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Senate Passes Job Creation Bill Eliminating Employer Share of Social Security Tax for New Hires in 2010

On February 24, the U.S. Senate passed H.R. 2847, the Hiring Incentives to Restore Employment (HIRE) Act, by a vote of 70-28. The bill would create a limited social security tax "holiday" for the employer share of social security tax on wages paid to previously unemployed new hires and a business tax credit if those employees are employed for at least a year. The aim of the bill is to free up funds for employers to hire employees who have been out of work and further stimulate the uncertain economy. At press time, the

House of Representatives had not yet taken up a version of the bill containing these provisions.

Social security tax 'holiday'

The bill provides relief from the employer share of social security tax, which is 6.2% of covered wages, on wages paid by a "qualified employer" to a "qualified individual" for employment beginning on the day after the bill is enacted into law and ending on December 31, 2010. The relief from the employer share of social security tax applies to services

performed in a trade or business of a qualified employer or in furtherance of activities related to the tax-exempt purpose or function of a tax-exempt entity.

Employee share still must be withheld; no Medicare exemption. The social security tax “holiday” does not apply to the employee share of the tax, which still must be withheld and deposited by the employer. The “holiday” also does not apply to either the employer or employee share of Medicare tax.

Government employers other than colleges not included

A qualified employer is any employer other than the United States, a state, a local government, or any government instrumentality. However, public institutions of higher education are qualified employers. Also, qualified employers can elect to not have the social security tax “holiday” apply. The IRS will provide the manner for making such an election.

Qualified individuals must have been unemployed for 60 days

A qualified individual is any individual who:

- begins employment with a qualified employer after February 3, 2010, and before January 1, 2011;
- certifies by signed affidavit, under penalties of perjury, that the individual has not been employed for more than 40 hours during the 60-day period ending on the day the individual begins work for the qualified employer;
- is not employed by the qualified employer to replace another employee unless the other employee left employment voluntarily or was terminated for cause, and
- is not related to the qualified employer or to anyone

owning 50% or more of the stock or other capital of the employer.

No double-dipping with WOTC

A qualified employer may not receive the work opportunity tax credit (WOTC) on any wages paid to a qualified individual during the one-year period beginning when the individual was hired, if those wages qualify the employer for the social security tax “holiday,” unless the employer elects not to have the social security tax relief apply with respect to that individual.

APA LOOKS TO EASE PAYROLL BURDEN –

If the HIRE Act is enacted into law in the form passed by the Senate, there are obvious implementation challenges for employers, service providers, and software companies, not the least of which is an immediate effective date that may fall in the middle of a payroll period, leading to tax relief that applies to some, but not all, wages of a qualified individual. For more on the APA’s efforts – working with Congress and the IRS – to reshape the HIRE Act’s provisions and deal with its ramifications for tax reporting and depositing, see “[Inside Washington](#)” for March.

Separate business tax credit

A different provision of the bill would give an employer a \$1,000 credit against its business income taxes for each qualified individual who is employed by the employer for at least 52 consecutive weeks and receives wages for such employment during the last 26 weeks of this period that are at least 80% of the wages the individual received during the first 26 weeks of the period. ■

COBRA Premium Assistance Deadline Extended to March 31

Notably absent from the HIRE Act is any extension of the period for qualifying for COBRA premium assistance under the American Recovery and Reinvestment Act of 2009, which ended on February 28. But on March 2, President Obama signed the Temporary Extension Act of 2010 (Pub. L. No. 111-144).

The Act extends the deadline for involuntary terminations qualifying for COBRA premium assistance for one month,

to March 31, 2010, and extends emergency unemployment benefits as well. The Act also provides COBRA premium assistance to employees who became eligible for COBRA health care continuation because of a reduction in hours and then are involuntarily terminated on or after the Act’s March 2 enactment date. Further extensions are now being discussed on Capitol Hill. ■

IRS Releases Form 941 for 2010

The IRS has released Form 941, *Employer’s Quarterly Federal Income Tax Return*, for tax year 2010, as well as the 2010 *Instructions for Form 941*, revised *Instructions for Schedule B (Form 941)*, and new Schedule R (Form 941), *Allocation Schedule for Aggregate Form 941 Filers*. All of these items are available on the APA website at www.americanpayroll.org/members/Forms-Pubs/#tax. Form 941 includes primarily minor cosmetic changes this year.

What’s new

- **COBRA premium assistance credit extended.** The credit for COBRA premium assistance payments has been extended. It now applies to premiums paid for employees terminated before March 1, 2010, and to premiums paid for 15 months (see [PAYROLL CURRENTLY, Issue No. 1, Vol. 18](#)).

- **Line 17 revised.** In Line 17, the instructions for the first check box have been revised. They now instruct filers to check the box and skip to Part 3 not only if Line 10 “on this return” is less than \$2,500, but also if Line 10 “on the return for the preceding quarter” was less than \$2,500 “and you did not incur a \$100,000 next-day deposit obligation during the current quarter.”

These revised instructions also appear on the 941-V payment voucher in the first bulleted item under *Making Payments With Form 941*.

- **Employers can choose to file Forms 941 instead of Form 944 for 2010.** Beginning with tax year 2010, employers that would otherwise be required to file Form 944, *Employer’s Annual Federal Tax Return*, can notify the IRS if they want to file quarterly Forms 941 instead to report their employment taxes (see [PAYROLL CURRENTLY, Issue No. 22, Vol. 17](#)).

- **Social security wage base for 2010.** Do not withhold social security tax after an employee reaches \$106,800 in social security wages. (There is no limit on the amount of wages subject to Medicare tax.)

Reminders

- **Correcting a previously filed Form 941.** If you discover an error on a previously filed Form 941, make the correction using Form 941-X, *Adjusted Employer’s Quarterly Federal Tax Return or Claim for Refund*. Form 941-X is filed separately from Form 941.

- **Paid preparers must sign Form 941.** Paid preparers must

complete and sign the paid preparer's section of Form 941.

- **Credit card payments.** Employers can pay the balance due shown on Form 941 by credit card. However, **do not** use a credit card to make federal tax deposits.

- **Electronic funds withdrawal (EFW).** If you file Form 941 electronically, you can e-file and e-pay (electronic funds withdrawal) the balance due in a single step using tax preparation software or through a tax professional. However, **do not** use EFW to make federal tax deposits. Note that a fee may be charged to file electronically. Go to www.irs.gov and type "e-pay" in the search box for more information on paying taxes using EFW.

- **Telephone help.** You can call the IRS toll-free at 800-829-4933, Monday through Friday from 7 a.m. to 10 p.m. local time (Alaska and Hawaii follow Pacific time), to order tax deposit coupons (Form 8109) and for answers to your questions about completing Form 941, tax deposit rules, or obtaining an employer identification number (EIN).

Revised Schedule B instructions: reminders

Reporting prior period adjustments. Prior period adjustments previously reported on Lines 7d-7g of Form 941 and Form 941-SS are no longer reported on Schedule B (Form 941). Prior period adjustments are now reported on Form 941-X, and are not taken into account when figuring the tax liability

for the current quarter. When you file Schedule B (Form 941) with your Form 941 (or Form 941-SS), do not change your tax liability by adjustments reported on any Form 941-X or for credits taken for COBRA premium assistance payments.

Amended Schedule B. If you have been assessed a failure-to-deposit (FTD) penalty, you may be able to file an amended Schedule B (Form 941).

New Schedule R

Purpose of Schedule R (Form 941). Use Schedule R (Form 941), to allocate the aggregate information reported on Form 941 to each client. If you have more than 15 clients, complete as many continuation sheets as necessary. Attach Schedule R (Form 941), including any continuation sheets, to your aggregate Form 941 and file it with your return.

Who must file? You must complete Schedule R (Form 941) each time you file an aggregate Form 941. Aggregate Forms 941 are filed by agents approved by the IRS under IRC §3504. To request approval to act as an agent for an employer, you must file Form 2678, *Employer/Payer Appointment of Agent*, with the IRS. On Schedule R (Form 941), those employers are called clients.

When must you file? If you are an aggregate Form 941 filer, file Schedule R (Form 941) with your aggregate Form 941 every quarter when Form 941 is due. ■

Federal Court Says Severance Payments Were Not FICA Wages

A U.S. District Court in Michigan, rejecting an IRS appeal of a Bankruptcy Court decision and the holding of the Federal Circuit Court of Appeals in *CSX Corp., Inc. v. U.S.* (see **PAYROLL CURRENTLY, Issue No. 6, Vol. 16**), has ruled that payments made to employees pursuant to an employer's severance plans were not "wages" for FICA (social security and Medicare) tax purposes [*U.S. v. Quality Stores, Inc.*, No. 1:09-cv-44, 2010 U.S. Dist. LEXIS 15825 (WD Mich., 2-23-10)]. The employer was not liable for FICA taxes on payments to employees upon their termination of employment because of the downsizing and subsequent closing of operations by the employer, even though the payments were not connected to or contingent on the recipients' eligibility for state unemployment compensation benefits. Accordingly, the employer was entitled to a refund.

Agricultural supplier provides severance, seeks FICA refund

Quality Stores, Inc. operated a chain of retail stores specializing in agricultural supplies and related products. In 2001, Quality closed dozens of its stores, several distribution centers, and terminated many of the employees at its corporate office. Then, after filing a bankruptcy petition, Quality closed its remaining stores and distribution centers, and terminated all remaining employees.

