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DOL Releases FAQs on Furloughs and Other Reductions in Pay and Hours Worked

The U.S. Department of Labor has released answers to 11 frequently asked questions (FAQs) that arise when employers require employees to take furloughs and other reductions in pay and/or hours worked as businesses and state and local governments adjust to economic challenges [Frequently Asked Questions Regarding Furloughs and Other Reductions in Pay and Hours Worked Issues, 7-09; www.dol.gov/esa/WHD/flsa/FurloughFAQ.pdf].

1. If an employer is having trouble meeting payroll, do they need to pay nonexempt employees on the regular payday? In general, an employer must pay covered nonexempt employees the full minimum wage and any statutory overtime due on the regularly scheduled payday for the workweek in question. Failure to do so is a violation of the Fair Labor Standards Act (FLSA). When the correct amount of overtime compensation cannot be determined until sometime after the regular pay period, however, the requirements of the FLSA are satisfied if the employer pays the excess overtime compensation as soon after the regular pay period as is practicable.

2. Is it legal for an employer to reduce the wages or number of hours of an hourly employee? The FLSA requires that all covered nonexempt employees receive at least the

applicable federal minimum wage for all hours worked. In a week in which employees work overtime, they must receive their regular rate of pay and overtime pay at a rate not less than one and one-half times the regular rate of pay for all overtime hours. The FLSA does not preclude an employer from lowering an employee's hourly rate, provided the rate paid is at least the minimum wage, or from reducing the number of hours the employee is scheduled to work.

3. Does an employer need to pay an hourly employee for a full day of work if he or she was scheduled for a full day but only worked a partial day due to lack of work? The FLSA does not require employers to pay nonexempt employees for hours they did not work.

4. In general, can an employer reduce an otherwise exempt employee's salary due to a slowdown in business? Reductions in the predetermined salary of an exempt employee will ordinarily cause a loss of the exemption. Such an employee must then be paid the minimum wage and overtime. In some circumstances, however, a prospective reduction in salary may not cause a loss of the exemption (see FAQ 7).

The FLSA requires payment of at least \$455 per week on a "salary" basis for those employed as exempt

Payroll Solutions

Q. Our company wants to amend its cafeteria plan to include a grace period for its health flexible spending arrangement (FSA). Does having a grace period mean that employees must submit their reimbursement requests by the last day of the period?

A. No. A grace period is not a deadline for submitting reimbursement requests after the end of a plan year. If a cafeteria plan provides for a grace period, an employee who has unused benefits or contributions relating to a qualified benefit covered by the grace period (such as a health FSA) from the immediately preceding plan year, and who incurs expenses for the same qualified benefit during the grace period, may be paid or reimbursed for those expenses from the unused benefits or contributions as if the expenses had been incurred in the immediately preceding plan year. A cafeteria plan can allow for a grace period of up to 2½ months immediately following the end of each plan year (i.e., March 15 for plans with plan years based on a calendar year), which gives an employee as much as 14 months and 15 days (12 months in the cafeteria plan year plus the grace period) to use the benefits or contributions for a plan year before those amounts are forfeited under the use-or-lose rule. The grace period provisions of a cafeteria plan can be applied to some benefits and not others, but must apply to all participants in the plan.

To impose a deadline for submitting reimbursement requests, a cafeteria plan may include a “run-out” period, which is a period after the end of a plan year (or grace period) during which a participant can submit a claim for reimbursement for a qualified benefit incurred during the plan year (or grace period). A run-out period must be provided on a uniform and consistent basis with respect to all participants.

For more information on flexible spending arrangements and grace periods, see *The Payroll Source*®, beginning at p. 4-61.

executive, administrative, or professional employees. A salary is a predetermined amount constituting all or part of the employee’s compensation, which is not subject to reduction because of variations in the quality or quantity of the work performed.

The employer must pay an exempt employee the full predetermined salary amount “free and clear” for any week in which the employee performs any work without regard to the number of days or hours worked. However, there is no requirement that the predetermined salary be paid if the employee performs no work for an entire workweek. Deductions may not be made from the employee’s predetermined salary for absences occasioned by the employer or by the operating requirements of the business. If the employee is ready, willing, and able to work, deductions may not be made for time when work is not available. Salary deductions are generally not permissible if the employee works less than a full day. Except for certain limited exceptions found in 29 C.F.R. §541.602(b)(1)-(7), salary deductions result in the loss of the exemption.

Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough disqualify the employee from being paid on a salary basis only in the workweek when the furlough occurs and for which the pay is accordingly reduced (see FAQ 9).

