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IRS Agrees to Easier Way to Prepare Form 941 and Schedule B Under the HIRE Act

Just in time for your second quarter (2Q) tax filings, the IRS has approved an easier way for you to prepare your Form 941 and Schedule B to reflect your tax relief under the Hiring Incentives to Restore Employment (HIRE) Act. In addition, the IRS has provided some guidance on whether the tax relief may be applied to employees who work seasonally or seem to go on and off the payroll and to disability payments.

The information presented here is from recent IRS conference calls with payroll industry representatives and separate conversations between the APA and the IRS.

Question: Schedule B. If an employer isn't able to calculate its year-to-date relief from its share of social security tax until sometime during 2Q and then reduces its next tax deposit accordingly, does it have to recalculate each pay date's tax liability on Schedule B, *Report of Tax Liability for Semiweekly Schedule Depositors*, or may it reduce the entry for the current or next pay date by that entire amount?

Answer: Either approach is acceptable, according to Ligeia Donis, of the IRS Office of Division Counsel/Associate Chief Counsel, Tax Exempt and Government Entities. The APA had suggested to the IRS that it allow either approach, as the second (and administratively easier) approach actually holds employers to a higher standard – its deposit liabilities would be recorded as higher in the earlier part of the quarter and lower in the latter part.

However, there should be no negative amounts on Schedule B, and the relief from 2Q must be recorded on the Schedule B for 2Q – it may not be carried forward to 3Q. (Relief for wages paid March 19-31 is recorded on a special line on the 941 for 2Q, but this relief does not affect Schedule B.)

Question: Seasonal employees. Is an employee who is seasonal, or otherwise goes on and off the payroll, a “qualified individual” for purposes of the tax relief?

Answer: It depends on the date of hire and whether the “employment relationship” is maintained while the employee is not performing services, said Donis. See the examples below. (Remember that to be a qualified individual, one must be hired after February 3, 2010, and must not have been employed by any employer for more than 40 hours during the 60 days before hire.)

Example 1: An employee began employment before

February 4, was terminated on April 30, and was then rehired by the same employer on August 21. The employer could claim the tax relief on wages paid from August 21 until the end of the year, but not on the wages paid from March 19 to April 30.

Example 2: An employee was laid off in November 2009 and then rehired after February 3, 2010, and after 60 days of not working, but the employer continued the employee's benefits coverage. This employee is not qualified because the employment relationship was continuous from a date prior to February 4.

Example 3: A teacher completed her 2009-2010 contract on May 15, 2010, received no wages from the school or anyone else during the summer, but is expected to return to work on August 16, 2010. This employee is not qualified because the employment relationship was continuous from a date prior to February 4.

Example 4: An employee was hired after February 3, 2010, and worked for only a few weeks. He was “laid off until business picks up” and came back to work less than 60 days later. The IRS said that if the employment relationship was maintained while the employee was not performing services, then the tax relief would apply to the wages for both periods.

There may be some situations that aren't clarified by these examples. The APA recommends that an employer make a reasonable definition of “maintaining the employment relationship” and apply that definition consistently.

No social security tax relief, but retention credit is OK

An employee who starts work so late in 2010 that her first pay date isn't until 2011 may be a qualified individual, but the employer may not take any social security tax relief on her wages. (The relief applies only to wages paid to qualified individuals from March 19 through December 31, 2010.) However, the employer may still enjoy the employee retention business tax credit if it employs her for at least 52 consecutive weeks and if her wages during the last 26 weeks of that period are at least 80% of the wages during the first 26 weeks.

Question: Applying tax relief to short-term disability. Assuming the definitions of “qualified employer” and “qualified individual” are met, are short-term disability (STD) payments (also called “sick pay”) considered wages on which an employer may take the social security tax relief?

Answer: The APA took the position that the answer should be “yes,” and the IRS agreed. Our reasoning was as follows: Other than any portion of STD payments that is proportional to any STD premium paid by the employee, STD payments are definitely wages, but whether the employer could take the SS tax relief on them would seem to hinge on whether the STD payments are “wages paid by a qualified employer with respect to employment” (IRC §3111(d)(1)).

“Paid by a qualified employer”: STD could be paid directly by the employer, by a third party as an agent of the employer, or by a third party under an insurance arrangement. However, even when the payment is made by a third party, the IRS has said that the third party is not the employer (see Pub. 15-A, p. 15, 2nd paragraph).