The severance plans. Quality made payments to employees terminated both before and after the bankruptcy filing pursuant to severance plans maintained by the company.

Under Quality's prepetition plan, senior executives received 12-18 months of severance pay. All other employees received one week of severance pay for each full year of service. These payments were made on Quality's normal payroll cycle.

Under Quality's postpetition plan, officers received 6-12 months of severance pay. Employees who had been employed for at least two years received one week of severance pay for each full year of service up to a maximum of 10 weeks for salaried employees and 5 weeks for hourly employees. Workers who had been employed for less than two years received one week of severance pay, and the employees who

were subsequently employed by the companies that purchased Quality's assets did not receive any severance pay. These amounts were paid in a lump sum.

None of the payments under either plan were connected to the receipt of state unemployment compensation, nor were they attributable to the rendering of any particular employment service.

The FICA tax dispute. Quality reported the severance payments as wages on the Forms W-2 issued to the employees, withheld federal income tax and the employees' share of FICA tax from the payments, and paid the employer's share of FICA tax with respect to the payments.

In 2002, Quality filed refund claims with the IRS, seeking to recover \$1,000,125 in allegedly overpaid FICA taxes.

SUB pay exception to FICA wages: IRS position

For purposes of FICA, IRC §3121 defines "wages" as "all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash." However, the IRS has published guidance providing an exception to FICA taxation for certain payments made by an employer, conditioned on eligibility for and receipt of state unemployment benefits, referred to as "supplemental unemployment compensation benefits," or "SUB" pay.

In a series of revenue rulings and private letter rulings beginning in 1956, the IRS took the position that SUB payments under particular plans were not wages for FICA purposes. Then in a 1990 revenue ruling, the IRS modified its position and said that SUB pay must be linked to the receipt of state unemployment compensation and must not be received in a lump sum in order to be excludable from the definition of wages for FICA purposes.

IRC §3402(o)

IRC §3402(o), enacted in 1969, provides that "any supplemental unemployment compensation benefit paid to an individual ... shall be treated as if it were a payment of wages by an employer to an employee for a payroll period." For purposes of this provision, "supplemental unemployment compensation

benefits” are defined as “amounts which are paid to an employee, pursuant to a plan to which the employer is a party, because of an employee’s involuntary separation from employment (whether or not such separation is temporary), resulting directly from a reduction in force, the discontinuance of a plant or operation, or other similar conditions, but only to the extent such benefits are includible in the employee’s gross income.”

Interpreting the statute

The court said the severance payments in this case were wage replacement benefits and not remuneration for the employees’ services or wages. Therefore, they were not FICA-taxable.

Under §3402(o), any supplemental unemployment compensation is excluded from the definition of “wages” for tax withholding purposes. And the severance payments in this case met the statutory definition of “supplemental unemployment compensation benefits.”

Rejecting IRS’ position on the treatment of SUB pay.

Although §3402(o) specifically relates to income tax withholding, it applies also to the question of whether SUB payments are wages for FICA tax purposes, said the court. The plain language and legislative histories of the relevant code sections indicate that Congress intended its definition to be interpreted in the same manner for FICA and FUTA as for income tax withholding – “in the interest of simplicity and ease of administration.”

While IRC §3121(a) allows the IRS to issue regulations distinguishing between exclusions in “wages” for income tax withholding and other tax purposes, the court said that no such regulations have ever been issued suggesting different treatment of SUB payments under the FICA and income tax withholding laws. It also noted that IRS revenue rulings do not override the specific provisions of the statute, a repudiation of the IRS’ position in Rev. Rul. 90-72 that SUB payments fit the §3402(o) definition only if they are connected to an employee’s eligibility for and receipt of state unemployment compensation.

Moreover, “at some point a line is to be drawn on the taxation of employee financial benefits. ... At one end of the spectrum are social security benefits and at the other end of the spectrum are wages/earnings, and at the point on the spectrum where severance payments are intended to serve the same purpose as social security benefits ... the collection of social benefit taxes on the wage replacement benefits makes little sense.”

Rejecting CSX court’s reading of the statute. The court

said the Federal Circuit Court’s conclusion in the CSX case – that the language in §3402(o) stating that SUB pay “shall be treated as if it were a payment of wages by an employer to an employer for a payroll period” does not necessarily imply that no such payments are in fact wages – strains logic and ignores clear statutory provisions.

The clear import of §3402(o) is that any payment meeting the definition of “supplemental unemployment compensation benefits” is *not* considered to be “wages.” Otherwise, the additional statement, “shall be treated as if it were a payment of wages,” is not only unnecessary but also meaningless. If SUB pay already falls within the definition of “wages,” there is no need to state that it shall be treated as if it were wages.

COMMENT FROM APA’S TAX COUNSEL – After the decision in *Quality Stores*, payroll professionals are faced with the same two basic questions they had to answer after the initial CSX decision. First, can payroll professionals simply stop collecting and paying FICA taxes on severance pay? And second, should companies file claims for credit or refund of FICA taxes already paid to the IRS?

Mary B. Hevener, tax counsel to APA and a partner at Morgan, Lewis and Bockius in Washington, DC, cautions payroll professionals not to stop collecting and paying FICA taxes on severance pay, unless the severance is paid under a “supplemental unemployment benefit plan” that complies with the IRS Revenue Rulings the court disregarded in *Quality Stores*. Otherwise, if the *Quality Stores* decision is overturned on appeal, the employer would owe the IRS both the employer and employee portions of FICA taxes. Arguably, the employer also may be required to treat its payment of the employee share of FICA taxes as *additional wages* to the former employee that are subject to income tax withholding, FICA, and FUTA taxes.

However, payroll professionals can and should continue to file refund claims for the FICA taxes they withhold and pay on severance pay. Ms. Hevener notes that many of the claims filed after the first CSX decision was issued have simply been held in abeyance for years. In recent months, however, the IRS has been issuing claim denial letters with respect to many of them. Ms. Hevener advises companies both to appeal the claim denials and to be sure that their refund claims have been filed for all years open under the statute of limitations. There is still time to file a claim for as far back as 2006, although the statute of limitations on FICA claims expires on April 15, 2010. ■

Many Obama Administration Fiscal 2011 Budget Proposals Would Impact Payroll

President Obama’s proposed budget for fiscal 2011, released on February 1, includes many items that would impact payroll operations. Keep in mind that the following are merely proposals and have not yet been introduced or enacted into law.

Extend the Making Work Pay (MWP) credit

The MWP credit is a temporary provision of the American Recovery and Reinvestment Act of 2009 (ARRA; Pub. L. No. 111-5). In 2010, individual taxpayers are eligible for a refundable income tax credit equal to 6.2% of earned income up to a maximum credit of \$400 (\$800 for married taxpayers filing a joint return). The credit is phased out for taxpayers with a modified adjusted gross income (AGI) in excess of \$75,000

(\$150,000 for married taxpayers filing jointly), and is completely lost at \$95,000 (\$190,000 for married taxpayers filing jointly). The IRS withholding tables have been modified to reflect the MWP credit. Overwithholding and underwithholding are reconciled on annual income tax returns. The MWP credit expires at the end of 2010. The administration’s fiscal 2011 budget proposes to extend the MWP credit for one year – through December 31, 2011 [www.treas.gov/offices/tax-policy/library/greenbk10.pdf].

Extend COBRA health insurance premium assistance

ARRA in certain circumstances limits the employee’s cost of purchasing health care continuation coverage to 35% of the COBRA premium charged by the group health plan. Employers

(or other entities providing the coverage) are allowed a credit against payroll taxes for the remaining 65% of the premium. Under ARRA, as amended by the Department of Defense Appropriations Act, 2010 (Pub. L. No. 111-118; see **PAYROLL CURRENTLY, Issue No. 1, Vol. 18**), the premium assistance is available for a maximum of 15 months. The premium assistance is limited to individuals who qualify for COBRA coverage as a result of an involuntary termination of employment between September 1, 2008, and February 28, 2010.

The budget proposes to extend the COBRA premium assistance eligibility period by allowing individuals who qualify for COBRA coverage as the result of an involuntary termination of employment prior to January 1, 2011, to qualify for the assistance. The duration of the COBRA premium assistance that results from an involuntary termination of employment from March 1 - December 31, 2010, would be 12 months.

Remove cell phones from listed property

The administration's budget proposes that cell phones (and other similar telecommunications equipment) would no longer be classified as listed property (see **PAYROLL CURRENTLY, Issue No. 13, Vol. 17**), effectively removing the requirement of strict substantiation of business use, effective for taxable years ending after the date of enactment. Also, the fair market value of personal use of a cell phone (or other similar telecommunications equipment) provided primarily for business purposes would be excluded from gross income.

Automatic enrollment in individual retirement accounts (IRAs)

Under the budget proposal, employers in business for at least two years that have more than 10 employees would be required to offer an automatic IRA option to employees, with regular contributions being made through payroll deductions. If the employer sponsored a qualified retirement plan, SEP, or SIMPLE for its employees, it would not be required to provide an automatic IRA option for them. However, if the qualified plan excluded from eligibility a portion of the employer's work force or a class of employees such as all employees of a subsidiary or division, the employer would be required to offer the automatic IRA option to those excluded employees.

The employer offering automatic IRAs would give employees a standard notice and election form informing them of the automatic IRA option and allowing them to elect to participate or opt out. Any employee who did not provide a written participation election would be enrolled at a default rate of 3% of the employee's compensation in an IRA. Employees could opt out or opt for a lower or higher contribution rate up to the IRA dollar limits. For most employees, the payroll deductions would be made by direct deposit.