Physicians, lawyers, outside salespersons, or teachers in bona fide educational institutions are not subject to any salary requirements. Deductions from the salary or pay of such employees will not result in loss of the exemption.

5. Can an employer reduce the leave of a salaried exempt employee? An employer can substitute or reduce an exempt employee’s accrued leave (or run a negative leave balance) for the time an employee is absent from work, even if it is less than a full day and even if the absence is directed by the employer because of lack of work, without affecting the salary basis payment, provided that the employee still receives payment equal to the employee’s predetermined salary in any week in which any work is performed even if the employee has no leave remaining.

6. Can a salaried exempt employee volunteer to take

time off of work due to lack of work? If the employer seeks volunteers to take time off due to insufficient work, and an exempt employee volunteers to take the day(s) off for personal reasons, other than sickness or disability, salary deductions may be made for one or more full days of missed work. The employee’s decision must be completely voluntary.

7. Can an employer make a prospective reduction in pay for a salaried exempt employee due to the economic downturn? An employer is not prohibited from prospectively reducing the predetermined salary amount to be paid regularly to an exempt employee during a business or economic slowdown, provided the change is bona fide and not used as a device to evade the salary basis requirements. Such a predetermined regular salary reduction, not related to the quantity or quality of work performed, will not result in loss of the exemption, as long as the employee still receives on a salary basis at least \$455 per week.

On the other hand, deductions from predetermined pay occasioned by day-to-day or week-to-week determinations of the operating requirements of the business constitute impermissible deductions from the predetermined salary and would result in loss of the exemption. The difference is that the first instance involves a prospective reduction in the predetermined pay to reflect long-term business needs, rather than a short-term, day-to-day or week-to-week deduction from the fixed salary for absences from scheduled work occasioned by the employer or its business operations.

8. Can an employee still be on call or performing work at home during a furlough day? Whether on-call time is hours worked under the FLSA depends on the circumstances. Generally, the facts may show that the employee was engaged to wait (which is work time) or that the employee was waiting to be engaged (which is not work time).

For example, a secretary who reads a book while waiting for dictation or a fireman who plays checkers while waiting for an alarm is working during such periods of inactivity. These employees have been “engaged to wait.” An employee who is required to remain on call on the employer’s premises is working while “on call.” On the other hand, an employee who is allowed to leave a message where he/she can be

reached is not working (in most cases) while on call. Additional constraints on the employee's freedom could require this time to be compensated.

Employees who perform part or all of their normal job duties during a furlough day are working while performing such duties.

9. Are the rules for paying furloughed employees different for state and local governments? For nonexempt public employees, see FAQ 2. For salaried exempt employees, in the case of public sector employees, there is a specific rule that applies: "Deductions from the pay of an employee of a public agency for absences due to a budget-related furlough shall not disqualify the employee from being paid on a salary basis except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced" (29 C.F.R. §541.710).

10. Does it matter if the state or local government employee is considered an essential or critical employee for purposes of a required furlough? The application of the FLSA is not affected by the classification of an employee as essential or critical for purposes of a required furlough.

11. What remedies are available to correct violations of

the FLSA when employees are not paid on a timely basis?

- The Secretary of Labor may sue for back wages and an equal amount as liquidated damages or for interest on the back wages, or the Secretary may sue for an injunction against the failure to pay wages when due.

- Employees who have filed complaints or provided information during an investigation are protected under the law. They may not be discriminated against or discharged for having done so. If they are, they may sue or the Secretary may sue on their behalf for relief including reinstatement to their jobs and payment of wages lost plus monetary damages.

- An employee may sue to recover back wages and an equal amount in liquidated damages, plus attorney's fees and costs. Note, however, that employees of state governments are prohibited from filing such lawsuits against their state employers for monetary relief in federal courts.

- Civil money penalties may be assessed for repeat and/or willful violations of the FLSA's minimum wage or overtime requirements.

- Employers willfully violating the law also may face criminal penalties, including fines and imprisonment. ■

ICE Puts Holes in Doughnut Companies' Bottom Lines

Krispy Kreme Doughnut Corp. U.S. Immigration and Customs Enforcement (ICE) has announced that the Krispy Kreme Doughnut Corporation has been fined \$40,000 following an inspection of the company's Forms I-9 (*Employment Eligibility Verification*). I-9 forms require an employer to establish an employee's identity and verify their employment eligibility at the time they are hired.

ICE received information from the local sheriff's office that the company had employed dozens of illegal aliens at one of its doughnut factories in Cincinnati [www.ice.gov/pi/nr/0907/090707cincinnati.htm].

