005 by improper deductions, the exemption was lost for those pay periods. "Life Time Fitness knowingly made salary deductions as part of a pre-designed bonus compensation plan" tied to the quality and quantity of an employee's work. ■

## Employer's Tool Plan Was Accountable Plan

In a private letter ruling, the IRS has ruled that an employer's tool expense reimbursement arrangement was an accountable plan [LTR 200930029, 7-24-09; [www.irs.gov/pub/irs-wd/0930029.pdf](http://www.irs.gov/pub/irs-wd/0930029.pdf)]. *Note:* In a coordinated issue paper dated 7-2-08 (see **PAYROLL CURRENTLY, Issue No. 17, Vol. 16**), the most recent guidance on the subject, the IRS said that none of the tool and equipment plans it had seen up to that time met accountable plan requirements.

### The tool plan

Service technicians are employed to perform repair and

maintenance services on the professional tools and equipment sold by the employer. The technicians are required to provide and maintain their own tools and equipment for performing this work. The technicians' tools and equipment, which are kept on-site at the employer's business locations, are owned by them and are used exclusively to perform repair and maintenance work for the employer.

The employer reimburses the technicians for certain deductible business expenses through an expense reimbursement plan. The plan only reimburses covered costs that the technician

substantiates to the employer. The reimbursements are not provided in lieu of, nor are they a function of, any other compensation such as hourly wages, fixed salaries, bonuses, benefits, or commissions. Nor does the plan provide for any adjustments to compensation on account of reimbursements.

#### Analysis

**Business connection requirement.** The plan satisfies the business connection requirement of 26 C.F.R. §1.62-2(d). The certifications required and the plan's claim form procedures establish that the plan will reimburse only business expenses deductible under IRC §162 or §179 and incurred by technicians in performing services for the employer.

For all tool and equipment expenses reimbursed under the plan, technicians are required to certify on the claim form that the expenses incurred are necessary for the performance of services for the employer, the tools and equipment are required to be kept on site, and all claimed expenses are verified as necessary for the performance of services for the employer by the technician's manager.

For tool and equipment expenses reimbursed under the plan that are deductible under §179 to the technician, the technician is further required to certify that he could otherwise claim the cost of the tools and equipment as a deduction under §179(a). The technician is also required to certify that he will reduce the §179(b)(1) and (b)(2) limits for the taxable year by the amount of any reimbursement received under the plan for §179 property during the taxable year, thereby limiting any deduction he or his spouse might claim under §179 for that taxable year if the technician has other §179 property that is placed in service during the taxable year but not reimbursed under the plan.

Finally, under the plan, the payments will be made in addition to, rather than in lieu of, any other compensation such as hourly wages, fixed salaries, bonuses, benefits, or

commissions. As such, the payments will not be made to an employee regardless of whether the employee incurs (or is reasonably expected to incur) deductible business expenses or other bona fide expenses related to the employer's business.

**Substantiation requirement.** The plan satisfies the substantiation requirement of 26 C.F.R. §1.62-2(e). Under the plan, expenses will be reimbursed only if they would be deductible by the technician under §162 or §179 and substantiated either under §162 or §274(d).

For all expenses, technicians are required to submit a claim form along with a receipt, invoice, or other written confirmation of proof of purchase that provides sufficient information for the employer to determine that the expense was incurred in connection with services performed for the employer – specifically, the amount, the date, and the type of expense incurred. In addition, the plan will only reimburse expenses incurred to purchase tools and equipment that are used only for business purposes on the work site and are kept on the work site at all times. Finally, the plan requires that expenses be substantiated within a reasonable period of time from the date the expense is incurred.

**Return of excess requirement.** The plan satisfies the return of excess requirement of 26 C.F.R. §1.62-2(f). The plan will reimburse only properly substantiated expenses already incurred. It does not provide any allowances or cash advances for expenses. In addition, any reimbursement in error is required to be returned within a reasonable period of time.

