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**Note:** Starting with this issue of PAYROLL CURRENTLY, references to *The Payroll Source*® refer to the 2010 edition of the book.

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## HIRE Act Takes Effect —

### No Employer Social Security Tax on Previously Unemployed New Hires in 2010

On March 18, President Obama signed the Hiring Incentives to Restore Employment (HIRE) Act (Pub. L. No. 111-147), one day after it received final approval by the U.S. Senate. The HIRE Act creates:

- a limited social security tax “holiday” for the employer share of social security tax on wages paid to a previously unemployed new hire, and
- a separate business tax credit of up to \$1,000 if the employee is employed for at least 52 weeks.

The aim of the Act is to free up funds for employers to hire

individuals who have been out of work to further stimulate the recovering economy.

**GUIDANCE FROM THE IRS** – The IRS has issued a set of frequently asked questions and answers, which are available at [www.irs.gov/businesses/small/article/0,,id=220745,00.html?portlet=7](http://www.irs.gov/businesses/small/article/0,,id=220745,00.html?portlet=7). The APA, along with representatives of the service provider community, has been working with the IRS to make HIRE Act implementation as smooth as possible for employers. For an article on APA's efforts on the HIRE Act, see “[Inside Washington](#)” for April.

### Social security tax ‘holiday’

The Act provides relief from the employer share of social security tax, which is 6.2% of covered wages up to \$106,800, on wages paid by a “qualified employer” to a “qualified individual” from March 19 (the day after the Act was enacted) through December 31, 2010. Wages paid to a qualified individual on or before March 19 or after December 31, 2010, do not qualify for the social security tax relief. Wages earned by a qualified individual before March 19 but paid on or after March 19 do qualify for the social security tax relief.

The relief from the employer share of social security tax applies to services performed in a trade or business of a qualified employer or for a nonprofit entity. The social security tax relief does not apply to services performed by household employees because such employees are not working in the employer’s trade or business.

**Qualified employer defined.** A qualified employer is broadly defined as any employer other than the United States, a state or local government, or any government instrumentality. However, public institutions of higher education can be qualified employers.

**Qualified individual defined.** A qualified individual is any individual who:

- begins employment with a qualified employer after February 3, 2010, and before January 1, 2011,
- certifies in a signed affidavit (i.e., statement), 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.

### Model affidavit – new Form W-11

The IRS has developed Form W-11, *Hiring Incentives to Restore Employment (HIRE) Act Employee Affidavit*, for employers to use in having qualified individuals certify that they have not been employed for more than 40 hours during the 60-day period ending on the date the employee begins work for the employer claiming the social security tax relief (see [www.americanpayroll.org/members/Forms-Pubs/#not](http://www.americanpayroll.org/members/Forms-Pubs/#not)). Employers do not have to use the form. They can use their own substitute form so long as it requires the employee to provide the same information as that requested on Form W-11 and to sign a perjury statement after all the information is provided.

**Can minors sign affidavit?** In conversations with the APA and other stakeholders, IRS personnel said that employers could rely on affidavits completed by employees under the age of 18 to the same extent they rely on Forms W-4 provided by such employees.

**Electronic affidavit is OK.** The IRS has indicated that an employer can institute an electronic Form W-11 process with an electronic signature if it follows processes similar to those required for electronic Forms W-4.

### What about rehires?

While the Act doesn’t specifically state whether it applies to employees who are rehired by the same employer, the IRS says that rehired employees would qualify if they meet the same qualifications as new hires.

### ‘Terminated for cause’ gets broad interpretation by IRS

The IRS will interpret the requirement that a qualified

individual can replace an employee who was “terminated for cause” rather broadly to include reasons other than employee misconduct. This can include performance issues and other “facts and circumstances,” as long as the employer did not terminate one employee in order to claim the social security tax relief by hiring the same individual or another employee to fill that position.

### Employers can ‘opt-out’

Qualified employers can elect to not have the social security tax “holiday” apply. The employer can make this election for each qualified individual, rather than having to make it for all qualified individuals at one time.

An 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, unless the employer elects not to have the social security tax relief apply for such individual.

### 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.

### Special rule for 1st quarter wages

In order to make implementation of the social security tax relief somewhat more feasible, the Act states that instead of immediately stopping payment of the employer share of social security tax on the day after the Act is signed into law (March 19), the employer will treat the employer’s social security tax on qualified individuals’ wages paid from March 19-31 as a payment against the employer share of social security tax due for the second quarter of 2010. The payment will be treated as being made on the first day of the second quarter – April 1.

Therefore, the employer must deposit the full employer share of social security tax for wages paid in the first quarter and report it on Form 941, *Employer’s Quarterly Federal Tax Return*, and then treat the amount that would have qualified for the social security tax reduction under the HIRE Act as a payment in the second quarter, which allows the employer to reduce its payroll tax payments for that quarter. This payment will be reflected on the revised Form 941 (see discussion following).

### Tax deposits in the 2nd-4th quarters

As noted above, the employer may reduce its payroll tax deposits for the second quarter by the amount of the employer share of social security tax that would have qualified for HIRE Act relief for wages paid from March 19-31. For wages paid from April 1 – December 31, 2010 that qualify for HIRE Act social security tax relief, the employer’s payroll tax liability is reduced, so it will not deposit the employer share of social security tax on wages paid to qualified individuals up to the social security wage base. The employer will continue to deposit the employer share of social security tax on wages paid to employees who are not qualified individuals, as well as its other payroll taxes – the employer share of Medicare tax on all covered wages, the employee share of social security and Medicare taxes withheld from all covered wages, and federal income tax withheld from wages.

**Example:** Joe’s Auto Body hired Jane Fender, who meets the requirements to be a “qualified individual,” on February 22, 2010. Jane is paid \$2,000 semimonthly on the 15th and last day of the month for wages earned through payday. Joe’s Auto Body is not entitled to any

social security tax relief on the wages it pays Jane on February 28 or March 15 because those wages were paid before the HIRE Act took effect. For the \$2,000 paid to Jane on March 31, Joe's will deposit its share of social security tax ( $\$2,000 \times 6.2\% = \$124$ ) and reflect that on its first quarter Form 941. Then Joe's will treat the \$124 as a payment made in the second quarter of 2010 and will take a credit for that payment on its second quarter Form 941.

#### Tax 'holiday' applies to RRTA tax also

The social security tax relief provided by the HIRE Act also applies to Tier 1 of the Railroad Retirement Tax Act tax.

#### Form 941 reporting changes

The IRS has revised Form 941 beginning with the second quarter of 2010. A draft version of the form (see [www.americanpayroll.org/members/Forms-Pubs/#drafts](http://www.americanpayroll.org/members/Forms-Pubs/#drafts)) includes the following new lines:

- **Line 6a – Number of qualified employees first paid exempt wages/tips this quarter.** Report here the number of qualified individuals you have hired who were paid wages or tips that are exempt from the employer share of social security tax under the HIRE Act for the first time in the quarter being reported.

- **Line 6b – Number of qualified employees paid exempt wages/tips this quarter.** Report here the number of qualified individuals you have hired who were paid wages or tips that are exempt from the employer share of social security tax under the HIRE Act in the quarter being reported, whether or not they were paid exempt wages or tips in a prior quarter.

- **Line 6c – Exempt wages/tips paid to qualified employees this quarter.** Report here the total wages and tips paid to qualified individuals during the quarter being reported that are exempt from the employer share of social security tax under the HIRE Act.

- **Line 6d.** Line 6c amount  $\times .062$ .

- **Line 6e – Total taxes before adjustments.** (Lines 3 + 5d – Line 6d = Line 6e).

- **Line 12c – Number of qualified employees paid wages/tips March 19 – March 31.** Report here the number of qualified individuals you have hired who were paid wages or tips from March 19-31 that are exempt from the employer share of social security tax under the HIRE Act.

- **Line 12d – Exempt wages/tips paid to qualified employees March 19 – March 31.** Report here the total wages and tips paid to qualified individuals from March 19-31 that are exempt from the employer share of social security tax under the HIRE Act.

- **Line 12e.** Line 12d amount  $\times .062$ .

☞ **COMPLETE NEW LINES 12c-12e ONLY ON 2nd QUARTER 941** – The new Lines 12c-12e on Form 941 were added so employers could take a credit for the employer social security tax it paid in the first quarter that would have qualified for social security tax relief under the HIRE Act from March 19-31. The employer can take the credit only as a payment during the second quarter, so Lines 12c-12e should not be used for the remainder of the year. Seasonal employers that want

to take a credit for qualifying first quarter wages will have to file a second quarter Form 941 even if they don't pay wages in the second quarter.

#### Schedule B will not be affected

Schedule B (Form 941), *Report of Tax Liability for Semiweekly Schedule Depositors*, which is used by semiweekly payroll tax depositors to report their payroll tax liabilities on the days when they are incurred, will not have to be revised to take the HIRE Act's social security tax "holiday" into account.

#### W-2 reporting will be required

According to the IRS, employers will be required to report wages and tips that are exempt from the employer share of social security on an employee's Form W-2 in Box 12 with new Code CC. Form W-3 will be revised to add a new box to report the total of the amounts reported on Forms W-2, Box 12, Code CC.

#### Trust fund accounts will be made whole

The Act provides that the U.S. Treasury will make whole the social security trust fund and the social security equivalent benefit account for any reductions in employer social security and RRTA taxes.

