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## Employers May Take Credit in 2010 for 2009 COBRA Premium Assistance Paid in 2010

If an employee becomes eligible for COBRA coverage and premium assistance in 2009, and then, in 2010, retroactively elects coverage and pays his or her share of the premium, the employer must take credit for its share of the premium on the Form 941, *Employer's Quarterly Federal Tax Return*, for the quarter during which the employee paid the premium or for any subsequent quarter during that calendar year. The IRS will be posting this new information at [www.irs.gov/newsroom/article/0,,id=205373,00.html](http://www.irs.gov/newsroom/article/0,,id=205373,00.html) (under "Form Preparation").

This is a reversal of the position the IRS took at its December 10 monthly conference call with payroll industry representatives (see "[Inside Washington for December 2009](#)"). When the question was posed by a call participant, the IRS said that because the coverage was for a period during 2009, the employer would have to amend the Form 941 for the related 2009 quarter.

### APA asked the IRS to reconsider its position

During the December 10 call, Scott Mezistrano, APA Senior Manager of Government Relations, pointed out that employers could become burdened with having to prepare Forms 941-X for fourth quarter 2009, and the IRS could then become burdened with processing all of those amended returns. While we understand how the answer flowed logically from earlier guidance provided by the IRS, we suggested that this was an unconsidered and unintended consequence.

Given the amount of time employers have to issue COBRA

eligibility notifications to terminated employees and the amount of time employees have to make their elections, it is possible that a terminated employee could elect coverage and pay premiums as late as April 2010 for periods going back to December 2009, said Russ Weinheimer, Office of Division Counsel/Associate Chief Counsel (Tax Exempt/Government Entities Division).

### New IRS Q&A

**Q.** If, in 2010, an employer receives payment of an assistance eligible individual's 35% share of the COBRA premium for 2009 coverage, does question FP-15 permit the credit for the related 65% premium subsidy to be claimed for a quarter in 2009?

**A.** No. If an employer receives an assistance eligible individual's 35% share of the COBRA premium in 2010, the employer may claim the credit for the related premium subsidy on Form 941 for either the quarter in 2010 in which it receives the individual's 35% premium payment or a later quarter in 2010, but not for a quarter in 2009, regardless of the fact that the premium is for coverage during 2009. In all cases, however, if an employer chooses to reduce its payroll tax deposits during the quarter based on the receipt of the individual's 35% premium payment, the employer must claim the credit for the related subsidy amount on Form 941 for the quarter during which its payroll tax deposits were reduced. In addition, of course, an employer may only claim credit for the subsidy amount once. ■

## APA Meets With Treasury Executives – Another Stimulus for 2010?

Despite the fact that the Making Work Pay Credit applies to 2009 and 2010, there are reports that the Obama Administration is considering an additional stimulus for 2010, perhaps along the lines of a "social security tax holiday."

Representatives from the APA and the National Payroll Reporting Consortium (NPRC) met with Treasury Department officials recently to review general recommendations from the payroll industry on implementation of any future stimulus plan. Attending the meeting were Mark Iwry, Senior Adviser to the Secretary of the Treasury, and other department executives, including those who set the income tax withholding tables.

### Policy-neutral, but concerned about process

The APA and NPRC are neutral as to whether a stimulus would address the current economic situation, but we emphasized that we would want to collaborate with the Treasury and other organizations to ensure that any proposal is feasible

and can be implemented with a minimum of cost, burden, and confusion for taxpayers, employers, and the government. Generally, the easier it is for employers to implement any changes, the more successful a stimulus will be.

We explained that a social security tax stimulus could be implemented most quickly and easily by a reduction in the current 6.2% tax rate applicable to the entire year and to all employees who pay these taxes. It could even be retroactive, as payroll systems generally self-adjust for overwithheld social security tax. However, we emphasized that a change could be implemented more easily if done before the close of a quarter and the filing of Forms 941.

Conversely, a change in rate for only a certain period of time or only those with annual earnings below a certain amount (as often suggested by some members of Congress) would be a radical departure from the way this tax is withheld and reported

on Forms 941 and W-2. Employers are required to withhold, remit, and report FICA tax within pennies, because there is no other reconciliation process for this tax as there is for income tax, for which employees file personal income tax returns. Additionally, a change for a limited time period or population would likely require the Internal Revenue Service and the Social Security Administration to change their forms and systems, and then employers would need time to react to those changes.

### Building on past success

The APA and NPRC were instrumental in easing the

## IRSAC Addresses Tax Law Assistance, Tax Penalty Reform

A few issues of interest to payroll and accounts payable professionals were addressed at the annual public meeting of the Internal Revenue Service Advisory Council (IRSAC). IRS executives (including the Commissioner) and taxpayer representatives (including APA's Michael Casey, CPP, EA, MAAT) discussed, among other issues, developing online tools to provide tax law assistance to taxpayers, reforming civil tax penalties to encourage voluntary compliance and not punish inadvertent or excusable error, and setting a cents-per-mile per diem for the trucking industry.

