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IRS Issues 2010 Form W-4 Plus Separate Instructions for Nonresident Aliens

The IRS has released the 2010 Form W-4, *Employee's Withholding Allowance Certificate*. The form is available on the APA website at www.americanpayroll.org/members/Forms-Pubs/#tax.

Employees who claimed exempt status in 2009 and wish to continue their exemption for 2010 must submit a new form to the payroll department by February 16, 2010. Those employees should complete only Boxes 1, 2, 3, 4, and 7 and sign the form to validate it. Individuals may not claim exempt status in 2010 if (1) their income exceeds \$950 (unchanged from 2009) and includes more than \$300 (also unchanged) of unearned income (e.g., interest and dividends) **and** (2) they can be claimed as a dependent on another person's tax return. If an employee whose exemption expires on February 16 does not file a new form, withhold as if the employee were single claiming no withholding allowances until he/she submits a new Form W-4.

Nonresident alien employees

Also for 2010, the note for "Nonresident alien" employees has been revised as follows: "If you are a nonresident alien, see Notice 1392, *Supplemental Form W-4 Instructions for Nonresident Aliens*, before completing this form." Notice 1392 is available on the APA website at the address given above. It includes the following directions for nonresident alien employees:

Will my withholding amounts be different from

withholding for my U.S. co-workers? Yes. Nonresident aliens cannot claim the standard deduction. In addition, nonresident aliens do not qualify for the Making Work Pay credit. The benefits of the standard deduction and the Making Work Pay credit are included in the wage withholding tables published in Publication 15 (Circular E), *Employer's Tax Guide*.

Because nonresident aliens do not qualify for these benefits, employers are instructed to withhold an additional amount from a nonresident alien's wages (see **PAYROLL CURRENTLY, Issue No. 23, Vol. 17**). For the specific amounts to be added to wages before application of the wage tables, see Publication 15. *Note:* A special rule applies to students and business apprentices from India who are eligible for benefits under the U.S.-India income tax treaty, because such individuals may be entitled to claim an additional withholding allowance for the standard deduction.

What are the special Form W-4 instructions? Nonresident aliens should pay particular attention to the following lines when completing Form W-4:

- **Line 2.** You are required to enter a social security number (SSN) on Line 2 of Form W-4. If you do not have an SSN, you must apply for one on Form SS-5, *Application for a Social Security Card*. *Note:* You cannot enter an individual taxpayer identification number (ITIN) on Line 2 of Form W-4.
- **Line 3.** Check the single box regardless of your actual

marital status.

- **Line 5.** Generally, you should claim one withholding allowance. However, if you are a resident of Canada, Mexico, or South Korea, a student or business apprentice from India, or a U.S. national, you may be able to claim additional withholding allowances for your spouse and children.

If you are completing Form W-4 for more than one employer, figure the total number of allowances you are entitled to claim and claim no more than that on all Forms W-4 combined. *Note:* Your

withholding usually will be most accurate when all allowances are claimed on the Form W-4 for the highest-paying job and zero allowances are claimed on the others.

- **Line 6.** Write “nonresident alien” or “NRA” on the dotted line. If you would like to have an additional amount withheld, enter the amount on Line 6.

- **Line 7.** Do not claim that you are exempt from withholding on Line 7 of Form W-4 (even if you meet both of the conditions listed on that line). ■

Tables Issued for Figuring Amount Exempt From Levy in 2010

Publication 1494, *Table for Figuring Amount Exempt from Levy on Wages, Salary, and Other Income*, provides tables showing the amount of an individual’s wages that is exempt from a Notice of Levy used to collect delinquent federal income tax in 2010 (see *The Payroll Source*®, beginning at p. 9-2). The exempt amounts

are based on the employee’s standard deduction and the number of exemptions claimed by the employee on the Notice of Levy. The tables are available at www.americanpayroll.org/members/Forms-Pubs/#annual. ■

IRS Releases Form 940 for Tax Year 2009

The IRS has released Form 940 (*Employer’s Annual Federal Unemployment (FUTA) Tax Return*) for 2009, as well as Schedule A (Form 940) (*Multi-State Employer and Credit Reduction Information*). Both forms and the *2009 Instructions for Form 940* are available on the APA website at www.americanpayroll.org/members/Forms-Pubs/#tax.

Items to note

- **Credit reduction state.** A state that has not repaid money it borrowed from the federal government to pay unemployment benefits is a “credit reduction state.” If an employer pays wages that are subject to the unemployment tax laws of a credit reduction state, that employer must pay additional federal unemployment tax when filing its Form 940.