Under the proposal, there would be no employer contributions, no employer compliance with qualified plan requirements, and no employer liability or responsibility for determining employee eligibility to make tax-favored IRA contributions or for opening IRAs for employees. In addition, employers could claim a temporary tax credit for making automatic payroll-deposit IRAs available to employees. The amount of the credit for a year would be \$25 per enrolled employee up to \$250, and the credit would be available for two years. The proposal would become effective January 1, 2012.

Reinstate the 39.6% and 36% income tax rates

39.6% rate. Prior to the enactment of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA; Pub. L. No. 107-16), the highest individual income tax rate was 39.6%.

EGTRRA phased in a temporary reduction in the 39.6% rate to 35%. The 35% tax rate sunsets after 2010. The budget proposal would permit the EGTRRA reduction in the highest income tax rate to sunset as scheduled. Thus, beginning in 2011, the highest income tax rate would be 39.6%.

36% rate. EGTRRA also phased in a temporary reduction in the second highest individual income rate from 36% to 33%. The budget proposal would permit the EGTRRA reduction in the second highest income tax rate to sunset as scheduled after 2010. Thus, beginning in 2011, the second highest tax rate would be 36%. *Note:* The 28% tax rate bracket would be expanded so that taxpayers earning less than the amounts subject to the 33% tax rate would not see their taxes rise as a result of the increased tax rate brackets.

Make FUTA surtax permanent

The Federal Unemployment Tax Act (FUTA) tax rate currently has two components: a permanent tax rate (6.0%) and a "temporary" surtax rate (0.2%) that has been in effect for more than 30 years. The surtax has been extended many times, most recently through June 30, 2011 (see **PAYROLL CURRENTLY, Issue No. 22, Vol. 17**). The budget proposal would make the 0.2% surtax permanent.

Restructure federal wage reporting process

The budget proposes to restructure the federal wage reporting process "by reverting to quarterly wage reporting. Currently, wages are reported to the federal government once a year. Increasing the timeliness of wage reporting would enhance tax administration, improve program integrity for a range of programs, and facilitate implementation of automatic workplace pensions. The administration will work with the states so that the overall reporting burden on employers is not increased" [www.whitehouse.gov/omb/budget/fy2011/assets/socsec.pdf].

Other information reporting changes

Require information reporting on payments to corporations. Under the budget proposal, a business would be required to file an information return (e.g., on Form 1099-MISC, *Miscellaneous Income*) for payments for services or for determinable gains aggregating to \$600 or more in a calendar year to a corporation (except a tax-exempt corporation). This would end a longstanding regulatory exception from information reporting for payments to corporations. The proposal would be effective for payments made to corporations after December 31, 2010.

Require a certified taxpayer identification number (TIN) from contractors. Under the budget proposal, a contractor receiving payments of \$600 or more in a calendar year from a particular business would be required to furnish to the business (on Form W-9, *Request for Taxpayer Identification Number and Certification*) the contractor's certified TIN. A business would be required to verify the contractor's TIN with the IRS, which would be authorized to disclose, solely for this purpose, whether the certified TIN-name combination matches IRS records.

If a contractor failed to furnish an accurate certified TIN, the business would be required to withhold a flat-rate percentage of gross payments for federal income tax and pay the withheld amounts to the U.S. Treasury. Contractors receiving payments of \$600 or more in a calendar year from a particular business could require the business to withhold a flat-rate percentage of their gross payments – with the flat-rate percentage of 15%, 25%, 30%, or 35% being selected by the contractor. The proposal would be effective for payments made to contractors after December 31, 2010.

Increase information reporting for government payments for property and services. Under the budget proposal, the IRS would be authorized to issue regulations requiring information reporting on all non-wage payments by federal, state, and local governments to procure property or services. Certain categories of payments would be excluded from the new information reporting requirements (e.g., payments of interest, payments for real property, payments to tax-exempt entities or foreign governments, intergovernmental payments, and payments made pursuant to a classified or confidential contract). The proposal would be effective for payments made after December 31, 2010.

Information return penalties

Under a proposal included in the budget, the first-tier penalty (correct information return filed within 30 days after the prescribed filing date) would be increased from \$15 to \$30, and the calendar year maximum would be increased from \$75,000 to \$250,000. The second-tier penalty (correct information return filed more than 30 days after the prescribed filing date but on or before August 1) would be increased from \$30 to \$60, and the calendar year maximum would be increased from \$150,000 to \$500,000. The third-tier penalty (correct information return not filed on or before August 1) would be increased from \$50 to \$100, and the calendar year maximum would be increased from \$250,000 to \$1,500,000.

For small filers (whose average annual gross receipts do not exceed \$5,000,000), the calendar year maximum would be increased from \$25,000 to \$75,000 for the first-tier penalty, from \$50,000 to \$200,000 for the second-tier penalty, and from \$100,000 to \$500,000 for the third-tier penalty.

The minimum penalty for each failure due to intentional disregard would be increased from \$100 to \$250. The proposal would be effective for information returns required to be filed after December 31, 2011.

Employee leasing companies' liability for clients' federal employment taxes

The budget includes a proposal to set forth standards for holding employee leasing companies jointly and severally liable with their clients for federal employment taxes. The proposal would also provide standards for holding employee leasing companies solely liable for such taxes if they meet specified requirements. The provision would be effective for employment tax returns required to be filed with respect to wages paid after December 31, 2010.

Earned Income Tax Credit (EITC)

Expand the EITC. ARRA increased the EITC percentage for families with three or more qualifying children to 45% of a certain base amount for 2009 and 2010. ARRA also increased the threshold phase-out amounts for married couples filing joint returns to \$5,000 above the threshold phase-out for singles, surviving spouses, and heads of household for 2009 and 2010. The budget proposal would make permanent the increased EITC for workers with three or more qualifying children. Specifically, the phase-in rate of the EITC for workers with three or more qualifying children under ARRA would be maintained at 45%, resulting in a higher maximum credit amount and longer phase-out range.

Eliminate the advance EITC. Since 1978, most EITC-eligible individuals have had the option of requesting advance payments of the EITC from their employers throughout the year. Employers offset the costs of the advance payments by reducing their payments of withheld income and employment taxes. The budget proposal would repeal the advance payment option of

the EITC. Workers would no longer be able to receive an advance payment of their expected EITC through their employer. This proposal would be effective for taxable years beginning after December 31, 2010.

National Directory of New Hires (NDNH)

The budget includes a proposal to require employers to report a "start work date" to the NDNH for all new hires, in addition to their name, address, and social security number.

The budget also includes a proposal to expand IRS access to the NDNH data for general tax administration purposes, including data matching, verification of taxpayer claims during return processing, preparation of substitute returns for noncompliant taxpayers, and identification of levy sources. Data obtained would be protected by existing taxpayer privacy law. These proposals would be effective upon enactment.

E-Verify program

The budget would provide more than \$103 million to continue expansion of E-Verify, the electronic employment eligibility verification program run by U.S. Citizenship and Immigration Services [www.dhs.gov/xlibrary/assets/budget_bib_fy2011.pdf].

Unemployment insurance 'integrity'

The budget proposes to: allow states to redirect up to 5% of unemployment benefit overpayment recoveries to additional enforcement activity; require states to impose a penalty of at least 15% on recipients of fraudulent overpayments and use penalty revenue exclusively for additional enforcement activity; expand the ability to collect benefit overpayments due to a state from income tax refunds owed to a benefit recipient; and allow states to deposit up to 5% of the money recovered in the course of an unemployment insurance tax investigation into a special fund dedicated to implementing the State Unemployment Tax Act (SUTA) Dumping Prevention Act of 2004 (Pub. L. No. 108-295) or enforcing state laws on employer fraud or tax evasion.

Saver's Credit

The budget proposes to expand the Saver's Credit by providing a 50% match for the first \$1,000 of retirement savings for families that earn less than \$65,000. The credit would be fully refundable. *Note:* The credit is equal to a specified percentage of certain employee contributions to an employer-sponsored retirement plan or an IRA.

Small Business Jobs and Wages Tax Credit

Included in the budget is a proposal for a new Small Business Jobs and Wages Tax Credit. Under the proposal, employers would receive a tax credit of up to \$5,000 against their payroll taxes for every net new employee they hire in 2010 (start-ups would be eligible for half the credit). The credit would be administered off an employer's unemployment insurance wage base (equal to 72% of the unemployment insurance wage base increase, or \$5,000 credit for each additional worker who earns at least \$7,000).

Businesses would receive an additional 6.2% tax credit (wage bonus) on aggregate wages in excess of inflation – reimbursing employers for the social security payroll taxes they pay on those payroll increases. This wage bonus would be calculated off the social security payroll tax base, so firms would not get credit for increasing wages for employees making more than the current taxable maximum of \$106,800.

The maximum credit would be limited to \$500,000 per business, and employers would have the option of receiving it on a quarterly estimated basis.

Anti-abuse provisions would include making businesses

that reduce employment or payrolls in 2010 ineligible for both the \$5,000 credit and the wage bonus, denying the credit to employers that replace full-time employees with part-time employees, limiting the maximum credit to 25% of the increase in an employer's social security payroll wage base, and preventing businesses from renaming themselves or merging in order to claim the credit [www.whitehouse.gov/sites/default/files/FACT_SHEET_Small_Business%20jobs_and_Wages_Tax_Cut.pdf].