#### Conclusion

The plan satisfies the business connection, substantiation, and return of excess requirements of an accountable plan. Therefore, all payments made under the plan are excluded from the technician's income and are not wages subject to employment taxes. ■

## Wage & Hour Roundup

The U.S. Department of Labor's Wage & Hour Division recently concluded the following Fair Labor Standards Act enforcement actions.

#### Minimum wage and overtime

Eight New York City area car washes and their parent corporation headquartered in Pelham Manor, New York, have agreed to pay \$3.4 million in back wages to 1,187 current and former employees to settle a lawsuit brought by the Department of Labor. The car washes employed workers at rates less than the applicable statutory minimum wage and did not pay overtime for hours worked in excess of 40 in a workweek.

#### Overtime: affiliated employers

Partners HealthCare Systems, Inc., which operates

hospitals and health care facilities in eastern Massachusetts, has agreed to pay \$2,756,514 in back wages to 700 employees. Partners failed to aggregate hours on separate payrolls to determine whether overtime was due when employees worked for two or more facilities during the same workweek.

#### Overtime: bonuses

Tulsa-based QuikTrip Corporation has agreed to pay \$747,729 in back overtime wages to 3,819 current and former convenience store workers in Arizona, Georgia, Illinois, Iowa, Kansas, Missouri, Nebraska, Oklahoma, and Texas. Wage & Hour investigators found that QuikTrip did not include performance-related bonuses as part of the employees' regular rate of pay for purposes of computing overtime. ■

## Information Reporting Requirement Enacted for Payment Card and Third-Party Network Transactions

Under new IRC §6050W, any payment settlement entity (credit card company) making a payment in settlement of a reportable payment must file an information return with the IRS and furnish a statement to the payee, reporting the gross amount of the reportable payment as well as the name, address, and taxpayer identification number (TIN) of the payee.

This new reporting requirement was added by the Housing Assistance Tax Act of 2008 (Pub. L. No. 110-289). New §6050W requires information returns to be made for each calendar

year by merchant acquiring entities and third-party settlement organizations with respect to payments made in settlement of payment card transactions and third-party payment network transactions occurring in that calendar year.

The Act also amended:

- IRC §3406(b)(3) to provide that reportable payment transactions subject to information reporting under §6050W are subject to backup withholding requirements; and
- IRC §6724(d) by adding returns required by §6050W to

the definition of information returns for purposes of penalties for failure to comply with information reporting requirements.

### Effective dates

Section 6050W and the related amendment to §6724(d) generally apply to returns for calendar years beginning after December 31, 2010. The amendments to the backup withholding requirements apply to amounts paid after December 31, 2011.

### Definitions

Under §6050W:

- **Reportable payment transaction** means any payment card transaction and any third-party network transaction.
- **Payment settlement entity** means:
  - for a payment card transaction, a merchant acquiring entity; and
  - for a third-party network transaction, a third-party settlement organization.
- **Participating payee** means:
  - for a payment card transaction, any person who accepts a payment card as payment; and
  - for a third-party network transaction, any person who accepts payment from a third-party settlement organization in settlement of such transaction.
- **Person** includes any governmental unit (and any agency or instrumentality thereof). However, a “participating payee” does not include any person with a foreign address.

### Payment card transactions

A “payment card transaction” means any transaction in which a payment card is accepted as payment.

A “payment card” is any card that is issued pursuant to an agreement or arrangement that provides for:

- one or more issuers of such cards;
- a network of persons unrelated to each other, and to the issuer, who agree to accept such cards as payment; and
- standards and mechanisms for settling the transactions between the merchant acquiring entities and the persons who agree to accept such cards as payment.

A “merchant acquiring entity” means the bank or other organization with the contractual obligation to make payment to participating payees in settlement of payment card transactions.

### Third-party network transactions

A “third-part network transaction” means any transaction that is settled through a third-party payment network.

