



# PAYROLL CURRENTLY

Volume 18

Issue # 7

July 9, 2010

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### State and Local News

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## Employer Ordered to Pay Arbitration Award to Former Employee With No Withholding

After a U.S. District Court in Texas ordered that Tracy Barker's sexual harassment claims against Halliburton Co. (experienced while she was working in Iraq) be submitted to an arbitrator, Barker received an arbitration award for, among other things, \$363,416.66 in back pay and \$356,000 in front pay, for a total of \$719,416.66 for wages past and future. Instead of paying the total amount of the award to Barker, Halliburton paid her only a portion and withheld the rest for federal tax withholdings. Citing IRC §7421, Halliburton argued that the court could not order it to pay the taxes withheld to Barker, but the court disagreed [*Barker v. Halliburton Co.*, No. H-07-2677, 2010 U.S. Dist. LEXIS 43331 (SD Tex., 5-4-10)].

The arbitration award ordered Halliburton to pay Barker specified amounts for back pay and front pay. A court cannot vacate or modify an arbitration award except in narrow circumstances that no one argued were present and the court saw no evidence of here. And a party may not unilaterally modify an arbitration award without a court order.

Halliburton argued that the court did not have the authority to order it to pay money owed to the government, citing IRC §7421(a). The court rejected this position, explaining that the section provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." The section ensures that once a tax has been assessed, the taxpayer ordinarily has no power to prevent the IRS from collecting it; the taxpayer's only recourse is to pay the tax in full, and then sue for a refund. It does not mandate withholding from arbitration awards, as Halliburton argued.

Here, the court said that Barker would be liable for the total tax burden on any part of the arbitration award considered income by the government. However, per the terms of the arbitration award, "that issue is between Barker and the government." Accordingly, Halliburton was ordered to pay the full amount of the arbitration award to Barker. ■

## E-Verify Website and Employee Verification Procedures Redesigned

U.S. Customs and Immigration Services (USCIS) introduced a redesigned website for its E-Verify program on June 13 [[www.dhs.gov/E-Verify](http://www.dhs.gov/E-Verify)]. The redesign is intended to enhance E-Verify's usability, security, accuracy, and efficiency. USCIS

advises that:

- Your existing user ID and password are still valid and all of your cases will be there when you log in.
- The first time you log in on or after June 13, 2010, you

will be required to take a short tutorial to learn about the changes.

- The redesigned E-Verify allows program administrators to download their electronically signed Memorandums of Understanding.

- Webinars are available on employment eligibility verification topics such as Form I-9, E-Verify overview, and E-Verify for federal contractors.

### Clear and simple language

One of the major elements of the redesigned E-Verify is clear and simple language. For example: “initiate a query” has been changed to “create a case”; “photo tool” has been changed to “photo matching”; “request additional verification” has been changed to “request name review”; “exit” has been changed to “log out”; and “resolve case” has been changed to “close case.”

### Home page

The new home page welcomes you by name, displays your user ID and your last login date and time to enhance security. In addition, the new case alerts feature will alert you when you are required to take action or when there is an update in the status of a case.

### Entering information

To verify an employee’s employment eligibility, just click “New Case” on the left menu or the green “Verify Employee” button in the middle of the home page. Entering the employee’s Form I-9 information is now less likely to result in typos or other mistakes that can cause tentative nonconfirmations (TNC) because:

- the list of documents has been rewritten so that a document’s name is listed first, followed by its number;
- the data entry screen is laid out in three columns and, where possible, fields have been organized in the order in which they appear on Form I-9;
- date fields have been changed to drop-down boxes to eliminate formatting confusion; and
- the social security number (SSN) field is now divided into three sections to improve accuracy.

### Case results

The redesigned E-Verify features case results displayed prominently on screen. Only the last four digits of SSNs are displayed on screen for added privacy and security. The employee’s full SSN will still be included on TNC notices and referral letters as it is important for employees to confirm that their SSNs have been entered correctly.

### Case alerts

The redesigned E-Verify features three types of case alerts for

increased efficiency.

- When a case gets a final result, you must close the case to complete the verification process. Any case that has been updated with a final case result within the past 30 days and that has not been closed appears in the “open cases to be closed” alert. To remove the case from this alert, simply close the case.

- Sometimes it is necessary to wait for the Department of Homeland Security or the Social Security Administration to update a case. When a case is updated within the past 30 days, it appears in the “cases with new updates” alert. The action you must take to remove the case from this alert depends on the status of the case (to learn more about case statuses, consult the E-Verify user manual).

- When you create a case for an employee who presents a work authorization document with an expiration date, E-Verify will remind you when the document is about to expire. For these cases, you must only complete section 3 of Form I-9 (you may not create a new case in E-Verify to re-verify the employee). The “work authorization documents expiring” alert provides a countdown of expiring work authorization documents beginning 90 days before expiration and will show the document as expired for 30 days past expiration. Once you have completed section 3 of Form I-9, you can remove a case from this alert by clicking the red “X” in the “dismiss alert” column. Note that any subsequent expirations will not appear in this alert though the usual Form I-9 rules still apply.

*Notes:* General users see case alerts for only the cases they created. Program administrators see case alerts for all cases created under their company’s account. When a user takes action that removes a case from a case alert, it removes the case from every user’s case alerts. Cases that were already open when the redesign launched appear in the case alerts feature as their statuses change. The case alerts feature is not available to corporate administrators as they do not manage cases.

### Closing a case

The last step in the verification process is to close (formerly resolve) the case once E-Verify displays a final case result. The redesigned E-Verify features easy-to-follow steps to closing a case. There are two steps to closing a case. First, E-Verify asks you whether the employee whose case you are closing still works for the company. Your answer and the status of the case determine the case closure statements displayed on the next screen. Note that cases closed before June 13, 2010, retain the old case closure codes. ■

## IRS Releases Form 8846 With New Instructions on HIRE Act Exemption From Employer Social Security Tax

The instructions for Form 8846, *Credit for Employer Social Security and Medicare Taxes Paid on Certain Tips*, have been revised in light of the Hiring Incentives to Restore Employment (HIRE) Act (Pub. L. No. 111-147), which affects the restaurant FICA tax credit on unreported tips.

The form, which was last revised in 2009, has been re-released unchanged ([www.irs.gov/pub/irs-pdf/f8846.pdf](http://www.irs.gov/pub/irs-pdf/f8846.pdf), 6-8-10) with the following new instruction:

“Section 101 of the [HIRE] Act of 2010 allows employers a tax exemption from social security taxes for wages paid after March 18, 2010, and before January 1, 2011, to employees who begin work with the employer after February 3, 2010.

“If any tipped employee’s wages are exempt from social security taxes, check the box on line 4 and attach a separate computation showing the amount of tips subject to only the Medicare tax rate of 1.45%. Subtract these tips from the line 3 tips, and multiply the difference by .0765. Then, multiply the tips subject only to the Medicare tax by .0145. Enter the sum of these amounts on line 4.”

**FORM 8846 AND THE BUSINESS TAX CREDIT FOR EMPLOYER FICA TAXES PAID ON TIPS** – Businesses providing, delivering, or serving food or beverages for consumption can take a business tax credit (taken on the employer’s corporate income tax return) for the employer’s

share of social security and Medicare taxes paid on employees' tips treated as paid by the employer under IRC §3121(q). The credit, which is taken on Form 8846, is available only for taxes paid on tips in excess of those that make up any difference between the cash wages paid by the employer (minimum of \$2.13 per hour for tipped employees) and \$5.15 per hour (the minimum wage in effect before the first step of the recent three-step increase in the minimum wage took effect in 2007).

Note that the credit is available whether or not the tips were reported by the employee to the employer. Note also that the credit is available in the year when the IRS serves the notice and demand for payment of the FICA taxes on the

deemed tips, not in the year when the tips are deemed to have been paid to the employee (see *The Payroll Source*®, p. 3-95).

#### **No double-dipping under the HIRE Act**

A restaurant employer that takes the HIRE Act relief from employer social security tax on the excess tips may not claim the business tax credit for the employer social security tax on those same tips on Form 8846, because it never paid that tax in the first place. However, it may still take the business tax credit for the employer share of Medicare tax on those tips as well as the HIRE Act tax relief on the tips that make up the difference between \$2.13 and \$5.15 per hour and the cash wages it pays these employees. ■

## **MWR Web-Based Reporting Option Now Available**

The Bureau of Labor Statistics (BLS) is now offering employers a web-based option for reporting Multiple Worksite Report (MWR) data (i.e., BLS 3020) [[www.bls.gov/cew/cewmwr05.htm](http://www.bls.gov/cew/cewmwr05.htm)].

To set up a web account, use the MWR web ID and password located in a starred box in the right-hand middle of your MWR form to log into the secure BLS website: <https://idcf.bls.gov>. The website will take you through step-by-step instructions to set up your account and submit your MWR data.

If you have any questions, you can contact BLS by e-mail at [mwr.helpdeskbls.gov](mailto:mwr.helpdeskbls.gov) or call 1-877-222-0955. Additional instructions for the new paperless reporting method are available at [www.bls.gov/cew/reporting\\_through\\_the\\_idcf.pdf](http://www.bls.gov/cew/reporting_through_the_idcf.pdf).

If you choose the web reporting option, note that:

- Once you submit your data on the web, you will no longer receive paper forms to complete. Each quarter, BLS will send you a reminder e-mail that data collection for the quarter

has begun.

- Contact information for your state office can be found at [www.bls.gov/cew/cewmwr03.htm](http://www.bls.gov/cew/cewmwr03.htm).