ShIPLEY Do-Nut Flour and Supply Co., Inc. ICE has also announced that the Shipley Do-Nut Flour and Supply Company, Inc., which supplies baking materials and logistical support to retail stores and franchises, has been sentenced to

pay a criminal fine of \$250,000 and forfeit \$1.334 million for harboring illegal aliens. The \$1.334 million was paid in lieu of the U.S. forfeiting the company's interest in housing located near its Houston warehouse where 27 illegal alien employees lived.

ICE's investigation included interviews with former employees and a review and analysis of I-9 forms and Social Security Administration (SSA) No-Match letters. No-Match letters are sent to employers when social security numbers reported on Forms W-2 (*Wage and Tax Statement*) do not match known social security numbers. Here, ICE agents recovered "42 No-Match letters sent by the SSA which placed the company on notice that the aliens did not have valid social security numbers." ■

Michigan Employers Will Lose Full FUTA Credit

The crisis in the domestic automobile industry has left Michigan with the highest unemployment rate in the U.S. (15.2% is the latest figure from June). Michigan will not be able to repay outstanding loans for its unemployment insurance (UI) program by the November 10, 2009, deadline, the Unemployment Insurance Agency (UIA) of the Michigan Department of Energy, Labor, and Economic Growth has announced. This means that the Federal Unemployment Tax Act (FUTA) rate for Michigan employers will increase to 1.1% from 0.8%. The additional FUTA taxes are due by the due date of Form 940, *Employer's Annual Federal Unemployment (FUTA) Tax Return*, which must be filed by February 1, 2010 [UIA, Fact Sheet No. 126, June 2009].

Credit reductions because of state loans

Under the joint federal/state UI system, states with a high rate of unemployment and difficulty meeting their benefit obligations can borrow money from the federal UI fund to pay benefits. If loans taken out during one year are not repaid by the end of the following calendar year, the FUTA credits for employers in those states are reduced, with the extra FUTA taxes paid being applied against each state's loan balance (see

The Payroll Source®, p. 7-8). The more years a loan remains unpaid, the greater the credit reduction becomes (subject to certain limits).

A state with an outstanding loan can avoid a credit reduction for its employers by repaying the loan by November 10 of the year the reduction is scheduled to take effect. If the loan is not repaid by that date, a credit reduction of 0.3% goes into effect, with employers in that state having their maximum credit reduced to 5.1% (5.4% - 0.3%) and their effective FUTA tax rate increased to 1.1% (0.8% + 0.3%). The extra 0.3% in FUTA taxes means that employers will have to pay an extra \$21 per employee (0.3% up to the federal wage base of \$7,000), for a total of \$77 per employee.

Form 940 to be revised

Sometime after November 10 of each year, the credit reductions for that year are announced by the IRS and are included on Form 940 (Part I, Line 6) so employers in the affected states can figure the amount of their credit reduction. Thus, the IRS will make the official determination of the credit reduction states for 2009 sometime after November 10, 2009. ■

IRS Says Discount Program Was Taxable Fringe Benefit

In a legal memorandum, the IRS advises that discounts provided to employees of one company who purchase or lease property from another company are taxable fringe benefits. As such, they are wages subject to employment tax [ILM 200923029, 1-30-09; www.irs.gov/pub/irs-wd/0923029.pdf].

Scenario

Two companies that were formerly in a parent-subsidiary relationship are now independent entities. Under a discount program, employees of the former subsidiary can purchase and lease property manufactured by the former parent company.

Historically, the former subsidiary (the employer) treated the amount of the discount as taxable wages to its employees. Employment taxes were collected, and the income was reported on each employee's Form W-2 (*Wage and Tax Statement*). As of a certain date, however, when the former parent company stopped providing discount data to the employer, the employer stopped withholding and paying the employment taxes attributable to the discount amounts. The employer then sought a refund of the FICA taxes it had paid with respect to the discounts.

Analysis

The IRS advised that here the discounts were not excluded from gross income as qualified employee discounts because the discounted property was not offered for sale to customers by the same company for which the employees receiving the discount performed services. In addition, the discounts were offered in

connection with the performance of services. A participant in the program was required to present an authorization number (available only to employees) when selecting property for purchase or lease. Finally, the IRS rejected the idea that the discounts were nontaxable price rebates because they were not available to the general public and arose from the employment relationship.

The discount program was a benefit the employer bargained for with its former parent company (as evidenced by several memoranda), which indicated that the employer intended for it to be compensatory. Further, IRC Reg. §1.61-21(a)(1) and (5) specifically provide that discounts are a taxable fringe benefit. And a fringe benefit need not be provided by the common law employer to be includible in an employee's gross income.