'Misclassification Initiative'

The fiscal year 2011 budget includes a joint Labor-Treasury initiative to identify and deter misclassification of employees as independent contractors.

IRS initiative. The IRS would be permitted to require prospective reclassification of workers who are currently misclassified. Reduced penalties for misclassification under current law would apply only if the employer voluntarily reclassified its workers before being contacted by the IRS or other enforcement agency and had filed all required information returns (Forms 1099) reporting the payments to the independent contractors. For a small employer with a small number of misclassified workers, even reduced penalties would be waived if the employer had consistently filed Forms 1099 reporting all payments to all misclassified workers and agreed to prospective reclassification of misclassified workers.

The IRS would also be permitted to issue guidance on the proper classification of workers under common law standards, as well as guidance providing safe harbors and/or rebuttable presumptions. Employers would be required to notify independent contractors, when they first begin performing services, explaining how they will be classified and the consequences of the classification (e.g., tax, workers' compensation, and wage and hour implications). The IRS would be permitted to disclose to the U.S. Department of Labor information about employers whose workers are reclassified.

The proposal would be effective upon enactment, but prospective reclassification of those covered by §530 of the Revenue Act of 1978 would not be effective until the first calendar year beginning at least one year after the date of enactment. The transition period could be up to two years

for independent contractors with existing written contracts establishing their status.

WHD initiative. For fiscal 2011, the Department of Labor has budgeted funds to hire 90 full-time Wage and Hour Division (WHD) employees and support an additional 4,700 investigations that will target industries with "misclassification characteristics," such as construction, child care, home health care, grocery stores, janitorial, business services, poultry and meat processing, and landscaping.

In addition, with funds appropriated by ARRA, WHD has hired 100 investigators in an effort to ensure that contractors on stimulus projects are in compliance with applicable laws. The fiscal year 2011 budget includes funding to maintain these staffing increases.

Child support matching funds for states

The budget would extend federal matching of state spending on child support incentive payments for one year, through September 30, 2011 [www.acf.hhs.gov/programs/olab/budget/2011/2011_all.pdf]. Note: ARRA resumed from October 1, 2008, through September 30, 2010, the federal matching of incentive funding that state child support enforcement agencies reinvest back into their enforcement programs, which was cut by the Deficit Reduction Act of 2005 (Pub. L. No. 109-171). The APA has lobbied on behalf of restoration of this funding, which provides much needed revenue to the state agencies, including funds to hire employees who help answer employers' questions (see "Inside Washington," for [March](#) and [November](#) 2007).

Labor certification fees

The budget proposes legislation to authorize an application fee for employers filing new applications in three major labor certification programs. The fees – which would be collected from employers for processing applications in connection with the Permanent Labor Certification Program, the H-2A Temporary Agricultural Program (replacing the current fee, which reverts to the Treasury), and the H-2B Temporary Non-Agricultural Program – would permit the Department of Labor to recover the costs of administering these programs [www.dol.gov/dol/budget/2011/PDF/bib.pdf]. ■

Tax Court Says Costs of Sex Change Operation Are Deductible

The U.S. Tax Court, in a case of first impression, has ruled that the costs of gender reassignment surgery (GRS) and hormone therapy were deductible medical expenses under IRC §213 as treatment for gender identity disorder (GID), while the cost of breast augmentation surgery was not [*O'Donnabhain v. Commissioner*, No. 6402-06, 2010 U.S. Tax Ct. LEXIS 4 (2-2-10)]. In a 2005 legal memorandum, the IRS took the position that expenses associated with the treatment of GRS are not deductible (see [PAYROLL CURRENTLY, Issue No. 4, Vol. 14](#)). This case is of interest to payroll professionals because deductible medical expenses for individual income tax purposes under §213 are reimbursable under medical flexible spending arrangements (FSAs) and health reimbursement arrangements (HRAs) or from health savings accounts (HSAs).

Background

In 1997, Robert Donovan was diagnosed with GID and began treatment under a regimen (the "Benjamin" standards of care) consisting of: (1) use of hormones to effect changes in physical appearance to resemble the opposite sex; (2) living full time publicly as a member of the opposite sex; and (3) GRS.

Donovan continued feminizing hormone therapy through

2001, the taxable year in question. In 2000, he legally changed his name to Rhiannon O'Donnabhain, began living full-time as a female, had the gender designation of his driver's license changed to female, and had surgery to feminize his facial features. After satisfactorily completing the first and second phases of the Benjamin standards, O'Donnabhain had GRS surgery in 2001. She also underwent breast augmentation surgery to make her breasts, which had developed in the course of hormone therapy, look more like the breasts of a genetic female.

O'Donnabhain claimed deductions for medical expenses related to the hormone therapy, GRS, and breast augmentation surgery. The IRS disallowed the deductions and issued a notice of deficiency.

Definitions

For purposes of IRC §213(d), "medical care" means amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body. It does not include "cosmetic surgery," defined as a procedure intended to improve the patient's appearance that does not meaningfully promote the

proper function of the body or treat illness or disease.

GID as a disease

The Tax Court said that GID is a disease for purposes of §213. The IRS position to the contrary is at odds with nearly 50 years of case law, which treats mental disorders as diseases under §213 without regard to demonstrated organic or physiological origins. The two factors influencing a finding of “disease” in the context of mental conditions are (1) a determination by a mental health professional that the condition creates a significant impairment to normal functioning and warrants treatment, and (2) a listing of the condition in a medical reference text.

Here, the court noted that GID is listed as a mental disease in the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders*, which is the primary diagnostic tool of American psychiatry. As three expert witnesses agreed, it is a serious and psychologically debilitating condition. And although O’Donnabhain’s diagnosis was made by a social worker with a master’s degree in social work, state law authorized a licensed social worker to diagnose and treat psychiatric illness. Moreover, O’Donnabhain’s social worker was trained in the diagnosis and treatment of gender-related disorders, and had ruled out other possible conditions in the

case.

Deductibility of the procedures

The Tax Court said that while there may be some lingering debate regarding acceptance of the Benjamin standards within the medical profession, “the evidence is clear that a substantial segment of the psychiatric profession has been persuaded of the advisability and efficacy of hormone therapy and [GRS] as treatment for GID, as have many courts.” O’Donnabhain was therefore entitled to deduct her expenses in connection with these procedures.

However, the expenses O’Donnabhain incurred for breast augmentation surgery were not deductible under §213. Although such surgery can be a component of treatment for GID, here it did not serve this purpose. O’Donnabhain’s hormone therapy had resulted in the development of breasts “within a normal range of appearance,” and there was no evidence that she was uncomfortable with them “in the social gender role.” The surgery did not promote the proper function of O’Donnabhain’s breasts; instead, it merely improved her appearance. Therefore, it was nondeductible cosmetic surgery, the court concluded. ■

Spring Ahead to Daylight Saving Time

Daylight Saving Time (DST) will begin on Sunday, March 14, at 2 a.m., when clocks are set ahead one hour. A shift worker on duty at that time will work an hour less than usual. If you pay the worker for a full shift of eight hours rather than seven, you do not need to count the extra hour as an hour worked for overtime purposes and do not need to include the

extra pay when calculating the employee’s regular rate of pay for the workweek (see *The Payroll Source*®, p. 2-51 for further information).

DST is not observed in the states of Arizona (other than inside the Navajo Nation) and Hawaii, and in the U.S. territories of American Samoa, Guam, Puerto Rico, and the Virgin Islands. ■

IRS Issues Instructions for 2010 Forms 1099, 1098, 3921, 3922, 5498, and W-2G

The IRS has issued the *General Instructions for Certain Information Returns (Forms 1098, 1099, 3921, 3922, 5498, and W-2G)* for 2010. The document is available for downloading from the APA website at www.americanpayroll.org/members/Forms-Pubs/#tax. Several “what’s new” items are highlighted:

- **New title for the General Instructions.** The title of the General Instructions has been changed to *General Instructions for Certain Information Returns (Forms 1098, 1099, 3921, 3922, 5498, and W-2G)*.

- **Electronic filing.** E-filers are reminded that using the FIRE (Filing Information Returns Electronically) system requires following the specifications contained in Publication 1220, *Specifications for Filing Forms 1098, 1099, 3921, 3922, 5498, 8935, and W-2G Electronically*. Also, the IRS does not provide a fill-in .pdf form option.

- **Due date for certain Forms 1099-MISC sent to recipients.** The due date for furnishing statements to recipients for Forms 1099-MISC (if amounts are reported in Boxes 8 or 14) is February 15.

- **Where to file.** All information returns filed on paper will be filed with only two IRS processing centers: Austin, TX, and Kansas City, MO.

- **Truncating payee identification number on paper**

payee statement. Notice 2009-93 (see **PAYROLL CURRENTLY, Issue No. 23, Vol. 17**) allows filers of forms in the 1098 series, 1099 series, and 5498 series to truncate an individual payee’s social security number (SSN), IRS individual taxpayer identification number (ITIN), or IRS adoption taxpayer identification number (ATIN) on paper payee statements for tax years 2009 and 2010.

- **Forms 3921 and 3922.** 2010 will be the first reporting year for Forms 3921 (*Exercise of an Incentive Stock Option Under Section 422(b)*) and 3922 (*Transfer of Stock Acquired Through an Employee Stock Purchase Plan Under Section 423(c)*).

- **Publication 1220.** Information on three new forms has been added to Publication 1220, which is now titled *Specifications for Filing Forms 1098, 1099, 3921, 3922, 5498, 8935, and W-2G Electronically* (see **PAYROLL CURRENTLY, Issue No. 14, Vol. 17**).