✎ **BLS 3020** – The states are responsible for collecting employment data and providing it to the BLS, which is responsible for compiling statistical information on the U.S. employment situation. For employers with one worksite, the necessary information can be taken from the employer's state unemployment contribution and wage reports. But for multiple worksite employers, the information must be broken down further. Employers with more than one worksite must not only file contribution and wage reports with each state, they must also file quarterly employment and wage reports with the state employment security agency that break down the information by industry and locality. To facilitate the collection of this information and reduce the paperwork burden on multiple worksite employers, the BLS developed a standardized report, BLS 3020 (see *The Payroll Source*®, p. 7-40). ■

## **New IRS Audit Program on Unreported Tip Income**

The IRS is beginning a new program using data from employees' Forms 4137, *Social Security and Medicare Tax on Unreported Tip Income*, to determine the employer's share of social security and Medicare taxes on unreported tips. The Service believes that employers in industries where tipping is common know that they must pay the employer's share of social security and Medicare taxes on tips employees report to them. However, many employers may not realize that they may be liable for these taxes on tips employees do not report to them.

For tips that employees do not report to the employer, the employer's liability for the employer's share does not arise until the IRS issues a Section 3121(q) Notice and Demand. In the past, the IRS has issued notice and demands based on tip audits using estimates, including data from Form 8027, *Employer's Annual Information Return of Tip Income and Allocated Tips*.

Under this new initiative, a Section 3121(q) Notice and Demand will be based on information the IRS collects from employees' Forms 4137. Employees use Form 4137 to report and pay their share of social security and Medicare taxes due on the tips they did not report to their employer. This includes any tips allocated to employees of large food and beverage establishments. Generally, employees must include the allocated tips as income on their income tax returns unless

they have adequate records to show that they received less tips in the year than the allocated figures.

The IRS generally intends to notify an employer at least 30 calendar days in advance of the issuance of a Section 3121(q) Notice and Demand by issuing a pre-notice. The IRS has a designated staff to help resolve any discrepancies the employer notes on the pre-notice.

A Section 3121(q) Notice and Demand instructs the employer to include the social security and Medicare taxes shown on the Notice and Demand on the employer's next Form 941, *Employers Quarterly Federal Tax Return*. The employer will not be subject to any interest charges or deposit penalties if the employer properly reports the taxes as instructed in the Notice and Demand and remits the tax due with its Form 941, or, if a deposit is required, makes that deposit timely [IRS Headliner, Volume 298, 5-25-10; [www.irs.gov/businesses/small/selfemployed/article/0,,id=223803,00.html](http://www.irs.gov/businesses/small/selfemployed/article/0,,id=223803,00.html)].

✎ **FORM 941 REVISION FOR 2011** – The IRS had planned to include a new line for §3121(q) notice and demand taxes on Form 941 when it was revised to include other new lines for HIRE Act reporting, and one of the draft versions of the form reflected that line. But now the Service has said it will wait to add the new line on the 2011 Form 941. ■

## Supreme Court Will Decide If Medical Residents Qualify for the FICA Student Exception

The U.S. Supreme Court has agreed to hear the appeal of a case involving the question of whether the “student exception” from FICA (social security and Medicare) taxes applies to medical residents [*Mayo Foundation for Medical Education and Research v. U.S.*, No. 09-837 (U.S. Sup. Ct., 6-1-10)].

In 2003, a federal district court in Minnesota ruled that the FICA student exception applied to residents in the Mayo Clinic’s graduate medical education program. In response to that and other similar decisions, the IRS issued revised regulations in 2004 restricting the scope of the exception in connection with the performance of services in the nature of on-the-job training and making clear that the exception does not apply to medical interns and residents.

After the revised regulations became effective on April 1, 2005, the Mayo Clinic withheld and paid FICA taxes on the

stipends paid to its medical residents, and sued to obtain a refund. In 2007, the Minnesota federal district court said the revised regulations were invalid interpretations of the IRC section setting out the exception, applied the FICA student exception to the residents, and ordered a refund of the FICA taxes paid.

In the case on appeal here, the Eighth Circuit Court of Appeals reversed that decision and said the revised regulations are valid – creating a split among the federal courts of appeals on this issue (see [PAYROLL CURRENTLY, Issue No. 13, Vol. 17](#)).

*Note:* The IRS recently announced that it would accept the position that medical residents are excepted from FICA taxes based on the student exception for tax periods ending before April 1, 2005 – the date when new regulations on the student FICA exception became effective (see [PAYROLL CURRENTLY, Issue No. 4, Vol. 18](#)). ■

## Wage & Hour Roundup

The U.S. Department of Labor’s (DOL) Wage & Hour Division recently concluded the following Fair Labor Standards Act (FLSA) enforcement actions.

### Overtime: pre-shift time

The Maricopa County Sheriff’s Office in Phoenix, Arizona has agreed to pay \$2,059,807 in back overtime wages to 1,690 employees for uncompensated meeting time. DOL investigators found that, beginning in 2007, the Maricopa County Sheriff’s Office attempted to reduce overtime expenses, leaving the time for daily routine pre-shift meetings off the official paid time recorded for detention officers and sergeants at six detention facilities.

### Hours worked: donning and doffing

In order to settle a lawsuit brought by the DOL, Tyson Foods, Inc. has agreed to pay almost 3,000 poultry processing workers at its Blountsville, Alabama facility \$500,000 in back overtime wages. In addition, going forward, the company has agreed to pay for all the time that workers at all of its plants spend putting on and taking off protective and sanitary items, for the time they spend washing and sanitizing themselves and the items, and for the time they spend walking and waiting during the workday.

### Minimum wage: commission sales

Tom Johnson Camping Center of Concord and Marion, North Carolina, which is engaged in the selling and maintenance of recreational vehicles, trailers, and campers, has agreed to pay 54 employees a total of \$144,984 in back wages. DOL investigators found that sales employees who worked on a commission basis received no pay in weeks when they did not make any sales. The FLSA requires that commission sales workers, other than those engaged in outside sales, be paid at least the federal minimum wage for all hours worked.

### Child labor: hazardous occupations

Four Bag ‘N Save Grocery Stores in Omaha and York, Nebraska have been assessed \$65,760 in civil money penalties for violations of FLSA child labor standards. DOL investigators found that the stores allowed 10 workers ages 16 and 17 to operate power driven balers and compactors, and that one minor operated a high lift pallet jack. The FLSA prohibits workers under the age of 18 from being employed in any nonagricultural occupations the DOL has declared to be hazardous. ■

## IRS Changes SSN Validation Procedure After Second ‘B’ Notice

The IRS has issued interim procedures that individual payees can use to obtain validation of social security numbers (SSNs) from the Social Security Administration (SSA) to prevent or stop backup withholding following the receipt of a second “B” notice from a payer. The interim procedures can be used until additional guidance, including a revision of Rev. Proc. 93-37, is published [Ann. 2010-41, 6-2-10; [www.irs.gov/pub/irs-drop/a-10-41.pdf](http://www.irs.gov/pub/irs-drop/a-10-41.pdf)].

### ‘B’ notices and backup withholding

A payer must send a notice under IRC §3406(a)(1)(B) to a payee after being notified by the IRS or a broker that the payee has provided an incorrect name and taxpayer identification number (TIN) combination. Following the first

notification from the IRS or a broker, the payer must send a first “B” notice to the payee directing the payee to certify the TIN on Form W-9, *Request for Taxpayer Identification Number and Certification*, in order to stop or prevent backup withholding on reportable payments by the payer.

If the payer receives a second notice of incorrect TIN from the IRS or a broker within three years, the payer must send a second “B” notice to the payee requiring the payee to provide TIN validation. After the second “B” notice, the payer cannot accept a TIN certification on Form W-9 but must receive validation of the payee’s TIN from the SSA or IRS. Without receipt of proper validation, the payer must backup withhold from future reportable payments it makes to the

payee.

The rules on the form, content, and manner of delivery of “B” notices are laid out in Rev. Proc. 93-37. It sets forth specific instructions on the TIN validation, which must be included in the second “B” notice sent to payees. Rev. Proc. 93-37 requires a payee who needs to validate an SSN to:

- contact the local SSA office to inquire about SSN validation,
- provide a copy of the “B” notice to the SSA, and
- request and authorize the SSA to send Form SSA-7028, *Notice to Third Party of Social Security Number Assignment*, to the payer to validate the payee’s SSN.

However, the SSA has discontinued the availability of Form SSA-7028 for purposes of verifying SSNs to avoid backup withholding, and only issues the form for its original purpose, which is as authorization from SSN applicants to notify their employers of their SSN once it has been assigned.

In a letter sent to the IRS in May 2009 and again in its annual report in October, the Information Reporting Program Advisory Committee emphasized the “urgent need” for the IRS to quickly issue instructions for payers on how to deal with second “B” Notices given the SSA’s change in policy on issuing Forms SSA-7028.

## DOL Announces Increased Penalties for Illegal Employment of Children

Following up on recently published updated child labor regulations applicable to nonagricultural work (see *PAYROLL CURRENTLY*, Issue No. 6, Vol. 18), the U.S. Department of Labor (DOL) has announced the implementation of stiffer penalties against employers that illegally employ child workers [[www.dol.gov/opa/media/press/ilab/ILAB20100843.htm](http://www.dol.gov/opa/media/press/ilab/ILAB20100843.htm)].

Under the DOL’s new, tougher penalty structure, employers that illegally employ individuals ages 12 or 13 will face a penalty of at least \$6,000 per violation. If a worker is under 12 years of age and illegally employed, the penalty will be at least \$8,000. Penalties for illegally employing workers under age 14 could be raised to \$11,000 under certain conditions.

The Fair Labor Standards Act establishes rules governing child labor. Key provisions prohibit the employment

### Interim procedures

To obtain validation of the payee’s SSN from the SSA for purposes of responding to a second “B” notice, each individual payee should now contact the local SSA office and request a Social Security Number Printout. The Social Security Number Printout will validate the SSN of the individual and will serve as acceptable validation of the individual’s TIN for purposes of §3406.

