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IRS Answers Many of APA's Questions About the HIRE Act

At its May 6 conference call with payroll industry representatives, the Internal Revenue Service provided answers to many of the APA's questions about the Hiring Incentives to Restore Employment (HIRE) Act (Pub. L. No. 111-147; see *PAYROLL CURRENTLY*, Issue No. 4, Vol. 18). Many of the clarifications are discussed below, and you can read the latest additions to the IRS's "Frequently Asked Questions" on the HIRE Act (posted on May 6) at www.irs.gov/businesses/small/article/0,,id=220746,00.html.

The IRS announced that it expects to release the Form 941 for the second through fourth quarters "in a couple of weeks" and expects the final form to be the same as the draft.

Electronic signatures for Form W-11 are allowed

The IRS said that employers may collect employee affidavits and signatures via an electronic system. The electronic system must transmit the same information as the Form W-11, the affidavit must be signed by way of an electronic signature by the employee whose name is on the affidavit, and the signature must immediately follow a perjury statement containing the same language as on Form W-11. The APA had been asking for this ever since we originally encouraged the IRS to develop Form W-11 as a model affidavit (see "Inside Washington" for April 2010).

No double-dipping for restaurant employers

Restaurant employers have long been allowed a business income tax credit in the amount of the employer share of social security and Medicare taxes on employees' tips in excess of those that make up any difference between the cash wages paid by the employer (minimum of \$2.13 per hour for tipped employees) and \$5.15 per hour, as long as the employer pays those taxes pursuant to a notice and demand from the IRS under IRC §3121(g).

The IRS clarified that a restaurant employer that takes the HIRE Act relief from employer social security tax on these excess tips may not claim the business tax credit for the employer social security tax on those same tips, because it never paid that tax in the first place. However, it may still take the business tax credit for the employer share of Medicare tax on those tips as well as the HIRE Act tax relief on the tips that make up the difference between \$2.13 and \$5.15 per hour and the cash wages it pays these employees.

Employers may translate Form W-11 into Spanish

Many APA members have been wondering whether the IRS would develop a Spanish version of Form W-11, *Hiring Incentives to Restore Employment (HIRE) Act Employee Affidavit*, as it has for the W-4. Outside of the conference call, we suggested to the

IRS that, since the W-11 instructions state that an employer may create its own affidavit, an employer should be able to translate the W-11 on its own. An IRS spokesperson agreed with our position on this issue. We suggested that the IRS devise a Spanish W-11 in any case, however, because not every employer will be able to translate the form. Our suggestion is being forwarded to the Forms and Publications division.

Coordination with Work Opportunity Tax Credit

The APA has told the IRS that often an employer is uncertain about whether an employee will qualify for the Work Opportunity Tax Credit (WOTC) or whether the WOTC will save more money than the HIRE Act social security tax relief. (The HIRE Act allows one credit or the other, not both.) We said we imagine IRS doesn't want to open the door to abuse but does want to let employers enjoy the stimulus as soon as possible so that jobs can be created.

The IRS explained that an employer may take the HIRE Act relief, and, if the WOTC turns out to be more beneficial, it may file Form 941-X for all affected quarters, pay the social security tax without penalty, and then take the WOTC on its business tax return. Alternatively, it may wait to find out which credit is more beneficial, and, if it is the HIRE Act relief, it may file Form 941-X for all affected quarters and request a refund (or apply the amount as a "payment" on a subsequent Form 941).

Specifically, the HIRE Act says that an employer may not receive the WOTC on wages paid to a qualified employee during the one-year period beginning when the employee was hired, unless the employer does not take the HIRE Act social security tax relief for that employee. (Taking the HIRE Act business income tax credit for employee retention, however, does not preclude receiving the WOTC.) The WOTC provides an incentive to hire individuals from targeted groups, and the credit can be as much as 40% of an employee's "qualified first year wages." Some APA members have said that it can take up to a year for a state employment security agency to certify an employee as qualified for the WOTC.

Tax filing shortcuts?

Instead of requiring employers to file Form 941-X to pay social security tax on prior quarter wages (if it took the HIRE Act relief and then determined the WOTC is more beneficial), could IRS revise Form 5884, *Work Opportunity Credit*, to allow an employer to offset the WOTC in the amount of those social security taxes? IRS said "no." Besides revising the form, this would require a major modification of their systems to reconcile the social security tax-exempt wages and tips with the amounts

that will be reported with the new Code CC in Box 12 of Form W-2. Currently, Code CC will be reconciled with lines 6c and 12d on the 941 for the second through fourth quarters of 2010.