- **Logos, slogans, and advertising.** For amounts paid after 2010, logos, slogans, and advertising will not be permitted on Forms 1096, or Copy A of Forms 1098, 1099, 5498, W-2G, 1042-S, or any payee statements.

- **Form 1099-R.**

- Generally, report distributions from traditional SEP and SIMPLE IRAs in Boxes 1 and 2a. Check the *Taxable amount not determined* box in Box 2b.

– Charges or payments made against the cash value of annuity contracts or the cash surrender value of life insurance policies for the purchase of qualified long-term care insurance contracts under combined arrangements are reported in Box 1, with Distribution Code W in Box 7.

– Notice 2002-3 has been modified and superseded by Notice 2009-68, which contains two safe harbor explanations that can be provided to recipients of eligible rollover distributions from an employer plan in order to satisfy IRC §402(f).

– Effective January 1, 2010, eligible rollover distributions from an employer's plan paid directly to a nonspouse beneficiary are subject to mandatory 20% withholding.

Instructions for Recipient.

– Reporting of tax free transfers of qualified long-term care insurance contracts has been added to Box 1.

– Reporting of charges or payments made against the cash value of an annuity contract or the cash surrender value of a life insurance contract for purchasing qualified long-term care insurance has been added to Box 1.

– Qualified long-term care insurance contracts have been added to the list of Section 1035 exchanges for Code 6 in Box 7.

– The title for Code E in Box 7 has been changed to *Distributions under Employee Plans Compliance Resolution System (EPCRS)*.

– New Code W has been added to the list of codes for Box 7 for reporting charges or payments for purchasing qualified long-term care insurance contracts under combined arrangements.

• **Form 5498.**

– References to *Additional contribution rules for 2004 and 2005 under Special reporting for U.S. Armed Forces in designated combat zones* have been removed due to expiration of this provision on May 28, 2009.

Box 11.

– The checkbox has been lined up to the right for the convenience of issuers of the form.

– The box description in the *Instructions for Participant* has been returned to the wording found on previous versions of the form.

Boxes 15a and 15b.

– References to catch-up contributions in *Special reporting for 2009*, and the reporting instructions have been removed due to expiration of this provision.

– The boxes have been shaded out as no further catch-up contributions to IRAs due to certain employer bankruptcies are permitted in lieu of the higher contribution limit for individuals 50 and older. Also, the box descriptions in the *Instructions for Participant* have been removed. ■

SIFL Rates for 1st Half of 2010 Announced

The Standard Industry Fare Level (SIFL) rates and the terminal charge for the period January 1, 2010 - June 30, 2010, have been issued. SIFL rates and the terminal charge are factors used to calculate the value of personal flights on employer-provided or commercial aircraft for purposes of federal income, FICA, and FUTA taxes.

For the first half of 2010, the terminal charge has decreased to \$40.28 (from \$45.71). The SIFL rates have also decreased to: \$0.2204 (from \$0.2501) per mile for the first 500 miles; \$0.1680 (from \$0.1907) per mile for miles 501 to 1,500; and \$0.1615 (from \$0.1833) per mile for miles over 1,500. ■

Employee's MBA Expenses Were Job-Related Educational Expenses

The U.S. Tax Court has ruled that the expenses incurred by a nurse in obtaining a Master's degree in Business Administration (MBA) were deductible, job-related educational expenses because the MBA was not a prerequisite for her job and did not qualify her for a new trade or business [*Singleton-Clarke v. Commissioner*, T.C. Summary Op. 2009-182, No. 27975-07S (12-2-09)].

Background

After obtaining a Bachelor's degree in Nursing, Lori Singleton-Clarke worked as a registered nurse (RN) for 24 years. From 1993 to 2004, she held various nursing management positions, eventually serving as nursing director of a long-term care facility.

From 2004 to 2008, Singleton-Clarke worked at three hospitals as a quality control coordinator:

- From 2004 to 2007, she worked for Civista Medical Center. Civista required candidates for her position to have a Bachelor of Science degree in Nursing or other equivalent education and experience, along with a current RN license in Maryland. Additionally, candidates with one year of experience in quality assurance, risk management, or nursing

management were preferred.

- From 2007 to 2008, she worked for Children's National Medical Center (CNMC). CNMC required an employee in Singleton-Clarke's position to have a Bachelor's degree in Nursing or a health-related field, and preferably a Master's degree in Public Health. Additionally, preference was given to candidates with two years of quality improvement experience in a hospital and three years of clinical experience.

- On September 8, 2008, she began working at St. Mary's Hospital with duties similar to her previous responsibilities at Civista and CNMC.

In 2005, Singleton-Clarke began taking courses at the University of Phoenix; she graduated in April 2008 with an MBA degree and a specialization in Health Care Management (MBA/HCM). None of Singleton-Clarke's employers had a reimbursement policy for the MBA/HCM program, so she paid for her MBA degree personally. When she deducted her MBA-related expenses, the IRS disallowed the deduction.

■ **WHAT THE LAW SAYS** – Under IRS regulations (26 C.F.R. §1.162-5(a)(1),(2)), a taxpayer may deduct education expenses as ordinary and necessary business expenses if

the education: (1) maintains or improves skills required by the individual in his employment or other trade or business, or (2) meets the express requirements of the individual's employer, or the requirements of applicable law or regulations, imposed as a condition to the retention by the individual of an established employment relationship, status, or rate of compensation. However, if the education qualifies the individual for a new trade or business, then the education expenses are not deductible because the education is a personal expense or constitutes an accumulation of personal capital (26 C.F.R. §1.162-5(b)(3)).

Note: One of the most popular benefits provided by employers is employer-paid educational assistance, whereby the employer pays for or reimburses the cost of educational courses attended by an employee. Different taxation rules apply depending on whether the courses are job-related. Employer-paid education that is related to an employee's current job is excluded from income as a working condition fringe benefit under certain conditions, with no dollar limit. On the other hand, employer-paid education that is non job-related is excluded from income only up to \$5,250 a year through 2010. The IRS has generally taken the position that courses leading to a graduate-level degree such as an MBA are non job-related (see *The Payroll Source*®, pp. 3-37 and 3-38).

Prerequisite for new job

The job description for Singleton-Clarke's position at St. Mary's Hospital required a Bachelor's degree in Health Care Administration, and preferably a Master's degree. The IRS argued that without receiving the MBA/HCM degree in April 2008, Singleton-Clarke would never have qualified for this position because she did not previously have education in this field.

The Tax Court disagreed. The court said that, though the titles of the jobs varied, Singleton-Clarke's three positions

since 2004 required an RN license or a Bachelor's degree in Nursing, with clinical or risk management experience – credentials that she possessed. The first two employers, Civista and CNMC, hired her without an MBA/HCM, and St. Mary's "would have gladly hired [her] ... even without [it]." Singleton-Clarke had won multiple awards, including recognition from the Governor of Maryland and other prominent organizations. She had worked her way up to serving as a director of nursing responsible for 110 nurses plus additional technicians. All three quality control positions were a voluntary step down in status and pay from her former duties. The MBA/HCM might have been a helpful addition to Singleton-Clarke's qualifications, but it was not an essential prerequisite for her to secure the position at St. Mary's.

Qualifying for a new trade or business

The court explained that an MBA degree is different from a degree that serves as a foundational qualification to obtain a professional license, such as a law degree. An MBA is a more general course of study that does not lead to a professional license or certification, so the deductibility of the educational expenses incurred in pursuing an MBA degree depends on the facts and circumstances of each case, with the decisive factor being whether the taxpayer was already established in his or her trade or business.

Here, Singleton-Clarke had been working for a year as a quality control coordinator and had more than 20 years of directly related work experience with extensive clinical and managerial knowledge in acute and subacute health care settings, before beginning the MBA/HCM program. She had already been performing the tasks and activities of her trade or business before commencing her MBA studies. Accordingly, the MBA did not qualify her for a new trade or business. She could deduct her education expenses. ■

IRS Announces Quarterly Interest Rates

The IRS has announced that the interest rates for the second quarter of 2010 (i.e., the calendar quarter beginning April 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. 2010-9; www.irs.gov/pub/irs-drop/rr-10-09.pdf]. ■

Helicopter Pilots Were Not FLSA-Exempt Learned Professionals

Michael Pignataro and Thompson Chase were helicopter pilots employed by the Port Authority of New York and New Jersey. When they sued under the Fair Labor Standards Act (FLSA) and won two years of back overtime pay for hours worked over 40 in a workweek, the Port Authority appealed, saying the pilots were exempt from the FLSA's overtime requirements because they were learned professionals. The Second Circuit Court of Appeals disagreed, and affirmed the award of back pay [*Pignataro v. Port Authority of New York and New Jersey*, Nos. 08-3605, 08-3825, 2010 U.S. App. LEXIS 1840 (2nd CA, 1-27-10)].

☞ **WHAT THE LAW SAYS** – In order for an employee to qualify for the FLSA learned professional exemption, the employee must perform work requiring advanced knowledge in a field of science or learning customarily acquired by a

prolonged course of specialized intellectual instruction in addition to being paid a minimum amount weekly on a salary or fee basis (see *The Payroll Source*®, p. 2-15).

Analysis

Helicopter pilots' status as learned professionals.