An individual may request one free copy of the Social Security Number Printout, which will verify the SSN assigned to that individual. The individual should provide a copy of the Social Security Number Printout to the payer who sent the second “B” notice. A payer who receives a copy of the Social Security Number Printout validating the SSN of a payee will not be required to begin backup withholding, and may stop backup withholding, on reportable payments made to that payee.

A payer sending a second “B” notice to an individual payee should inform the payee of this change in procedure. The following language is acceptable under Ann. 2010-41: “Note that the Instructions for Incorrect Social Security Numbers have changed and the SSA no longer uses Form SSA-7028. You must request a Social Security Number Printout from SSA rather than Form SSA-7028. You must send a copy of the Social Security Number Printout directly to us, along with a copy of this notice.” ■

of individuals under age 18 in hazardous nonagricultural occupations. Individuals under age 16 may work only limited hours outside of school hours. Additionally, 14- and 15-year-olds may not work before 7 a.m. or later than 7 p.m. (9 p.m. from June 1 through Labor Day). There are additional restrictions on the types of jobs and hours 14- and 15-year-olds may work.

Regarding agricultural employment, individuals under age 12 may be employed with parental consent, but only on very small farms that are not subject to the federal minimum wage requirements. Individuals ages 12 and 13 may be employed in agricultural work on the same farm as a parent, or with a parent’s consent. Generally, no hired farm worker under age 16 may perform hazardous work or be employed during school hours. *Note:* A review of regulations governing child labor in agriculture is currently underway by the DOL. ■

## Supreme Court Agrees to Review Case Involving Arizona E-Verify Law

The U.S. Supreme Court has agreed to hear the appeal of a dispute involving the validity of the Legal Arizona Workers Act (LAWA), which imposes penalties on employers that knowingly employ undocumented workers [*Chamber of Commerce v. Candelaria*, No. 09-115 (U.S. Sup. Ct., 6-28-10)].

LAWA, which became effective January 1, 2008, requires Arizona employers to verify the employment eligibility of newly hired employees through the E-Verify program. Employers that are found to knowingly employ unauthorized aliens may have their business licenses suspended or revoked. A first violation requires the employer to terminate the employment of all unauthorized aliens, file quarterly reports of all new hires for a probationary period, and file an affidavit stating that it terminated all unauthorized aliens and will not intentionally or knowingly hire any others. A second violation during the probationary period results in permanent revocation of the employer’s business

license (see *PAYROLL CURRENTLY*, Issue No. 15, Vol. 15).

Federal immigration law expressly preempts any state or local laws that impose civil or criminal sanctions “other than through licensing and similar laws” (8 USC §1324a(h)). In 2008, the U.S. Court of Appeals for the Ninth Circuit, responding to several appeals challenging the validity of LAWA, affirmed that the Act was a licensing law that was not preempted by federal immigration law (see *PAYROLL CURRENTLY*, Issue No. 20, Vol. 16). The requirement to use E-Verify (which is voluntary under federal law) is not expressly or impliedly preempted by federal policy. The court, which noted that LAWA had yet to be enforced against any employer, also said that LAWA does not violate the Due Process Clause because it creates a rebuttable presumption, which implicitly provides an employer with the opportunity to present rebuttal evidence during the state court proceeding held to determine whether a LAWA violation has been committed. ■

## SPECIAL REPORT: Payroll Questions Answered by Federal Panel at APA Congress

A panel of federal agency executives answered questions submitted by participants at the American Payroll Association's 28th Annual Congress in Washington, DC. Members of this year's panel included: Mary Gorman, Assistant Division Counsel, Office of Chief Counsel, SB/SE, Internal Revenue Service (IRS); Sherri Grigsby, Manager, Employer Services Team, Office of Child Support Enforcement (OCSE); Francine Hill, Deputy Chief, Outreach, Verification Division, U.S. Citizenship and Immigration Services (USCIS); Yvette LaGonterie, Chief, Outreach, Verification Division, USCIS; Chuck Liptz, Director, Division of Electronic Services Support and Communications, Social Security Administration (SSA); Jeff Mayfield, IMAGE National Program Manager, U.S. Immigration and Customs Enforcement (ICE); and Carl Smith, Deputy Regional Administrator, Wage and Hour Division, Department of Labor (DOL).

### Internal Revenue Service

#### *Health care reform: medical benefits for 'adult children'*

**Q.** I understand that the health care reform law changed the rules on whether medical benefits must be provided to "adult children" and the taxability of this benefit. Can you describe the changes and tell us when they take effect?

**A.** The new Patient Protection and Affordable Care Act (PPACA, as amended by the Health Care and Education Reconciliation Act of 2010) requires health insurers to allow children to remain on their parents' health plan until they are 26 years old. The IRS recently issued Notice 2010-38 (see [PAYROLL CURRENTLY, Issue No. 5, Vol. 18](#)), which addresses the nontaxability of the coverage of children up to the year in which they reach age 27.

Congress was concerned that plans usually run through the end of the calendar year; and if you have a 25-year-old who turns 26 during the year, you might have an income tax effect for that child after he or she reaches age 26. They wanted to make sure that if the child turns 26 during the plan year or the tax year (which should be the same), you don't have a tax effect for the months that the child was age 26.

Previously, children aged out of their parents' health plans at age 19 (nonstudents) or 24 (students). Coverage also usually depended on a child qualifying as a dependent for tax purposes. So it wasn't just age or student status that mattered, it was also residency with parent, marital status, and financial support by the parent. Those last three requirements are now gone. You now only have to be a child as defined by IRC §152(f) – a son, daughter, stepchild, legally adopted child, or eligible foster child. An eligible foster child is defined in Notice 2010-38 as a child who has been placed in the taxpayer's house by a court order or state agency.

In other words, the child can now be married or living in another state. The only thing that will count is if the child is working for an employer that offers him or her health coverage. Otherwise, up to age 26, you must allow the child of an employee to be covered under your health plan if your plan provides dependent coverage.

A lot of insurance companies have already started offering this coverage, effective for plan years that begin after September 23, 2010. The federal government's plan year starts in January. So it will be January before federal employees can add their under 26-year-olds back onto their health care plan.

#### *Health care reform: Form 1099-MISC reporting*

**Q.** I understand that the health care reform law made some

changes in the Form 1099-MISC reporting of certain payments that are typically made by the Accounts Payable Department – payments that have nothing to do with health care. Can you explain the change and tell us when it takes effect?

**A.** The PPACA provides that payments made in the course of a trade or business after December 31, 2011, that total \$600 or more in a calendar year to a single payee, must be reported to the payee and the IRS – including gross proceeds paid for property or services. Until the PPACA was enacted, payments to corporations other than those providing health care or legal services did not have to be reported on Form 1099-MISC. Payments to corporations will now be reported on a Form 1099 beginning in 2013 for payments made in 2012, and this also covers both goods and services.

#### *Hiring Incentives to Restore Employment (HIRE) Act: impact on tax deposits*

**Q.** With regard to HIRE Act relief from the employer share of social security tax on wages paid to qualified individuals during the second through fourth quarters of 2010, do we have the choice of either (a) contemporaneously reducing tax deposits or (b) making deposits as if there is no relief and then taking our relief on Form 941? How would we prepare Schedule B under each of those options?

**A.** HIRE Act relief is just a tax holiday. It does not work like COBRA premium assistance. You are not reducing your tax deposits; you are paying less tax. Of course, your deposits are lower because you are paying less tax. So if you didn't take the holiday on an eligible employee and you want to come back and take it after filing your Form 941, unless we're talking about the first quarter which has its own rules (see below), then you are going to have to file a 941-X to reduce your tax.

Schedule B is not impacted. You have less liability, so your deposits are less. They match your liabilities. There should not be a Schedule B issue here because you will reduce your liabilities.

First quarter taxes are treated as a credit because the law was enacted shortly before the end of the first quarter. Credits from the first quarter are treated as a payment made on the first day of the second quarter. That is the only exception. Otherwise, basically you are paying less tax and depositing less tax.

Note that this wage exemption is at the employee level. If you pick an employee and say you are going to treat him or her as someone you are taking the wage exception for, then you can't treat the employee that way for three months and then full pay the employee for four months and then take the exemption for another three months. You have to treat the employee the same way throughout the year. If you change how you treat the employee in midyear, you are going to have to go back and amend.

#### *HIRE Act: definition of 'employed' and status as a 'qualified individual'*

**Q.** For purposes of the HIRE Act, can you clarify the definition of "employed"? To be a qualified individual, an individual must certify that he or she has not been employed for more than 40 hours during the 60-day period ending on the date such individual begins employment. Would individuals be "qualified" if they are employees we laid off and then rehired after February 3, 2010, and after more than 60 days since they last worked?

**A.** I'll refer you to the IRS website, where there are FAQs on the HIRE Act (see [www.irs.gov/businesses/small/](http://www.irs.gov/businesses/small/))

article/0,,id=220749,00.html). FAQ 5 asks: Does the payroll tax exemption apply to wages paid to an employee who was previously laid off and then rehired by the same or a related employer after a 60-day period? The answer is: Yes, an employer may apply the payroll tax exemption to wages paid to a rehired employee who is otherwise a qualified employee. That means the employee hasn't worked for more than 40 hours in the 60 days prior to the date you rehired him or her.

**Form 1099-MISC reporting of withholding paid to an attorney**

**Q.** Payroll departments sometimes receive withholding orders for bankruptcies, creditor garnishments, and child support cases that are to be paid directly to a court-appointed attorney. Should these payments be reported on Form 1099-MISC as payments to attorneys? The attorney is not receiving income but is simply collecting money on behalf of the court. Does the chapter of the U.S. Code under which the order is issued make any difference?

**A.** IRC §6045(f) requires that payments to attorneys in excess of \$600 must be reported on a Form 1099-MISC. The regulations provide that this rule applies whether or not a portion of the payment is to be kept by the attorney as compensation for legal services. So the short answer is, yes, you are going to have to issue a 1099-MISC because you are not going to be able to tell. Note that payments to attorneys include checks where the payee is an attorney-client trust fund.