For 2009, Michigan is a credit reduction state. If you paid any wages that are subject to the unemployment compensation laws of the state of Michigan, you are not allowed 0.3% of the regular 5.4% credit. Use Schedule A (Form 940), Part 2, to compute the additional tax. See also “Many States Now Have Outstanding UI Loan Balances” in *PAYROLL CURRENTLY, Issue No. 23, Vol. 17*.

- **FUTA rate for 2010.** The FUTA tax rate was scheduled to decrease from 6.2% to 6.0% in 2010, when the 0.2% FUTA surtax was set to expire. However, the Worker, Homeownership, and Business Assistance Act of 2009 (see “Capitol Hill Update” in *PAYROLL CURRENTLY, Issue No. 22, Vol. 17*) includes a provision extending the surtax and the current 6.2% rate for 18 months,

through June 30, 2011.

- **Disregarded entities and qualified subchapter S subsidiaries (Qsubs).** For wages paid on or after January 1, 2009, business entities that are disregarded as separate from their owner, including qualified subchapter S subsidiaries, are required to withhold and pay employment taxes and file employment tax returns using the name and EIN of the disregarded entity. The employment taxes may not be treated as a liability of the owner.

Revisions to the form and instructions

The following changes have been made to the form and instructions this year:

- Language has been deleted from the form as follows: above lines 2 and 11, the direction to “Skip line (2/11) for 2008 and go to line (3/12)” has been removed.

- On page 10 of the instructions under *Who Must Sign Form 940?*, for a corporation (including an LLC treated as a corporation), “other principal officer” has been changed to “other principal officer duly authorized to act.” For a single member LLC treated as a disregarded entity for federal income tax purposes, the “owner of the LLC” has been changed to the “owner of the LLC or a principal officer duly authorized to act.”

- On page 11 of the instructions under *Other IRS Forms and Publications You May Need*, Forms 941-X, 943-X, and 944-X plus the instructions for these forms have been added. ■

IRS Decreases Business Mileage Rate to 50 Cents for 2010

The IRS has announced that the business standard mileage rate for transportation expenses paid or incurred beginning January 1, 2010, will be 50 cents per mile, down from the 55 cents-per-mile rate in effect during 2009 [Rev. Proc. 2009-54, released 12-3-09; www.americanpayroll.org/members/Forms-Pubs/#guide].

The mileage rate may be used to compute the deductible cost of operating a passenger car (also vans, pickups, or panel trucks) for business purposes. It may also be used by employers that elect to use the “cents-per-mile” valuation method for

purposes of determining the amount that needs to be imputed to an employee’s income for personal use of certain company-owned or leased nonluxury vehicles (see *The Payroll Source*®, pp. 3-21 and 3-22).

In addition, the 2010 standard rate for miles driven for medical or moving purposes will decrease to 16.5 cents per mile, down from the 24 cents-per-mile rate in effect during 2009.

Finally, the standard mileage rate for operating a passenger car for charitable purposes is set by law and will stay at 14 cents per mile in 2010. ■

IRS Issues 2010 Pub 15-B, Employer’s Tax Guide to Fringe Benefits

The 2010 supplement to Circular E, *Employer’s Tax Guide to Fringe Benefits* (Pub. 15-B), has been released by the IRS. Publication 15-B contains specialized and detailed information on the employment tax treatment of fringe benefits. The publication is available on the APA website at

www.americanpayroll.org/members/Forms-Pubs/#annual. The following items are highlighted this year:

- **Cents-per-mile rule.** The standard mileage rate that an employer can use under the cents-per-mile rule to value the personal use of a company vehicle provided to an employee in

2010 is 50 cents a mile (down from the 55 cents-per-mile rate in effect for 2009).

In addition, the 2010 standard rate for miles driven for medical or moving purposes will decrease to 16.5 cents per mile, down from the 24 cents-per-mile rate in effect during 2009 (see “IRS Decreases Business Mileage Rate to 50 Cents for 2010” in this issue).

- **Qualified transportation fringes.** For 2010, the amounts excluded from gross income for employer-provided “qualified transportation fringe benefits” are \$230 per month for “combined commuter highway vehicle transportation and transit passes (unchanged from 2009) and \$230 per month for “qualified parking” (also unchanged; see **PAYROLL CURRENTLY, Issue No. 21, Vol. 17**).

- **Qualified bicycle commuting reimbursement.** After 2008, qualified transportation fringe benefits include any qualified bicycle commuting reimbursement (see **PAYROLL**

CURRENTLY, Issue No. 21, Vol. 16, “Emergency Economic Stabilization Legislation Enacted”).

- **Health savings accounts (HSAs).** For 2010, the maximum annual HSA contribution for an eligible individual with self-only coverage is \$3,050 (\$3,000 in 2009). For family coverage, the maximum annual HSA contribution is \$6,150 (\$5,950 in 2009). These amounts are increased by \$1,000 for a qualified individual who is age 55 or older at any time during the year.

