



The Biweekly
Payroll
Compliance
Publication
Of The
American
Payroll
Association

PAYROLL CURRENTLY

Volume 17

Issue # 7

April 3, 2009

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Reminder: New Form I-9 Should Be Used Beginning April 3, New Rules Also in Effect

U.S. Citizenship and Immigration Services (USCIS) has issued a revised Form I-9, *Employment Eligibility Verification*. The revised form (dated February 2, 2009) should be used beginning April 3, 2009. It is available on the APA website at www.americanpayroll.org/members/Forms-Pubs/#non. All prior versions of the form are obsolete and should no longer be used. USCIS has also revised the *Handbook for Employers (Instructions for Completing Form I-9)*, for

use on and after April 3. It is also available on the APA website.

The new form implements an "interim final rule" amending regulations that govern the types of acceptable identity and employment authorization documents and receipts that employees may present to their employers when completing Form I-9 (see **PAYROLL CURRENTLY**, Issue No. 26, Vol. 16). The rule makes changes to the lists of acceptable documents and receipts and requires unexpired documents. ■

Federal Agency Speakers Outline a Busy Future for Payroll at APA's Capital Summit

There may be a new presidential administration in town, but one by one, the federal government agency speakers at APA's 5th Annual Capital Summit in Washington, D.C., on March 19-20 reinforced a familiar theme for the largest-ever Summit audience. When the government wants to initiate or change a social or economic policy initiative, payroll professionals are going to be right in the middle of it.

Whether it's more affordable COBRA health insurance coverage for unemployed workers, an income tax credit to stimulate the economy, keeping unauthorized aliens out of the workforce, preventing identity theft, closing the tax gap, or making sure international bad guys aren't getting paid by U.S. businesses, Congress and federal government agencies call on the nation's employers to make it happen. And that means it's the job of payroll, accounts payable, human resources, and benefits professionals in those companies to once again deliver results.

As David Williams, IRS Director, Electronic Tax Administration and Refundable Credits, told the audience, "You are the glue that holds it [the tax system] together. When there is an economic stimulus package to implement immediately, where do they look? They look to this community."

Note: This issue of **PAYROLL CURRENTLY** covers Summit presentations on Internal Revenue Service implementation of the American Recovery and Reinvestment Act, e-services enhancements, and employment tax initiatives; Department of Homeland Security law enforcement priorities, the Form I-9 revision, and E-Verify enhancements; paycards and the state law obstacles they continue to face; and highlights of the National Taxpayer Advocate's annual report of interest to employers. A future issue will cover presentations on Office of Child Support Enforcement and Department of Labor initiatives, IRS identity theft prevention efforts, new data requirements for international

ACH transactions, potential problems under proposed cafeteria plan regulations, and Obama Administration budget proposals that would impact employers.

Internal Revenue Service

Website upgrade. In his role as champion of the IRS's presence on the World Wide Web, Williams said he wants the IRS website to "be a place where we provide services to our partners – more than just a communications device." He noted that traffic on the site has more than doubled since 2003, with 242 million visitors in 2008, and that there are now more than 50,000 web pages on the site, although only 4,000 get used regularly. This means that the IRS needs to concentrate its efforts on making needed information easier to locate and making its electronic services features easy to use and secure.

E-services enhancements. Williams then discussed IRS initiatives in the employment tax area, noting that they are currently working on the security issues involved in delivering employer notices electronically through a project called Bulk and Electronic Delivery (BED).

As for electronic filing of employment tax forms (e.g., Form 941), Williams said that only 20% are e-filed now and the Service is trying to make the business case for e-file providers to provide no- or low-cost business e-file available. If that can't be done, Williams said the IRS would have to determine if it should provide employment tax free e-file at some point in the future as the only way to significantly increase participation in the program.

ARRA implementation. The drive to implement and provide guidance for employers and the public on the tax aspects of the American Recovery and Reinvestment Act of 2009 (ARRA) has been at the top of the IRS agenda since before the law was signed on February 17, said John Tuzynski, Chief, Employment Tax, SB/SE Specialty Programs. Tuzynski briefly outlined the major responsibilities for employers in implementing the new COBRA premium subsidy and payroll tax credit, as well as the new withholding tables that take into account the Making Work Pay income tax credit.