#### Separate business tax credit

A different provision of the Act gives an employer a maximum \$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 whose wages during the second 26 weeks of this period are at least 80% of the wages during the first 26 weeks of the period.

The amount of the credit is the lesser of \$1,000 or 6.2% of the wages paid to the qualified individual during the year. Therefore, if the employer pays the employee \$16,129 or more in wages during the 52-week period, the business tax credit is \$1,000. If the employer pays the employee less than \$16,129, the business tax credit is 6.2% of the wages paid. The business tax credit and the social security tax relief are separate, and employers can claim both of them for the same employees.

☞ **Credit applies to FITW wages.** Wages paid to domestic workers and employees who can claim the foreign earned income housing exclusion do not qualify the employer for the business tax credit because the credit is limited to wages as defined in IRC §3401(a) – wages subject to federal income tax withholding. For employees for whom the business tax credit is taken, employers will need to be sure to calculate the credit on wages exclusive of deductions for cafeteria and/or deferred compensation plans.

An employer may claim the WOTC on the wages paid during the one-year period after hire to an employee for whom it is claiming the business tax credit under the HIRE Act, as long as it is not also claiming the social security tax "holiday" under the HIRE Act on any wages paid to that employee.

☞ **APA OFFERS HIRE ACT WEBINAR** – The APA will present a live 60-minute webinar, "How the HIRE Act Impacts Your Payroll Processing," on April 16 at 1:00 p.m. ET. Get all the details on the Act's requirements and guidance on depositing and reporting issued by the IRS. Check APA's website at [www.americanpayroll.org/product/?cid=49&gid=119](http://www.americanpayroll.org/product/?cid=49&gid=119) for registration information. ■

## APA to Hold 28th Annual Congress

On May 25-29, the American Payroll Association will hold its Annual Congress at the Gaylord National Resort & Convention Center in Washington, DC. For 28 years, the Congress has been the payroll profession's premier

educational event and an eagerly awaited training and networking opportunity for APA members, their colleagues, and allied professionals in accounts payable, finance, HR, and benefits.

This year's five-day program will offer more than 170 workshops led by the industry's foremost authorities. Attendees will learn about the most current legislative and regulatory developments affecting payroll and accounts payable, including the HIRE Act and health care reform. Sessions will be offered along a variety of tracks – thought leadership, executive, international forums, payroll processing, paying and making deductions from employees, U.S. taxation and forms, technology, accounts payable, benefits and compensation,

organization and personal management, special industry forums, and government forums.

As an added bonus, vendors will demonstrate payroll- and accounts payable-related products and services in the industry's largest expo. You will be able to find the latest, most cost-efficient technology to help your organization succeed.

To register or obtain more information, call APA Membership Services at 210-224-6406, 8:00 a.m. - 6:00 p.m. CT, M-F, or visit [www.apaCongress.org](http://www.apaCongress.org). ■

## Health Insurance Reform Bills Enacted

On March 23, President Obama signed into law the Patient Protection and Affordable Care Act (PPACA; Pub. L. No. 111-148), as passed by the Senate (see **PAYROLL CURRENTLY, Issue No. 1, Vol. 18**). A bill amending the PPACA – the Health Care and Education Reconciliation Act of 2010 (HCERA; Pub. L. No. 111-152) – was signed into law just a week later, on March 30. The provisions of the PPACA (as amended by the HCERA) of interest to payroll professionals are discussed here.

### W-2 reporting of cost of employer-provided health coverage

Employers will have to report the total cost of employer-provided health coverage on employees' Forms W-2, effective for tax years beginning after 2010 (Forms W-2 for 2011 filed in 2012). For example, if an employee enrolls in employer-sponsored health insurance coverage under a major medical plan, a dental plan, and a vision plan, the employer must report the total value of the combination of all of these health related insurance policies. The cost of coverage will be determined by calculating the applicable premiums under the rules for COBRA continuation coverage. But if the plan provides for the same COBRA premium for individual and family coverage, the plan will have to calculate separate premiums for this purpose. *Note:* This requirement does not apply to the amount of salary reduction contributions to a health Flexible Spending Arrangement (FSA) under a cafeteria plan or to amounts contributed to an Archer Medical Savings Account (MSA) or Health Savings Account (HSA).

### Medicare tax increase on high earners

The Medicare tax rate increases from 1.45% to 2.35% on wages earned over \$200,000 for single filers and \$250,000 for joint filers (\$125,000 for a married individual filing separately). Because employers will not know the wages of an employee's spouse, they are directed to withhold the increased amount from all workers with wages exceeding \$200,000, regardless of the marital status claimed on their Form W-4. Overwithholding and underwithholding for employees will be reconciled when they file their tax returns.

Employers do not have to match the increased Medicare tax amounts withheld from employees' wages. Self-employed individuals will also be subject to the Medicare tax increase if they meet the income thresholds, and will not be allowed to deduct the additional tax as a business expense. If an employer fails to withhold and deposit the extra Medicare tax and the employee pays it with their tax return, the tax will not be collected from the employer, but the employer faces penalties for its failure to withhold the tax. This provision is effective for taxable years after December 31, 2012.

### NEW MEDICARE TAX ON INVESTMENT INCOME –

The HCERA imposes a further 3.8% Medicare tax on the net investment income of individuals with a modified adjusted gross income over \$200,000 (\$250,000 for joint filers), but it is paid by the individuals when they file their tax returns. It is not withheld

from their earnings by their employers or matched by their employers.

### Change in definition of 'medical expenses'

The definition of "medical expense" with respect to medicines, for purposes of health FSAs, Health Reimbursement Arrangements (HRAs), Health Savings Accounts (HSAs), and Archer MSAs is conformed to the definition used in determining the itemized deduction for medical expenses, except that "prescribed drug" is determined without regard to whether the drug is available without a prescription. This means that only the cost of medicine prescribed by a doctor and insulin can be reimbursed through a health FSA or HRA or on a tax-free basis through an HSA or Archer MSA. This changes the current rule allowing such reimbursements for nonprescription drugs if the plan provides for it. This change only affects over-the-counter medicines, not other medical products, such as bandages, braces, etc., which can still be reimbursed on a tax-free basis. This change takes effect for tax years beginning after December 31, 2010.

### Reduced health FSA deferral limits

Salary reductions by an employee into a health FSA are limited to \$2,500, effective for tax years beginning after December 31, 2012 (indexed for inflation after 2013 to the next lowest multiple of \$50). This does not limit the exclusion for health coverage offered through an HRA.

### Higher penalty for non-medical HSA reimbursements

The additional tax on distributions from an HSA that are not used for medical expenses is increased from 10% to 20% of the distributed amount. The increase is effective for distributions made during tax years starting after December 31, 2010.

### Expanded information reporting on Form 1099-MISC

The general information reporting requirements regarding services provided to a trade or business are modified. The exception for payments to corporations is eliminated. In addition, the class of payments for which information reporting is required is expanded to include gross proceeds for both property and services. The current regulatory exception for payments to tax-exempt organizations is not affected. The changes will take effect for payments made after December 31, 2011.

### Simpler cafeteria plan nondiscrimination rules for small employers

For tax years beginning after 2010, a "simple" safe harbor from the nondiscrimination requirements for cafeteria plans for an eligible small employer (generally 100 or fewer employees) is provided. The safe harbor will also apply to the nondiscrimination requirements for specified qualified benefits offered under a cafeteria plan, including group-term life insurance, coverage under a self-insured group health plan, and benefits under a dependent care assistance program. The safe harbor will require that a cafeteria plan satisfy minimum

eligibility requirements and minimum employer contribution requirements.

To meet the eligibility requirement, all employees who cannot be excluded must be eligible to participate, and each eligible employee must be able to elect any benefit available under the plan. The plan can exclude employees who don't reach age 21 before the end of a plan year, work less than 1,000 hours in the preceding plan year, worked less than one year for the employer by the beginning of the plan year, are covered by a union contract if the plan benefits were bargained by the union and the employer, or are nonresident aliens working outside the U.S.

To meet the minimum contribution requirement, the employer must contribute at least 2% of each eligible nonhighly compensated employee's compensation or make a minimum matching contribution of the lesser of 100% of the employee's salary reduction contribution or 6% of the employee's compensation.

#### **Medical benefits for adult children expanded, excluded from income**

Effective for plan years beginning on or after September 23, 2010 (six months after the date of enactment), PPACA requires health plans that offer coverage of dependent children to continue to make such coverage available until the child turns 26 years old.

Effective March 30, 2010 (the date of enactment), HCERA extends the general exclusion from income for medical expense reimbursements under an employer-provided accident or health plan to any child of an employee who has not attained age 27 as of the end of the taxable year. This change also applies to the exclusion for employer-provided health coverage for injuries or sickness for such a child.

#### **Expansion of adoption assistance programs**

For taxable years beginning in 2010, the maximum amount of the income exclusion for employer-provided adoption assistance is increased to \$13,170 (currently \$12,170) and is adjusted for inflation after 2010. In addition, the income exclusion is extended through December 31, 2011, from the current expiration date of December 31, 2010.

#### **Excise tax on high-cost health coverage**

For tax years beginning after 2017, health insurers will be subject to an excise tax of 40% on the cost of employer-sponsored health coverage in excess of \$10,200 for individuals and \$27,500 for families, with these amounts indexed for inflation in later years. The thresholds will be higher for retirees who are at least age 55 but not yet eligible for Medicare and for employees in certain high-risk professions, such as firefighting, law enforcement, construction, agriculture, and mining. The thresholds also will be adjusted if health care costs increase more than expected in the coming years. Employers will have to provide information to the IRS and insurers about the amounts subject to the excise tax.