A qualifying high deductible health plan must have a deductible of at least \$1,200 (\$1,150 in 2009) for self-only coverage or \$2,400 (\$2,300 in 2009) for family coverage and must limit annual out-of-pocket expenses of the beneficiary to \$5,950 (\$5,800 in 2009) for self-only coverage and \$11,900 (\$11,600 in 2009) for family coverage (see **PAYROLL CURRENTLY, Issue No. 11, Vol. 17**). ■

IRS Extends Food and Beverage Tip Reporting Pilot Program

The IRS has extended the Attributed Tip Income Program (ATIP) for two years, until December 31, 2011 [Rev. Proc. 2009-53, 12-1-09; www.irs.gov/pub/irs-drop/rp-09-53.pdf]. ATIP simplifies the recordkeeping burden for reporting tip income in the food and beverage industry. First announced in 2006 (see **PAYROLL CURRENTLY, Issue No. 17, Vol. 14**), it was originally set to expire on December 31, 2009.

Employers that participate in ATIP report the tip income of employees based on a formula that uses a percentage of gross receipts, which are generally allocated among employees based on the practices of the restaurant.

Both employees and employers benefit from participation

in the ATIP program. The IRS will not initiate a tip examination during the period the employer and employee participate in ATIP. Participating employees do not have to keep a daily tip log or other tip records.

Employers elect participation in ATIP by checking the designated box on Form 8027, *Employer's Annual Information Return of Tip Income and Allocated Tips*. Employees working for a participating employer elect to participate in ATIP by signing an agreement with their employer to have their tip income computed under the program and reported as wages. For more on ATIP, see *The Payroll Source*®, p. 3-93. ■

IRS Releases Form 944 for Tax Year 2009

The IRS has released Form 944, *Employer's Annual Federal Tax Return*, for tax year 2009. The form and instructions are available on the APA website at www.americanpayroll.org/members/Forms-Pubs/#tax. The instructions for this year include the following reminders:

- **Optional filing of Form 944 for 2010.** Beginning with tax year 2010, employers that otherwise would be required to file Form 944 can notify the IRS if they want to elect to file Form 941 quarterly instead of Form 944 annually (see **PAYROLL CURRENTLY, Issue No. 22, Vol. 17**).

- **COBRA premium assistance payments credit.** Employers that make COBRA premium assistance payments

for assistance eligible individuals are allowed a credit for the payments on Form 944. See **PAYROLL CURRENTLY, Issue Nos. 4, 5, 6, 7, 8, 10, and 12, Vol. 17**. See also www.irs.gov (keyword COBRA).

- **Correcting a previously filed Form 944.** If you discover an error on a previously filed Form 944, make the correction using Form 944-X, *Adjusted Employer's Annual Federal Tax Return or Claim for Refund*. Form 944-X is filed separately from Form 944.

- **Paid preparers must sign Form 944.** Paid preparers must complete and sign the paid preparer's section of Form 944. ■

IRS Announces Quarterly Interest Rates

The IRS has announced that the interest rates for the first quarter of 2010 (i.e., the calendar quarter beginning January 1, 2010) will not change. The rates will remain at:

- 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. 2009-37; www.irs.gov/pub/irs-drop/rr-09-37.pdf]. ■

State EITC Notice Requirements

Employees earning less than a certain amount in a year are entitled to the federal Earned Income Tax Credit (EITC) (also referred to as the Earned Income Credit or EIC). The EITC is a tax credit that reduces any taxes owed (for more information, see *The Payroll Source*®, beginning at p. 6-43). Six states – California, Illinois, Louisiana, New Jersey, Texas, and Virginia – require employers to notify employees of the federal EITC.

California

A California employer that is subject to and required to provide unemployment insurance (UI) to its employees under the California UI Code must notify all employees in California that they may be eligible for the federal EITC within one week before or after, or at the same time that the employer provides a Form W-2, *Wage and Tax Statement*, to any employee. The

employer must provide the notification by handing directly to the employee or mailing to the employee's last known address instructions on how to obtain any notices available from the IRS for this purpose, including IRS Notice 797, *Possible Federal Tax Refund Due to the Earned Income Credit (EIC)*, and federal Form W-5, *Earned Income Credit Advance Payment Certificate*, or any notice created by the employer as long as it contains substantially the same language (download a sample notice at www.edd.ca.gov/Payroll_Taxes/pdf/EarnedIncomeTaxCredit.pdf).