In order to qualify for their jobs, Port Authority helicopter pilots were required to: (1) log 2,000 hours of flying time in helicopters; (2) earn a commercial helicopter pilot certificate with a helicopter instrument rating; (3) earn a Federal Aviation Administration (FAA) Second Class Medical certificate; (4) have knowledge of FAA rules and regulations governing helicopter flights; and (5) earn a high school diploma or GED.

The court explained that an employee's status as a learned professional is determined by the employee's duties and salary. Here, none of the certifications required of

helicopter pilots were academic degrees. Nearly all of their instruction took place in the air rather than a classroom. Logging in-flight hours, in-flight instruction, and passing practical and written tests are not a “prolonged course of specialized intellectual instruction and study,” said the court. Although helicopter pilots have “specialized knowledge” and “unique skills,” they are not covered by the learned professional exemption because their knowledge and skills are acquired through experience and supervised training, rather than intellectual, academic instruction.

Willfulness of Port Authority’s FLSA violation. An employer that willfully violates the FLSA is subject to a three-year statute of limitations on violations instead of the usual two-year limit. Pignataro and Chase argued that the Port

Authority’s violation of the FLSA was willful because the agency repeatedly denied their requests to be paid time and one-half for overtime work and because others who had similar positions, such as a chief pilot and chief mechanic, were paid time and one-half for overtime work.

The court rejected the pilots’ argument and affirmed that the two-year period was appropriate in this case. An employer does not willfully violate the FLSA if it acts reasonably to determine its legal obligation. Here, a Port Authority manager had consulted with the agency’s law department before classifying the helicopter pilots as exempt. Moreover, there was legal authority from the Fifth Circuit Court of Appeals indicating that airplane pilots are FLSA-exempt learned professionals. ■

DOL Revises Form for Review of Denial of COBRA Premium Reduction

The U.S. Department of Labor (DOL) has posted an updated application on its website for those who believe they have been improperly denied a COBRA premium subsidy under the American Recovery and Reinvestment Act of 2009 (Pub. L. No. 111-5), as modified by the Department of Defense Appropriations Act, 2010 (Pub. L. No. 111-118). The *Application for Review of Denial of COBRA Premium Reduction*, together with a “quick check” on eligibility, general information, and instructions, is accessible at www.dol.gov/ebsa/COBRA/main.html.

An applicant requesting review of a denial of premium assistance may be either a former employee or a member of

the employee’s family who is eligible for COBRA continuation coverage or the COBRA premium assistance through an employment-based health plan. The applicant should include copies of any documents that will help the DOL in its review (examples are listed in the instructions). The DOL encourages applicants to complete and file the application online; the form may also be mailed or faxed, along with attachments.

Note: Individuals whose COBRA continuation coverage is provided through a federal, state, or local government plan, or pursuant to state insurance law, are advised to direct requests for review to the Department of Health and Human Services. ■

IRS Lists Countries for Which Foreign Earned Income Exclusion Requirements Are Waived for 2009

In Rev. Proc 2010-17 [2010-8 IRB 425; www.irs.gov/pub/irs-drop/rp-10-17.pdf], the IRS has announced the list of countries for which the foreign earned income exclusion requirements of IRC §911 are waived for 2009 (with departure dates). The list includes Madagascar (3-18-09) and Guinea (10-1-09).

IRC §911 allows a “qualified individual” to exclude foreign earned income from gross income up to a certain amount (\$91,400 in 2009). An employer need not withhold federal income tax from any wages paid to a qualifying employee it reasonably believes will be excluded under §911. A qualifying individual is an individual who is a U.S. citizen and a bona fide resident of or present in a foreign country for a specified portion of the taxable year (see *The Payroll Source*®, beginning

at p. 14-6 for a detailed discussion).

IRC §911(d)(4) provides an exception to these eligibility requirements if an otherwise qualified individual:

- leaves a listed foreign country because of war, civil unrest, or similar adverse conditions that preclude the normal conduct of business,
- on or after a certain date,
- pursuant to a determination by the Secretary of the Treasury (in consultation with the Secretary of State).

In such a case, the income exclusion will apply even though the individual was not in the foreign country for the statutorily prescribed period, if the individual can show that *but for* the adverse conditions he or she had a reasonable expectation of meeting the requirements of §911. ■

DOL Recovers \$1 Million in Back Wages for Hurricane Katrina Workers

Fluor Enterprises, Inc., headquartered in Irving, Texas, is primarily engaged in engineering, procurement, and construction. In the aftermath of Hurricane Katrina, Fluor entered into a contract with the Federal Emergency Management Agency (FEMA) to provide general contracting services. Fluor subcontracted the job of inspecting temporary housing trailers for displaced residents to Universal Project Management, Inc. pursuant to the FEMA contract.

The U.S. Department of Labor’s (DOL) Wage and Hour

Division found that the companies failed to pay overtime compensation during the hurricane recovery effort to workers involved in inspecting the trailers. The workers were paid straight time for all hours worked, and were not paid time and one-half their regular rate for hours worked over 40 in a week, as required by the Fair Labor Standards Act (FLSA). The DOL reported that some employees worked up to 84 hours in a week without receiving overtime. The DOL sued Fluor and Universal as joint employers for violating the overtime provisions of the FLSA.

On February 8, 2010, Fluor entered into a consent judgment resolving its part in the DOL lawsuit. The judgment acknowledges Fluor's payment of \$1 million to the DOL, covering the overtime claims of affected employees between September 1, 2005, and December 31, 2006. It provides Fluor with a complete defense to any action brought against it by the DOL or by affected employees for FLSA violations during that time period, but does not prevent the DOL from acting to recover unpaid overtime in connection with FLSA violations that occurred after December 31, 2006 [*Solis v. Universal Project Management, Inc.*, No. 4:08-cv-0517

(SD Tex., consent judgment filed 2-8-10)]. Commenting on the consent judgment, Secretary of Labor Hilda Solis said, "Workers who help rebuild our communities and secure the safety of local residents following natural disasters should be fairly and legally compensated for the work they perform."

Note: Universal never responded to the DOL's lawsuit and, on September 3, 2009, the court entered a default judgment against the company, ordering it to pay more than \$1.8 million in back overtime owed to its employees, plus an equal amount in liquidated damages. ■

Freight Engineers' Layover Time Was Not Hours Worked for FMLA Eligibility

Locomotive engineers working on Union Pacific Railroad freight trains are often required to spend time, including overnight stays, near the railroad's away-from-home terminals. While at an away-from-home terminal, an engineer ready and available for work (in "OK" status) must be able to report for work in as little as an hour and a half, cannot consume alcohol or drugs, and must be rested enough to operate a train.

Union Pacific engineers sued under the Family and Medical Leave Act (FMLA) because the railroad refused to count the time in OK status near away-from-home terminals as hours worked when determining their eligibility for FMLA leave and the amount of leave available.

Note: To be eligible for FMLA benefits, an employee must have been employed by his or her employer for at least 12 months (not necessarily consecutively) and have worked at least 1,250 hours within the previous 12-month period (see *The Payroll*

Source®, p. 434).

Here, a U.S. District Court rejected the engineers' position, explaining that the time in OK status was similar to "on call" time, which is not work if an employee can devote the time to "the ordinary activities of private life." The court said that engineers in OK status near away-from-home terminals were not working. They were free to eat, sleep, golf, fish, exercise, shop, or visit friends. They could travel up to an hour and a half from the terminal, and could monitor the railroad's train lineup system to get an idea of when they would be called to duty. The fact that engineers could be disciplined for certain types of behavior while near the away-from-home terminals and were expected to use some of their time to rest before being called to duty did not convert the time into work [*Brotherhood of Locomotive Engineers and Trainmen v. Union Pacific Railroad Co.*, No. 08 C 3591, 2009 U.S. Dist. LEXIS 84168 (ND Ill., 9-15-09)]. ■

Update on Income Tax Treaties

The U.S. has income tax treaties with more than 60 countries. Income tax treaties may exempt or reduce the amount of withholding from wages earned by nonresident aliens in the U.S. if certain conditions are met (see *The Payroll Source*®, pp. 14-17 and 14-18 for additional discussion of income tax treaties). Since PAYROLL CURRENTLY last reported on the subject (see *Issue No. 11, Vol. 17*), a replacement treaty with Italy that was signed in 1999 and a protocol updating the income tax treaty with France have both entered into force.

Treaty and protocols enter into force

U.S.-Italy. On December 16, 2009, a new income tax treaty between the U.S. and Italy entered into force following its approval by the Italian legislature. The treaty was signed by the two countries in 1999 and ratified by the U.S. Senate that year. It replaces an existing treaty and protocol in force since 1985. The treaty generally follows the format of the 1996 U.S. Model Tax Convention. (*Note:* In 2006, the Treasury Department issued a new version of the Model Income Tax Convention; see *PAYROLL CURRENTLY, Issue No. 16, Vol. 15*.)

With respect to taxes withheld at source, the new treaty was effective for amounts paid or credited on or after February 1, 2010. For all other taxes, the new treaty covers taxable years beginning January 1, 2010.

U.S.-France. On December 23, 2009, a protocol to the income tax treaty with France entered into force, following ratification by the U.S. Senate. The protocol, signed on January 13, 2009, is the second update to the 1994 income tax treaty between the two countries. It provides for elimination of source-country taxation of certain dividends and royalty payments. Unlike mandatory arbitration provisions in U.S. income tax

treaties with Belgium, Canada, and Germany that only allow arbitration concerning the application of certain treaty articles, the treaty with France provides for the arbitration of any case concerning the application of a treaty article unless the competent authorities of each country agree that the case is not suitable for arbitration. The treaty also seeks to prevent "treaty shopping" (the inappropriate use of a tax treaty by third-country residents), and modernizes rules for sharing taxpayer information between the two countries.