The only time you would not include a payment to an attorney on a 1099 is where the attorney's name is written on the check in such a way that the attorney does not have the right to negotiate the check (e.g., Payable to the District Court of Maryland, care of John Smith, attorney).

There also is a regulation under IRC §6045 that says that where an attorney is acting as a trustee in a bankruptcy proceeding under Title 11 of the U.S. Code, you do not have to issue a Form 1099-MISC when you are paying money to that attorney.

*Moderator's note:* For child support purposes, this is another reason to make all payments directly to the state disbursement unit.

**Pretax cafeteria plan deduction for health insurance in later year**

**Q.** For one of our employees, the cafeteria plan deduction for health insurance was not taken for July through December 2009. Fortunately, her insurance was never discontinued. We have discussed this with the employee and she is willing to pay the premium. Is there any way to take the deduction on a pretax basis now that we're well into the new year?

**A.** Not that I can think of. You are talking about deducting in 2010 for insurance premiums for 2009. Since the employer caused the problem, possibly there may be something the employer could do with respect to what the employee is being charged for her premiums (unless this would mess up the entire health care plan), but that's about the only thing I can think of.

**COBRA premium assistance: reduced hours vs. termination of employment**

**Q.** What is the last date on which somebody could be terminated and still be eligible? Does it matter if the termination is within the window but the loss of insurance coverage is outside the window? What is the special rule for an employee who loses coverage due to a reduction in work hours, and must that employee also be terminated to be eligible for COBRA premium assistance?

**A.** As of today, the latest date is May 31st. The first

extension (the Department of Defense Appropriations Act, 2010; see [PAYROLL CURRENTLY, Issue No. 1, Vol. 18](#)) eliminated the requirement that the termination be within the window. Notice 2009-27 (see [PAYROLL CURRENTLY, Issue No. 8, Vol. 17](#)) provided that both the qualifying event, which was the termination of employment, and the COBRA election had to occur before the 31st of December; but people whose last day of work was the 31st of December couldn't elect COBRA until the 1st of January, which put them outside the subsidy window. To solve this problem, when they extended the subsidy, they got rid of that piece. You are no longer required to elect COBRA by the last day, which right now is May 31. You have to be involuntarily terminated by that day, but you can elect COBRA after that day.

So the answer to the question is yes, you do have to be terminated to receive the COBRA premium subsidy; but it is better than it used to be because it used to be that you were not able to get it at all if your hours were reduced first.

**COBRA premium assistance: coverage for spouse**

**Q.** We have a former employee who is currently enjoying COBRA premium assistance. He has found a new job and will be terminating his COBRA coverage under our plan next month. However, he would like to continue COBRA coverage and premium assistance for his spouse, even though she is eligible for coverage under the plan of his new employer. May he do this? Could he keep her on our COBRA plan without the premium assistance?

**A.** No. If the wife is eligible to be on his new employer's plan, she is no longer an assistance eligible individual. If you look at Notice 2009-27 (see above), question 33 says that the premium reduction applies until the date an assistance eligible individual is first eligible for coverage under another group health plan. Here, since the wife is eligible to join her husband's health plan, she can no longer get the COBRA premium subsidy.

As to whether or not he can keep her on the COBRA plan without the premium assistance, it would be up to the terms of the plan if she would continue to be a qualified beneficiary.

**Severance payments and FICA tax: U.S. v. Quality Stores, Inc.**

**Q.** Given the recent decision by a U.S. District Court in Michigan (*U.S. v. Quality Stores, Inc.*; see [PAYROLL CURRENTLY, Issue No. 3, Vol. 18](#)) that payments to employees under an employer's severance plans were not "wages" for social security and Medicare tax purposes, may all employers stop withholding and depositing these taxes on their severance payments? If not, may employers file claims for credit or refund of these taxes already paid to the IRS?

**A.** The *Quality Stores* case is kind of a follow-up to the *CSX* case, which involved FICA tax for involuntary layoff payments. In 2002, the Court of Claims said that FICA did not apply to these payments and thereafter everybody filed refund claims or protective claims to get their FICA back. The Federal Circuit Court of Appeals reversed the Court of Claims and said FICA does apply (see [PAYROLL CURRENTLY, Issue No. 6, Vol. 16](#)).

Based on the appellate court's decision in *CSX*, the IRS started disallowing the claims that had been filed for refund of FICA tax for taxpayers with a *CSX* situation. Then in February 2010, a U.S. District Court in Michigan decided *Quality Stores*, agreeing with the earlier Court of Claims opinion in *CSX* that FICA shouldn't apply.

The IRS was in the middle of sending out claim disallowance letters when this happened. People started filing more claims or objecting to our disallowance of their *CSX*-type claims. It is our position that nothing has changed. The district court opinion in

*Quality Stores* is only binding on the taxpayers in that case. We filed a notice of appeal in the *Quality Stores* case on April 23. We're just going to continue denying CSX-type claims; I would not stop withholding FICA or quit paying FICA.

#### **Tax levies and bonus payments**

**Q.** We have an employee with a federal tax levy. Every time we issue his biweekly pay, we withhold and remit all current taxes and any other deductions that were in place at the time the levy was received, give the employee his "exempt amount" per the table for a biweekly pay period in IRS Publication 1494, and send the balance to the IRS. In what would otherwise be a non-payroll week, we will be issuing annual bonuses, and this employee is scheduled to receive one. Is this payment also subject to levy? If so, how do we calculate the "exempt" amount?

**A.** IRC §6331(e) provides for a continuous levy on salaries and wages. Treasury regulations provide that salary and wages can include compensation for services paid in the form of fees, commissions, bonuses, and similar items. So the bonus is subject to the levy.

In a recent case, we had issued a continuous wage levy on a partner's draw account. The partnership refused to pay it, saying these weren't wages and salaries, these were advances or draws. Both the District Court and the Second Circuit agreed that the wage levy was sufficient to attach to the partner's draws because the checks were written as periodic payments that compensated the partner for his services to the firm. So the bonus will be subject to levy.

As to the exempt amount — I couldn't find an official IRS position on this. But I think what you have to do is look at Reg. §301.6334-3(d), which provides that in the case of an individual who is paid or receives wages, salary, or other income other than on a weekly basis (that is, once a year, like the bonus here), the amount payable to that individual during any applicable pay period that is exempt from levy is the amount that as early as possible will result in the same total exemption for such individual over that period of time.

In other words, you go back and figure out the maximum levy exemption for the year, which is based on the standard deduction, marital status, and number of exemptions. Then, if the individual hasn't met that total levy exemption for the year based on what you have exempted from the levy payments to date, then I think what you do is take the bonus and divide it up whichever way you are dividing up the individual's exemptions (either by 52 or 26 or 24) and use up the rest of the levy exemption; but then once the levy exemption is maxed out, the rest of the bonus is subject to levy.

#### **Duplicate information reporting requirements: credit card payments**

**Q.** Can you explain how the recently proposed regulations under IRC §6050W (to be effective in tax year 2011) that require organizations that settle credit card payments to submit information returns will impact the requirement for payers to report credit card payments under §6041 and the qualified purchasing card agent program? If the payments are reported by the organization settling the payment, are we required to report the payments as well?

**A.** IRS Commissioner Shulman addressed this in his remarks to your members when he talked about merchant card reporting under §6050W and then the new 1099 reporting for corporations and the issue of whether there may be some overlap. As he explained, the Service is looking at ways to mitigate double reporting.

I will mention that a new Form 1099-K for credit card reporting is being circulated. It has monthly figures instead of annual figures.

#### **Social Security Administration**

##### **Randomization of social security numbers (SSNs)**

**Q.** I have heard that the SSA will be changing the way it issues SSNs. When will this be happening and what is the nature of the change? How might it affect my payroll processes?

**A.** Since the SSA began issuing SSNs about 75 years ago, the first three digits of each SSN have corresponded to the geographic area where the card was issued. The country looks different than it did 75 years ago, and the scheme we set up back then doesn't work as well today. While we haven't run out of numbers in any ranges yet, we know that it's going to happen in the next few years. In addition, identity theft has become a big concern. What we've decided is that we have to change the way we distribute numbers. We expect to begin using a new scheme June 26, 2011.

First of all, we're going to start randomizing how we issue SSNs; they are not going to be issued in the same order we use today. Second, the first three digits are not going to relate to a geographic area as they have in the past. Third, we are going to start issuing SSNs with "8" in the first position. We have never done that before. Fourth, we're going to use the whole range of sevens. Previously, SSNs beginning with seven were only used for specific situations (e.g., people who worked for the Railroad Retirement Board or a program called Enumeration at Entry), but they will no longer hold this meaning.

The high group list is going to be frozen and won't be used after June 2011. There will not be a new list in its place because we're randomizing how we issue SSNs. Finally, we will not issue SSNs beginning with "9" (those are used by the IRS when it issues ITINs), and we will not issue SSNs that start with "666."

##### **'No-match' letters**

**Q.** Now that the Department of Homeland Security has rescinded its safe harbor rules for employers who receive SSA no-match letters, and since those requirements are what prompted the injunction against SSA sending the letters, will you be resuming these letters?

**A.** There are two kinds of letters that some people refer to as "no-match" letters. First is a set of letters that we call DECOR (decentralized correspondence), which go to individuals. Every year, millions of W-2s come in with names and numbers that don't match. After we run them through our various routines and clean them up, we're able to reduce the number to about 10 million. We feel that it is our responsibility to let individuals know that we were not able to post W-2 information to their earnings record (the Master Earnings File). We keep the information in the Earnings Suspense File, and we send a notice to those individuals. We have never stopped sending those notices.

The other letters we call EDCOR (educational correspondence). These we send to employers that have sent us at least 11 numbers on their report that don't match and have to go to the Earnings Suspense File. These are the letters that we stopped sending. We have not resumed them and have no plans to do so.