If an employer files a Form 941-X for a quarter in a prior year, it will also have to file a W-2c to either insert or remove an amount under Code CC in Box 12. If this is the only change to the W-2, could IRS waive the requirement to provide the W-2c to the employee, since the amount is not needed to prepare a personal income tax return? The IRS is considering this request, but is concerned that it could open the door to fraud by employers that would take the HIRE Act relief on nonqualified individuals by

Treasury Issues Proposed Garnishment Rules for Financial Institutions

Citing recent developments in technology and debt collection practices, five federal agencies – Department of the Treasury, Social Security Administration (SSA), Department of Veteran's Affairs, Railroad Retirement Board, and Office of Personnel Management – are proposing a new rule for financial institutions on the garnishment of federal benefits that are directly deposited into bank accounts or onto payment cards [75 F.R. 20299, 4-19-10; <http://edocket.access.gpo.gov/2010/pdf/2010-8899.pdf>].

These benefits are generally exempt from garnishment. However, banks are required to obey court-ordered garnishments, which may require placing a freeze on an account, causing a benefit recipient "significant hardship" because the benefits constitute such a large portion of the recipient's income. The benefits in question include Social Security benefits, Supplemental Security Income (SSI) benefits, VA benefits, Federal Railroad Retirement benefits, Federal Railroad unemployment and sickness benefits, Civil Service Retirement System benefits, and Federal Employees Retirement System benefits.

According to the SSA, 32% of social security beneficiaries age 65 or older report receiving at least 90% of their income from social security. For 64% of social security beneficiaries age 65 or older, their benefits represent at least 50% of their income.

The proposed rule would establish uniform procedures for financial institutions to follow "to minimize the hardships encountered by federal benefit payment recipients whose accounts are frozen pursuant to a garnishment order." Upon receiving a garnishment order, a financial institution would be required to determine whether an exempt benefit payment was deposited to the account within the past 60 days. If so, the full amount of the exempt benefit, or the total balance if lower, would remain available to the depositor.

Federal benefits are paid monthly, so the 60-day lookback period establishes a protected amount roughly equal to twice the monthly benefit amount. The proposed rule does not prevent individuals from challenging the garnishment; if the benefits recipient believes he or she is entitled to greater protection, the person may follow any applicable rules and contest the garnishment.

Confusion at the bank

Financial institutions may be unable to differentiate the sources of income in depositors' accounts. For funds deposited electronically, financial institutions might not recognize the batch headers identifying federal benefits programs and therefore fail to recognize that the funds may be exempt from garnishment. Benefits deposited by check are difficult to identify without reviewing the deposit slips and checks themselves (or their images), which the Treasury says is "a manual, time-consuming, and costly process."

Having nonexempt funds deposited into the same account further complicates the situation. Although federal benefits are

filing Forms 941-X and then not give a W-2c to the employee, who might be able to detect that the employer should not have taken that credit.

Spouses may be qualified individuals

To be a "qualified individual" on whose wages the employer may take social security tax relief and/or the business tax credit for employee retention under the HIRE Act, the employee must not be related to the "employer" (i.e., owner, majority shareholder, etc.) in a relationship described in Internal Revenue Code §51(i) (1). That section lists many relationships, but it does not list "spouse." ■

generally exempt from garnishment, exceptions apply. If the garnishment order does not inform the financial institution that it qualifies for an exception, then the financial institution is likely to release attached funds to the depositor. Doing so can make the financial institution liable to the creditor for the total amount that should have been attached. Finally, financial institutions that allow depositors continued access to their accounts while sorting out the myriad complexities risk contempt of court charges.

The Treasury reports that "many financial institutions have concluded that they are not in a position to evaluate the extent to which funds in an account are protected from garnishment." So the account is frozen and the account holders are left to assert their rights in court, which is costly and time consuming.

Some court orders may order the account to be frozen, while some jurisdictions allow financial institutions the discretion to freeze the accounts. "The agencies have ... determined that the only way to protect exempt funds from being subjected to garnishment, seizure, or other legal process is to preclude financial institutions from placing freezes on protected funds in all circumstances."

Identifying exempt deposits

In order to help financial institutions identify the nature of deposits made by federal agencies, the agencies have agreed to two practices. First, in each ACH batch file of deposits of exempt benefits, the Treasury will encode an "X" in position 20 of the Company Name field. (A payment from the SSA would appear as "US TREASURY 303X.") Combined with the current practice of placing a "2" in the Originator Status Code, identifying a payment from the federal government, the batch files are expected to be easily identifiable by the receiving depository financial institutions.

Second, "the agencies will publish a list of the unique 'Entry Detail Description' Fields in the batch header record for all their exempt benefit payments." These changes will also be included in the Green Book, *A Guide to Federal ACH Payments and Collections*.

Safe harbor

Financial institutions that comply with the required procedures would not be at risk of contempt charges or liable to creditors. The proposed rule would also preempt any state or local law that is inconsistent with the rule, to the extent that the law prevents a financial institution from complying. The proposed rule would not preempt any state or local provision that grants greater protection to the depositor. For example, if state law provides an exemption from garnishment greater than that allowed under the proposed rule, state law would not be preempted.

In applying the rules, financial institutions would not need to determine the purpose of a garnishment order. Child and spousal support orders would not receive preferential treatment. The Treasury notes that such orders may be served directly to the federal agencies making the payments rather than to the financial institutions. ■