#### **Enrolling employees in health care plans: rules for employers**

**Large employers.** Effective for months beginning after December 31, 2013, an "applicable large employer" (employer with an average of at least 50 full-time employees during the preceding calendar year) that does not offer coverage for all its full-time employees, offers minimum essential coverage that is unaffordable, or offers minimum essential coverage that consists of a plan under which the plan's share of the total allowed cost of benefits is less than 60%, is required to pay a penalty if any full-

time employee is certified to the employer as having purchased health insurance through a state exchange with respect to which a tax credit or cost-sharing reduction is allowed or paid to the employee.

The penalty for any month is an excise tax equal to the number of full-time employees over a 30-employee threshold during the applicable month (regardless of how many employees are receiving a premium tax credit or cost-sharing reduction) multiplied by one-twelfth of \$2,000.

A separate penalty is assessed to large employers if they offer their employees minimum essential coverage under an employer-sponsored plan and any full-time employee is certified as having enrolled in coverage purchased through a state exchange with respect to which a tax credit or cost-sharing reduction is allowed or paid to the employee. The penalty is an excise tax of one-twelfth of \$3,000 for each such employee per month, up to a maximum amount that equals the penalty for not providing affordable coverage noted earlier. No penalties are assessed for employees enrolled in Medicaid.

**Small employers.** Effective for tax years beginning after December 31, 2009, a tax credit is provided for "qualified small employers" (employers with no more than 25 full-time equivalent (FTE) employees and whose average annual FTE wages are no more than \$50,000) for nonelective contributions to purchase health insurance for their employees. However, the full amount of the credit is available only to an employer with 10 or fewer FTEs and whose employees are paid average annual FTE wages from the employer of less than \$25,000. These wage limits will be adjusted for inflation beginning in 2014.

An employer's FTEs are calculated by dividing the total hours worked by all employees (no more than 2,080 hours can be counted for any single employee) during the employer's tax year by 2,080. For tax years beginning in 2010 through 2013, the credit is 35%, and qualifying health insurance for claiming the credit is generally coverage purchased from an insurance company licensed under state law. For tax years beginning in 2014 and 2015, the credit is 50%, and is only available to an employer that purchases coverage for its employees through a state exchange. The employer must make its nonelective contributions during the year and claim the credit on its tax return. Smaller credits are allowed to small tax-exempt entities that will take the credit against their payroll taxes – withheld federal income tax and the employer and employee shares of social security and Medicare taxes.

#### **Other new reporting requirements**

**For insurers.** For calendar years beginning after 2013, insurers (including employers that self-insure) that provide minimum essential coverage to any individual during a calendar year must report the following to both the covered individual and to the IRS under new IRC §6055: (1) the name, address, and taxpayer identification number (TIN) of the primary insured, and the name and TIN of each other individual obtaining coverage under the policy; (2) the dates during which the individual was covered under the policy during the calendar year; (3) whether the coverage is a qualified health plan offered through an exchange; (4) the amount of any premium tax credit or cost-sharing reduction received by the individual with respect to such coverage; and (5) such other information as the Treasury Secretary may require.

To the extent coverage is through an employer-provided group health plan, the insurer is also required to report the name, address, and employer identification number of the employer,

the portion of the premium, if any, required to be paid by the employer, and any other information the Treasury Secretary may require to administer the new tax credit for eligible small employers. The insurer must provide all this information, plus the insurer's name, address, and contact information, to the insured individual by January 31 of the year following the year for which the information is required to be reported. Insurers that fail to comply with these reporting requirements are subject to the general penalties for failure to file information returns and furnish payee statements.

**For employers.** For periods beginning after December 31, 2013, there will be new reporting requirements for large employers subject to the employer responsibility rules discussed earlier and employers offering minimum essential coverage and paying part of the cost that require employees to contribute more than 8% of their wages to the premiums. Such employers will have to report to the IRS: (1) the name, address, and EIN of the employer; (2) a certification whether the employer offers its employees the opportunity to enroll in minimum essential coverage under an employer-sponsored plan; (3) the number of full-time employees for each month during the calendar year; (4) the name, address, and TIN of each full-time employee employed by the employer for each month during the calendar year and the number of months during which the employee (and any dependents) was covered by a plan sponsored by the employer; and (5) any other information the IRS may require. Employers that offer minimum essential coverage must report other items as well.

These employers must report to each individual employee the above information with respect to the employee, plus the name, address, and contact information of the employer, by January 31 of the year following the calendar year for which the information is required to be reported to the IRS. Employers that fail to comply with these new reporting requirements will be subject to the general penalties for failure to file information returns or furnish payee statements. The IRS may provide that the information required to be provided by this new requirement may be provided on Form W-2 or the form required to be provided by the insurer under new §6055.

#### **Offering qualified health plans through §125**

Under another PPACA provision, reimbursement or direct payment for the premiums for health coverage under a qualified plan offered through a state exchange is a qualified benefit under a cafeteria plan offered by a qualified employer. A qualified employer is generally a small employer that elects to make all its full-time employees eligible for qualified plans offered in the small group market through an exchange.

#### **Fair Labor Standards Act amendments**

**Automatic health insurance enrollment.** Under new §18A of the Fair Labor Standards Act (FLSA), employers that have more than 200 full-time employees and that offer them enrollment in a health benefit plan must automatically enroll new full-time employees in one of the plans offered and continue the enrollment of current employees. An automatic enrollment program must include adequate notice and the opportunity

for an employee to opt out of coverage the employee was automatically enrolled in. Nothing in this section supersedes any state law establishing “any standard or requirement relating to employers in connection with payroll” unless the law prevents an employer from instituting an automatic health insurance enrollment program.

**Required notice of coverage to employees.** Beginning March 1, 2013, covered employers must provide each new employee (and all current employees no later than March 1, 2013) written notice:

- of the existence of a health insurance exchange, including a description of the services provided by the exchange and the manner for contacting the exchange to request assistance;
- that, if the employer plan's share of the total cost of benefits provided under the plan is less than 60%, the employee may be eligible for a premium tax credit and a cost-sharing reduction if the employee purchases a health plan through the exchange and the employer does not offer a “free choice voucher”; and
- that, if the employee purchases a health plan through the exchange, the employee may lose the employer's contribution to any health benefits offered by the employer and that all or part of the employer's contribution may be excludable from income for federal income tax purposes.

**New anti-retaliation provision.** Employers are prohibited from discharging or otherwise discriminating against an employee because the employee has received a premium tax credit or a cost-sharing reduction under the PPACA, has provided information to the federal or state government relating to a violation of PPACA provisions relating to affordable health care, has testified or participated in a proceeding concerning such a violation, or has refused to participate in an activity that the employee reasonably believes violates such provisions.

**Break time for nursing mothers.** Employers must provide a reasonable break time for an employee to express breast milk for her nursing child for one year after the child's birth each time the employee needs to do so, in a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public. This break time may be unpaid. Employers with fewer than 50 employees do not have to comply with this requirement if it would impose an undue hardship by causing the employer “significant difficulty or expense” in relation to the employer's “size, financial resources, nature, or structure.” State laws that provide greater protection to nursing employees are not preempted by this provision.

☛ **APA OFFERS HEALTH CARE REFORM WEBINAR** – The APA will present a live 60-minute webinar on May 4 at 1:00 p.m. ET, “Health Care Reform – It Does Impact Payroll!” Get all the details on how this landmark legislation will impact your payroll and benefit processes and procedures. Visit the APA website at [www.americanpayroll.org/product/?cid=49&gid=119](http://www.americanpayroll.org/product/?cid=49&gid=119) for registration information. ■

## **IRS Re-Issues 2010 Instructions for Forms W-2 and W-3**

The IRS has posted a note on its website [[www.irs.gov/formspubs/article/0,,id=109875,00.html](http://www.irs.gov/formspubs/article/0,,id=109875,00.html)] (3-2-10) advising taxpayers that the *2010 Instructions for Forms W-2 and W-3* were corrected and reissued on February 18, 2010.

On page 12, the definition for Box 12, Code Q – Nontaxable

combat pay, was corrected to state “If you are a military employer, report any nontaxable combat pay in Box 12.”

The corrected version of the *Instructions* is available on the APA website at [www.americanpayroll.org/members/Forms-Pubs/#tax](http://www.americanpayroll.org/members/Forms-Pubs/#tax). ■

## Broad Spectrum of Payroll Administration Developments Addressed by Capital Summit Speakers

With a job creation bill and health care reform legislation on the verge of becoming law, the participants at APA's 6th Annual Capital Summit in Washington, D.C. on March 11-12 were anxious about payroll's possible role in implementing a social security tax "holiday" and helping to provide health insurance to the millions of Americans without it. As payroll professionals have come to realize over the years, they are usually on the front lines whenever tax policy is used to advance the nation's political and social agendas.

By the time the conference had ended and the last question had been addressed, it was clear that they had learned much more from the federal government agency speakers who offered their insight and expertise. Among other things, they learned about:

- random IRS employment tax audits being conducted to measure employer compliance,
- APA's efforts as part of a coalition to convince both employers and state governments to embrace electronic payroll,
- improvements to the E-Verify system,
- a new workgroup to address child support withholding from bonuses and other lump sum payments,
- the upcoming "randomization" of the assignment of social security numbers (SSNs), and
- ways the IRS is reducing the use of SSNs on its documents to help prevent the scourge of identity theft.