He said the IRS expects to receive at least 750,000 Forms 941 claiming the COBRA payroll tax credit, which is more than 10% of all the 941s that are filed. He also said the IRS would continue to issue more guidance in the form of questions and answers on the different issues related to the COBRA payroll tax credit, plus a notice dealing with the determination of whether a separation from employment is an "involuntary termination" entitling an individual to the COBRA premium discount and subsidy. And Tuzynski confirmed that the amount of a former employee's subsidy would not have to be reported on Form W-2, although it will most likely have to be reported to the former employee in some other fashion, such as on a 1099 form or in a separate notice.

Employment tax initiatives. Other employment tax initiatives the IRS is focusing on at this time include:

- *Worker classification* – proper classification of workers as employees or independent contractors can help reduce the tax gap, given the 98% compliance rate when a taxpayer receives a Form W-2 from an employer;
- *Questionable Employment Tax Practices (QETP)* – the IRS has memos of understanding with 32 states to exchange audit reports, data, and leads, and to participate in side-by-side exams, if appropriate;
- *TIGTA recommendations for worker classification* – the IRS will implement an enterprise-wide employment tax program to manage information and determine compliance; the Service will

begin the first employment tax National Research Program in 25 years, with random audits starting in November 2009;

- *Backup withholding* – the IRS needs to determine why taxpayer name-TIN mismatches or lack of a TIN are on the rise while backup withholding amounts have declined; audits began in November 2008.

Department of Homeland Security

Law enforcement focus. While there may be a new president and new leadership at the Department of Homeland Security, there has been no directive to change enforcement priorities, said Eric Breitzke, Acting Section Chief, IMAGE Program, at U.S. Immigration and Customs Enforcement (ICE). They continue to focus their efforts on the southwest border and the workplace, Breitzke said, and employers can anticipate a decrease in large scale investigations and increases in criminal prosecutions and regulatory workplace inspections. A relatively new ICE initiative is the debarment of federal government contractors for 1-3 years if they are knowingly hiring unauthorized aliens.

Revised Form I-9. When Breitzke reminded employers that they must begin using the revised Form I-9, *Employment Eligibility Verification*, on April 3, several audience members asked if employers would be penalized for having used the new form when it was initially scheduled for implementation on Monday, February 2, since it was pulled at 5:00 p.m. on Friday, January 30 for further review by the new administration. Breitzke responded by saying that ICE stresses to its agents that they should use prosecutorial discretion in situations where employers that are generally compliant end up using the wrong version of Form I-9 because of a last-minute change from the federal government.

E-Verify. Phyllis Bell, from the Customer Relationship and Learning Management Branch of U.S. Citizenship and Immigration Services (USCIS), told the audience about some recent enhancements to E-Verify, the electronic system that verifies an employee's right to work in the U.S. by checking their Form I-9 information against databases from DHS and the Social Security Administration. She said that over 112,000 employers now use E-Verify, with 1,000 more added each week, and that the system handled more than 6.6 million verification queries in FY 2008 (over 2.6 million so far in FY 2009), with 96.1% being returned as "employment authorized" almost immediately. She also noted that E-Verify can now check on an employee's naturalization status even if the naturalized citizen has not yet updated their citizenship records with SSA.

Bell said USCIS is currently working on the following E-Verify-related projects:

- Continuing to reduce the incidence of mismatches;
- Developing a marketing plan to recruit more employers;
- Developing functions to monitor system and employer compliance; and
- Adding a place on Form I-9 for the employer to enter an acknowledgment number, as it is required to do under E-Verify.

Paycards continue to face state law obstacles

Despite the many benefits to both employers and employees of electronic wage payment, state legislatures continue to wrangle over the issue of whether to allow employers to pay employees through payroll debit cards ("paycards"), noted Pete Isberg, Vice President of Government Affairs for ADP, Inc. and a member of the Paycard Subcommittee of APA's Government Affairs Task Force. Isberg expressed some surprise at this resistance, given that wages paid by direct deposit or paycards are much more likely to meet state requirements to pay wages in full and on time than wages paid by paper paychecks, especially when natural disasters

disrupt the paycheck delivery process or when employees are suddenly terminated.