With respect to taxes withheld at source, the protocol was effective for amounts paid or credited on or after January 1, 2009. For all other taxes, the agreement generally took effect for taxable years beginning on or after January 1, 2010.

Treaties and protocols awaiting Senate ratification

U.S.-Malta. An income tax treaty signed by the U.S. and Malta in 2008 was transmitted to the U.S. Senate for ratification on January 15, 2009. (*Note:* In 1997, the U.S. terminated a prior income tax treaty with Malta because at that time Malta did not generally permit sharing bank information with foreign tax authorities.) Under the new treaty, each country generally agrees not to tax business income derived from sources within that country by residents of the other country unless the business activities in the taxing country are substantial enough to constitute a permanent establishment. The treaty also contains exemptions under which residents of one country performing personal services in the other country will not pay tax in the other country unless their contact with the other country exceeds specified minimums.

Pensions and other similar remuneration paid to a resident of one country will be taxed only by that country and only at

the time and to the extent that a pension distribution is made. Students and business trainees who are residents of one treaty country and who visit the other treaty country (the host country) will generally be exempt from host-country taxation on certain types of payments received from sources in their home country for their maintenance, education, or training. The treaty includes a comprehensive limitation of benefits provision and provides for the exchange of information between the competent authorities of each country to facilitate tax administration.

U.S.-New Zealand. A protocol amending the 1982 income tax treaty between the U.S. and New Zealand was submitted to the U.S. Senate for ratification on June 16, 2009. It updates provisions governing residence in a treaty country, limitation of benefits, nondiscrimination, and exchange of information to make the treaty more compliant with current U.S. tax treaty policy. It clarifies that it covers U.S. income and excise taxes on private foundations imposed under the Internal Revenue Code, but not social security and unemployment taxes. It also removes a treaty article on individuals performing services in an independent capacity.

Newly signed treaties and protocols not yet transmitted to the Senate

U.S.-Chile. On February 4, 2010, the U.S. and Chile signed the first income tax treaty between the two countries. It establishes rules to determine when an enterprise or an individual from one country is subject to tax on business activities in the other country. It coordinates the tax provisions of the U.S. and Chilean pension systems to facilitate the mobility of labor between the two countries. It has provisions exempting the income that a resident of the U.S. or Chile receives for performing personal services as an independent contractor or self-employed person in the other treaty country. The treaty also includes provisions exempting wages that a resident of the U.S. or Chile receives for performing labor or personal services as an employee in the other treaty country from the other country's income tax. It establishes mechanisms through which the U.S. and Chilean tax authorities may resolve tax disputes and relieve double taxation, and includes provisions to ensure that only residents of the two countries enjoy the benefits of the treaty.

U.S.-Hungary. On February 4, 2010, the U.S. and Hungary signed a new tax treaty to replace and update the existing agreement between the two countries that dates from 1979. In

general, the treaty provides that the wages derived by a resident of one treaty country with respect to employment will be taxable only in that country unless the employment is performed in the other treaty country, in which case the wages may be taxed in that other country. It includes a provision to ensure that only residents of the U.S. and Hungary can benefit from the new treaty, and also features a new exemption from withholding tax on dividends paid to pension plans.

U.S.-Switzerland. On September 23, 2009, the U.S. and Switzerland signed a protocol amending the existing tax treaty between the two countries. It includes new provisions designed to allow for more extensive exchange of information for income tax purposes. It also provides for mandatory arbitration when the competent authorities of each country are unable to reach complete agreement in a case and addresses issues concerning the cross-border taxation of individual retirement accounts.

Information about tax treaties

- Detailed summaries of the individual tax treaties currently in force between the U.S. and other countries can be found in the APA's *Guide to Global Payroll Management* (see www.americanpayroll.org/publication/).

- IRS Publication 515 (*Withholding of Tax on Nonresident Aliens and Foreign Entities*) contains general tax treaty information, as well as a table of tax treaties providing information about tax exemptions for nonresident aliens. Publications 901 (*U.S. Tax Treaties*) and 597 (*Information on the U.S.-Canada Income Tax Treaty*) contain more detailed explanations. Form 6166 is a letter of U.S. residency certification for purposes of claiming benefits under an income tax treaty. Rev. Proc. 2006-54 (www.irs.gov/irb/2006-49_IRB/ar13.html) outlines the procedures for obtaining U.S. competent authority assistance under an income tax treaty to which the U.S. is a party. (The IRS Deputy Commissioner (International), Large and Mid-Size Business Division, acts as the U.S. competent authority in administering the operating provisions of tax treaties.)

All of these materials, plus tax treaties and proposed treaty documents themselves, and the current 2006 Model Income Tax Convention and its technical explanation (a Model Income Tax Convention is used by the U.S. as a starting point in negotiating bilateral tax treaties with other countries) can be found on the IRS website at www.irs.gov/businesses/international/article/0,,id=96739,00.html. ■

Air Time Sales Rep Was a Common Law Employee, Not a Direct Seller or Statutory Employee

Angela Sloan worked for Clear Channel Communications selling on-air media time to prospective clients, which required her to spend most of her time outside the office. Clear Channel did not reimburse Sloan for personal expenses she incurred to obtain and keep clients, such as the use of her cell phone and car, gifts to clients, and meals with clients.

Sloan appealed to the Tax Court after the IRS issued a Notice of Deficiency in connection with her 2004 tax return. She argued that she was entitled to deduct her business expenses at Clear Channel on Schedule C, *Profit or Loss From Business*, because she was a direct seller and a statutory employee who was a traveling or city salesperson.

The court concluded that Sloan was a common law employee, and not a direct seller or statutory employee. Therefore, she could not deduct her expenses on Schedule C

[*Sloan v. Commissioner*, T.C. Summary Op. 2009-162, No. 3529-08S (10-19-09)].

Direct seller

Under IRC §3508, a person performing services as a direct seller is not treated as an employee. A direct seller is a person engaged in the trade or business of either selling consumer products in the home as opposed to a permanent retail establishment, or delivering or distributing newspapers or shopping news. To qualify as a direct seller, the person must receive remuneration based on sales, rather than the number of hours worked. Also, the person must perform those services pursuant to a written contract that specifies that the person is not treated as an employee for federal tax purposes.

Sloan was not a direct seller. Although substantially all the remuneration she received was directly related to sales rather

than to the number of hours worked, she did not sell consumer products or deliver newspapers. And there was no evidence that she had a contractual agreement with Clear Channel indicating that she would not be treated as an employee for federal tax purposes.

Statutory employee

A statutory employee is a worker who is not a common law employee but is treated as such for certain employment tax purposes. An employer's payments to a statutory employee are not subject to federal income tax withholding, but are subject to withholding for social security and Medicare taxes. The employer must also pay the employer share of social security and Medicare taxes and may have to pay FUTA tax.

Statutory workers fall into several categories, including traveling or city salespersons. The salesperson's principal business activity must be working full-time for the employer soliciting orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or similar establishments who either resell or use the merchandise in their own businesses. If the salesperson occasionally solicits orders on behalf of another company, he or she is still a statutory employee, but only with respect to the primary employer (see *The Payroll Source*®, pp. 1-10 and 1-11).

Sloan was not a traveling or city salesperson. She sold advertising time, which is not merchandise. Moreover, her clients purchased air time to advertise their products or services, not for resale or to supply their businesses.

Common law employee

To decide whether a worker is a common law employee,

courts consider factors such as: (1) the degree of control exercised by the principal over the details of the work; (2) which party invests in the facilities used in the work; (3) the opportunity of the worker for profit or loss; (4) the permanency of the relationship; (5) whether or not the principal has the right to discharge the worker; (6) whether the work is an integral part of the principal's regular business; (7) the relationship the parties believe they are creating; and (8) whether the worker receives benefits consistent with employee status.

Sloan was a common law employee. Although she was responsible for soliciting clients and collecting commissions, she worked under the control of Clear Channel. The company established her duties, set her performance goals, and provided sales training consistent with its procedures. Sloan reported to a manager who supervised her performance. She had to submit reports of her client accounts and weekly timecards showing the hours she worked. And Clear Channel could terminate her employment for unsatisfactory performance.

Clear Channel treated Sloan as an employee. It withheld employment taxes and did not report her income on a Form 1099. The company provided her with health and dental insurance, and contributed to her 401(k) plan.

Sloan did not purchase or own the air time she was selling, and her risk of loss was negligible. Clear Channel provided Sloan with work space, a desk, a computer, a phone, and personnel to assist her. She had little investment in facilities or equipment beyond the use of her personal computer, cell phone, and motor vehicle. ■

Convenience Store Manager Was FLSA-Exempt Executive

A U.S. District Court in North Carolina has ruled that the manager of a discount retail store was not entitled to overtime compensation under the Fair Labor Standards Act (FLSA) because she was an exempt executive employee [*Grace v. Family Dollar Stores, Inc.*, No. 3:08 MD 1932, 2009 U.S. Dist. LEXIS 59154 (WD N.C., 7-9-09)].

Background

Family Dollar Stores, Inc. operated discount retail stores throughout the U.S., each run by a store manager. Irene Grace said that as a store manager, she spent 99% of her time handling freight, running a cash register, and doing janitorial work. She worked 52 to 65 hours a week but did not receive overtime pay.