### Random audits and new tip exams from the IRS

The audience was very interested when John Tuzynski, IRS's Chief of Employment Tax Operations, Small Business/Self-Employed Division, announced that the National Research Program audits he had spoken about a year earlier had recently begun. The IRS has started contacting the 2,000 "lucky" employers that were chosen at random for a comprehensive employment tax examination by sending them introductory Letter 3851-B and then Letter 3850-B, which sets the date for the audit to begin. The results of the audits – 6,000 of which will be conducted from 2010-2012 – will be used to help determine trends in employment tax compliance in areas such as worker classification, fringe benefits, information reporting, and officers' compensation, and where the highest incidence of noncompliance is. This will go a long way toward determining the actual size of the "tax gap" and developing strategies to reduce it, Tuzynski said.

Also on the IRS's calendar for 2010, noted Tuzynski, are new tip audits based on information gathered from Forms 4137, *Social Security and Medicare Tax on Unreported Tip Income*, filed by tipped employees so they can pay their share of FICA taxes on tips they did not report to their employers. The IRS plans to use the information reported on these forms for the first time to assess the employer's share of FICA taxes. Tuzynski said that Form 4137 requires the employee to report their employer's EIN, which will allow the IRS to total the amounts reported by different employees for assessment purposes. Employers will receive a notice and demand from the IRS for the assessed FICA taxes after a Pre-Notice and Demand letter (L4520) is sent with specific guidance for the employer. Tuzynski also said the IRS will soon begin outreach efforts to the employer community explaining what the IRS will be doing and the legal authority for the audits and assessments.

### HIRE Act and health care guidance promised

Because the job creation bill, which became the Hiring Incentives to Restore Employment (HIRE) Act, and the health care reform bills, which became the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act, had still not received final approval, speakers who addressed them offered few specifics. John Tuzynski did promise, however, that the IRS would provide guidance in the form of news releases and frequently asked questions and answers soon after enactment of the HIRE Act, while Mark Iwry of the Treasury Department said that interpretive guidance would also be issued on the health care reform provisions soon after they became law. For detailed information on these new laws and their effects on payroll, see the related articles in this issue of PAYROLL CURRENTLY.

### Promoting e-Pay as a cost saver and friend of the environment

In addressing the Capital Summit participants, Ian Macoy, Managing Director, Network Strategy & Outreach at NACHA – The Electronic Payments Association, outlined strategies being employed by NACHA, the Association for Financial Professionals (AFP), and APA to drive greater adoption of electronic payroll (direct deposit and paycards) by employers and employees, as well as state policies allowing mandatory electronic payroll. According to Macoy, the three-pronged approach is aimed at overcoming obstacles employers face in implementing and increasing electronic payroll through awareness and outreach.

The coalition will use the following methods to present the benefits of electronic payroll to employers, employees, and state policymakers:

- Developing employer success strategies based on actual case studies and available research;
- Advocating model State Payroll EFT policies embracing direct deposit and paycards that allow employers to pay all employees electronically; and
- Working with labor unions to understand the specific needs of union employees and to promote electronic payroll as an employee benefit.

Macoy said the work of NACHA, AFP, and APA has begun to "move the needle" on electronic payroll, as more states adopt employer-friendly paycard legislation and regulations and the federal government – the largest and longest user of direct deposit – actively promotes electronic benefit payments. Macoy also highlighted NACHA's efforts to show how electronic payroll is good for the environment through its PayItGreen® initiative, which provides member companies with access to marketing tools and research materials to use in their own outreach efforts.

### E-Verify compliance monitored; contractor verification issues

Shannon Slattery, Management and Program Analyst for the Outreach Branch, Verification Division at U.S. Citizenship and Immigration Services, provided an update on the status of the E-Verify Program, including its required use by federal government contractors and subcontractors. Slattery said USCIS launched the Compliance Tracking and Management System (CTMS) in 2009 to track and manage noncompliance. The areas

that CTMS began monitoring for include:

- Multiple social security numbers in E-Verify;
- Employers that terminated employees who received mismatches before receiving a final nonconfirmation; and
- Employers that ran queries more than three days after employees began working for pay.

In the fourth quarter of 2009, more than 1,000 compliance letters were sent to employers. Slattery reassured the audience that CTMS is not an enforcement program, but is designed to see if employers are using E-Verify correctly. If an employer gets a letter, it is not an enforcement action, she added. In fiscal year 2010, CTMS is expanding its program through:

- Increased automation;
- Monitoring for additional types of noncompliance; and
- Broadening its compliance assistance for employers to include phone calls, desk audits, and referrals.

Slattery also addressed aspects of the requirement that federal contractors and subcontractors must use E-Verify for contracts awarded on or after September 8, 2009, depending on the size of the contract. One aspect she covered in some detail is the choice that covered contractors have to verify their entire workforce (both new hires and existing employees company-wide) rather than just new hires and existing employees who are assigned to contracts subject to the E-Verify requirement.

Employers that choose to verify their entire employee population can either require that all employees complete a new Form I-9, *Employment Eligibility Verification*, or require that employees complete a new form only under the following circumstances:

- The employee presented an expired document with a previous Form I-9;
- The employee's employment authorization has expired;
- The List B identity document previously submitted did not have a photo or you cannot determine if it had a photo;
- The employee is a noncitizen national but could not attest to that status on a previous I-9 (previous versions of the I-9 had one checkbox for "citizen or noncitizen national" of the U.S.);
- The employee presented a document that was acceptable at the time but is no longer acceptable;
- The employee's immigration status has changed; or
- The previous Form I-9 was not compliant when it was completed.

Federal contractor employers that choose not to verify the entire workforce are still required to verify all new hires and any existing employees who are assigned to contracts subject to the E-Verify requirement. The existing employees must complete a new I-9 if any of the above-listed conditions apply.

One question on several participants' minds was what to do if an existing employee who is subject to verification under the federal contractor requirements had submitted with the previously completed Form I-9 an identity document, such as a state-issued driver's license with a photo, that was unexpired at that time but that has since expired. Now that the I-9 regulations require the submission of unexpired documents, is the employer required to have such an employee submit an unexpired driver's license or some other identity document? Slattery's answer was that an unexpired driver's license does not have to be provided by the employee.

#### **OCSE workgroups to tackle standard IWO changes, lump sum pay**

Sherri Grigsby, Manager, Employer Services Team at

the Office of Child Support Enforcement (OCSE) began by thanking those in the audience and all employers for their role in collecting nearly 70% of all the child support paid in the U.S. in 2009 and for reporting 46.8 million new hires. Then she announced that the OCSE is creating a workgroup comprised of employers, payroll service providers, the judiciary, and state child support enforcement agencies to discuss revising the standard child support withholding order, *Income Withholding for Support*. Conference calls will be held in April and May to develop and review options.

The current form was issued in November 2007 and contained several significant changes to the previous version. Grigsby said employers should receive this form in all of their withholding situations, whether initiated by a state agency, a court, or a private entity. The upcoming renewal of the form, which has an expiration date of October 31, 2010, is an opportunity to further improve the child support collection process and reduce the burden on the employer community, according to Grigsby, who is working with the Child Support Subcommittee of APA's Government Affairs Task Force to find representatives from the employer and payroll processor community to participate in the conference calls and provide feedback.

According to Grigsby, revising the form is a way to help employers overcome two of their biggest challenges regarding child support orders:

- Receiving new orders to withhold child support that are not on the standard IWO; and
- Receiving new orders and processing existing orders that do not direct payment to a state disbursement unit (SDU) – the revised form may tell the employer to return it if the employer is not directed to send payments of withheld amounts to the SDU.

Grigsby also pointed out that the OCSE is putting together a separate workgroup to discuss another troublesome challenge for employers – whether and how much to withhold from bonuses and other lump sum payments under a current child support withholding order. States handle lump sum payments in different ways; some require that such payments be reported to the state before they are made while others do not, and some states treat them as regular wage payments subject to state limits on the amount that can be withheld while others require the entire amount of the payment to be turned over if there are sufficient arrearages owed by the employee. The workgroup will be gathering suggestions for provisions that could become part of model state legislation in this area. In the meantime, a matrix on the OCSE's website at [www.acf.hhs.gov/programs/cse/newhire/employer/contacts/ls\\_matrix.pdf](http://www.acf.hhs.gov/programs/cse/newhire/employer/contacts/ls_matrix.pdf) provides state contacts for questions regarding lump sum payments and information regarding employers' responsibilities.

#### **SSA: 'randomized' SSNs on the way; still no employer no-match letters**

Sometime in the next couple of years, the Social Security Administration will begin to assign new social security numbers without regard to the geographic location of the individual to whom the SSN is assigned. This "randomization" of the way SSNs are assigned is being done to prevent the SSA from running out of numbers in certain areas of the country, according to Chuck Liptz, Director, Division of Electronic Services Support and Communications at SSA. When the new assignment process begins, the so-called "high-group" list of the

highest numbers currently being assigned will disappear, and for the first time SSNs beginning with an “8” will be assigned.

Randomization is currently planned for 2011, but it may be pushed back, except in California and Maryland where the danger of running out of unassigned numbers is more acute. Liptz recognized that randomization and assigning SSNs beginning with “8” may present issues for employers and software providers that have payroll systems designed with edit functions that question any SSN outside of the current range of numbers issued by the SSA. But he expressed optimism that the early notification being provided will give those parties time to make necessary adjustments.