Conclusion

Provision of property discounts under this scenario is a taxable fringe benefit. The common law employer, here the former subsidiary company, therefore had an obligation to withhold employment taxes on this benefit and report the benefit as income and wages on employee Forms W-2, concluded the IRS. The Service therefore rejected the employer's refund claim.

Moreover, if the former parent company refused to provide discount data to the employer, then the employer had a choice of discontinuing the program or continuing the program using "alternative methods" of obtaining the data. ■

Processing Online Forms W-2c for Prior Years Coming to BSO

Effective December 7, 2009 (effective tax year 2009), Business Services Online (BSO) will begin accepting online Form W-2cs submitted for tax years 2006 through 2009. Correction reports for those years can be submitted through April 15, 2010. However, beginning after April 15, 2010, only W-2cs for tax years 2007 through 2009 can be

submitted, due to the statute of limitations (three years, three months, and 15 days). Previously, BSO's W-2c Online service could only be used to correct the immediate prior year's Forms W-2 (this updates *The Payroll Source*, p. 8-109) [Publication 1693, *SSA/IRS Reporter*, Fall 2009; www.irs.gov/formspubs/index.html]. ■

Court Reaffirms That Employer Did Not Have to Reimburse H-2B Workers' Migration Expenses

Daniel Castellanos-Contreras and other workers were brought to New Orleans following Hurricane Katrina on H-2B (nonagricultural guest worker) visas to work at the hotel properties of Decatur Hotels, LLC. When they sued Decatur under the Fair Labor Standards Act (FLSA) for failing to reimburse them during their first week of employment for expenses they incurred in migrating to the U.S. (i.e., recruitment, travel, and visas), Decatur argued that H-2B workers are not covered by the FLSA.

In February 2009, the Fifth Circuit Court of Appeals decided that the workers were protected by the FLSA, but said Decatur was not required to reimburse them for their migration expenses (see *PAYROLL CURRENTLY*, Issue No. 9, Vol. 17).

The next month, the U.S. Department of Labor (DOL) withdrew "for further consideration" an interpretation of the FLSA and its implementing regulations stating that employers do not have to reimburse workers under H-2A (agricultural guest worker) and H-2B nonimmigrant visa programs for relocation expenses even when such costs result in the workers being paid less than the minimum wage (see *PAYROLL CURRENTLY*, Issue No. 7, Vol. 17).

The Fifth Circuit has now reconsidered its February decision and issued a revised opinion without changing its

earlier conclusion [*Castellanos-Contreras v. Decatur Hotels, LLC*, No. 07-30942, 2009 U.S. App. LEXIS 16105 (5th CA, 7-21-09)].

Visa expenses. FLSA regulations (29 C.F.R. §531.35) require an employer to pay wages to an employee "free and clear," a condition that is not met when the employee must "kick back" to the employer (or to another person for the employer's benefit) all or part of the employee's wage. The court explained that an employee-incurred expense is a kick-back if it tends to shift part of the employer's business expense to the employee.

U.S. immigration regulations assign to employers the H-2B sponsorship application fees and assign to applicants the H-2B visa processing fees. Accordingly, requiring guest H-2B workers to pay for their visa expenses did not violate the FLSA by shifting part of Decatur's business expense to the guest workers.

Recruitment expenses. The court also said Decatur was not required to reimburse the workers for the fees they paid abroad to foreign recruitment companies. The FLSA does not require reimbursement of these employee-incurred expenses. Moreover, under revised H-2B regulations that went into effect on January 18, 2009 (see *PAYROLL CURRENTLY*, Issue No. 3, Vol. 17), H-2B employers are now required to certify that they have contractually forbidden foreign labor contractors from

receiving payments from prospective employees unless allowed by the Department of Homeland Security – which means that such expenses incurred before the revised regulations went into effect were not part of Decatur's business expense.

Travel expenses. Decatur was not required to reimburse the workers' inbound travel expenses. Because of the DOL's history of unclear and inconsistent positions on this issue, the court disregarded the agency's March 2009 interpretation. Although immigration regulations sometimes make the inbound transportation expenses of an H-2A worker the employer's responsibility, there is no comparable provision applicable to the inbound transportation expenses of H-2B workers.

USCIS to accept new H-2B fiscal year 2009 petitions

On August 6, U.S. Citizenship and Immigration Services (USCIS) announced that it was reopening the fiscal year 2009 H-2B petition filing period [www.uscis.gov/portal/site/uscis]. The difference between the congressionally mandated annual cap (66,000) and the number of visas issued to date (40,640) means that there are approximately 25,000 visas that may go unused.