### What is IRSAC?

IRSAC is a group of 31 volunteer representatives from many industries and disciplines, such as payroll, tax return preparation, software development, insurance, and investment brokerage. As representatives of the taxpaying public, they can provide IRS with the best perspective on process improvements and which new projects will have the most positive and far-reaching impact. You can read all of IRSAC's recommendations in the 2009 report at [www.irs.gov/taxpros/article/0,,id=215345,00.html](http://www.irs.gov/taxpros/article/0,,id=215345,00.html).

IRSAC has four subgroups. Three of them correspond to three of the four IRS operating divisions: Large and Mid-Size Business (LMSB), Small Business and Self-Employed (SBSE), and Wage and Investment (W&I). (The fourth IRS operating division, Tax-Exempt and Government Entities, has its own advisory committee.)

### Online tax law assistance will increase compliance

IRS representatives on the toll-free customer assistance telephone lines and at Tax Assistance Centers have access to IRS's Interactive Tax Law Assistant (ITA) so they can provide taxpayers with answers to certain tax questions. The IRS is working with outside contractors to develop the ITA into a publicly-available, interactive program of tax law questions and answers and decision trees in plain English. Besides the help this would provide, it is expected that better-educated taxpayers will be more compliant.

Members of IRSAC's W&I subgroup met regularly with the contractor during 2009. There are currently 114 Tax Law

## Submit Your Payroll Questions for the 2010 Federal Forum

One of the most popular workshops at the APA's Annual Congress is the *Forum on Federal Payroll Issues*, which features a panel of representatives from five federal agencies answering challenging payroll questions posed by our members. The questions are provided to the panelists about a month in advance, so they can do any necessary research and deliver complete answers.

If you have a question about a federal payroll law or regulation, or how it should be applied in your particular setting, please send it by March 19 to [smezistrano@americanpayroll.org](mailto:smezistrano@americanpayroll.org). You may pose a question to the Internal Revenue Service,

delivery of the Making Work Pay Credit. Our discussions with Congressional tax-writing committees and Treasury executives resulted in a simple reduction in the 2009 and 2010 withholding tax rates, to be reconciled with a credit calculated on the personal income tax return (see "Inside Washington" for [January](#) and [February](#) 2009). The IRS issued new withholding tables just four days after President Obama signed the American Recovery and Reinvestment Act of 2009 (Pub. L. No. 111-5) into law, and employers applied the new tables shortly thereafter. ■

Categories (TLCs) available to IRS telephone assistors. IRSAC recommended that additional TLCs be included in the initial public rollout of the ITA.

### Civil tax penalty has not been reformed in over 20 years

"Penalties must be designed to encourage voluntary compliance and discourage intentional or reckless noncompliance. Inadvertent or excusable error should not be punished to the same degree, if at all, as willful misconduct," according to the IRSAC report. The IRS "should establish a task force comprised of government representatives and stakeholders to analyze the possibility of updated comprehensive civil tax penalty reform as a method of encouraging voluntary compliance." The report also noted that the number of civil penalties in the Internal Revenue Code has increased nearly tenfold in the last 55 years but there has been no comprehensive reform of these penalties since 1989.

### A trucking 'cents-per-mile' per diem would reflect actual practice

The trucking industry commonly reimburses drivers' expenses on the basis of their mileage rather than time spent on the job, according to the IRSAC report. This is motivated by competitive and productivity considerations. However, the only safe harbor expense reimbursement allowed by the IRS is its per diem system – a set of flat amounts per day, based on the city of travel. The IRS has special per diem rates for the transportation industry (currently \$59 per day for travel within the continental U.S.; \$65 outside the continental U.S.) to account for the fact the workers in this industry could be in multiple locations in one day.

After employers in the trucking industry compensate based on mileage, they must reconcile those payments with IRS's daily rates to see if there is any taxable excess. This process is "time-consuming, complicated, and costly for taxpayers," says IRSAC. "The IRS should revisit this issue with industry groups and attempt to develop an allowable 'cents-per-mile' per diem which is acceptable to both the IRS and the trucking industry." ■

the Social Security Administration, the Office of Child Support Enforcement, the Department of Labor, or the Department of Homeland Security.

In addition to being presented at the Congress workshop, many of the questions and answers will be transcribed for publication in PAYROLL CURRENTLY. Last year's Congress Q&A appeared in [Issue No. 13](#).

APA's 28th Annual Congress will be held May 25-29 just outside Washington, D.C. For more information, visit [www.americanpayroll.org/congress](http://www.americanpayroll.org/congress). ■