To increase states' acceptance of paycards as a legitimate wage payment method, and to encourage them to allow employers to require payment by direct deposit or paycard, Isberg said that Paycard Subcommittee members, APA Manager of Government Relations Bill Dunn, and other interested parties are encouraging state labor departments to provide favorable opinions and state lawmakers to enact legislation specifically allowing employers to use paycards.

Burdensome provisions. Constant vigilance is necessary, Isberg warned, because each state law that is introduced seems to have one or more provisions that place onerous burdens on any employer that wants to introduce a paycard program. These provisions include:

- Paycard issuer must file a notice with the state containing their name, address, and phone number – MN, VT;
- Wages paid by paycard must be “owned by the employee” (may conflict with NACHA rules) – MN;
- Information generated by paycard transactions can be used only in relation to such transactions (may violate anti-money laundering laws) – MN;
- There must be no link to any form of credit (systems can't prevent this in all circumstances) – MN, TX, VT;
- One free withdrawal of full pay “at a location convenient to the place of employment” – NH;
- No “employer costs” (what are they?) can be passed on to employees – NH;
- New consent from employee required whenever any terms or conditions change – NH, VT;
- Branded cards only (limits ability to issue or replace cards quickly and conflicts with “no overdraft” language) – VT; and
- One free ATM transaction beyond opportunity to get full pay without a fee – VT.

National Taxpayer Advocate

In her luncheon address to Capital Summit attendees, National Taxpayer Advocate Nina Olson concentrated on a few

topics from her annual report to Congress sure to interest her audience.

Third-party information returns. One thing she and her group at the IRS are working on is trying to figure out how to get access to third-party information returns earlier so the Service can check them against payments being made to taxpayers before they are made rather than well afterward. She said they are considering various alternatives, including earlier due dates for information returns, which are now due to IRS on February 28 (March 31 if e-filed).

Classification of workers. Olson said that another area of perennial interest to IRS because of its potential to help close part of the annual “tax gap” between what Treasury collects and what it is owed is the proper classification of workers as employees or independent contractors. She noted that ambiguities in the current rules and the prohibition on IRS guidance in the area lead directly to noncompliance.

Olson has recommended a legislative solution that would replace §530 of the Revenue Act of 1978 with IRS guidance after IRS consults with representatives of different industries as to why they treat certain workers as independent contractors. This would allow industry-specific practices to be built into the guidance. She also wants IRS to develop an electronic Q&A tool (including subsets for specific industries) employers can use to determine the proper classification of their workers and that they can rely on as long as the facts do not change.

IRS outreach. IRS outreach to employers is also a key to increased employment tax compliance, Olson emphasized. She said the IRS should help employers that are trying to comply with complex tax rules and base its treatment of employers on the level of and reasons for their noncompliance.

Olson also addressed the issue of the few payroll service providers that have misapplied clients' employment tax funds by saying the IRS needs to educate employers about using the Electronic Federal Tax Payment System to check whether their provider has made their employment tax deposits to the U.S. Treasury. ■

IRS Reissues Instructions for 2009 Form 1099-MISC

The IRS has posted a note on its website [www.irs.gov/formspubs/article/0,,id=109875,00.html] (3-24-09) advising taxpayers that the *2009 Instructions for Form 1099-MISC* have been reissued. Anyone who downloaded the instructions before February 5 is alerted that they have been modified.

On page 1 under “What's New,” the paragraph on “Death benefits” has been revised to read as follows: “Death benefits from nonqualified deferred compensation plans paid to the estate or beneficiary of a deceased employee are now reported on Form 1099-MISC instead of Form 1099-R. Continue reporting

death benefit payments from qualified plans on Form 1099-R.”

On pages 2 and 3, the last paragraph under “Deceased employee's wages” has been revised to read as follows: “Death benefits from nonqualified deferred compensation plans paid to the estate or beneficiary of a deceased employee are now reportable on Form 1099-MISC. Do not report these death benefits on Form 1099-R. However, if the benefits are from a qualified plan, continue reporting them on Form 1099-R.