Illinois

An Illinois employer that is subject to and required to provide UI to its employees under the Illinois UI Act must notify any employee whose gross wages do not exceed the maximum amount that might qualify for the federal EITC. The employer must give or mail any notice available from the IRS, including IRS Notice 797, or any notice created by the employer as long as it contains substantially the same language. The notice must be furnished within one week before or after, or at the same time that the employer provides a Form W-2 to the employee. A sample notice is contained in state law (see 820 ILCS §170/20; available at www.ilga.gov/legislation/ilcs/ilcs2.asp?ChapterID=68).

Louisiana

A Louisiana business establishment that has 20 or more employees must notify new employees whose anticipated wages are \$40,000 or less per year that they may be eligible for the federal EITC. The employer must provide written notice from the IRS or the Louisiana Department of Labor (see www.laworks.net/Downloads/Posters/2009_Earned_Income_Credit_ltr_color.pdf) at the time of hiring. This information must also be

posted with other notices required by state and federal law.

New Jersey

All New Jersey public and private employers must give written notice to eligible employees of the availability of both the federal and New Jersey EITC when the employer gives the employee his or her Form W-2. The notice must be distributed between January 1 and February 15 of each year to coincide with the employer's distribution of Forms W-2. The written notice must use the statement developed by the New Jersey State Treasurer (see www.state.nj.us/treasury/taxation/pdf/eitcstatement.pdf).

Texas

A Texas employer must provide information by March 1 each year to all employees in Texas regarding the general eligibility requirements for the federal 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. In addition, an employer may provide federal forms or publications related to the EITC or information prepared by the Texas Comptroller.

Virginia

Virginia employers must post any notice provided by the Virginia Department of Social Services informing employees that they may be eligible for federal and state EITCs. The notice must be posted in the same location where other employee notices required by state or federal law are posted. Notices are available at www.dss.virginia.gov/community/eitc.cgi. ■

IRS Issues Final Regulations on Employee Stock Purchase Plans

The IRS has issued final regulations on stock options granted under an employee stock purchase plan (ESPP) [74 F.R. 59074, 11-17-09; <http://edocket.access.gpo.gov/2009/pdf/E9-27452.pdf>]. The regulations provide a comprehensive set of rules for ESPPs that update existing regulations under IRC §423. Proposed regulations issued on July 29, 2008 (see *PAYROLL CURRENTLY*, Issue No. 17, Vol. 16) are adopted with modifications and clarifications as noted below.

The final regulations apply to any ESPP granted on or after January 1, 2010. Taxpayers may rely on the final regulations for the treatment of any ESPP granted prior to that date.

Background

IRC §421 provides special rules for determining the income tax treatment of the transfer of shares of stock pursuant to the exercise of an option if the requirements applicable to "statutory options" – §422(a) (incentive stock options) and §423(a) (ESPPs) – are met. Under §421, if a share of stock is transferred to an individual pursuant to the exercise of a statutory option, there is no income at the time the option is exercised and no deduction is allowed to the employer corporation with respect to the transfer.

General requirements

The final regulations clarify that an option may still qualify for the special tax treatment of §421 – even if the terms of the plan do not comply with the final regulations under §423(a) – if the option is granted under an offering with terms that do comply with these regulations.

Offerings under an ESPP

Multiple offerings. The final regulations provide that multiple offerings under a plan may be consecutive or overlapping. While the terms of each offering need not be identical, the terms of the

plan and each offering together must satisfy the requirements of the final regulations.

For example, if overlapping offerings are made under an ESPP, then each offering may contain different terms, provided that the terms of each offering (together with the plan) satisfy the requirements of the final regulations.

Furthermore, when a parent corporation adopts an ESPP, it may establish separate offerings with different terms under the plan and designate which of its subsidiary corporations may participate in a particular offering, provided that the terms of each offering (together with the plan) satisfy regulatory requirements.

Employees covered by the plan. The final regulations modify the rule set out in the proposed regulations that exclusions for various categories of employees must be applied in an identical manner to all employees of every corporation whose employees are granted options under the plan. The final regulations permit multiple offerings under a plan with different exclusions applicable to the one or more corporations whose employees participate in the particular offering under the plan.

The determination as to whether the terms of a plan and offering satisfy regulatory requirements is made on an offering-by-offering basis. The terms of each offering under a plan may be different, provided the plan and offering together satisfy those requirements.

In addition, the final regulations offer some flexibility with respect to highly compensated employees. While HCEs may not be excluded from participation in an ESPP on "any" basis, they may be excluded within specified limits. In addition, the terms of each offering made under a plan need not be identical with respect to HCEs.