Some employers may think they got a lot letter from us this year. What happened is that if we do not have an address for an individual, then we send that individual's notice to the employer, and we ask the employer to try to contact the employee.

**Correcting misreported wages**

**Q.** We were contacted by someone who said that while he had never worked for us, we reported wages for him for 2007, 2008, and 2009. This was brought to his attention by the IRS, which told him to contact us to get an official letter stating that he had never worked for us. What steps should we take to verify that this person is the true holder of the SSN we reported on Form W-2 and that the person who worked for us is not? If what he says is true, do I file Forms W-2c to back out the wages? Of course, I don't have another named SSN to which to post the wages. So will I have a discrepancy between my W-2s and 941s?

**A.** The SSA is not in the identity business. We're in the business of paying benefits. I can't advise you how to tell whether someone is the true holder of an SSN or not. I can't tell you which pieces of identification to use or whether the person in front of you really is that person as opposed to the person who worked for you in the past. If you want to give them a letter, you can do it. But it is not SSA's job to advise you on that.

I understand that IRS Publication 1586 explains what you should do in a case like this. And, if what the individual says is true, you should not file Forms W-2c to back out the wages. You should have the individual go to the local SSA field office and let us resolve the case. Of course, if you are not doing W-2c's, then you won't have a discrepancy between your W-2s and 941s.

**'Third-party sick pay' check box**

**Q.** On Form W-2, should the "Third-party sick pay" check box be checked only by the third party or also by employers when the W-2 contains any third-party sick pay? What is the purpose of this check box?

**A.** The W-2 third-party indicator should be checked regardless of whether it is an employer or a third party sending the W-2s in to us; and on the W-3, the third-party indicator should be checked if any of the W-2s have third-party sick pay.

The third-party indicator helps with reconciliation issues. Sometimes the numbers that go to the IRS and the numbers that go to the SSA don't match. Then either the IRS or the SSA has to try to resolve the discrepancy. The third-party sick pay indicator on the W-2 tells us that there may be a situation where somebody is getting third-party sick pay and it makes it easier to resolve the issue.

**Individual Taxpayer Identification Numbers (ITINs) vs. SSNs on Forms W-2**

**Q.** Some of our employees were set up in our HR/payroll system with what we thought was an SSN but turns out to be an ITIN. If we don't get an SSN to replace the ITIN, should we file Form W-2 with the ITIN in the SSN box or should we leave the SSN box blank?

**A.** We do not issue SSNs starting with the number nine; ITINs, which are issued by the IRS, start with a nine and have a seven or eight in the fourth position. Any person working for you should have an SSN. Suppose you have somebody who has applied for an SSN and doesn't have it yet, but they have an ITIN. When they fill out the W-4, they probably put that number on it.

Before you report your W-2s, you should check to see whether the person has an SSN. If the answer is still no, you should use the ITIN. Your other option is to leave the number field blank. If you leave it blank, it becomes zeroes. There is a tremendous amount of data in our Earnings Suspense File where the numbers are all zeroes. If this person who has applied for a number wants to come in and fix a record later, it is going to be a lot easier to track down those wages if you have a name and a unique number as opposed to all zeroes.

The bottom line is that you are going to have to use what's on the individual's W-4. Later, you can ask if they've gotten an SSN. When they do get it, then you will need to file a W-2c to correct the record so that the earnings go from the Earnings Suspense File into the Master Earnings File and the individual gets credit for those wages.

**New registration process for SSA online services**

**Q.** I understand that the SSA may be changing the way people register to use SSA's online services. What are the plans for this change and when will it take effect?

**A.** A couple of years ago, we changed the password part of our registration process. You now have to change your password every 90 days. After 90 days, the next time you visit the website, you will get a pop up screen that says you need to change your password; and you change it at that time. It doesn't matter whether it's been 91 days or 365 days. We will remind you to change your password. You don't have to visit the website every 90 days.

We have a project going on now to try to come up with a better way of authenticating people so that they can use our online services. Many of you use Business Services Online so that you can send wage reports to us and verify names and SSNs with us; but we also have people who go online to file for social security benefits or to use our retirement estimator; and we are trying to make things a little more automated and offer more services over the Internet.

We're working to come up with a way to authenticate you as an individual and then to be able to authorize you for different services that SSA offers. For instance, right now, many of you are authorized to use Business Services Online and it may not be time for you to file for benefits. When it comes time to file for benefits, you would already have been authenticated as an individual, but authorization for those other services may require you to jump through some hoops.

We have met with members of the APA Government Affairs Task Force to give them an overview of our plans and solicit feedback on how the new process would affect you as individuals as well as payroll professionals.

We anticipate that sometime in 2011 we will start rolling this out; right now though, we're still at the planning and analysis stage. At this point there is no implementation date and we're trying to make it as simple as possible for those of you who are already registered to use our services to be grandfathered into the new process.

**Employee with only one name**

**Q.** We have an employee who says that she has only one name. What should we put in the first name field and what should we put in the last name field for the purposes of the Social Security Number Verification Service (SSNVS)? How about for Form W-2?

**A.** If my name were Zorro, it would go in the last name field if you wanted get it verified through SSNVS. On a W-2, it would also go in the last name field because that is the name we look at first.

**SSNVS and E-Verify**

**Q.** The USCIS E-Verify system verifies the match of an employee's name and SSN and the employee's work eligibility. If I'm using E-Verify on all employees, is there any reason to use SSNVS on employees at the time of hire or at any other time?

**A.** SSNVS was designed as a tool for employers to use to ensure that the name and number data from the W-2s you send us is correct. Ten percent of the W-2s we get have names

and numbers that don't match and we're trying to drive that mismatch rate down. We've found that mismatch rates for employers that use SSNVS – which is free, by the way – go down substantially and they send cleaner reports to us, which makes it possible for us to post more peoples' earnings to their earnings record.

E-Verify is designed to tell whether someone is legally allowed to work in the United States. That is different than what we do with SSNVS.

Let's suppose you use E-Verify when you hire someone. A few months later, they get married and change their name but forget to tell the SSA. When the next W-2 for that individual comes to us, it won't match. The individual will get notices from us and want to know why. Or they'll get the Social Security Statement from us and ask why their earnings aren't on there when you should have reported them.

Suppose that at the end of the year – sometime during November or December – you send us all of your names and numbers, not just new hires but everybody who has worked for you during the year. We will let you know if they match our records or not. Then if there is a problem with your W-2s, you will know about it before you send them to us, as opposed to hearing about it after the fact.

#### ***SSNVS and the problem of name-SSN mismatches***

**Q.** If an employee gives me an SSN but SSNVS tells me it's wrong and the employee won't supply any other information, what should I put in the SSN box on Form W-2?

**A.** In addition to verifying whether the name and SSN match our records, SSNVS also matches fields like gender and date of birth. So you may get codes indicating that the name and number match but the gender is different or the date of birth is different. Note that the W-2 will process if the name and number match and the gender is different. Also, if the date of birth is off, we don't come back and tell you what the correct date of birth is.

The other thing you should know about SSNVS is that if a name doesn't match or you are not sure about a name, you can try multiple versions of the name to try to get it right. If it doesn't match the first time, you can go back and try a variation.

After you have finished with SSNVS, if you still have a mismatch, the name and number that the individual reported on their Form W-4 is what you are going to have to report on the W-2. When it comes to us, of course, there's going to be a mismatch. We will run some additional checks in the W-2 processing; and if we're not able to process it, then it will go into the Earnings Suspense File. We will send a letter to the individual whose name and number do not match and then we will work with them to try to fix it.

*IRS note:* IRC §6721 provides for a penalty for sending in a bad W-2. But the IRS does not punish employers who were lied to about numbers. So if the number you have on the W-2 is what you had on the W-4, that will be reasonable cause for purposes of avoiding the penalty, but you will be required to do two annual solicitations to try to get a better number.

#### **Office of Child Support Enforcement**

##### ***Private collection agencies***

**Q.** I received an income withholding order (IWO) from a private collection agency. How do I know whether it's okay to implement it?

**A.** Private collection agencies are regulated under state law. We have a lot of information about them on our website ([www.acf.hhs.gov/programs/cse](http://www.acf.hhs.gov/programs/cse)).

The most important thing to remember is that if you receive an income withholding order from a private collection agency, you need to make sure that there is an underlying order. Often, private collection agencies send stipulation agreements or property settlement agreements, but they are not really orders.

Another thing to remember is that all child support income withholding orders are required to be on the OMB-approved form. If an order is not on the proper form, that is an indication that you might want to take a closer look. Also, child support payments withheld by employers are required to be paid to the state disbursement unit (SDU). Watch for a payment that is going to an address other than an SDU.

A recent case involved a private collection agency, Child Support Services of Atlanta (see "[Inside Washington](#)" for February 2010). The United States Postal Service sued the agency, which was using the mail to commit fraud. Instead of giving the child support to the custodial parents, they were keeping it. The USPS stopped the mail in post office boxes across the country and estimates that \$500,000 was diverted and did not reach children and families.

If you ever have a question about whether you should be honoring an order from a private collection agency or if an order doesn't look right to you, you can either contact the state child support enforcement agency (contact information is available on our website) or you can contact our office, and we will be happy to help.

#### ***Child support withholding from unemployment insurance payments***

**Q.** An employee informs me that the amount of income being withheld for child support is concurrently being withheld from his partial unemployment payments. Should I withhold at a lesser amount or withhold according to the IWO?

**A.** Child support payments may be withheld from unemployment in addition to wages and other income. If the full amount of current support isn't being met from the IWO that was sent to the employer, then the state agency can and normally will send an IWO to collect from the individual's unemployment insurance. In other words, an IWO can be sent to the employer and as well as the unemployment agency.

Employers are required to honor the terms of an IWO; but if they think that overwithholding may be occurring, the best thing to do is to contact the state child support enforcement agency. Either the employer or the employee can do this.