The corrected version of the instructions is available on the APA website at www.americanpayroll.org/members/Forms-Pubs/#tax. ■

DOL Issues COBRA Model Notices Required by the American Recovery and Reinvestment Act

The U.S. Department of Labor (DOL) has announced [74 F.R. 11971, 3-20-09; <http://edocket.access.gpo.gov/2009/pdf/E9-6131.pdf>] the availability of model health care continuation coverage notices as required by the American Recovery and Reinvestment Act of 2009 (ARRA; see *PAYROLL CURRENTLY*, Issue No. 4, Vol. 17). The four notices – the General Notice (two versions), the Alternative Notice, and the Notice in Connection with Extended Election Periods – are available at www.americanpayroll.org/members/Forms-Pubs/#non.

www.americanpayroll.org/members/Forms-Pubs/#non.

Each of these notices must include:

- a prominent description of the availability of the premium reduction, including any conditions on the entitlement;
- a model form to request treatment as an “assistance eligible individual”;
- the name, address, and telephone number of the plan administrator (and any other person with information about the

premium reduction);

- a description of the obligation of individuals paying reduced premiums who become eligible for other coverage to notify the plan; and
 - (if applicable) a description of the opportunity to switch coverage options.
- The Notice in Connection with Extended Election Periods must also include a description of the extended election period.

General Notice

The General Notice is required to be sent by plans that are subject to the COBRA continuation provisions under federal law. It must include the information described above and be provided to ALL qualified beneficiaries, not just covered employees, who have experienced a qualifying event at any time from September 1, 2008, through December 31, 2009, regardless of the type of qualifying event. The DOL has created two versions of this notice:

The abbreviated version is for individuals who have elected COBRA and are still covered after experiencing a qualifying event at some time on or after September 1, 2008, to advise them of the availability of the premium reduction and other rights and obligations under ARRA.

The longer version includes all of the information related to the premium reduction and other rights and obligations under ARRA as well as all of the information required in an election notice under DOL COBRA notice regulations. Providing the longer notice to individuals who have experienced a qualifying event from September 1, 2008, through December 31, 2009, will satisfy both existing DOL requirements for the content of

the COBRA election notice as well as those imposed by ARRA.

Alternative Notice

The Alternative Notice is required to be sent by issuers that offer group health insurance coverage that is subject to continuation coverage requirements imposed by state law. The Alternative Notice must include the information described above and be provided to ALL qualified beneficiaries, not just covered employees, who have experienced a qualifying event at any time from September 1, 2008, through December 31, 2009, regardless of the type of qualifying event.

Continuation coverage requirements vary among states. Thus, the DOL created a single version of this notice that should be modified to reflect the requirements of the applicable state law. Issuers of group health insurance coverage subject to this notice requirement should feel free to use the model Alternative Notice or the abbreviated model General Notice (as appropriate).

Notice in Connection with Extended Election Periods

The Notice in Connection with Extended Election Periods is required to be sent by plans that are subject to COBRA continuation provisions under federal law. It must include the information described above and be provided to any assistance eligible individual (or any individual if a COBRA continuation coverage election were in effect) who: had a qualifying event at any time from September 1, 2008, through February 16, 2009; AND either did not elect COBRA continuation coverage or elected but subsequently discontinued COBRA. This notice MUST be provided by April 18, 2009, which is 60 days after the date ARRA was enacted. ■

IRS Issues COBRA Premium Subsidy Q&As for Employers: Part 3

In recent issues of PAYROLL CURRENTLY, we included questions and answers for employers on the new COBRA premium subsidy under the American Recovery and Reinvestment Act of 2009 (ARRA; see [PAYROLL CURRENTLY, Issue No. 4, Vol. 17](#)). This article contains questions and answers from an expanded document offering additional guidance. The complete document, *COBRA: Answers for Employers*, is available on the IRS website at www.irs.gov/newsroom/article/0,,id=204708,00.html.