“With respect to employment”: Although not payment directly for services, these wages wouldn’t be paid if it weren’t for the employment relationship. Also, there could certainly be other wages that aren’t directly tied to performance of services, but on which social security taxes accrue (e.g., post-employment taxable benefits) and for which there doesn’t seem to be anything precluding the employer from taking the relief.

Situations still not clarified

The APA has asked the IRS whether either of the following situations will prevent an employee from being a qualified individual, but the answers are still not clear:

- self-employment during the 60 days prior to hire, or
- receiving severance pay during the 60 days prior to hire.

Revised 941-X expected in August

Form 941-X, *Adjusted Employer’s Quarterly Federal Tax Return or Claim for Refund*, is being revised to include new lines that will correspond to the lines that were added to the 2Q Form 941 to accommodate the HIRE Act. A draft of the revised form is available at www.americanpayroll.org/members/Forms-Pubs/#drafts; the new form will be released in August, the IRS announced. Until the new form is released, you may use the existing 941-X, even to amend a 941 filed for 2Q, as long as you are not amending any lines related to the HIRE Act. Once the new form is released, however, the old 941-X will no longer be acceptable.

Other items still in the works

The APA and other organizations continue to ask the IRS for guidance on the W-2 reporting of employer-provided health care that will be required for tax years 2011 and beyond, under the Patient Protection and Affordable Care Act (PPACA; see [PAYROLL CURRENTLY, Issue No. 4, Vol. 18](#)). The staff of the IRS Office of Payroll and Practitioner Liaison said they are waiting for it to be released from the Office of Chief Counsel.

Publications 1141 and 1223, which provide the general rules and specifications for substitute Forms W-2/W-3 and W-2c/W-3c, respectively, are expected to be revised and posted to the IRS website in early August.

The final cafeteria plan regulations (proposed in 2007), which were expected by now, have been put on hold so that the IRS can focus on guidance necessary for the implementation of the PPACA. ■

Financial Reform Bill Spares Paycard Industry, for Now

A last-minute amendment to financial reform legislation (H.R. 4173), which aimed to change the formula by which interchange fees for credit and debit card transactions are calculated, has been further amended to exclude transactions involving general-purpose prepaid debit cards, including payroll debit cards, after the APA and its partners informed Congress of the negative impact the original amendment would have had on consumers (see [“Inside Washington” for June](#)).

Currently, paycard providers earn nearly all of their profits through the interchange fee, which is paid by merchants for each credit or debit transaction they accept. If card providers are unable to make their profit in this way it is expected that they would earn their profit through fees charged to the cardholders.

State and federal treasury departments also asked Congress for an exemption relating to cards used to pay government benefits. In April, the U.S. Treasury announced that it would stop issuing paper checks for various government benefits, including social security, VA benefits, and others, and instead pay all benefits either by direct deposit to a bank account or via the Treasury’s Direct Express debit card (see [PAYROLL CURRENTLY, Issue No. 5, Vol. 18](#), “Many Smaller Employers Will Have to Use EFTPS for Payroll Tax Deposits”).

Congress agreed that the change to the interchange rate calculation would negatively impact benefit recipients using these benefits cards as well as employees using paycards and consumers using general purpose prepaid debit cards, so the exclusion was provided – but not without a catch. It will expire

after one year if the cardholder is charged a fee either for overdrafts or for the first ATM transaction of each month.

Paycard providers will need to adjust to these provisions. While the standard in the paycard industry is to provide one free transaction each pay period, that transaction is not necessarily an ATM transaction. Also, where a pay period crosses months, a cardholder might be entitled to two free transactions in the same pay period. These issues are likely to be discussed with the Federal Reserve when regulations are being drafted to implement the law, should it be enacted.

Overdrafts

Under Regulation E’s overdraft provisions, which became effective July 6, 2010, consumers must affirmatively consent to overdraft protection. This provision was intended to protect consumers who find themselves automatically enrolled in overdraft protection and later incur unwelcome fees and interest due to a lack of understanding of how the overdraft protection works. Reg. E governs paycards as well as other card transactions.

While it is uncommon, it is possible to overdraft some paycard accounts. Paycard providers, their partner banks, and their employer clients will need to review their overdraft policies to protect their programs so that they do not fall outside the exclusion provided by the bill.

Senate vote deferred

President Obama had wanted to sign the bill prior to July 4. The House passed the bill on June 30, but complications arose in the Senate when Sen. Robert Byrd (D-WV) passed away on June 28. Reports say that the Senate is likely to wait until mid-July to take up the issue once again. ■