#### ***Update on e-IWO and e-NMSN projects***

**Q.** What is the status of the electronic income withholding order (e-IWO) and the effort to automate the National Medical Support Notice (NMSN)?

**A.** The e-IWO program is up and running. More than 22 state child support enforcement agencies are using it. We started in 2004, and piloted it with a couple of employers and states and found that it worked very well. We took the IWO and identified all of the data elements on the form and turned it into an electronic record. Rather than have each state develop an e-IWO on its own so that employers would potentially have to deal with 54 different states and territories in order to use the process, we decided (after consulting with employers and states) that the best thing to do was to develop a portal. We now have one communication point for states and employers. What happens is that the states using the portal create IWO files. We pick up those files from the states and unbatch them. The file that we receive has IWOs for lots of different employers. When we receive it, we unbatch it

and then rebatch it by employer. When an employer receives the file, it contains IWOs from multiple states. We push the file to the employer.

Employers that want to use the portal have a couple of options. One option is a full system-to-system interface. This means that the employer's IT staff gets involved – mapping the data elements from the IWO into the employer's system. The information is then pushed to the employer from the portal and integrated into its payroll system without human intervention.

After we heard from employers that wanted to take advantage of the portal but didn't have IT resources available, we came up with a "no programming" option where the only thing you need is a secure FTP server. We send IWOs to you in a file. You get a pdf version of the IWO and a fillable pdf of the acknowledgment; and the acknowledgment is prefilled with all of the information about the order. You just click to indicate that you accept it and are going to implement it. Or if you are going to reject it, you use a drop-down menu and select the reason for the rejection. You click accept and save, and the document is saved on your SFTP server in a folder and our process picks up the file that night. We come seven days a week to drop off and pick up files.

Employers find that using the portal is a cost savings. And the states that are using the portal love it because the money is getting to families so quickly. The portal is also a real benefit if the individual is no longer working for you or has never worked for you. Using the electronic process, you click that you do not accept the IWO and select the reason why. Then the state knows right away that they need to start seeking another income source because they are not going to get any money from you.

Our goal is to have every state and territory up and using the portal. The states want more employers to join. Employers want more states to join. And they are. My team will do anything that we can to help you get set up. Don't hesitate to contact us.

We are working to automate the NMSN using the same process that we used to automate the IWO – because it worked. We have a work group made up of states and employers and plan administrators and we're working with the DOL, because they own part B of the form and we need to make sure that we're all together on this. I'm sure we'll have an update for you by next year's Congress.

#### **Changes planned for the IWO form**

**Q.** The OMB-approved IWO form is up for renewal later this year. Does OCSE anticipate that there will be changes to the form?

**A.** We have proposed several changes to the form. For example, we're proposing to remove the shading that currently sets off certain sections of the form. We have heard from employers that when state agencies fax the form or scan it and e-mail it, the shading makes it difficult to read the information in the shaded sections. Another proposed change involves adding language to the notice to the effect that if the payment is not directed to the SDU, the employer is to return the document to the sender. You just check the box saying this is why the form is being returned.

We understand, however, that you don't always get IWOs on the OMB-approved form. So one of the other efforts we have underway involves improving the IWO process – focusing on two areas. We want to ensure that anyone who issues an IWO uses the OMB-approved form (with exceptions for orders dated prior to January 1, 1994 and orders in tribal child support cases) and that payments go the SDU.

We have convened a group of employers, state child support

enforcement agencies, and representatives of the judiciary because we understand that often these issues come up when a case is not being enforced by the state agency (a non-4D case), e.g., in private child support cases where two parties go to court on their own and a notice is issued to the employer instructing that the payment go somewhere other than the SDU.

We're looking at ways to improve that process because the ultimate goal is to ensure that all payments go to the SDU and that everybody is using the OMB-approved form.

We don't currently have any plans to change the data elements or the fields on the e-IWO. The last thing we want to do now that the process is up and running is to go back and make programming changes. However, we may add some new verbiage to the form, such as a statutory citation to support the statement that the payment – by law – has to go to the SDU.

#### **The problem of multiple orders**

**Q.** The Uniform Interstate Family Support Act (UIFSA) requires employers to follow the laws of the state in which the employee works for numerous definitions, calculations, withholding limits, etc. Several states have administrative policies that differ from their actual laws. For example, Missouri and Nevada instruct employers in those states to withhold up to 50% of disposable earnings, but their state laws reference the section of the federal Consumer Credit Protection Act (CCPA) that sets withholding limits between 50% and 65% of disposable earnings. If an employee works in Missouri and the employer receives an out-of-state order, should the employer follow CCPA rules or the administrative limit of 50% for Missouri? As a further complication, if an employer has two orders for two families, and one is issued by Missouri and the other is from outside the state, which laws should be followed?

**A.** State administrative agencies can set withholding limits that differ from state law. They can have a lower limit, assuming they don't exceed the federal CCPA. We maintain a matrix on our website that lists the limit for each state. The information on our website (which we got from the state child support agencies in Missouri and Nevada) is that they follow the federal CCPA. So we will be contacting both of those states to figure out if we need to update the information on our website.

To answer the question, if the employee works in Missouri and the employer receives an out-of-state order, then the employer should use the 50% limit that is administratively set by Missouri.

If there are two families and one order is issued by Missouri and another order is issued by another state, the other state is going to insert its percentage. There is a good possibility that the other state doesn't know the principal place of employment for the noncustodial party, but that is the limit you should use.

#### **Withholding from lump sum payments**

**Q.** Please explain how to handle withholding from lump sum payments. How do you know whether a lump sum payment is subject to child support withholding?

**A.** Unfortunately, there isn't a single process for handling lump sum payments or reporting lump sum payments to a child support enforcement agency when an individual from whom you are withholding support is going to get a lump sum or bonus payment. We have a lot of information on our website that may help you. For example, we maintain a lump sum matrix with information about state requirements for reporting lump sum payments. It includes statutory sites and contact information for each state. So if you have a question about whether or not you have to report, or how you should report, or who you should

report to, that information is available.

Only about 15 states have laws on the books that require employers to notify them when they are going to issue a lump sum payment to an individual. The other states don't have laws on the books, but they'd like to know.

One of the ways you can notify states of lump sum payments is through the e-IWO process. In addition to allowing states to get IWOs to employers electronically, the process allows an employer to notify a state agency that it is going to make a lump sum payment.

Ohio, which is a county-based state, requires that you report lump sum payments to each and every county. However, Ohio is up and running on our e-IWO portal, and they have told us that if the employer reports a lump sum through the portal, that meets the reporting requirement. In other words, if you use the portal you don't have to contact each and every county.

We understand that this is an area where there is room for improvement. We have heard from a lot of employers that states and families are missing out on lots of money because it is a very confusing and convoluted process, especially since it differs from state to state.

We have established a work group comprised of employers and state and federal child support enforcement agency representatives, and we're aiming to come up with a way to streamline the lump sum reporting and collection process. One of the suggestions that has been made is to create a model law so that states that don't already have legislation can have something to refer to and to serve as a starting point for standardizing the process.

We are working with the DOL to define income, bonuses, etc. – all the items that are available for collection and at what percentage.

#### ***Orders to send payments to the custodial parent vs. the SDU***

**Q.** I know that all child support payments should go to the state disbursement unit, but I am afraid to risk a contempt of court charge if I disobey a court order to make a payment to the custodial parent. What can I do?

**A.** All payments are required to go to the SDU. We are doing a lot of outreach to the judicial community. In most cases, we find they don't know. It is in federal law and every state is supposed to have laws that mirror the federal law and require all payments that are withheld for child support go to the SDU. There are a couple of exceptions. The first is if the order was entered prior to January 1st, 1994, and the second is for a tribal child support orders. We might never get to 100% compliance, but there is a lot of room for improvement.

If you receive an order that directs you to send payment somewhere other than an SDU – for example, to a custodial parent, a court, a private attorney, or even a private collection agency – please contact us. We have an initiative underway to improve the income withholding process and this is one of the areas we're focusing on.

#### ***Verification of Employment (VOE) requests***

**Q.** I understand that OCSE has been talking with employers and states about VOE requests. We feel inundated by VOEs and hope that we might see a reduction. Can you share anything about your discussions?

**A.** We are working with employers and states. We understand that this is a cumbersome process for employers because every state has its own version. Usually, they are not sent for enforcement or child support collection purposes, but

to establish a child support order or to modify an existing child support order. The state needs accurate wage and employment information so that they can set up an order for the correct amount.

We initially thought that we would be able to develop a standard VOE form, but we soon realized that this would be too difficult. Instead, we are working with states and employers to come up with a standard response. States will continue to send their unique VOE forms, but you will be able to return a standard response. Some employers are talking about programming it into their systems so that it can just be generated and sent back to the state.

On a case-by-case basis, states may need to contact employers for additional information, but so far most child support enforcement agencies seem satisfied with our approach. Our next step is to compile a list of the states that will accept the new standard response and get it out to employers. Using our e-IWO portal, we may be able to deliver VOE requests to the employer and allow the employer to return the standard response to the states.

#### ***Garnishing bank accounts in addition to wages***

**Q.** Do child support agencies garnish employees' bank accounts as well as their wages? We have employees who will not get bank accounts because they do not want their accounts garnished as well as their wages. Is there any protection against this double garnishment? If so, we would like to be able to tell our employees so that we can encourage them to accept electronic payments, either through direct deposit or paycards.

**A.** Child support agencies can freeze and seize bank accounts; but they are only going to do that if an individual is delinquent in their child support obligation. We conduct a quarterly data match with multistate financial institutions (i.e., those that do business in two or more states). For institutions that do business in only one state, state child support enforcement agencies have a state financial institution data match that they perform as well.