Administration and eligibility

Q. Does the subsidy apply to medical and dental plans or medical only?

A. The subsidy is generally available for COBRA continuation coverage under any group health plan, including medical, dental, and vision coverage. However, it does not apply to a flexible spending arrangement (FSA) offered under a cafeteria plan.

Q. If an employer changes the insurance offered under its group health plan, can the subsidy apply to an assistance eligible individual's coverage under the new insurance?

A. Yes, as long as the individual's coverage under the new insurance qualifies as COBRA continuation coverage and the individual otherwise continues to be eligible for the subsidy.

Q. What is the general process by which an assistance eligible individual applies for the subsidy?

A. A group health plan is required to notify any individual with a qualifying event occurring during the period from September 1, 2009, through December 31, 2009, of the availability of the subsidy. If an assistance eligible individual

already has COBRA coverage in effect on February 17, 2009 (date of enactment of ARRA), the individual should receive a special notice of the availability of the subsidy. The notices will explain how to apply for the subsidy.

Q. If an individual's involuntary termination of employment took place on or after September 1, 2008, and before February 17, 2009, and the individual became eligible for COBRA coverage during that period, but the individual doesn't have COBRA coverage in effect on February 17, 2009, can the individual still elect COBRA coverage and get the subsidy?

A. Yes, if the individual's right to continuation coverage is provided under federal law. In that case, the individual will be given a new special election period to elect COBRA coverage and to pay reduced premiums as an assistance eligible individual. The special election period applies regardless of whether the individual failed to elect COBRA coverage previously or elected COBRA coverage and later discontinued it. The individual should be notified by April 18, 2009, of the new opportunity to elect COBRA coverage. The individual will then have 60 days after the notice to elect COBRA coverage and apply for the subsidy.

Q. What agency is responsible for providing guidance on these notice requirements?

A. The Department of Labor (DOL) is responsible for providing guidance on notices that must be provided about the availability of the subsidy and, if applicable, the special COBRA election period. For more information and model notices, visit www.dol.gov/COBRA. You can also call 1-866-444-3272 to speak with a benefits advisor from DOL's Employee Benefits

Security Administration.

Q. How will the COBRA premium subsidy be provided retroactive to September 2008?

A. The COBRA premium subsidy is not retroactive. The earliest it can apply is for the first period of coverage beginning on or after February 17, 2009, the date of enactment of ARRA. In addition, if an individual elects COBRA coverage under the special COBRA election period, the coverage is effective only for the first period of coverage beginning on or after February 17, 2009. In the case of a health plan that provides coverage on a calendar month basis, the first period of coverage is the month beginning March 1, 2009.

Q. Can an assistance eligible individual reduce his or her COBRA premium to 35% immediately, rather than waiting for the notice from the health plan?

A. Yes. The subsidy applies as of an assistance eligible individual's first period of coverage beginning on or after February 17, 2009. For example, it would apply to the premium for the period of coverage beginning March 1, 2009, in the case of coverage provided on a calendar month basis. However, because the COBRA subsidy provision was only recently enacted, systems to implement the premium reduction might not yet be in place. The assistance eligible individual would therefore be well advised to contact the group health plan or employer to discuss the premium reduction before sending in the reduced premium.

Q. Can an employer just reduce an assistance eligible individual's premiums to 35%, rather than notifying the individual about the subsidy?

A. No, because an individual might not be eligible for the subsidy. For example, the individual might be eligible for coverage under another group health plan and therefore not be eligible for the subsidy.

Q. Can an employer pay an assistance eligible individual's 35% share of the premium, rather than collecting it from the individual?

A. No. The premium subsidy provision does not allow the individual's 35% share of the premium to be paid by the employer.

Q. If I am an assistance eligible individual, is there any other way to get the subsidy besides paying reduced premiums? For example, can I take it as a credit when I file my 2009 tax return?

A. No, the subsidy is provided to an assistance eligible individual only in the form of reduced COBRA premiums. That is, the assistance eligible individual only has to pay 35% of the premium in order to receive the COBRA coverage. The employer is reimbursed for the remaining 65% through a credit on its payroll tax returns.

Q. Is an employer initiated layoff an involuntary termination of employment for purposes of eligibility for the COBRA premium subsidy?