Liptz also updated the audience on the SSA’s current position on issuing no-match letters after a mismatch is found between an employee’s name and SSN on Form W-2. The SSA has not issued group letters (Educational Correspondence – EDCOR) to employers for several years, ever since a federal court halted their issuance after the Department of Homeland Security sought to classify them as evidence of an employer’s constructive knowledge that it had hired unauthorized aliens. Liptz said that the SSA has no plans to begin sending EDCOR letters again. But he did say that the SSA continues to send individual letters to employees for whom a mismatch is found, and that the letters may go to an employer if the SSA does not have a good address for the employee. Letters are also sent to employers if the SSN on an employee’s W-2 matches that of a

deceased person or a very young child, Liptz acknowledged.

### IRS privacy efforts stress reduction of SSN usage

The IRS is in the midst of an effort to eliminate or reduce the use of social security numbers on IRS forms, notices, and letters wherever possible, said Amber Smith, Attorney-Adviser in the IRS Office of Privacy, Information Protection, and Data Security, thereby reducing the opportunities for identity theft related to IRS documents. The IRS needs to identify how it can change its systems and processes so they rely less on SSNs, Smith said, and “scrub” SSNs from its documents where there is no statutory requirement to include them. So far, the IRS’s SSN Elimination and Reduction Strategy has:

- protected an estimated eight million SSNs (fiscal year 2009) by eliminating and reducing SSN usage on forms and notices;
- deployed the Research Command Code, which has enabled IRS customer service representatives to authenticate more than 14,000 taxpayers without using their full SSNs;
- taken a leadership role in interagency SSN elimination efforts through quarterly committee meetings that ensure ongoing collaboration;
- created a pilot program that allows payers to mask the first five digits of recipients’ SSNs, ITINs, and ATINs on the paper payee statement of forms in the 1098, 1099, and 5498 series; and
- begun working with IRS Chief Counsel to identify other possibilities for masking TINs on employee/payee statements. ■

## Supreme Court Will Decide If Verbal Complaints Are Protected by the FLSA

The U.S. Supreme Court has agreed to hear the appeal of a case involving the applicability of the anti-retaliation provision of the Fair Labor Standards Act (FLSA) to an employee’s verbal complaints [*Kasten v. Saint Gobain Performance Plastics Corp.*, No. 09-834 (U.S. Sup. Ct., 3-22-10)].

Under the provision (29 USC §215(a)(3)), it is unlawful for an employer “to discharge ... any employee because such employee has filed a complaint or caused to be instituted any proceeding under or related to [the FLSA].”

Some courts have interpreted this provision to protect any activity by a worker that constitutes assertion of an FLSA right,

including oral complaints (see [PAYROLL CURRENTLY, Issue No. 6, Vol. 13](#)). Other courts have interpreted the provision to require lodging a formal complaint with a labor agency or court (see [PAYROLL CURRENTLY, Issue No. 10, Vol. 16](#)).

In the case on appeal here, the Seventh Circuit Court of Appeals took a middle-of-the-road approach, ruling that because the provision says that a complaint must be “filed,” the submission of “some writing” to an employer, court, or administrative agency is required (see [PAYROLL CURRENTLY, Issue No. 16, Vol. 17](#)). Kevin Kasten’s complaints, which the court said were not protected, were “purely verbal.” ■

## COBRA Premium Assistance Deadline Expires Before Extension Can Be Enacted

The COBRA premium assistance deadline, which was extended to March 31 by the Temporary Extension Act of 2010 (TEA; see [PAYROLL CURRENTLY, Issue No. 3, Vol. 18](#)), has expired. Further extension scenarios under consideration by the House and Senate were not finalized before the congressional spring recess.

On March 10, the Senate approved H.R. 4213, the American Workers, State and Business Relief Act of 2010 (an “extenders bill” for a variety of expiring tax provisions) by a vote of 62-36. Among other things, the bill would extend premium assistance for COBRA benefits through December 31, 2010. On March 17, the House approved H.R. 4851, the Continuing Extension Act of 2010, by voice vote. The bill would extend premium assistance for COBRA benefits through April 30, 2010.

### H.R. 4213: American Workers, State and Business Relief Act of 2010

#### *Extension of premium assistance for COBRA benefits.*

The American Workers Act includes a provision that would

extend the period during which an involuntary termination (including an involuntary termination of employment occurring on or after TEA’s date of enactment that follows a reduction in hours of employment) that is a qualifying event must occur by nine months – from March 31 to December 31, 2010.

Under the provision, assistance eligible individuals in a “2010 transition period” who experience an involuntary termination that is a qualifying event on or after April 1, 2010, and before the provision’s date of enactment, would be permitted to retroactively pay their premiums (at the reduced rate of 35%) and maintain their COBRA coverage. Retroactive payments would be considered timely (and thus, the individual would be considered to have been continuously covered) if payments are made by the latest of:

- 60 days after the date of enactment of the provision,
- 30 days after the date the notice required by the provision is given (see below), or
- the end of the plan’s grace period for making COBRA

premium payments.

In the case of an assistance eligible individual who pays 100% of the premium required for COBRA continuation coverage during a 2010 transition period, rules similar to the ARRA special reimbursement rules would apply. These rules provide for the reimbursement of an assistance eligible individual, or the crediting of overpayments against future premium payments.

Plan administrators would be required to provide assistance eligible individuals in a 2010 transition period notice of their ability to make retroactive reduced premium payments within 60 days of the first day of their transition period.

**Increase in information return penalties.** The Act includes a provision from the Obama Administration budget proposal to increase information return penalties. 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 business 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. Every five years, the penalty amounts would be adjusted for inflation. The provision would apply with respect to information returns required to be filed on or after January 1, 2011.

*Note:* These same information return penalty increases are also contained in H.R. 4849, the Small Business and Infrastructure Jobs Tax Act of 2010, which was passed by the House on March 24, but was not acted on by the Senate before the recess.

**Employees can designate elective deferrals as Roth contributions for governmental §457(b) plans.** The Act includes a provision, effective for taxable years beginning after December 31, 2010, that would allow state and local government employers to establish designated Roth §457(b) plans that would operate similarly to those established under §401(k) and §403(b) plans.

Beginning on the date of enactment, the Act would also permit participants in these three types of plans to roll over amounts in the plans to designated Roth accounts during 2010 under the special rule that allows 2010 Roth IRA contributions to be included in income in equal amounts in 2011 and 2012 rather than in 2010.

#### **H.R. 4851: Continuing Extension Act of 2010**

This Act would pick up where the Temporary Extension Act of 2010 left off (see **PAYROLL CURRENTLY**, Issue No. 3, Vol. 18). It would extend the deadline for involuntary terminations qualifying for COBRA premium assistance for another month, to April 30, 2010, and extend emergency unemployment benefits as well. ■

## **Changes Made to Federal Per Diem Rates**

Several changes have been made to the list of federal per diem rates for travel to locations within the continental U.S. (CONUS). FTR Per Diem Bulletin 10-3 is effective for travel undertaken on or after April 1, 2010 [75 F.R. 14443, 3-25-10; <http://edocket.access.gpo.gov/2010/pdf/2010-6612.pdf>]. The Bulletin is available on the APA website at [www.americanpayroll.org/members/Forms-Pubs/#perdiem](http://www.americanpayroll.org/members/Forms-Pubs/#perdiem). The changes are as follows:

#### **Kansas**

- **Leavenworth** is designated as a destination. For the period October 1 - March 31, the lodging rate is \$70 and the M&IE rate is \$46, for a total maximum per diem rate of \$116. For the period April 1 - September 30, the lodging rate is \$107 and the M&IE rate is \$56, for a total maximum per diem rate of \$163.

#### **New Mexico**

- **Las Cruces** is designated as a destination. For the period October 1 - March 31, the lodging rate is \$70 and the M&IE rate is \$46, for a total maximum per diem rate of \$116. For the period April 1 - September 30, the lodging rate is \$79 and the M&IE rate

is \$56, for a total maximum per diem rate of \$135.

#### **New York**

- **Oswego** is designated as a destination. For the period October 1 - March 31, the lodging rate is \$70 and the M&IE rate is \$46, for a total maximum per diem rate of \$116. For the period April 1 - September 30, the lodging rate is \$97 and the M&IE rate is \$56, for a total maximum per diem rate of \$153.

#### **Rhode Island**

- **Bristol** is designated as a destination. For the period October 1 - March 31, the lodging rate is \$70 and the M&IE rate is \$46, for a total maximum per diem rate of \$116. For the period April 1 - September 30, the lodging rate is \$139 and the M&IE rate is \$71, for a total maximum per diem rate of \$210.

#### **Texas**

- **Midland** is designated as a destination. For the period October 1 - March 31, the lodging rate is \$70 and the M&IE rate is \$46, for a total maximum per diem rate of \$116. For the period April 1 - September 30, the lodging rate is \$90 and the M&IE rate is \$51, for a total maximum per diem rate of \$141. ■

## **IRS Adjusts Foreign Housing Cost Exclusion Amount for High Cost Locations for 2010**

The IRS has issued a notice providing adjustments to the limitation on housing expenses for specific locations for purposes of the foreign housing cost exclusion under IRC §911 [Notice 2010-27, 3-22-10; [www.irs.gov/pub/irs-drop/](http://www.irs.gov/pub/irs-drop/n-10-27.pdf)

[n-10-27.pdf](http://www.irs.gov/pub/irs-drop/n-10-27.pdf)].