Equal rights and privileges. The final regulations provide flexibility by permitting employers to make multiple offerings with different rights and privileges applicable to the participants of each offering under a plan. However, the rights and privileges established with respect to a particular offering must be applied in an identical manner to all employees of every corporation whose employees are granted options under that particular offering.

Maximum number of shares that may be purchased by an employee

Under the final regulations, the date of grant is the first day of an offering period if the terms of an ESPP or offering designate a maximum number of shares that may be purchased by each employee during the offering period. Similarly, the date of grant is the first day of an offering if the terms of the plan or offering require the application of a formula to establish, on the first day of the offering, the maximum number of shares that may be purchased by each employee during the offering.

However, the final regulations do not require that an ESPP or offering designate a maximum number of shares that may be

purchased by each employee during the offering or incorporate a formula to establish a maximum number of shares that may be purchased by each employee during the offering.

If the maximum number of shares that can be purchased under an option is not fixed or determinable until the date the option is exercised, then the date of exercise is also the date of grant of the option.

Annual \$25,000 limitation

The final regulations modify the proposed regulations to clarify that the \$25,000 limit for ESPPs (limiting the accrual of an employee's right to purchase stock) increases by \$25,000 for each calendar year that an option is outstanding.

Stockholder approval requirements

The final regulations clarify that new stockholder approval is required if there is a change in the shares with respect to which options are issued or a change in the granting corporation. In particular, the final regulations clarify that the stockholders of a subsidiary corporation include the parent corporation and any other stockholders of the subsidiary. ■

IRS Releases 2009-2010 Priority Guidance Plan

The IRS and the Treasury Department have released their 2009-2010 priority guidance plan, a list of tax regulations and other administrative guidance scheduled for publication during the year ending June 30, 2010 [www.irs.gov/pub/irs-utl/2009_-_2010_priority_guidance_plan.pdf]. This year's plan lists 315 projects, with 54 items relating to tax administration, 72 relating to employee benefits (including retirement, health care, and other benefits, and employment taxes), and 20 relating to international issues. The IRS says the plan is not an exclusive list of the guidance that may be published during this plan year; other areas currently under study may result in published guidance. In addition, the IRS will update the plan periodically, in order to respond to developments that may arise during the plan year.

The following are some of the payroll-related regulations and guidance that the IRS hopes to release by June 30, 2010.

Retirement benefits

- guidance on IRC §403(b) prototype program; and
- guidance on certain retirement plan provisions of the Heroes Earnings Assistance and Relief Tax (HEART) Act of 2008 (see *PAYROLL CURRENTLY*, Issue No. 11, Vol. 16).

Health care, other benefits, and employment taxes

- final comprehensive regulations on cafeteria plans (see *PAYROLL CURRENTLY*, Issue No. 17, Vol. 15);
- final regulations under §274(i) on qualified nonpersonal use vehicles (see *PAYROLL CURRENTLY*, Issue No. 14, Vol. 16);
- final regulations on income inclusion under §409A (see *PAYROLL CURRENTLY*, Issue No. 25, Vol. 16 and Issue No. 2, Vol. 17);

- update to guidance on tips under Rev. Rul. 95-7;
- regulations implementing new §3121(z), as added by the HEART Act, on foreign employers;
- guidance on reporting FUTA tax for home health care recipients under §3504 ("acts to be performed by agents"); and
- guidance on making employment tax adjustments and refund claims.

General tax issues

- regulations on the deductibility of expenses for lodging not incurred in traveling away from home;
- final regulations regarding personal use of company aircraft (see *PAYROLL CURRENTLY*, Issue No. 20, Vol. 15);
- final regulations under §3402(t) on extension of withholding to certain payments made by government entities (see *PAYROLL CURRENTLY*, Issue No. 4, Vol. 17); and
- guidance on the meal expenses deduction limitation in employee leasing arrangements.

International issues

- guidance on the 2009 foreign housing cost exclusion amount; and
- guidance on cross-border information reporting.

Tax administration

- guidance on third-party payer issues and reporting agents;
- guidance on the Form SS-4 signature requirement, including digital or electronic signatures;
- guidance on the Form 944 program; and
- guidance on return-preparer penalties. ■

IRS Issues Proposed Regulations on New Reporting Requirement for Payment Card Transactions

The IRS has issued proposed regulations on information reporting requirements, information reporting penalties, and backup withholding requirements for payment card and third party network transactions following enactment of new IRC §6050W as part of the Housing and Economic Recovery Act of 2008 (Pub. L. No. 110-289; see *PAYROLL CURRENTLY*, Issue No. 16, Vol. 16) [74 F.R. 61294, 11-24-09; <http://edocket.access.gpo.gov/2009/pdf/E9-28076.pdf>].