Note that the normal (non-premium processing) adjudication time frame for H-2B petitions is 60 days. USCIS will make visa numbers available to petitions in the order in which the petitions are filed. However, because H-2B petitions for fiscal year 2009 visas must be received, evaluated, and adjudicated on or before the fiscal year 2009 deadline of September 30, 2009, USCIS cannot guarantee approval of any H-2B petition

on or before the deadline. Employers are therefore encouraged to file as soon as possible and to request premium processing by filing a Form I-907 (*Request for Premium Processing Service*) and submitting the \$1,000 premium processing fee, which will allow for expedited adjudication.

To qualify for a fiscal year 2009 H-2B cap number, employers must submit Form I-129 (*Petition for a Nonimmigrant Worker*) to USCIS with all required documents, including an approved *Alien Employment Certification* from the DOL that is valid for the entire employment period stated in the petition. The petitioner must also indicate an employment start date before October 1, 2009.

Petitions received on or after October 1, 2009, and/or requesting a start date on or after October 1, 2009, will be considered toward the fiscal year 2010 H-2B cap and are subject to all eligibility requirements for fiscal year 2010 H-2B filings, including 8 C.F.R. §214.2(h)(6)(iv)(D), which requires that the start date listed on the petition be the same as the starting date authorized on the temporary labor certification.

Note: The H-2B program allows U.S. employers to bring foreign nationals to the U.S. to fill temporary nonagricultural jobs for which there is a shortage of available U.S. workers. Typically, H-2B workers fill labor needs in occupational areas such as education, construction, health care, landscaping, manufacturing, food service/processing, and resort/hospitality services. ■

DHS Proposes Regs Rescinding No-Match Rule

Following up on an announcement made in July (see **PAYROLL CURRENTLY, Issue No. 14, Vol. 17**), the Department of Homeland Security (DHS) has issued proposed regulations that would rescind its No-Match Rule and reinstate the regulations that existed prior to the effective date of the final rule [74 F.R. 41801, 8-19-09; <http://edocket.access.gpo.gov/2009/pdf/E9-19826.pdf>]. The No-Match Rule, which dates from 2007, was blocked by court order shortly after it was issued and has never taken effect. It established procedures that employers could follow to avoid a finding that they knowingly employed unauthorized workers if they receive SSA no-match letters or notices from DHS that call into question work eligibility information provided by employees (see **PAYROLL CURRENTLY, Issue Nos. 17 and 22, Vol. 15**).

In proposing the change, DHS explains that it has decided that improvements and increased participation in E-Verify, the

ICE Mutual Agreement Between Government and Employers (IMAGE), and other DHS programs, provide better tools for employers to reduce unauthorized employment, and better detect and deter the use of fraudulent identity documents by employees. "DHS therefore has concluded that rescinding the August 2007 No-Match Rule and 2008 Supplemental Final Rule will better achieve DHS's regulatory and enforcement goals."

Comments on the proposed regulations must be received by September 18, 2009. Send written comments to: National Program Manager Charles McClain, U.S. Immigration and Customs Enforcement, Office of Investigations—MS 5112, 500 12th Street, SW., Washington, DC 20536. Or submit comments electronically at: www.regulations.gov. Be sure to reference DHS Docket No. ICEB-2006-0004. ■

Commuting Time in Government Vehicles Was Noncompensable

Employees of the Bureau of Alcohol, Tobacco, and Firearms (BATF), U.S. Immigration and Customs Enforcement (ICE), and the Drug Enforcement Administration (DEA) sued their federal government employer for compensation for time spent driving government vehicles between home and work. The court rejected the employees' claims, citing 29 USC §254(a) [*Easter v. U.S.*, 83 Fed. Cl. 236 (Ct. of Fed. Cl., 8-1-08) (ICE + BATF), *aff'd* No. 2008-5187, 2009 U.S. App. LEXIS 17373 (Fed. Cir. CA, 8-5-09); *Forbes v. U.S.*, 84 Fed. Cl. 319 (Ct. of Fed. Cl., 10-16-08) (DEA)].

Background

The federal employees involved in these actions all were required to drive government-supplied vehicles between home and work. For example:

- An ICE Technical Enforcement Officer was required to transport the equipment used for his work in his government

vehicle. He could not use the vehicle for personal purposes and was required to monitor the radio while driving to and from work.

- A BATF Explosives Enforcement Officer was required to transport his work equipment (which weighed more than 1,000 pounds) in the back of his government-provided pickup truck. He could not use the vehicle for personal purposes or make personal stops, and had to remain in phone contact at all times with the BATF while driving to and from work.

- DEA "diversion investigators" were charged with investigating the diversion of controlled pharmaceuticals and regulated chemicals from legitimate manufacturing and distribution channels. They had to maintain a log documenting the use of their government-supplied vehicles and could not use them for personal purposes.