A “third-party payment network” is any agreement or arrangement that:

- involves the establishment of accounts with a central organization by a substantial number of persons who are unrelated to such organization, provide goods or services, and have agreed to settle transactions for the provision of such goods or services pursuant to such agreement or arrangement;
- provides for standards and mechanisms for settling such transactions; and
- guarantees persons providing goods or services pursuant to such agreement or arrangement that such persons will be paid for providing such goods or services.

In a third-party network transaction, a payment settlement entity is the “third-party settlement organization,” which is the central organization that has the contractual obligation to make payment to participating payees of third-party network transactions.

A third-party payment network does not include any agreement or arrangement that provides for the issuance of payment cards.

### Information reporting and backup withholding

A third-party settlement organization is required to report with respect to third-party network transactions of any participating payee only if:

- the aggregate amount with respect to such third-party network transactions for the year that would otherwise be reported exceeds \$20,000, and
- the aggregate number of such transactions exceeds 200.

If an electronic payment facilitator or other third party makes payments in settlement of reportable payment transactions on behalf of the payment settlement entity, the electronic payment facilitator or other third party must file the annual information return in lieu of the payment settlement entity.

The reportable payment transactions subject to the new information reporting requirement generally are subject to backup withholding. In addition, information returns required by §6050W are subject to penalties for failure to comply with the information reporting requirements.

### Intermediaries

The new law imposes reporting requirements on intermediaries who receive payments from a payment settlement entity and distribute such payments to one or more participating payees. Intermediaries are treated as:

- participating payees to the payment settlement entity, and
- payment settlement entities to the participating payees to whom the intermediary distributes payments.

### Comments IRS is considering

The IRS received comments through March 18, 2009, and is currently considering input on the following issues:

- Whether the Form 1099 series is appropriate for §6050W reporting, and whether the time and manner of reporting to the IRS should conform to existing practices for information reporting to the IRS under other provisions of the Code;
- Whether procedures for electronic reporting to payees, under §6050W(f), should conform to existing procedures for electronic reporting to payees under other provisions of the Code;
  - What foreign entities, if any, should be included in the definition of “payment settlement entity”;
  - What persons with foreign addresses, if any, should be included in the definition of “participating payee”;
  - How to interpret the statutory definition and scope of “payment card”;
  - How to interpret the statutory definition and scope of “third-party payment network”;
  - Whether the “gross amount” of the reportable payment transaction should be defined as “gross receipts or sales” or whether adjustments should be made for credits, cash equivalents, discount amounts, fees, refunded amounts, or other amounts;
  - How to administer the reporting requirements so as to prevent reporting of the same transaction more than once;
  - How to address differences between §6050W reporting and payee reporting on Forms 1040, 1065, or 1120, particularly when timing differences arise, for example, between calendar reporting years and fiscal taxable years, and the potential appropriateness of annual information returns from payment settlement entities that either segregate monthly “gross amounts” or reflect the taxable year of the participating payee; and

• What document retention and other verification requirements should apply to reporting entities, and what information should be captured for purposes of substantiating

the payments reported [Notice 2009-19; 2009-10 IRB 660; [www.irs.gov/irb/2009-10\\_IRB/ar09.html](http://www.irs.gov/irb/2009-10_IRB/ar09.html)]. ■

## Benefits Paid Under City's Length of Service Award Program Were Not Wages for FICA Tax Purposes

In a private letter ruling, the IRS has ruled that a city's length of service award program for its volunteer firefighters and rescue squad workers is not subject to IRC §457(b) or (f), and that amounts paid to participants or their beneficiaries are includible in the participant's gross income in the year they are paid but are not wages for FICA tax purposes [LTR 200927023, 4-1-09; [www.irs.gov/pub/irs-wd/0927023.pdf](http://www.irs.gov/pub/irs-wd/0927023.pdf)].

**IRC §457(e)(11).** The plan established by a city and its fire department satisfies the requirements of §457(e)(11)(A)(ii). It applies only to volunteers who provide qualified services – i.e., fire fighting and prevention services, emergency medical services, ambulance services, and related essential services in compliance with §457(e)(11)(C).