IRC §911 generally allows a U.S. citizen or resident living abroad to exclude from U.S. taxable income certain foreign earned income. A qualified individual is also allowed an exclusion

from gross income (or a deduction) for certain housing costs paid or incurred on his/her behalf that exceed a certain base housing amount.

Under the Tax Increase Prevention and Reconciliation Act of 2005 (Pub. L. No. 109-222), the Secretary of the Treasury is authorized to make annual adjustments to this limit based on geographic differences in housing costs.

A qualified individual incurring housing expenses in one or more of the listed high cost localities in 2010 may use the adjusted limit specified (instead of \$27,450) in determining his or her housing cost amount on Form 2555, *Foreign Earned*

*Income*. On the other hand, the \$27,450 limit continues to apply to a qualified individual not incurring housing expenses in a listed high cost locality.

Notice 2010-27, which includes a revised table, supersedes Notice 2008-107 (see **PAYROLL CURRENTLY, Issue No. 25, Vol. 16**). It is effective for taxable years beginning on or after January 1, 2010. However, a taxpayer may elect to apply the 2010 adjusted housing limitations contained in the notice to his/her taxable year beginning in 2009, because the IRS did not issue a list of high cost localities in 2009. ■

## USCIS Announces Initiatives to Enhance E-Verify

U.S. Citizenship and Immigration Services (USCIS) has announced a trio of initiatives to strengthen the efficiency and accuracy of the E-Verify system [Press Release, 3-17-10; [www.dhs.gov/ynews/releases/pr\\_1268843939770.shtm](http://www.dhs.gov/ynews/releases/pr_1268843939770.shtm)]. More than 705,000 worksites currently use E-Verify to electronically verify their workers' employment eligibility. Since October 1, 2009, E-Verify has processed more than six million queries. For more information, visit [www.dhs.gov/e-verify](http://www.dhs.gov/e-verify).

• A Memorandum of Agreement signed between USCIS and the Department of Justice's Office of Special Counsel for Unfair Immigration-Related Employment Practices establishes: (1) a streamlined process for addressing potential cases of discrimination and employer misuse of E-Verify, and (2) protocol between USCIS and the Department of Justice for

referring matters that fall within the agencies' respective jurisdictions.

• The USCIS E-Verify help line now offers employees information about the E-Verify process, as well as assistance in completing Form I-9 (*Employment Eligibility Verification*). Callers can also use the help line to file complaints about possible discrimination or employer misuse of the E-Verify program. The hotline number – (888) 897-7781 – was activated April 5, 2010.

• Training videos explaining E-Verify procedures and policies, employee rights, and employer responsibilities (in English and Spanish) are available for viewing at [www.dhs.gov/e-verify](http://www.dhs.gov/e-verify) and [www.youtube.com/ushomelandsecurity](http://www.youtube.com/ushomelandsecurity). ■

## IRS Says It Will Honor Some Medical Resident FICA Refund Claims

The IRS has made an administrative determination to accept the position that medical residents are excepted from FICA (social security and Medicare) taxes based on the student exception for tax periods ending before April 1, 2005 [[www.irs.gov/newsroom/article/0,,id=219731,00.html](http://www.irs.gov/newsroom/article/0,,id=219731,00.html)].

A companion set of *Questions and Answers About Medical Resident FICA Refund Claims* offers a more detailed explanation [[www.irs.gov/pub/irs-tege/medresident\\_fica\\_qa\\_030110.pdf](http://www.irs.gov/pub/irs-tege/medresident_fica_qa_030110.pdf)].

**Why are FICA refunds being paid to medical residents and their employers?** Employers (typically hospitals and medical schools) and individual taxpayers (medical residents) began filing FICA refund claims in the 1990s, based on their position that medical residents are eligible for the student FICA tax exception under IRC §3121(b)(10). The employers' FICA refund claims were for both the employer and employee shares of the FICA tax. In some cases, individual medical residents filed their own claims for the employee share of the FICA tax. The IRS has been holding the claims in suspense because of a dispute as to whether the student FICA exception applied.

**Who is eligible to receive a refund?** Institutions that employed medical residents and individual medical residents are eligible to receive refunds if they are covered by timely filed FICA refund claims. *Note:* The period of limitations for filing a claim for tax periods before April 1, 2005, has expired.

**What is the significance of April 1, 2005?** On April 1, 2005, new regulations on the student FICA exception became effective. These regulations include a provision that an employee who works 40 hours or more (full-time employee) for a school, college, or university is not eligible for the student exception. This provision excludes medical residents from the student exception. *Note:* The new regulations are also being challenged in the federal courts.

**If I filed a refund claim, what should I do?** Do not take any action at this time. Within the next 90 days, the IRS will be sending information to each employer and individual medical resident who filed a FICA refund claim. This information will explain the actions you must take to receive your refund. Taxpayers with currently pending suits should contact the Department of Justice attorney assigned to the case. ■

## Wage & Hour Roundup

The U.S. Department of Labor recently concluded the following Fair Labor Standards Act (FLSA) enforcement actions.

### Overtime: miscalculation

• **Regular rate.** Husky Energy Corp., a Lima, Ohio petroleum refinery, has paid \$989,182 in back overtime wages

to 173 workers. W-H investigators found that Husky was not paying 1½ the employees' regular rates for workweeks in excess of 40 hours. The violations began when the company changed from 8-hour shifts to 12-hour shifts for some of its workers, which resulted in alternating workweeks of 60 and 24 hours. Instead of paying 1½ times an employee's regular

rate for the resulting overtime hours, the company established an “adjusted” rate whereby all these hours were compensated at the same rate.

A second violation was found involving the employer not including a shift differential in the overtime pay. An employer is not required by law to provide a shift differential, but if one is paid then it must be included as part of the employee’s regular rate of pay for purposes of computing overtime.

- **Workweek.** Health Services Group, Inc. has paid \$265,451 in back overtime wages to 1,971 employees. The company, headquartered in Bensalem, Pennsylvania, provides housekeeping, laundry, linen, facility maintenance, and food services to more than 2,000 establishments in the health care industry nationwide – nursing homes, retirement complexes, rehabilitation centers, and hospitals. W-H investigators found that at some of the company’s establishments, workers were paid time and one-half for any hours worked in excess of 80 hours in a two-week pay period, rather than for hours worked in excess of 40 in a single workweek. The company paid straight time to workers for overtime hours that were worked in one pay period but paid for in a subsequent pay period. *Note:* Because the company had a prior investigative history with the department, it also has been ordered to pay \$195,000 in civil money penalties.

#### **Overtime: hours worked**

- **Donning and doffing.** Pilgrim’s Pride Corp., the country’s largest poultry processor, has agreed to pay \$1,001,438 in back overtime wages to 798 current and former processing workers at the company’s Dallas, Texas facility. The company failed to pay these employees for all hours worked, including time spent putting on and taking off protective clothing at the beginning and end of the workday and before and after meals.

- **Timekeeping.** New Liberty Hospital in Liberty,

Missouri, has paid \$282,166 in back overtime wages to 1,032 nursing, security, and maintenance employees. W-H investigators found that the hospital’s timekeeping system did not count the time worked either before or after a scheduled shift unless it amounted to a full 12 minutes. Additionally, the hospital’s security department automatically deducted 30 minutes for lunches whether or not the employees were able to take them.

- **Hours worked in multiple locations.** Davis Life Care Center, Inc., of Pine Bluff, Arkansas, has paid \$61,962 in back overtime wages to 21 current and former health care workers. The workers were engaged in taking care of elderly and disabled residents at two company facilities. W-H investigators found that the company failed to combine hours worked from both locations to determine the overall hours worked in a week.

#### **Overtime: misclassified workers**

- Dawson Geophysical Co., a Midland, Texas oil and gas exploration company, has paid \$100,356 in back overtime wages to 24 current and former employees. W-H investigators found that the company misclassified field clerks as being executive or administrative staff, when in fact they were not exempt from the FLSA’s overtime provisions.

#### **Child labor: hazardous occupations**

- Superior Center Warehouse, a California supermarket chain, has been ordered to pay \$79,200 for violating child labor provisions of the FLSA. W-H investigators found that the company allowed minors to operate scrap paper balers, paper box compactors, and power-driven hoisting apparatuses or forklifts. A total of 40 hazardous occupational violations were identified. The FLSA prohibits workers under the age of 18 from being employed in any nonagricultural occupations that the Department of Labor has declared to be hazardous. ■

## **Insurance Adjusters Were FLSA-Exempt Administrative Employees**

In 2004, a U.S. District Court in the District of Columbia said that Jerome Robinson-Smith and more than 270 other automobile damage adjusters employed by the Government Employees Insurance Company (GEICO) were entitled to overtime pay (see [PAYROLL CURRENTLY, Issue No. 17, Vol. 12](#)). Now the U.S. Court of Appeals for the District of Columbia Circuit has reversed that decision, holding that the adjusters were administrative employees exempt from the minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA) [*Robinson-Smith v. Government Employees Ins. Co.*, 590 F.3d 886 (D.C. Cir., 1-5-10)].