☞ **WHAT THE LAW SAYS** – 29 USC §254(a) provides that

“no employer shall be subject to any liability or punishment under the [FLSA] ... on account of the failure to pay an employee [for] ... (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and (2) activities which are preliminary to or postliminary to said principal activity or activities.” For purposes of this exception to the FLSA compensability rule, “the use of an employer’s vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee’s principal activities if the use of such vehicle for travel is within the normal commuting area for the employer’s business or establishment and the use of the employer’s vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.”

Ruling

The Court of Federal Claims explained that this means “commuting done for the employer’s benefit, under the employer’s

rules, is noncompensable if the labor beyond the mere act of driving the vehicle is de minimis.” In each of these cases, the court said the commuting time between home and work was noncompensable. None of the employees involved were subject to restrictions while driving their government vehicles to and from home that were so severe as to overcome the §254(a) exception.

For example, in the case of the DEA investigators, the requirement to maintain a log and the general prohibition on personal use were not FLSA-compensable principal activities. The investigators were permitted to use their vehicles for certain “incidental personal purposes,” such as picking up dry cleaning and going to a gym. The fact that government regulations classified the home-to-work driving as “field work” did not overcome the “de minimis” threshold to convert the drive into compensable work time. Nor did the fact that the government believed it would be more efficient for the investigators to drive directly from home in a government vehicle to their first stop of the day make the commuting compensable. ■

EBSA Offers Transition Relief for 2009 Form 5500 Reporting by 403(b) Plans

The U.S. Department of Labor’s Employee Benefits Security Administration (EBSA) has released a Field Assistance Bulletin to provide guidance to field investigators on the annual Form 5500 reporting requirements for §403(b) plans [FAB No. 2009-02, 7-20-09; www.dol.gov/ebsa/regs/fab2009-2.html]. The guidance offers transition relief in connection with Form 5500 (*Annual Return/Report of Employee Benefit Plan*) annual filing requirements for the 2009 plan year.

Background

In 2007, final regulations under IRC §403(b) were published by the IRS (see *PAYROLL CURRENTLY*, Issue No. 16, Vol. 15). Effective January 1, 2009, sponsors of §403(b) plans were generally required to be maintained pursuant to a written plan containing all the material terms and conditions for benefits under the plan. The IRS issued transitional relief from the written plan requirement in Revenue Procedure 2007-71 (see *PAYROLL CURRENTLY*, Issue No. 25, Vol. 15) and in Notice 2009-3 (see *PAYROLL CURRENTLY*, Issue No. 26, Vol. 16).

The Department of Labor separately published Form 5500 revisions and related final regulations generally effective for plan years beginning on or after January 1, 2009, which, among other things, changed the annual reporting requirements for §403(b) plans covered by Title I of ERISA. Under the new annual reporting rules, beginning with their Form 5500 filing for the 2009 plan year, “large” ERISA-covered §403(b) plans (generally plans with 100 or more participants) are required to file audited financial statements with their Form 5500. Small §403(b) plans will for the most part be able to use Form 5500-SF (*Short Form 5500*), a new simplified form for small plans invested in certain types of assets. Even small plans, however, must report aggregate financial information regarding the plan.

Transition relief

For reasons similar to those underlying the IRS transition relief, the Department of Labor has decided to provide transition relief for administrators of §403(b) plans that make good faith

efforts to transition for the 2009 plan year to ERISA’s generally applicable annual reporting requirements. This relief is limited to the Form 5500 annual reporting requirements, including the requirement for large plans to include as part of their annual report the report of an independent qualified public accountant.

Specifically, the administrator of a §403(b) plan does not need to treat annuity contracts and custodial accounts as part of the employer’s plan or as plan assets for purposes of ERISA’s annual requirements, provided that:

- The contract or account was issued to a current or former employee before January 1, 2009;
- The employer ceased to have any obligation to make contributions (including employee salary reduction contributions), and in fact ceased making contributions to the contract or account before January 1, 2009;
- All of the rights and benefits under the contract or account are legally enforceable against the insurer or custodian by the individual owner of the contract or account without any involvement by the employer; and
- The individual owner of the contract is fully vested in the contract or account.