The plan also satisfies §457(e)(11)(B)(i) by limiting eligible volunteers to persons who receive reimbursements, reasonable

expenses, nominal fees, or reasonable benefits customarily paid by eligible employers in connection with the performance of qualified services by volunteers.

Finally, the plan satisfies §457(e)(11) by limiting the aggregate amount of awards for any year of service to \$3,000.

**IRC §451(a).** Under §451(a) and IRS Reg. §1.451-1(a), amounts paid to participants in the plan established by the city and its fire department or their beneficiaries are includible in the participants' gross income in the taxable year in which such amounts are paid or made available.

**IRC §3121(a)(5)(l).** However, §3121(a)(5)(l) provides that any payment made to, or on behalf of, an employee or his beneficiary under a plan described in §457(e)(11)(A)(ii) is not treated as "wages" for FICA tax purposes. ■

## PBGC Issues Proposed Regulations on Pension Benefits Under USERRA

The Pension Benefit Guaranty Corporation (PBGC) has issued proposed regulations on employee pension plan benefits in light of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) [74 F.R. 37666, 7-29-09; <http://edocket.access.gpo.gov/2009/pdf/E9-18074.pdf>].

USERRA provides that an individual who leaves his or her job to serve in the uniformed services is generally entitled to reemployment by his or her previous employer and, upon reemployment, to receive credit for benefits, including employee pension plan benefits, that would have accrued but for the employee's absence due to the military service.

Under existing PBGC regulations, a benefit is guaranteed only if the participant satisfies the conditions for entitlement to the benefit on or before the plan's termination date. The proposed regulations would provide an exception to this rule where a participant is serving in the uniformed services as of the plan's termination date. The proposed rule is consistent with USERRA's statutory mandate to treat such persons, upon

reemployment, as if they had never left the employ of their former employer.

Under the proposed regulations, so long as a service member is reemployed within the time limits set by USERRA, even if the reemployment occurs after the plan's termination date, PBGC would treat the participant as having satisfied the reemployment condition as of the termination date. This would ensure that the pension benefits of reemployed service members, like those of other employees, would be guaranteed for periods up to the plan's termination date.

### Comments

Comments on the proposed regulations must be received by September 28, 2009. Send written comments to: Legislative and Regulatory Department, Pension Benefit Guaranty Corporation, 1200 K Street, NW, Washington, DC 20005-4026. Or submit comments electronically at: [www.regulations.gov](http://www.regulations.gov). All submissions must include the Regulatory Information Number for this rulemaking – RIN 1212-AB19. ■

## Emergency Responder Benefits Excluded From Income

Responding to an inquiry, the IRS Office of Chief Counsel has written a letter explaining the types of benefits excluded from gross income under IRC §139B and the meaning of the term "qualified reimbursement payment" [INFO 2009-0112, 5-22-09; [www.irs.gov/pub/irs-wd/09-0112.pdf](http://www.irs.gov/pub/irs-wd/09-0112.pdf)].

### IRC §139B: benefits excluded from income

IRC §139B excludes from gross income any:

• **Qualified state and local tax benefit.** This is defined as any reduction or rebate of state or local real property taxes, personal property taxes, or income taxes that a state or local government provides for services performed as a member of a qualified volunteer emergency response team.

• **Qualified payment.** This is defined as any payment (whether by reimbursement or otherwise) that a state or local government provides for services performed as a member of a qualified volunteer emergency response organization. A

qualified payment is limited to \$30 for each month during which the taxpayer performs the services. Thus, the maximum exclusion is \$360 for any taxable year.

### Qualified reimbursement payment

This is defined as a payment a state or local government provides to reimburse expenses incurred in connection with performing services as a member of a qualified volunteer emergency response organization.