*Note:* Both the District Court and the Court of Appeals used the “short test” for the administrative exemption in effect prior to August 23, 2004 (old regulations). The District Court said that the outcome of the case would have been the same if it had been decided under the regulations that became effective August 23, 2004 (new regulations), and the Court of Appeals noted that the new regulations were meant to “consolidate and streamline” the old regulations and to be consistent with the short test.

#### **Background**

GEICO underwrites and sells automobile insurance. Auto damage adjusters assess, negotiate, and settle automobile damage claims. They spend a majority of their time appraising damaged vehicles and estimating repair costs but also negotiate

and settle claims with body shops over repair costs and with insureds over total loss vehicles.

An adjuster can make settlements within predetermined limits and can recommend settlements in excess of these limits. Adjusters do not determine GEICO’s liability on a given claim and cannot deny liability; they simply evaluate the value of a claim once the decision to pay the claim has been made.

Adjusters prepare estimates using specialized software that retrieves information on items such as parts prices. The software also provides prompts that indicate when a vehicle becomes a total loss, when a lower-cost part is available, and when it would be more cost-effective to replace a part. The adjuster must determine the amount of labor time that a repair will require without the aid of computer programs, although the software includes descriptions of repair procedures. The software does not prevent an adjuster from making a manual entry, or an entry different from the software’s recommendation, but it does flag the entry.

If a vehicle is flagged as a total loss, the adjuster orders a valuation estimate from the software company and makes additions and subtractions pursuant to GEICO policies and guidelines to determine a final value. About 70% of total loss claims are settled on the first offer with no subsequent negotiation. For the remaining 30%, the adjuster initiates

settlement negotiations over amounts ranging from nominal to thousands of dollars.

☞ **WHAT THE LAW SAYS** – To qualify as an exempt administrative employee under both the short test in the old regulations and the new regulations, each of the following requirements must be met: (1) the employee must be paid not less than a specified minimum amount per week on a salary basis; (2) the employee's primary duty must consist of office or nonmanual work directly related to the employer's management policies or general business operations; and (3) the employee's primary duty must include the exercise of discretion and independent judgment. Here, the only question for the Court of Appeals was whether the adjusters satisfied the third requirement.

#### Analysis

The court explained that the exercise of discretion and independent judgment is more than merely using skill to apply well-established techniques. Moreover, it must be exercised free

from immediate supervision and with respect to matters of significance.

The primary duty of the adjusters included the exercise of discretion and independent judgment, concluded the court. The adjusters admitted that negotiating with insureds involved the use of discretion. The number of "total loss" negotiations conducted by an adjuster ranged from 20 to 60 per year; even 20 negotiations per year would satisfy the requirement for exemption, said the court.

In addition, the adjusters made independent choices free from immediate direction or supervision. The fact that their decisions were later subject to review did not alter this conclusion. Moreover, the adjusters could settle claims up to \$10,000 or \$15,000 on their own based on the facts of the claim and within GEICO guidelines.

Finally, the adjusters' discretion and independent judgment extended to matters of significance because their negotiations within their settlement limits bound GEICO financially. ■

## Employer-Provided Clothing and Accessories Were De Minimis Fringes

In a private letter ruling, the IRS has ruled that the value of clothing and accessories provided by a municipal department to its employees was excludable from the employees' gross income as a de minimis fringe benefit under IRC §132 [LTR 201005014, 10-28-09; [www.irs.gov/pub/irs-wd/1005014.pdf](http://www.irs.gov/pub/irs-wd/1005014.pdf)].

#### Background

A political subdivision has many employees who are eligible to receive work-related articles of clothing and accessories – tee shirts, polo shirts, sweaters, jackets, swimsuits, socks, sweatshirts, coats, pants, jeans, shorts, gloves, hats, fanny packs, belts, clip-on ties, and equipment bags. While working, employees are required to wear these items of clothing, many of which have the subdivision's logo or other information that identifies the wearer as an employee of the subdivision.

**Employer-vendor arrangements.** The clothing is obtained annually under a contract system when the city council appropriates funds to the subdivision. Vendor bids, if accepted, become contracts under which any department may order specific items. The contracts rarely specify the precise number of items that the subdivision will collectively order or break out the precise cost of each item, but instead specify a maximum number of items that may be ordered. The cost of an item can vary in the same year as well as from year to year because of escalation clauses and variations in the size of an item or the fabric used.

Once contracts are in place, departments secure needed items by ordering them directly from vendors. Vendors submit invoices to the departments' fiscal officers, who forward them to the city auditor for payment after verifying that the goods were received.

**Employees' receipt of clothing items.** Storeroom supervisors within the departments issue items to employees in accordance with department policies. However, the frequency with which employees receive new or replacement items varies from department to department. Moreover, different classes of employees may be entitled to different types of items and different quantities of an item.

The subdivision cannot enumerate the particular number of items that each employee receives each year, but says

items are generally provided to employees no more often than annually. In most cases, individual employees receive less than one item per year, so the number of employees eligible to receive a given item typically exceeds the number of items actually distributed by a department. Because departments do not typically distribute every item ordered in a year, items are stored for future use.

☞ **WHAT THE LAW SAYS** – IRC §132(a)(4) excludes from an employee's gross income the value of a de minimis fringe benefit provided to that employee. In order to exclude the value of items provided to employees as de minimis fringes, it is necessary to establish that the value of the items is so low as to make accounting for them administratively impracticable. Neither the IRC nor IRS regulations specify a particular value above which an item no longer qualifies as a de minimis fringe. However, even an item with a low value may not qualify as a de minimis fringe if an employee receives it too frequently, so that the aggregate value is not de minimis.

#### Administrative impracticability

Here, the IRS said that accounting for the distribution of clothing items was impracticable because of the administrative costs that would be involved in requiring each department storeroom to track items given to employees and maintain records. Many departments do not issue clothing regularly. Many items of clothing are also provided to volunteers, a group inherently difficult to track. And not all employees opt to receive the items to which they are entitled under departmental policies.

Establishing a system to track the cost of each individual item would be expensive – and impossible, unless vendors provide invoices laying out in detail the particular types and amounts of clothing purchased by each department. And it would be difficult to ascertain the fair market value of each item, especially since these items bear the insignia of the subdivision or contain other writing.

Although many of these hypothetical administrative costs are due to the subdivision's large decentralized structure, it is significant that there is no indication that the subdivision designed its system with the intent to make it administratively impracticable to track the values of the items in question.

Finally, the clothing items are not provided to employees frequently. Departmental policies enumerate the number of items employees may receive in a given year, and typically entitle employees to new clothing items when hired and

replacements on an “as needed” basis. “We do not consider the provision of the items once, or perhaps twice, annually as so frequent that, given the low value of each item, the provision could not properly be characterized as de minimis.” ■

## Church Musician Was Misclassified as an Independent Contractor

Responding to a request for a determination of employment status under the Form SS-8 Program, the IRS has concluded that a musician was a church employee and not an independent contractor [SS8 2010020002, 10-26-09; [www.irs.gov/pub/ss8det/67160\\_0002\\_2-17-10\\_gml.pdf](http://www.irs.gov/pub/ss8det/67160_0002_2-17-10_gml.pdf)].

### The work relationship

A church hired a musician to play music on Sunday mornings from 10:30 to 11:30 a.m. after practicing for two hours during the week. The musician performs his services personally. He supplies his own musical instrument, and the church provides all other supplies and materials he needs to complete his assignments. The musician receives his instructions/assignments from the church’s pastor via e-mail.

The musician’s services are performed under the church’s name. He does not advertise his services and does not perform similar services for others.

There is no written contract describing the terms and conditions of the work relationship, which has so far lasted four years. During that time, the church has reported payments to the musician using Form 1099-MISC, *Miscellaneous Income*. It filed Form SS-8, *Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding*, in order to determine whether this is appropriate.

### IRS determination

The IRS weighed the facts and concluded that the church had the right to exercise direction and control over the musician to the degree necessary to establish that he was a common law employee and not an independent contractor operating a trade or business.

**Behavioral controls.** Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. Here, the church retained the right to change the musician’s methods and to direct him to the extent necessary to protect its financial investment.

**Financial controls.** Factors that illustrate whether there is a right to direct and control the financial aspects of a worker’s activities include significant investment, unreimbursed expenses,

the methods of payment, and the opportunity for profit or loss. Here, the musician did not invest capital or assume business risks, and therefore, did not have the opportunity to realize a profit or incur a loss as a result of the services he provided.

**How the parties perceive their relationship.** Factors that illustrate how the parties perceive their relationship include the intent of the parties as expressed in written contracts; the provision of, or lack of employee benefits; the right of the parties to terminate the relationship; the permanency of the relationship; and whether the services performed are part of the service recipient’s regular business activities. Here, the musician was not engaged in an independent enterprise, but rather the services performed by the musician were a necessary and integral part of the church’s business. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

### Correcting the problem

The IRS advised the church that a determination under the Form SS-8 Program is not related to an IRS audit. Therefore, IRC §7436, which concerns reclassifications of worker status that occur during IRS examinations, does not apply to an SS-8 determination.

In addition, an SS-8 determination is not an audit for purposes of entitling an employer to relief under §530 of the Revenue Act of 1978 (see *The Payroll Source*®, p. 1-5). “The SS-8 Program does not calculate your balance due and send you a bill. You are responsible for satisfying the employment tax reporting, filing, and obligations that result from this determination, such as filing employment tax returns or adjusting previously filed employment tax returns.”