In addition, current or former employees with only contracts or accounts that are excludable from the plan’s Form 5500 or Form 5500-SF under this transition relief do not need to be counted as participants covered under the plan for Form 5500 annual reporting purposes. The Department also will not reject a Form 5500 on the basis of a “qualified,” “adverse,” or disclaimed opinion if the accountant expressly states that the sole reason for such an opinion was because such pre-2009 contracts were not covered by the audit or included in the plan’s financial statements. Except with respect to this relief, accountants engaged to perform audits of employee benefit plans must perform audit procedures and report in accordance with generally accepted auditing standards as required by ERISA and implementing regulations. ■

IRS Modifies Guidance on Expanded Work Opportunity Tax Credit

The American Recovery and Reinvestment Act of 2009 (see *PAYROLL CURRENTLY*, Issue No. 4, Vol. 17) added unemployed veterans returning to civilian life and “disconnected youth” to the list of those covered by the Work Opportunity Tax Credit (WOTC). Notice 2009-28 (see *PAYROLL*

CURRENTLY, Issue No. 13, Vol. 17) provided guidance to employers hiring workers in these two new targeted groups and seeking to claim the WOTC.

The IRS has now modified Notice 2009-28 – clarifying the definition of “disconnected youth” and extending transition

relief for filing Form 8850 (*Pre-Screening Notice and Certification Request for the Work Opportunity Credit*) to claim the WOTC in connection with unemployed veterans and disconnected youth by two months [Notice 2009-69, 8-12-09; www.irs.gov/pub/irs-drop/n-09-69.pdf].

Definition clarified. An individual who received a high school diploma or GED certificate at least six months prior to the hiring date and who otherwise satisfies the requirements for a disconnected youth will not fail to qualify

as a disconnected youth merely because the individual has been employed at times since graduation, as long as that employment was no more than occasional.

Transition relief extended. Any employer that hires an unemployed veteran or disconnected youth after December 31, 2008, and before September 17, 2009, will be considered to meet the WOTC filing deadline if the employer submits Form 8850 to the state workforce agency to request certification not later than October 17, 2009. ■

Award to Employee Whose Health Insurance Was Canceled After She Took FMLA Leave Affirmed

In 2008, a jury awarded Kathleen Ryl-Kuchar more than \$85,000 after a jury found that her employer, Care Centers, Inc., interfered with her rights under the Family and Medical Leave Act (FMLA) and retaliated against her for taking FMLA leave (see **PAYROLL CURRENTLY**, Issue No. 11, Vol. 17). The Seventh Circuit Court of Appeals has affirmed the award, adding attorney fees and costs of the appeal [*Ryl-Kuchar v. Care Centers, Inc.*, 565 F.3d 1027 (7th CA, 5-11-09)].

Following the birth of triplets on July 17, 2003, Ryl-Kuchar took FMLA leave. At the end of her leave, Ryl-Kuchar decided to stay home to raise her children and resigned her position on October 1. In November 2003, CCS VEBA (the employee benefits association affiliated with Care Centers that administered the company's health plan) cancelled Ryl-Kuchar's health insurance retroactive to June 15, 2003, without notifying her, purportedly because she ceased to be a full-time employee at that time. The cancellation left Ryl-Kuchar with unpaid medical bills from her pregnancy after June 15, and she sued.

The jury verdict in favor of Ryl-Kuchar on interference with her FMLA rights was appropriate. An employee on FMLA leave is entitled to have health benefits maintained while on leave as if the employee had continued to work instead of taking the leave (29 C.F.R. §800.125(b)). It was reasonable for the jury to conclude that Ryl-Kuchar had in fact been a full-time employee until she took FMLA leave, which entitled her to health insurance not only up until the time she took leave, but also while she was on leave, through the date of her resignation.

The verdict on retaliation was supported by evidence showing that CCS VEBA was a unit of Care Centers, not a separate entity. CCS VEBA shared the same facilities as Care Centers and the administrator of CCS VEBA was married to the owner of Care Centers. Moreover, the timing of the decision to retroactively terminate Ryl-Kuchar's health insurance (*after* she took FMLA leave) and Care Centers' concern about rising health costs supported the claim of retaliation. ■

Employee's Verbal Complaints Were Not Protected by the FLSA

In early 2006, Kevin Kasten received a disciplinary warning from his employer for not using the company's time clock. He complained verbally on several occasions that he thought the location of the time clock was illegal because it meant that employees were not getting paid for all the time they spent donning and doffing gear, but he never put his complaints in writing. After his fourth violation of the company policy requiring employees to punch in and out, he was fired. Kasten then sued the company for retaliation in violation of the Fair Labor Standards Act (FLSA).

Note: Under the FLSA's anti-retaliation provision (29 USC §215(a)(3)), it is unlawful for an employer "to discharge ... any

employee because such employee has filed a complaint or caused to be instituted any proceeding under or related to [the FLSA]."