The exclusion from income for "qualified payments" under §139B, however, is not limited to reimbursements. Thus, a taxpayer excludes from gross income qualified payments, even if they do not reimburse an expense, if the qualified payments do not exceed \$30 for each month during which the taxpayer performs services as a member of a qualified volunteer emergency response organization.

### No double benefits

To prevent double benefits, a taxpayer cannot:

- Deduct for federal income tax purposes the amount of state or local taxes equal to the amount of any qualified state and local tax benefit.
- Take a charitable contribution deduction for any expense paid in connection with performing services as a member of a volunteer emergency response organization to the extent the expense does not exceed the amount of any qualified payment. ■



## STATE AND LOCAL NEWS

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### New Hampshire

**Online UI system established.** Beginning 8-17-09, the Department of Employment Security's (DES) new unemployment insurance (UI) system will be online. Employers will be able to manage their UI accounts online using this system. The DES is offering free seminars explaining registration, viewing benefit charge statements, and more. For seminar dates and locations, and a tutorial, visit [www.nh.gov/nhes](http://www.nh.gov/nhes) [DES, Press Release, 6-23-09].

### New Jersey

**Guidelines established for W-2 reporting of state mandated withholding.** The reporting guidelines for 2009 Forms W-2, *Wage and Tax Statement*, have been established. Sample W-2 forms show employers how to properly report employee contributions withheld for unemployment insurance, temporary disability insurance, family leave insurance, and the workforce development/supplemental workforce fund (download at [www.state.nj.us/treasury/taxation/pdf/other\\_forms/git-er/m6025\\_2009.pdf](http://www.state.nj.us/treasury/taxation/pdf/other_forms/git-er/m6025_2009.pdf)) [Division of Taxation, Notice M-6025, rev. 7-09].

**Withholding tables revised.** Effective for tax year 2009 only, income tax rates are increased for taxpayers with gross income over \$400,000. Employers must withhold at the rate of 12% from wages, salaries, and other remuneration paid in excess of \$400,000 during the remainder of 2009. This new rate takes effect immediately and must be implemented by employers no later than 10-1-09. Effective 1-1-10, the withholding rates will revert back to their prior rates. The Department of Taxation (DOT) has issued two sets of revised percentage-method withholding tables: tables effective for wages paid 10-1-09 through 12-31-09, and tables effective for wages paid on and after 1-1-10 (download at [www.state.nj.us/treasury/taxation/prntempl.shtml](http://www.state.nj.us/treasury/taxation/prntempl.shtml)) [A.B. 4102, L. 2009; DOT, Notice to Employers, 7-15-09].

### Wisconsin

**Supplemental wage tax rates changed.** Effective 10-1-09, the supplemental wage tax rates are 4.6% if it is estimated that an employee's annual gross salary is less than \$10,220 (currently less than \$7,970); 6.15% if gross salary is at least \$10,220 but less than \$20,440 (currently \$7,970 - \$15,590); 6.5% if gross salary is at least \$20,440 but less than \$153,280 (currently \$15,590 - \$115,140); 6.75% if gross salary is at least \$153,280 but less than \$225,000 (currently \$115,140 and over); and 7.75% if gross salary is \$225,000 and over (this updates *The Payroll Source*®, p. 6-37) [Department of Revenue, Pub. W-166, rev. 7-09].

**Withholding tables revised.** The Department of Revenue (DOR) has revised the wage bracket and percentage-method (Alternate Method A and B) withholding tables to reflect a new tax rate and bracket adjustment resulting from inflation. Employers should implement the revised withholding tables found in Publication W-166, *Wisconsin Employer's Withholding Tax Guide*, at [www.revenue.wi.gov/pubs/pb166.pdf](http://www.revenue.wi.gov/pubs/pb166.pdf), no later than 10-1-09 [A.B. 75, L. 2009; DOR, *Wisconsin Tax Bulletin*, No. 162, 7-09; DOR, News for Tax Practitioners, 7-6-09 and 7-27-09].

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