The IRS explained that if an employer is not eligible for §530 relief, and the failure to pay the correct amount of employment tax was due to misclassification of a worker’s status, then the employer must use the rates outlined in IRC §3509 to calculate its liability (see *The Payroll Source*®, p. 1-17). ■

## Field Supervisor Was Not an Exempt Administrative Employee

As a field supervisor for HFS-USA, a company providing home finishing services such as installation of flooring and tile to residential builders, Steven Cotten was responsible for managing job sites and contract installers. When Cotten sued to recover overtime pay under the Fair Labor Standards Act (FLSA), HFS argued that he was an exempt administrative employee. The court disagreed [*Cotten v. HFS-USA, Inc.*, 620 F.Supp. 2d 1342 (MD Fla., 5-18-09)].

☞ **WHAT THE LAW SAYS** – To qualify as an exempt administrative employee: (1) the employee must be paid at least \$455 a week on a salary or fee basis, not including board, lodging, or other facilities; (2) the employee’s primary duty must be the performance of office or nonmanual work directly related to the management or general business operations of the employer or the employer’s customers; and (3) the employee’s primary duty must include the exercise of discretion

and independent judgment regarding matters of significance (see *The Payroll Source*®, p. 2-9).

Here, the question for the court was whether the second and third requirements were satisfied.

### Directly related to management or general business operations

Cotten’s primary duty was not directly related to the management or general business operations of HFS. The court explained that the distinction between exempt administrative work and nonexempt production work applies in a service industry, where production activities relate to the “primary service goal” of the business. Here, HFS’s primary goal was the installation of finishing products for builders. Although Cotten “managed” the installation sites to which he was assigned, his duties were limited to ensuring that installers received their work orders, retrieved the correct materials from the

warehouse, and completed the installation job in accordance with the work order, builder specifications, and industry standards. Cotten could not negotiate or execute contracts, create work orders, or develop applicable standards.

Work directly related to management or business operations includes work in functional areas such as quality control, purchasing procurement, safety and health, public relations, and government relations. Although Cotten performed only minor manual labor, none of his duties were directly related to these areas. He had no role in formulating the company's business policies or procedures. And he was not responsible for security or safety on the jobsite.

#### **Discretion and independent judgment**

Cotten's duties did not involve the exercise of discretion and independent judgment with respect to matters of significance. He spent much of his time during an installation

conducting inspections by comparing what he saw with established industry standards or the terms of a contract. This was the kind of "ordinary inspection work" (29 C.F.R. §541.203(g)) that generally does not satisfy the duties requirement for the administrative employee exemption. Cotten could place an installation on hold pending the completion of pre-installation repairs to a jobsite and could determine whether installers should be paid after an installation, but this was not discretionary because these were the natural consequences of a failed inspection.

Finally, Cotten's authority to direct repairs of a jobsite before an installation or of a substandard installation was limited to charges of less than \$200. For more expensive repairs, he had to consult with his project manager or the operations manager, who would resolve the problem or provide a price for Cotten to quote to the installer or builder for the repair. ■



## STATE AND LOCAL NEWS

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**Changes to 2010 State Unemployment Insurance Taxable Wage Bases.** Three states recently decreased their unemployment insurance (UI) taxable wage base amounts for 2010 through legislation: (1) Florida - \$7,000; was scheduled to increase to \$8,500 (delayed until 2012) [H.B. 7033, L. 2010]; (2) Hawaii - \$34,900; was scheduled to increase to \$38,800 [H.B. 2169, L. 2010]; and (3) Indiana - \$7,000; was scheduled to increase to \$9,500 (delayed until 2011) [S.B. 23, L. 2010]. For a list of updated state wage bases, check the APA's website at [www.americanpayroll.org/government/government-resources](http://www.americanpayroll.org/government/government-resources).

### **California**

***Kin care law applicability to paid sick leave policies limited.*** The California Supreme Court has ruled that the kin care law, which permits an employee to use accrued paid sick leave to care for an ill child, parent, spouse, or domestic partner, does not apply to paid sick leave policies that provide for an uncapped number of compensated days off. This decision reverses the appeals court, which held that employers that provide sick leave must allow employees to use some of this leave as kin care leave [*McCarther v. Pacific Telesis Group*, No. S164692, 2010 Cal. LEXIS 1050 (Cal. Sup. Ct., 2-18-10)].

### **Colorado**

***Deductions for automatic enrollment in a retirement plan permitted.*** Effective 1-1-11, payroll deductions for employee contributions resulting from the employee's automatic enrollment in a retirement plan, regardless of whether the plan is subject to the federal Employee Retirement Income Security Act (ERISA), are permitted. Deductions for supplemental retirement plans (as long as they are authorized by the employee) are also permitted [S.B. 35, L. 2010].

### **District of Columbia**

***Same-sex marriage legalized.*** Effective 3-3-10, same-sex marriages can be legally performed in the District of Columbia. As a result, there is an exclusion from income for employer-paid health insurance premiums to cover an employee's same-sex spouse. Domestic partners can apply for a marriage license, and the domestic partnership will be terminated upon their marriage. Same-sex marriages legally performed elsewhere have been recognized in the District of Columbia since 7-7-09 [Bill No. 18-0482, L. 2010].

### **Kansas**

***Time for making interest-free quarterly UI payments extended.*** Employers have an additional 90 days to make quarterly unemployment insurance (UI) tax payments for the first three quarters of 2010 and 2011 without accruing interest. However, the Department of Labor (DOL) advises employers that delaying payments could adversely affect their tax rates for the following year. Any payments for the first or second quarter taxes paid after July 31 will not be included in the tax computation for the next year. The 90-day grace period does not apply to the submission of quarterly wage reports, which are still due the last day of the month following the end of the quarter [H.B. 2676, L. 2010; DOL, News Release, 3-23-10].

## Massachusetts

**Limited tax amnesty program announced.** Beginning 4-1-10 and ending 6-1-10, a limited amnesty program will apply to certain taxes, including withholding taxes and performer withholding taxes. The program applies to tax years or periods ending on or before 12-31-09. Employers that are eligible to participate in the program will be issued a Tax Amnesty Notice by the Department of Revenue (DOR). The Commissioner is authorized to waive all unpaid penalties provided the employer pays the full amount of tax and interest due for any period as shown on the notice. An employer that fails to do so may be subject to an additional penalty of up to \$500 [H.B. 4359, L. 2009; DOR, TIR 10-5, 3-15-10].

## Michigan

**Tax credit offered for additional FUTA tax.** The Unemployment Insurance Agency (UIA) will issue a state tax credit to contributing employers with positive unemployment insurance (UI) balances in 2010. The credit is provided to ease the burden on employers that have to pay additional FUTA (Federal Unemployment Tax Act) tax because the state borrowed money from the federal government to pay UI benefits that it has been unable to pay back. Michigan is the only FUTA credit reduction state for 2009.

The state tax credit will be the lesser of: (1) 50% of the additional FUTA tax paid by the employer for the previous year; or (2) the employer's taxable wages for the previous year multiplied by the nonchargeable benefits component (NBC) of the employer's UI tax rate for that year. Employers can apply for the credit through the UIA Employer Web Account Manager (EWAM) at [www.michigan.gov/ui](http://www.michigan.gov/ui) or by completing Form UIA 1110, *Application for Michigan Unemployment Tax Credit*. The credit can be used against an employer's Michigan UI tax liability beginning in the second quarter of 2010 [UIA, *Michigan Employer Advisor*, Winter 2010].

## Nevada

**Electronic child support payments mandated.** Effective 7-1-10, an employer that has 50 or more employees must send child support payments electronically to the State Collection and Disbursement Unit using a method allowed by the Division of Welfare and Supportive Services. Currently, electronic funds transfer (EFT) is accepted. For EFT instructions, send an e-mail to: [SCaDU.EFT@dwss.nv.gov](mailto:SCaDU.EFT@dwss.nv.gov) [A.B. 1B, L. 2010].

## Oregon

**Withholding adjustments due to Measure 66 explained.** The withholding tables dated 1-1-07 remain in effect for employees with annual wages of less than \$125,000. For employees with annual wages of \$125,000 or more, employers can use the Department of Revenue's (DOR) payroll withholding calculator to modify withholding to adjust for changes resulting from Measure 66. Another option for employers that have a small number of high-income earners is to have them change their withholding using Form W-4, *Employee's Withholding Allowance Certificate*, and the Oregon Personal Allowances Worksheet. Download the calculator and worksheet at [www.oregon.gov/DOR/BUS/docs/206-643.pdf](http://www.oregon.gov/DOR/BUS/docs/206-643.pdf). The DOR intends to modify the withholding tables, effective for wages paid on or after 1-1-11, and make them available the week of 11-29-10 [DOR, *2010 Payroll Withholding/Transit Updates*, 3-12-10].

## Utah

**Paycards permitted for payment of employees' wages.** Effective 3-24-10, employers may use paycards to pay employees' wages as long as: (1) the employee can withdraw the full amount of wages in a single transaction without incurring a fee; (2) the full amount of wages for a pay period is available for the employee via the paycard on the applicable payday; and (3) on each payday, the employer provides the employee a statement of deductions from the employee's gross wages. The statement must be in paper or electronic form, provided the employee can easily and immediately access the information and print a paper copy without cost. The Paycard Subcommittee of APA's Government Affairs Task Force worked actively with Brent Asay, Wage Claim Unit Manager for the Labor Commission, to enact this rule [Utah Adm. Code R610-3-22].

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