Seizure of an individual's bank account is a tool that states have for collecting past due child support. At the federal level, we can intercept the individual's federal tax refund; at the state level, state tax refunds can also be intercepted. If the individual is more than \$2,500 delinquent, their passport can be denied. States have many enforcement tools to collect past due child support. If there is money available and there is a delinquency, states will pursue freezing and seizing the asset.

Every state has different policies, procedures, and laws that govern freezing and seizing of assets. For example, some states will not freeze and seize checking accounts with less than \$500. But yes, they can freeze and seize bank accounts as well as wages and there is really no protection.

#### ***U.S. Citizenship and Immigration Services***

##### ***I-9 and E-Verify deadlines***

**Q.** What is the earliest opportunity for an employee and employer to complete Form I-9? What is the deadline? What is the earliest opportunity for an employer to use E-Verify? What is the deadline? And what if we miss a deadline?

**A.** Each newly hired employee must complete Section 1 of Form I-9 no later than the first day of employment for pay, regardless of his or her citizenship status. Employers must complete and sign Section 2 of Form I-9 no later than the third business day after the employee's start-for-pay date.

The earliest the employer may create a case in E-Verify is

after an employee accepts an offer of employment and after the employee and employer have completed Form I-9. The employer must create a case in E-Verify no later than the end of the third business day after the new hire's actual start date.

If the employer is unable to meet the three-day deadline, then the employer should enter a note explaining why the deadline could not be met, and then enter the information as soon as the documents are received to get back into compliance.

**Federal contractors and E-Verify: previous I-9 clearance**

**Q.** We have just become a federal contractor. I understand that we will be required to submit E-Verify queries on all existing employees who work under the federal contract. If an existing employee previously cleared the I-9 process with documents that wouldn't work under today's I-9, will this employee pass an E-Verify screening? For example, an employee may have used an identity or an eligibility document that was fine at the time but is no longer on the list of acceptable documents. Or an employee may have used a driver's license that was fine at the time but has since expired.

**A.** The Federal Acquisition Regulation requires federal contractors to verify all newly hired employees as well as all employees on the federal contract. You may also choose to verify your entire workforce.

Once you have made a decision whether to verify only your new hires and employees assigned to the contract or to verify your entire workforce, you need to determine how you are going to complete your I-9s. Are you going to do entirely new I-9s for everyone, or are you just going to update your existing I-9s? If you are just updating your Form I-9 and the individual originally submitted a List B document such as a driver's license that was unexpired, then you do not have to get a new document for that List B document.

**Federal contractors and E-Verify: transition period**

**Q.** The regulations that apply to federal contractors seem to say that an employer that has been enrolled in E-Verify for 90 or more days at any worksite and then becomes a federal contractor is immediately required to perform E-Verification on all new hires hired at all worksites. Is this true? Or is some transition period allowed?

**A.** This is not as onerous as it looks. From the time that you become a federal contractor, you have 30 days to update your profile in E-Verify to identify yourself as a federal contractor. After the date that you update your profile, you have 90 days to begin using E-Verify at all of your company worksites. So the timeline could actually be as long as 120 days.

If you are thinking about becoming a federal contractor, we encourage you – in advance – to update your profile, enroll all of your worksites, and get them ready to do E-Verify.

**E-Verify self-check tool**

**Q.** I have heard that USCIS will be adding a self-check tool within the E-Verify system to allow individuals to verify the accuracy of their records on file with federal agencies and their work authorization, such as before applying for a job. When will this be launched and what more can you tell us about it?

**A.** We are very excited about E-Verify "self-check," a process whereby U.S. workers go to our website and access information on their own status before they apply for a job. We plan to launch it in December 2010. We believe it will lower the initial mismatch rate.

E-Verify self-check is a process through which U.S. workers, including U.S. citizens, can verify the accuracy of government

records before they are hired by an employer. It permits the workers to correct faulty information and update their records before they are hired. It also lets employees know their rights and responsibilities with respect to the E-Verify program.

**I-9 documents with expiration dates**

**Q.** Section 2 of Form I-9 has lines to record the expiration dates of documents the employee shows the employer to prove work eligibility. Does the employer need to keep track of when all those documents are going to expire and require the employee to show new documents when they do? Is the answer the same whether the expiring documents is from List A (shows identity and authorization), List B (shows identity only), or List C (shows authorization only)?

**A.** Employers do not have to keep track of expiring documents from List A, B, or C on the I-9 for U.S. citizens or permanent residents. Section 3 does not apply to these employees.

Section 3 should only be completed when the employee indicates in Section 1 of Form I-9 that he or she is an alien authorized to work until a certain date. In other words, the employer should reconfirm the employment authorization of every employee who is not a U.S. citizen or permanent resident and who has presented evidence of work authorization that contains an expiration date.

Employers should complete Section 3 of Form I-9 when updating and reverifying the employment authorization of these other classes of employees – that is, when an employment authorization document is scheduled to expire, the employer must reverify that the employee has renewed his or her authorization to work.

**Form I-9 'begin employment' date**

**Q.** Section 2 of Form I-9 is the employer review and verification. It asks the employer to attest that the employee began employment on a particular date. If the employer completes the I-9 after the employee accepts the offer but before the first day of work, what date should the employer use?

**A.** Form I-9 may be completed on the date of hire – before the actual start date for pay. The date that is entered in Section 2 of Form I-9 is the date the employee began work for pay.

For example, on May 28 an employer interviews an individual, makes an offer, and the individual accepts. The start date for pay is June 1. On May 28 the employer provides Form I-9, the individual completes Section 1, and the employer completes Section 2. The employer enters the date as June 1 because that is the first day of work for pay; however, all signatures on the form will be May 28.

**E-Verify timing**

**Q.** My company is concerned about spending time and money on training new employees who turn out to be unauthorized to work in the U.S. Would the following be OK? An offer of employment is made and accepted, and the employee will start 10 days later. We immediately complete Form I-9 and perform an E-Verification. Even if we immediately receive a confirmation, the employee still will not start for 10 days. If we get a final nonconfirmation before the agreed-upon start date, the employee will not be allowed to work for us.

**A.** As the scenario is laid out in this question, E-Verify was used correctly. The offer of employment was made and accepted and a start date was set. After the start date was set, Form I-9 was completed and the E-Verify entry was made. If a final nonconfirmation comes before that start date, the employee

should not be allowed to work.

An employer cannot use E-Verify to screen out employees. But in this case, the start date was set. Had the start date been two days later – when a tentative nonconfirmation had come through E-Verify – and had the employer then changed the start date to sometime later, that would have been a misuse of E-Verify.

### **U.S. Immigration and Customs Enforcement**

#### ***IMAGE program***

**Q.** What is the IMAGE program and what are the advantages for an employer that joins it? Would an associate-level membership be a good way for a company to get started with the program?

**A.** ICE is responsible for enforcing the nation's immigration and customs laws. To combat unlawful employment and reduce vulnerabilities that help illegal aliens gain such employment, the ICE Mutual Agreement between Government and Employers (IMAGE) program was initiated in 2007. Our goal is to help employers develop a more secure and stable workforce and restore the integrity of our immigration system by utilizing industry outreach and self-policing.

The associate option has been discontinued. It was too resource intensive and there were tracking problems in regard to oversight and follow-up as employers progressed toward full membership. Rather than signing a company up and allowing them time to work on their Forms I-9 and compliance program, we will provide them the education and tools they need up front so that when they are ready to join, it will be as a full member. It is easier to get the training needed in order to become immigration compliant now that we are focusing on education for all employers.

#### ***Worksite I-9 audits***

**Q.** I hear that the number of worksite I-9 audits is increasing and that many are being performed by forensic auditors from other departments of the federal government. If my company is chosen for an audit, how should I prepare? On which issues will the auditors be focusing? What could I do if I run into difficulties with an auditor? Does Homeland Security have some sort of ombudsman?

**A.** If you think an auditor is being unprofessional, or if you run into difficulties with an auditor and cannot resolve the problem, you should ask the auditor to provide the name and number of his or her supervisor. If the auditor does not give you that information, you can contact the assistant special agent in charge. Their signature should have appeared in the notice of inspection.

The time to prepare for an audit is before you are selected for inspection. ICE has established 12 best practices (see [www.ice.gov/partners/opaimage/index.htm](http://www.ice.gov/partners/opaimage/index.htm)) to make sure that a participating company meets its employment eligibility verification obligations.

By law, companies are required to produce Forms I-9 for inspection by ICE upon request. While some inspections are conducted by ICE special agents, ICE primarily relies on auditors to conduct Form I-9 inspections.

### **Department of Labor**

#### ***Prorating the salary of a mid-workweek new hire***

**Q.** May I prorate the salary of an exempt new hire who begins in the middle of the workweek? If I may, how do I coordinate the weekly requirement with the fact that his annual salary is \$48,000 and we pay on a semimonthly basis?

**A.** Yes, you are allowed to prorate if someone is hired in the middle of a workweek. If they are on an annual salary and you

pay them on a semimonthly basis, what you need to do is convert that annual salary to a semimonthly salary and then determine the weekly equivalent (.4615) from which you would calculate your proration.

#### ***Administrative fees and garnishment limits***

**Q.** Some states allow an employer to deduct an administrative fee for handling creditor garnishments. In a number of those states, instructions tell the employer to deduct the fee from the garnishment collected. Some states, however, instruct the employer to deduct the fee from "exempt" earnings. If the maximum amount is being withheld for a garnishment (25% of disposable income), can the employer fee be deducted in addition to the amount deducted for the garnishment?

**A.** No. The 25% is hard and fast, and what is left is exempt from garnishment and it would seem to me in this case that the fee is adjunct to that.

#### ***Compensable time: booting up a computer to clock in***

**Q.** If an employer eliminates time clocks and has its workers clock in and out via their office computers, is the time they are waiting for the computers to boot up considered compensable?