☞ **WHAT THE LAW SAYS** – The FLSA executive exemption applies to an employee: (1) who is paid a salary of at least \$455 per week, not including board, lodging, or other facilities; (2) whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision of the enterprise; (3) who customarily and regularly directs the work of two or more other employees; and (4) who has the authority to hire or fire other employees or whose recommendations in this area are given particular weight (see *The Payroll Source*®, p. 2-12). Here, the salary requirement for exemption was not in dispute.

Primary duty of management

The following factors are evaluated in considering whether an employee's primary duty is management: (1) the amount of time spent performing managerial duties; (2) the relative importance of managerial duties as compared with other types of duties; (3) the employee's relative freedom from supervision;

(4) the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee; and (5) the frequency with which the employee exercises discretionary powers. All of these factors indicated that Grace's primary duty was management, said the court.

Time spent performing managerial duties. An employee who spends less than 50% of his or her time on management duties can still be considered to have a primary duty of management if other factors support that conclusion, which was the case here. Moreover, the concurrent performance of exempt and nonexempt work does not disqualify an employee from exemption. While she stocked shelves, unloaded a truck, or ran a cash register, Grace remained responsible for ensuring the successful operation of her store.

Relative importance of managerial duties. Grace's managerial duties included processing freight, hiring and training employees, handling customers, and managing the store's finances. These managerial duties were more important to Family Dollar than Grace's non-managerial duties.

Relation between manager's salary and nonexempt employee wages. Grace's salary was significantly greater than the wages of the store's nonexempt employees. She received a salary of \$625 per week, which later increased to \$655. The \$625 per week salary was equal to an average hourly wage of between \$9.62 (in a 65-hour week) and \$12.02 (in a 52-hour week). The \$655 salary per week was equal to an average hourly wage of between \$10.07 (in a 65-hour week) and \$12.60 (in a 52-hour week). In comparison, the average hourly wage of nonexempt

employees at the store during that time (i.e., before the minimum wage increased to \$5.85 in 2007) was \$5.81 an hour.

Relative freedom from supervision. Grace was relatively free from supervision. Her district manager supervised 17 stores over 11 counties in Georgia, and visited her store only every second or third week. Most communication between Grace and her manager occurred by phone and e-mail. Grace said she did not feel that her district manager infringed on her ability to run her store as she saw fit.

Exercise of discretion. Grace frequently exercised discretion as a store manager. She interviewed employees, made hiring recommendations, disciplined employees, and assigned work. She had discretion over theft control and the prosecution of shoplifters. The fact that Family Dollar standardized some policies and procedures, such as store setup, did not negate Grace's ability to exercise discretion.

Directing the work of two or more employees

Grace customarily and regularly directed the work of two or more employees. She managed between three and five employees, and always supervised at least two cashiers. The

court said an exempt executive employee must direct a total of 80 employee hours each week to satisfy the requirement of customarily and regularly directing the work of two or more employees. Grace directed at least 80 employee hours of work more than 89% of the time she was a store manager.

Hiring and firing employees

Grace satisfied this requirement as well. She could not hire employees, but she was actively involved in interviewing and screening new hires, and her district manager almost always followed her recommendations. Grace terminated the employment of at least one employee without the prior approval of her district manager, and she could reduce an employee's hours in order to induce the employee to quit.

Note: In 2008, the Eleventh Circuit Court of Appeals upheld a jury verdict finding that more than 1,400 current and former Family Dollar managers were not FLSA-exempt executive employees and awarding them more than \$35 million (see *PAYROLL CURRENTLY*, Issue No. 4, Vol. 17). The case here does not fall in the Eleventh Circuit, but in the Fourth. ■



STATE AND LOCAL NEWS

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Alaska

Online new hire reporting available. Employers can now report new hires online to the Child Support Services Division (CSSD). Employers must register for a myAlaska account at <https://myAlaska.state.ak.us> to access the new hire reporting website (click "Submit employee hirings to CSSD" under "Services for Businesses"). Download *New Hire User Instructions* at www.csed.state.ak.us.

California

San Francisco HCSO annual reporting form available. The 2009 Annual Reporting Form for the San Francisco Health Care Security Ordinance (HCSO) is available as a fillable PDF at www.sfgov.org/olse/hcso (under "Forms & Documents"). Pre-printed forms will also be mailed in early March by the San Francisco Office of Labor Standards Enforcement (OLSE). Employers subject to the employer spending requirement of the HCSO must return completed forms by 4-30-10 [OLSE, HCSO Update, 2-10].

Connecticut

Same-sex civil union law repealed, conversion of unions to marriages anticipated. Same-sex marriage is valid in Connecticut under a 2008 state Supreme Court decision (*Kerrigan v. Comm'n*, 289 Conn. 135 (2008)). Same-sex civil unions have also been recognized since 2005. However, civil union laws will be repealed effective 10-1-10. All civil unions entered into in Connecticut will convert into marriages on 10-1-10, unless a proceeding for annulment, dissolution, or legal separation is pending on 10-1-10. *Note:* Employers that provide health insurance coverage for employees' opposite-sex spouses and their children must provide it for employees' same-sex spouses and civil union partners and their children on the same terms, and this benefit is similarly exempt from state income taxation [Department of Public Health, *Frequently Asked Questions About Same-Sex Marriages*].

Illinois

Child support penalties of employee's work state apply, court rules. The Illinois Supreme Court has ruled that the child support penalty laws of an employee's work state, not the state of the court that issued the income withholding order, apply under the Uniform Interstate Family Support Act (UIFSA) where an employer failed to withhold child support [*In re Marriage of Suzanne Gulla*, No. 106612, 2009 Ill. LEXIS 920 (Ill. Sup. Ct., 6-4-09; rehearing denied, 9-28-09)].

UI contribution rate calculation method changed, online reporting programs updated. The method used to calculate unemployment insurance (UI) contribution rates has been changed. The change can create a rate with up to three digits to the right of the decimal point. The new rate takes effect for first quarter contribution and wage reports due 4-30-10. Because the QWIS (Quarterly Wage Information System) and SWATS (State Wage and Tax System) programs cannot accommodate the calculation

change, employers are encouraged to use the TaxNet system, which is available at <https://taxnet.ides.state.il.us/login/default.aspx>. The Department of Employment Security (DES) is currently working on a new free software program to replace QWIS and SWATS [DES, Notice for QWIS and SWATS Users, 1-1-10].

Iowa

NACHA operating rules amended for international ACH transactions. NACHA – The Electronic Payments Association recently amended its operating rules to require all internationally funded payments sent via the ACH network to be identified as International ACH Transactions (IATs). Beginning on or around 4-1-10, employers using the ePay (direct debit) option for the eFile & Pay system (online or by telephone) for withholding taxes will be asked if the payment funds are coming from an account outside the U.S. If so, another payment method must be selected or a different bank account in the U.S. must be used [Department of Revenue, Notice, 2-2-10].

New online UI filing and payment system available. A new online filing system for unemployment insurance (UI), My Iowa UI, will be available in April 2010. It will allow employers to electronically file quarterly reports and pay taxes, and will replace the current Unemployment Insurance Tax System (UITS). All employers will receive a packet in the mail containing detailed registration instructions in early March. More information is available at www.iowaworkforce.org/ui/MyIowaUI.pdf [Workforce Development Department, News Release, 2-11-10].

New Jersey

Employer audits with suspension or revocation of business licenses for labor, tax law violations authorized. Effective 7-13-10, the Commissioner of the Department of Labor and Workforce Development may audit an employer that fails to maintain and report wage, benefit, and tax information to the state for one or more employees, and also fails to pay wages, benefits, or taxes. The audit must take place within 12 months after the Commissioner has determined that a violation has occurred. If in the course of the audit the Commissioner determines that the employer has continually failed to report records and pay wages, taxes, or benefits, the Commissioner has the authority to suspend or revoke the business license of the employer. Notice and an opportunity for a hearing must be provided to the employer [S.B. 2773, L. 2010].

Ohio

Electronic remittance of child support payments mandated. Employers with more than 50 employees are required to remit all child support payments electronically to the state disbursement unit (Ohio Child Support Payment Central). There are two electronic payment methods: (1) electronic funds transfer/electronic data interchange (EFT/EDI) – payments accepted in either CCD+ or CTX format; or (2) ExpertPay website – payments remitted electronically through www.expertpay.com; no charge to employers [H.B. 1, L. 2009].

Oklahoma

Electronic withholding tax reporting and payment mandated. Employers that are required to remit state withholding taxes on a semiweekly deposit schedule must use QuickTax, the Tax Commission's (TC) free online reporting system. Information about the system is available for employers at www.tax.ok.gov/qtindex.html. After following account login instructions, employers should select "Employers Withholding Pre-Payment Only" on the "QuickTax Withholding Report Selection" page to make a semiweekly payment. To file a report due on the 20th of the month, employers should select the "Employers Withholding Tax Return" option, available on the same page. Employers with no Internet access may call the QuickTax interactive phone system at 877-829-2002 [TC, Press Release, 2-17-10].

Online UI filing and payment available. The Employment Security Commission has announced that the EZ Tax Express portal is now available for employers. The portal can be used by employers to file quarterly unemployment insurance (UI) contribution reports, pay UI taxes, and make adjustments. Employers must register to use the portal, which is available at <https://eztaxexpress.oesc.state.ok.us/Access/LearnMore.aspx>.

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