Background

New §6050W requires merchant acquiring entities and third party settlement organizations to file an information return for each calendar year reporting all payment card transactions and third party network transactions with participating payees occurring in that calendar year. This requirement applies beginning in 2011.

New §6050W also requires statements to be furnished to participating payees on or before January 31 of the year following

the year for which the return is required.

The Act also amended §3406(b)(3) to provide that amounts reportable under §6050W are subject to backup withholding requirements. Backup withholding for amounts reportable under §6050W applies to amounts paid after December 31, 2011.

Solely for purposes of carrying out TIN (taxpayer identification number) matching under §3406, §6050W was effective July 30, 2008 (the date of enactment). The IRS has announced that those who will be required to make returns under §6050W may match TINs under established procedures (see **PAYROLL CURRENTLY, Issue No. 6, Vol. 17**).

The Act also amended §6724(d) by adding returns required under §6050W to the definition of information return for purposes of penalties for failure to comply with certain information reporting requirements. These amendments apply to returns for calendar years beginning in 2011.

Definitions clarified by the proposed regulations

The new law requires any payment settlement entity making payment to a participating payee in settlement of reportable payment transactions to make an annual return for each calendar year reporting the gross amount of the reportable transactions, as well as the name, address, and TIN of the participating payee. The law also requires payment settlement entities to furnish written statements to persons with respect to whom such a return is required showing the name, address, and telephone number of the information contact of the person required to make the return and the gross amount of the reportable payment transactions with respect to the person required to be shown on the return.

A **reportable payment transaction** is defined as any transaction in which a payment card is accepted as payment and any transaction that is settled through a third party payment network. The proposed regulations provide guidance to interpret the meaning of this term in the context of both payment card transactions and third party network transactions, and to determine the gross amount of the transaction to be reported.

The proposed regulations provide that **gross amount** means the total dollar amount of the aggregate reportable payment transactions for each participating payee without regard to any adjustments for credits, cash equivalents, discount amounts, fees, refunded amounts, or any other amounts.

Payment settlement entity: U.S. payer or U.S. middleman

The proposed regulations provide that a payment settlement entity that is a U.S. payer or U.S. middleman (under Reg. §1.6049-5(c)(5)) is not required to report payments to participating payees with a foreign address as long as, prior to payment, the payee has provided documentation the payment settlement entity may rely on to treat the payment as made to a foreign person.

By contrast, a payment settlement entity that is not a U.S. payer or U.S. middleman is not required to report payments to participating payees that do not have a U.S. address as long as the payment settlement entity neither knows nor has reason to know that the participating payee is a U.S. person.

A **foreign address** means any address that is not within the 50 states and the District of Columbia. A **United States address** means any address that is within the U.S.

☞ **COMMENTS ARE REQUESTED** – on the treatment of payment settlement entities that are not U.S. payers or U.S. middlemen.

Payments to governmental units

The proposed regulations do not provide for any exceptions to reporting for payments made to governmental units. Payments to governmental units that are made using transit cards and electronic

toll collection systems are included within the scope of §6050W if such payments meet the other requirements of the section.

☞ **COMMENTS ARE REQUESTED** – on the impact of these proposed regulations on governmental units that accept payments made using transit cards, electronic toll collection systems, and similar electronic payment mechanisms.

Monthly reporting requirement

The proposed regulations require reporting, with respect to each participating payee, of the gross amount of the aggregate reportable payment transactions for the calendar year and the gross amount of the aggregate reportable payment transactions for each month of the calendar year (to aid in reconciling payment card and third party network transaction receipts for fiscal year payees).

De minimis exception. Under the proposed regulations, a third party settlement organization must report payments made to a participating payee only if its aggregate payments to that payee from third party network transactions exceed \$20,000 and the aggregate number of those transactions with the payee exceeds 200.

☞ **COMMENTS ARE REQUESTED** – on the application of the de minimis exception, including whether it should be mandatory or voluntary.

Payment card transactions

Under the proposed regulations, a “payment card” is a card issued to a cardholder that a network of unrelated persons has agreed to accept as payment under an agreement that provides standards and mechanisms for settling the transactions between a merchant acquiring bank or similar entity and the providers who accept the cards.

The definition includes, but is not limited to, all credit cards, debit cards, and stored-value cards (including gift cards), and also includes the acceptance as payment of any account number or other indicia associated with a payment card.

FSAs and HSAs. Under the proposed regulations, the definition of payment card encompasses a card issued in connection with a flexible spending arrangement (FSA) or health reimbursement arrangement (HRA). Note, however, that payments made for medical care under FSAs or HRAs continue to be exempt from reporting under §6041.