A. Yes, an employer initiated layoff is generally an involuntary termination of employment for purposes of eligibility for the COBRA premium subsidy.

Q. Are tax-exempt entities subject to this provision?

A. Yes, if the tax-exempt entity is required to provide COBRA continuation coverage. Moreover, an employer that is exempt from federal income tax is generally subject to federal payroll tax requirements and required to file Form 941. As in the case of taxable employers, a tax-exempt entity can claim credit on Form 941 for the COBRA subsidy it provides.

Q. How will the COBRA credit apply in the case of a business acquisition that results in a successor employer?

A. There is no "one size fits all" answer because the result depends on the facts and circumstances, including whether the entity that provided the subsidy continues in existence. The fact that an employer is a successor employer for purposes of applying the social security wage base does not mean that it can claim credit for the subsidy provided by the predecessor employer.

Form preparation

Q. Does a COBRA premium assistance credit reduce an employer's payroll tax liabilities when determining whether \$100,000 in liabilities has accumulated for deposit purposes?

A. The credit is treated like a payment of payroll taxes and is applied as a deposit made on the first day of the quarter. It does not reduce an employer's tax liabilities for purposes of determining the employer's deposit schedule generally or applying the \$100,000 deposit rule specifically. However, since the credit is applied as a deposit, a required deposit can be reduced by the amount of the credit. For example, if an employer accumulates \$110,000 of liabilities and has a \$20,000 subsidy credit, the employer must still deposit the next day under the \$100,000 rule, but is only required to deposit \$90,000.

Q. If an employer has unpaid employment taxes or unpaid income taxes, will that affect the amount of the COBRA premium credit that the employer can claim on Line 12a of Form 941?

A. If an employer with unpaid employment or income taxes claims a credit on Line 12a of Form 941 for the amount of COBRA premium assistance provided during the quarter, and the amount of the credit exceeds the amount of payroll tax liabilities shown on Form 941, the IRS will offset the other unpaid taxes against the balance due before refunding any balance. In this case, the IRS will notify the employer of the offset.

Reporting and documentation

Q. If an employer reduces its payroll tax deposits during the quarter by the amount of its credit for the subsidy provided during the quarter, does the employer have to report the specific amount of the credit that is applied against each deposit?

A. No. The credit is claimed on the quarterly Form 941, regardless of whether the employer reduces its deposits during the quarter by the amount of the credit. It is not necessary for the employer to report the specific amount of the credit that is applied against each deposit. For example, an employer that applies the credit toward its required semi-weekly deposits would still report the total credit at the end of the quarter on Form 941 for the quarter.

Q. Regarding federal unemployment tax (FUTA), will an employer's percentage contribution or the balance of money in that fund change as a result of the COBRA premium subsidy?

A. No, the new subsidy provision has no impact on FUTA.

Taxability and recapture

Q. Is the 65% subsidy subject to state income tax?

A. The premium subsidy is not included in income for federal tax purposes. However, its treatment for state income tax purposes is determined under state law and depends on the tax law of the particular state. ■

APA to Hold 27th Annual Congress

On May 19-23, the American Payroll Association will hold its Annual Congress at the Long Beach Convention Center in Long Beach, California. For 27 years, the Congress has been the payroll profession's premier educational event and an eagerly awaited training and networking opportunity for APA members, their colleagues, and allied professionals in accounts payable, finance, HR, and benefits.

This year's 5-day program will offer more than 190 workshops led by the industry's foremost authorities. Attendees will learn about the most current legislative and regulatory developments affecting payroll and accounts payable. Sessions will be offered on payroll specialties, accounts payable,

benefits and compensation, government affairs, executive issues, organization and personal management, personal finance, special industry issues, international issues, and technology issues.

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

To register or obtain more information, call APA Membership Services at 210-224-6406, 8:00 a.m. – 6:00 p.m. CT, M-F, or visit www.americanpayroll.org. ■

Salary Reductions Because of Insufficient Work Could Endanger 'White Collar' Exempt Status

In a Wage-Hour opinion letter, the U.S. Department of Labor (DOL) advises an employer that reducing salaries when there is insufficient work could jeopardize the exempt status of executive, administrative, or professional ("white collar") employees under the Fair Labor Standards Act (FLSA) [W-H Op. Ltr., FLSA2009-18 (1-16-09)].