The Seventh Circuit Court of Appeals said that the FLSA's anti-retaliation provision protects an employee making complaints to his or her employer, but did not protect Kasten because his complaints were "purely verbal" [*Kasten v. Saint Gobain Performance Plastics Corp.*, 570 F.3d 834 (7th CA, 6-29-09)]. The court explained that because the complaint must be "filed," the submission of "some writing" to an employer, court, or administrative agency is required (see **PAYROLL CURRENTLY**, Issue No. 20, Vol. 16 for an earlier ruling in the case). ■

Maintenance Employees' On-Call Time Was Noncompensable

The Vineland Housing Authority (VHA) was a government agency that rented affordable housing units to qualifying families. VHA had six maintenance employees who performed service and repairs as needed on the housing units. The employees worked eight hours a day Monday through Friday.

VHA required each maintenance employee to be on call one week out of six to handle maintenance requests occurring between 5 p.m. and 8:00 a.m. on weekdays or over weekends. An employee on call was required to carry a pager. When paged, the employee was required to immediately call his or her supervisor and respond to the maintenance request within 20 minutes or face discipline. An on-call employee called to work was paid overtime for the time spent on the job, and was always paid for at least two hours.

When the maintenance employees sued VHA to recover overtime compensation for all of the time they were on call, a U.S. District Court said the on-call time was not compensable work time under the Fair Labor Standards Act (FLSA) [*Cannon v. Vineland Housing Authority*, No. 06-2086 (JBS), 2008 U.S. Dist. LEXIS 71636 (D.N.J., 9-19-08)].

Analysis

The court considered the following factors in reaching its conclusion: (1) whether the employees could carry a beeper or leave home; (2) the frequency of calls and the nature of VHA's demands; (3) the employees' ability to maintain a flexible on-call schedule and switch on-call shifts; and (4) whether the employees actually engaged in personal activities during on-call time.

Here, the employees carried pagers and were not required to

stay at home while on call. In addition, they were able to switch on-call shifts with one another without restriction.

If an on-call employee receives calls so frequently and of such urgency that the employee cannot effectively use the on-call time for personal pursuits, then the time is likely to be compensable. On-call time has been found to be compensable when calls average three to five per day, but the average here was considerably less than three per day. In many weeks, employees received no calls, and in only one week over a 20-year period did the average approach three per day. Moreover, the 20-minute response window was not urgent enough to make the on-call time

compensable.

Finally, the employees were able to use their on-call time to engage in a variety of personal activities. They testified that they did yard work, spent time with friends and relatives, and attended church. The fact that these activities did not represent the full range of activities in which the employees would have liked to engage did not matter – “the test is not whether the employee can engage in an unrestricted range of personal pursuits while on call, but is instead whether the employee is able to participate in personal activities during on-call waiting time.” ■



STATE AND LOCAL NEWS

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Alabama

Electronic UI reporting and payments mandated for all employers. Beginning with the report for the quarter ending 6-30-09, all employers must submit quarterly unemployment insurance (UI) contribution and wage reports by phone (the Interactive Voice Response System) or Internet instead of on paper (this updates *The Payroll Source*®, p. 7-34). Previously, electronic reporting was required if the employer had at least five employees. Employers filing UI contribution and wage reports by phone or electronically must make payments by electronic funds transfer using an ACH debit transaction [Ala. Adm. Code §§480-4-2-.17, 480-4-2-.32].

Georgia

EFT threshold lowered. Effective for tax periods beginning on or after 1-1-10, an employer owing more than \$1,000 (currently more than \$5,000) in connection with any withholding return is required to make payments using electronic funds transfer (EFT). Effective for tax periods beginning on or after 1-1-11, the threshold will decrease to more than \$500 [H.B. 334, L. 2009].

North Dakota

Electronic UI reporting threshold lowered. Effective beginning with tax year 2010, an employer that has at least 25 employees (currently at least 100 employees) at any time must file unemployment insurance (UI) contribution and wage reports by an electronic method approved by Job Service North Dakota (this updates *The Payroll Source*®, p. 7-36) [S.B. 2107, L. 2009].

Texas

EITC notice requirement established. Effective 9-1-09, employers must provide information by March 1 each year to all employees regarding the general eligibility requirements for the federal Earned Income Tax Credit (EITC). The information must be provided to employees: (1) in person; (2) electronically at the employee's last known e-mail address; (3) through a flyer included, in writing or electronically, as a payroll stuffer; or (4) by first-class mail to the employee's last known address. An employer may not satisfy this requirement solely by posting information in the place of employment. In addition to the information required above, an employer may provide federal forms or publications related to the EITC or information prepared by the Texas Comptroller [H.B. 2360, L. 2009].

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