Relationship to the issuer. Under the proposed regulations, a stored-value card is not a payment card within the meaning of §6050W when it is accepted as payment by a person who is related to the issuer of the card. However, if the stored-value card itself is purchased with a payment card issued by an unrelated entity, that purchase transaction is reportable under §6050W.

In contrast, a stored-value card that a network of persons unrelated to the issuer has agreed to accept as payment (such as a stored-value card issued by a college that may be used at various local merchants unrelated to the college) is a payment card when it is accepted as payment in a transaction with an unrelated person.

Third party network transactions

The proposed regulations provide that the central organization of a third party settlement organization must provide a third party payment network that enables purchasers to transfer funds to providers of goods and services. The Joint Committee on Taxation (JCT) technical explanation of §6050W describes a “third party payment network” as any agreement or arrangement that, among other requirements, involves the establishment of accounts with a central organization by a “substantial number of persons (e.g., more than 50).”

☞ **COMMENTS ARE REQUESTED** – on the interpretation of

“substantial number of persons” as used in the definition of “third party payment network.”

Healthcare networks. Under the proposed regulations, health carriers operating a healthcare network are outside the scope of §6050W because the purpose of a healthcare network is not to enable buyers to transfer funds to sellers. Health carriers collect premiums from covered persons pursuant to a plan agreement between the health carrier and the covered person for the cost of participation in the healthcare network. Separately, health carriers pay healthcare providers to compensate providers for services rendered to covered persons pursuant to provider agreements.

Accounts payable departments and shared-service organizations. Under the proposed regulations, an in-house accounts payable department is not a third party settlement organization of a third party payment network because an in-house accounts payable department is not a “third party.” Rather, an in-house accounts payable department is merely an accounting function of the purchaser of goods and services by which the purchaser makes payments directly to sellers on the purchaser’s own behalf.

In contrast, many purchasers outsource their accounts payable function to a third party organization, sometimes referred to as a “shared-service” organization. This organization acts as an independent contractor with respect to the accounts payable of purchasers of goods and services. Accordingly, under the proposed regulations, a shared-service organization is a third party settlement organization of a third party payment network if: (1) a substantial number of unrelated providers of goods and services have established accounts with the shared-service organization, and (2) this arrangement enables purchasers of the goods and services to transfer funds to these providers, who are obligated by contract to accept guaranteed payments from the shared-service organization in settlement of their transactions with the purchasers. The shared-service organization must report these transactions as third party network transactions unless the de minimis exception applies.

Automated clearing house (ACH) networks. Under the proposed regulations, payments settled through an ACH network are not settled through a third party payment network. An ACH merely processes electronic payments between payers and payees, and does not itself have contractual agreements with payees to use the ACH network. Accordingly, under the proposed regulations an ACH network is not a third party payment network, and an ACH is not required to report under §6050W.

Special rules

Aggregated payees. Under §6050W(b)(4)(A), special rules apply to persons who receive payments from a payment settlement entity on behalf of one or more participating payees and distribute such payments to one or more participating payees. The proposed regulations provide the following example: Corporation A, acting on behalf of A’s independently owned franchise stores, receives payment from Bank X for credit card sales at these franchise stores. X, the payment settlement entity, is required to report the gross amount of the reportable payment transactions distributed to A (notwithstanding the fact that A does not accept payment cards and would not otherwise be treated as a participating payee). In turn, A is required to report the gross amount of the reportable payment transactions allocable to each franchise store. X has no reporting obligation under §6050W with respect to payments made by A to its franchise stores.

Electronic payment facilitators. Under §6050W(b)(4)(B), in any case where an “electronic payment facilitator” or other third party makes payments in settlement of reportable payment

transactions on behalf of the payment settlement entity, the §6050W return must be filed by the electronic payment facilitator or other third party in lieu of the payment settlement entity. Under the proposed regulations, any person that has contracted with a payment settlement entity to make payments on its behalf to a participating payee in settlement of reportable transactions is subject to this special rule.

Duplicate reporting of the same transaction

Section 6041. The proposed regulations provide that any payment card transaction that otherwise would be reportable under both §6041 (information reporting generally) and §6050W must be reported under §6050W and not §6041.

Relief from reporting under §6041 is warranted for payment card transactions because §6050W reporting covers all payment card transactions and thus effectively encompasses all payments subject to §6041 reporting made by payment card. Relief from reporting under §6041 is not warranted, however, for third party network transactions because such transactions are not subject to reporting unless de minimis thresholds are met (see above). The payer with the obligation to report under §6041 cannot determine whether a third party network transaction must be reported under §6050W.

☞ **COMMENTS ARE REQUESTED** – on the application of this rule to prevent the reporting of the same transaction more than once.