**A.** Yes, it is. The employees are engaged to wait, as opposed to waiting to be engaged.

#### ***Incentive pay and overtime calculations***

**Q.** My company wants to induce better attendance and wants to offer paid time off as an incentive. What effect would the value of the time off have on overtime calculations?

**A.** This is an attendance bonus and must be included in the regular rate for the purposes of computing overtime pay.

#### ***Opinion letters will be issued less frequently***

**Q.** It has been reported that the Wage and Hour Division will no longer issue opinion letters. Is that true? If an employer has a situation that it would like clarified – and presumably blessed by the DOL – how would it go about obtaining that?

**A.** Pursuant to a recent change in policy, the Wage and Hour Division is going to exercise more discretion in responding to the opinion requests we receive. But we are still accepting opinion requests.

At the same time, we have started issuing "Administrator's Interpretations" on the application of the laws we enforce. They address a broad range of issues that should cover issues that would previously have been presented as individual opinion requests.

#### ***Reducing the pay of salaried nonexempt employees for time off***

**Q.** May the pay of a salaried nonexempt employee be reduced for time off if the employee has exhausted his or her leave bank?

**A.** The answer to this question depends on what the salary is for. Is there an understanding that the salary is for all hours worked or is it for a fixed workweek? That would make a difference. The leave bank has nothing to do with it. You have to look at the hours worked in the workweek.

I am assuming that the person has not worked all the hours in the week that they normally work. If the salary is for a 40-hour week and the person works less than 40 hours, as long as they make the minimum wage everything is fine.

What you may be doing, though, is changing the understanding of what the salary is for. If there was an understanding that the salary was to be for all hours worked in a week and now you are making deductions, then that changes what the salary is for. If they don't work any overtime in the week, it is a moot point.

If you assume that the salary was for a 40-hour week, and the person worked the first four days of the week, took the fifth day off, and had no more leave time left, then the deduction could be made.

**Health care reform and the Fair Labor Standards Act (FLSA)**

**Q.** What is the effective date of the FLSA amendment in the new health care reform law that requires employers of at least 200 employees to automatically enroll new hires in their health insurance plan? What about the new provision requiring unpaid break time for nursing mothers?

**A.** The effective date is March 2013 for the mandatory enrollment provision. The provision for unpaid break time for nursing mothers is already in effect.

**Paying furloughed employees**

**Q.** Our public school system plans to furlough staff for two days during the 2010-2011 school year, and we'd like to do this as painlessly as possible. The school board has not yet determined which days the employees will be furloughed. We're wondering if the docked pay must all come out of the same paycheck, or whether it can be spread out over the entire school year, from September to June.

**A.** For exempt employees – the teachers and administrators,

who qualify for the professional exemption – a furlough simply means that instead of working five days, you are only going to work four days or three days that week. Because you are a public school system, you can make that deduction for a whole day. Also, teachers are not subject to the FLSA's requirement that exempt professionals be paid on a salary basis.

Where it may get a little sticky is where you have nonexempt salaried employees. Again, you are simply reducing the hours in that week. So for a nonexempt employee who is on a salary, you're simply controlling the hours that the person works in a workweek.

But you have to be careful about what the salary is intended to cover. Is it a salary for all hours, or is it a salary for a fixed number of hours? In any case, you can make the deduction because there are no hours worked.

What you are doing in both of these cases is controlling the hours worked. You really aren't spreading anything out. Likewise, you can't just say that instead of taking all of the money out of the employee's pocket in one week you'll take a little bit out over several weeks. ■



## STATE AND LOCAL NEWS

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### California

***Petition for U.S. Supreme Court review of case involving San Francisco Health Care Security Ordinance denied.***

The U.S. Supreme Court has refused to hear the appeal of the Golden Gate Restaurant Association in a case involving the Employer Spending Requirement (ESR) of the San Francisco Health Care Security Ordinance [*Golden Gate Restaurant Ass'n v. City and County of San Francisco*, No. 08-1515 (U.S. Sup. Ct., 6-28-10)]. A three-judge panel for the U.S. Court of Appeals for the Ninth Circuit had ruled that the ESR did not conflict with the federal Employee Retirement Income Security Act of 1974 (ERISA) and upheld the ordinance (see **PAYROLL CURRENTLY, Issue No. 21, Vol. 16**). As a result of the Supreme Court determination, the decision of the Ninth Circuit Court of Appeals will stand. The ESR remained in effect while the Supreme Court was deciding whether to hear the case.

### Kansas

***Electronic filing of withholding tax returns mandated.*** Effective 7-1-10, all employers will be required to file withholding tax returns electronically. To make the transition easier for some employers, the Department of Revenue will continue to provide paper forms as needed through 9-30-10. As of 10-1-10, the DOR will no longer have printed paper forms available for distribution. Employers have the option of filing online using the KS WebTax system, available at [www.ksrevenue.org/kswebtax.htm](http://www.ksrevenue.org/kswebtax.htm) or by telephone at 877-600-5640. Both methods require the employer to obtain a PIN prior to use. Employers can obtain a PIN by contacting Electronic Services at 800-525-3901 or [eservices@kdor.state.ks.us](mailto:eservices@kdor.state.ks.us) [S.B. 430, L. 2010; DOR, New Filing Requirements for Your Retailers' Sales, Compensating Use, and Withholding Tax].

### Kentucky

***UI taxable wage base increased.*** Effective 1-1-12, the unemployment insurance (UI) taxable wage base will increase to \$9,000 (currently \$8,000). It will increase by \$300 every year until 2022, but will not exceed \$12,000. Also effective 1-1-12, negative balance employers are permitted to make voluntary contribution payments every other calendar year [H.B. 5, L. 2010].

### New York

***Guidance on personal income tax treatment of same-sex marriage issued.*** The Department of Taxation and Finance (DTF) recently issued an advisory opinion stating that same-sex marriages will not be recognized for state personal income

tax purposes. The DTF notes that New York State follows the federal determination of filing status. Because a marriage to a same-sex partner is not a marriage for federal income tax purposes, it is not a marriage for state income tax purposes. The petition had asked whether Governor David Paterson's 2008 directive to all state agencies regarding the recognition of same-sex marriages would affect tax treatment [DTF, TSB-A-(2)I, 5-12-10].

### Vermont

**Employee misclassification penalties enacted.** Effective 7-1-10, an employer that fails to properly classify an individual as an employee is subject to a maximum penalty of \$5,000 per misclassified employee. An employer found to have misclassified employees will be prohibited from contracting, directly or indirectly, with the state for up to three years following the date of the violation [H.B. 647, L. 2010].

**New hire reporting requirements revised.** Effective 7-1-10, employers must report new hires within 10 calendar days of the first date of employment. The report must also include the new hire's first date of employment. New hire reporting should be done electronically or on a form supplied or approved by the Department of Labor. Previously, the law required employers to report all new hires within 20 days of hire [H.B. 792, L. 2010].

**Paycard use permitted.** Employers may now use paycards to pay employees' wages as long certain conditions are met. The employer must provide the employee with written disclosure in plain language of all of the employee's wage payment options and the terms and conditions of a paycard account. The employee must voluntarily consent in writing to the payment of wages by paycard and the consent must not be a condition of hire or continued employment. The employee must receive at least three free withdrawals from the paycard, one of which permits withdrawal of the full amount of the balance at a federally insured depository institution or other location convenient to the place of employment. None of the employer's costs associated with the paycard account can be passed on to the employee. The paycard issued to the employee must be a branded paycard. However, a nonbranded paycard may be issued for temporary purposes and cannot be valid for more than 60 days [S.B. 58, L. 2010].

### Washington

**UI penalties enacted for knowing failure to register.** Effective 1-1-11, an employer that knowingly fails to register with the Employment Security Department (ESD) and obtain an employment security account number for unemployment insurance (UI) purposes may be penalized up to \$1,000 per quarter or two times the taxes due per quarter, whichever is greater. This penalty is in addition to all other applicable penalties and higher rates for an employer that is not a "qualified employer." The penalty does not apply if the employer can prove that it had good cause to believe that it was not required to register with the ESD [S.B. 6524, L. 2010].

**UI taxable wage base increased.** Effective 1-1-11, the unemployment insurance (UI) taxable wage base will increase to \$37,300 (currently \$36,800) [Employment Security Department, News Release, 6-17-10].

### Wisconsin

**Tax treatment of health care benefits for children under 27 explained.** The state will not follow federal law in 2010 with regard to the change, enacted by the federal Affordable Health Care Acts (Pub. L. No. 111-148 and Pub. L. No. 111-152), that extends the general exclusion from gross income for medical care expenses under an employer-provided accident or health plan to any child of an employee who has not reached the age of 27.

The Department of Revenue (DOR) advises that the child under age 27 must either be claimed as a dependent for state income tax purposes, or the employee must provide over one-half of the child's support for the calendar year and the child must not be the qualifying child of any other taxpayer. If these requirements are not met, the fair market value of the adult child's health insurance coverage is income and taxable wages to the employee. Employers must either (1) include the amount that is taxable for Wisconsin purposes (but not taxable for federal purposes) in Box 16 of the 2010 Form W-2, or (2) provide employees with a supplemental "Wisconsin only" Form W-2 with the taxable benefits shown in Box 16. The DOR has posted guidance on its website at [www.revenue.wi.gov/taxpro/news/100511.html](http://www.revenue.wi.gov/taxpro/news/100511.html).

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Payroll Currently (ISSN 1065-6529) is published by the American Payroll Institute, Inc., in cooperation with The American Payroll Association, 660 North Main Avenue, Suite 100, San Antonio, TX 78205-1217; Tel: 210-226-4600; Fax: 210-226-4027. Payroll Currently is designed to provide authoritative information in regard to the subject matter covered. It is provided with the understanding that the publisher is not engaged in rendering legal, accounting or other professional service. If legal advice or other expert assistance is required, the services of a competent professional person should be sought. © Copyright 2010 American Payroll Institute, Inc. All rights reserved. Printed in the USA.