Section 3402(t). The same transaction may be subject to reporting under §6050W and withholding and reporting under §3402(t) (certain payments made by government entities). However, reporting under §3402(t) is not being eliminated in such cases because:

- Information reporting under these sections serves different purposes – §3402(t) reporting allows both payees and the IRS to account for the income tax that has been withheld from payments.
- The payment settlement entity, such as a merchant acquiring entity in the case of a payment card transaction, may not know the identity of the actual card user – and thus would not know whether the card user is a government entity required to withhold under §3402(t) and would not be able to determine whether reporting under §6050W is excepted.
- Proposed regulations under §3402(t) provide for a \$10,000 payment threshold amount, whereas §6050W has no payment threshold amount for payment card transactions.

New Form 1099-K

The IRS is creating a new form for information reporting under §6050W. A draft of new form 1099-K, *Merchant Card and Third-Party Payments*, is available for review at www.irs.gov/pub/irs-dft/f1099k-dft.pdf. The first returns due under §6050W will be returns for calendar year 2011 due in 2012.

Under the proposed regulations, the time and manner for reporting under §6050W will follow existing procedures for information reporting under other Code sections.

☞ **COMMENTS ARE REQUESTED** – on whether existing consent procedures regarding electronic statements should be modified for purposes of §6050W.

Backup withholding

Under the proposed regulations, persons making information returns with respect to any reportable payment under §6050W made after December 31, 2011, are included in the definition of “payers” obligated to backup withhold when a Taxpayer Identification Number is not provided.

The proposed regulations do not eliminate the requirement for backup withholding for transactions that are reportable under

§6050W and another Code section.

COMMENTS ARE REQUESTED – on the circumstances under which relief for duplicate backup withholding is appropriate once backup withholding under §6050W becomes effective.

Effective date

The information reporting regulations under §6050W and §6041 are proposed to apply to returns for calendar years beginning after December 31, 2010. The backup withholding

regulations under §3406 are proposed to apply to amounts paid after December 31, 2011.

Comments

Comments must be received by January 25, 2010. Send written comments to: CC:PA:LPD:PR (REG-139255-08), Room 5205, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Or submit comments electronically at: www.regulations.gov (IRS REG-139255-08). ■



STATE AND LOCAL NEWS

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Several states have issued 2010 withholding tables. Several states have recently issued withholding tables for employers to use in determining the amount of state income tax to withhold from their employees' wages in 2010. These states include California, Delaware, Kentucky, Maine, Maryland, Minnesota, New York, North Dakota, Rhode Island, and Vermont.

Alaska

UI taxable wage base increased, employee contribution rate unchanged. For 2010, the unemployment insurance (UI) taxable wage base will increase to \$34,100 from the 2009 wage base of \$32,700 (this updates *The Payroll Source*®, p. 7-23). Also, for 2010, the UI employee tax rate will remain 0.5% of annual earnings up to the wage base. This converts to a maximum employee deduction of \$170.50 for 2010, up from \$163.50 for 2009 (this updates *The Payroll Source*®, p. 7-28).

Connecticut

Presence test for income tax withholding on nonresident employees established. Effective 12-2-09, employers are not required to withhold Connecticut income tax from wages or compensation paid to nonresident employees for services performed in Connecticut provided the employees are assigned to a primary work location outside of Connecticut and work in Connecticut for 14 or fewer days in a calendar year [Department of Revenue Services, AN 2009(9), 12-2-09].

Hawaii

TDI wage base and maximum weekly deduction increased. The 2010 temporary disability insurance (TDI) weekly wage base will increase to \$901.70 from the 2009 weekly wage base of \$877.69. An employer may withhold TDI contributions of one-half of the premium cost, but no more than 0.5% of the employee's weekly wage, with the maximum weekly deduction not to exceed \$4.51 (\$4.39 in 2009) (this updates *The Payroll Source*®, p. 7-42) [Department of Labor and Industrial Relations website, 12-1-09].

New York

Paycard use permitted. The Department of Labor (DOL) has issued a letter stating its opinion that the use of payroll debit cards for the payment of wages is permissible under New York labor law under certain circumstances. The employee must not be charged fees to access wages. Voluntary consent is required from nonexempt employees and consent must not be a condition of employment [NYDOL Ltr., 10-29-09].

Rhode Island

TDI wage base increased, employee contribution rate decreased. For 2010, the temporary disability insurance (TDI) taxable wage base will increase to \$57,900 from the 2009 wage base of \$56,000 (this updates *The Payroll Source*®, p. 7-42). The employee contribution rate will decrease to 1.2% from 1.5% in 2009. This converts to a maximum employee contribution of \$694.80 for 2010 (\$840 for 2009) [Department of Labor and Training, News Release, 11-23-09].

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