The furlough plan

An employer proposes to require salaried exempt employees to stay home or leave work early when there is insufficient work. The partial-day or full-day absences would be deducted from employees' accrued paid time-off (PTO) accounts. Employees would receive their full salary if they have sufficient hours in their PTO accounts to cover the non-work periods. If an employee's accrued PTO is exhausted, the employee's salary would be reduced in full day increments, except that in no event would an employee's salary be reduced below the minimum salary of \$455 per week.

Salary basis test for exemption

In addition to meeting certain tests related to job duties to qualify for one of the FLSA white collar exemptions, an employee must be paid on a "salary basis." An employee is paid on a salary basis if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount that is all or part of the employee's compensation, which amount is "not subject to reduction because of variations in the quality or quantity of the work performed" (29 C.F.R. §541.602(a)).

The DOL explains that an employer can substitute or reduce an exempt employee's accrued leave time to cover the time an employee is absent from work, even if it is less than a full day and even if the absence is directed by the employer because of the lack of work, without affecting the employee's exemption, so long as the employee receives in payment an amount equal to the employee's guaranteed salary.

Are exempt employees who are required to take leave in danger of losing their exempt status?

The DOL explains that an employee will not be considered to be paid "on a salary basis" if any deductions from his or her salary are made for partial or full-day absences "occasioned by the employer or by the operating requirements of the business." Thus, if an employer requires an exempt employee to work less than a full workweek, the employer must pay the employee's full salary even if: (1) the employer does not have a bona fide benefits plan; (2) the employee has no accrued benefits in the leave bank; (3) the employee has limited accrued leave benefits, and reducing the leave will result in a negative balance; or (4) the employee already has a negative balance in the accrued leave bank.

If an exempt employee's accrued leave is exhausted, can the employer schedule the employee for less than 40 hours and reduce his or her pay accordingly?

The DOL advises that full or partial day reductions in compensation would mean that the employee is not paid on a fixed and guaranteed weekly salary basis without regard to the quantity of work performed.

Fixed reduction vs. reductions based on operating requirements

The DOL distinguishes "a fixed reduction in salary" due to economic conditions and "not designed to circumvent the salary basis payment" from "deductions from salary due to day-to-day or week-to-week determinations of the operating requirements of the business." Here, the plan whereby exempt employees are called at home and required to take the day off, or are sent home early in the workweek "during occasional unplanned and transitory periods" is exactly the sort of arrangement the salary basis test is intended to guard against. It is "inconsistent with the guaranteed salary basis of payment required by the regulations," concludes the DOL. ■

Omnibus Appropriations Bill Extends Life of E-Verify Program

Before taking up President Obama's proposed fiscal year 2010 federal budget, the Senate and House of Representatives approved the "Omnibus Appropriations Act, 2009," which extends and funds various government operations and programs through the end of fiscal year 2009. The bill was signed into law on March 11, 2009 (Pub. L.

No. 111-8).

One of the programs extended by this legislation is U.S. Citizenship and Immigration Services' E-Verify program "to assist U.S. employers with maintaining a legal workforce."

E-Verify is a free and voluntary program that involves verification checks of the SSA (Social Security Administration)

and DHS (Department of Homeland Security) databases, using an automated system to verify the employment authorization of all newly hired employees. It is a web-based system that can be used from any personal computer with access to the

Internet. Once an employer has registered and completed the web-based tutorial, it can immediately begin using the program. To register, go to www.dhs.gov/E-Verify and follow the instructions. ■

Changes Made to Federal Per Diem Rates

Several changes have been made to the list of federal per diem rates for travel to locations within the continental U.S. (CONUS). FTR Per Diem Bulletin 09-5 is effective for travel undertaken on or after April 1, 2009 [74 F.R. 11958, 3-20-09; <http://edocket.access.gpo.gov/2009/pdf/E9-6261.pdf>]. The Bulletin is available on the APA website at www.americanpayroll.org/members/Forms-Pubs/#perdiem. The changes are as follows:

Idaho

- **Bonner's Ferry/Sandpoint** is designated as a destination. For the period October 1 – March 31, the lodging rate is \$70 and the M&IE rate is \$39, for a total maximum per diem rate of \$109. For the periods April 1 – June 30 and September 1 – September 30, the lodging rate is \$76 and the M&IE rate is \$59, for a total maximum per diem rate of \$135. For the period July 1 – August 31, the lodging rate is \$104 and the M&IE rate is \$59, for a total maximum per diem rate of \$163.

- **Driggs/Idaho Falls** is designated as a destination. For the period October 1 – March 31, the lodging rate is \$70 and the M&IE rate is \$39, for a total maximum per diem rate of \$109. For the period April 1 – September 30, the lodging rate is \$76 and the M&IE rate is \$44, for a total maximum per diem rate of \$120.

Maryland

- The entry for **Frederick** is modified to designate seasonal periods. For the period October 1 – March 31, the lodging rate is \$89 and the M&IE rate is \$39, for a total maximum per diem rate of \$128. For the period April 1 –

September 30, the lodging rate is \$90 and the M&IE rate is \$39, for a total maximum per diem rate of \$129.

South Carolina

- **Lexington County** is designated as a designation. For the period October 1 – March 31, the lodging rate is \$70 and the M&IE rate is \$39, for a total maximum per diem rate of \$109. For the period April 1 – September 30, the lodging rate is \$92 and the M&IE rate is \$44, for a total maximum per diem rate of \$136.

Other per diem updates: federal agency employees

Per Diem Bulletin 09-2. FTR Per Diem Bulletin 09-2 (74 F.R. 1688, 1-13-09; <http://edocket.access.gpo.gov/2009/pdf/E9-434.pdf>) is effective for travel undertaken on or after December 31, 2008. It informs federal agencies what baggage and seat choice fees they may reimburse their employees while on official travel.

Per Diem Bulletin 09-3. FTR Per Diem Bulletin 09-3 (74 F.R. 107, 1-2-09; <http://edocket.access.gpo.gov/2009/pdf/E8-31231.pdf>) is effective for relocations performed on or after January 1, 2009, until December 31, 2009. It advises that the standard mileage rate at which federal agencies may reimburse their employees for using a privately-owned vehicle for moving purposes is \$0.24 per mile.

Per Diem Bulletin 09-4. FTR Per Diem Bulletin 09-4 (74 F.R. 10049, 3-9-09; <http://edocket.access.gpo.gov/2009/pdf/E9-4840.pdf>) was effective February 25, 2009. It informs federal agencies that the annual changes to the tables needed for calculating the relocation income tax (RIT) allowance are now available. ■

DOL Suspends Revised Temporary Agricultural Worker Visa Rules

The U.S. Department of Labor (DOL) has proposed a nine-month suspension of the regulations effective January 17, 2009 (see **PAYROLL CURRENTLY, Issue No. 3, Vol. 17**), that modified the labor certification process for nonimmigrant temporary or seasonal agricultural (H-2A) workers, and the enforcement of the contractual obligations applicable to employers of such workers [74 F.R. 11408, 3-17-09; <http://edocket.access.gpo.gov/2009/pdf/E9-5562.pdf>]. The DOL proposes to reinstate on an interim basis the rules that were in place on January 16, 2009, the day before the revised rules became effective.

Reasons given for this suspension include:

- a pending lawsuit challenging the H-2A final rule,
- lack of sufficient resources at both the DOL and the state workforce agencies charged with implementing the new procedures,

- the importance of avoiding disruption and confusion in the administration of the H-2A program “in light of the severe economic conditions the country is now facing,” and

- the fact that the final rule “was based in part on policy positions of the prior administration with which the current administration may differ” and that the DOL may wish to reconsider these policy positions “in light of the rising unemployment among U.S. workers and their availability for

these jobs.”

Reimbursement of relocation expenses

The DOL has also withdrawn “for further consideration” an interpretation of the Fair Labor Standards Act that the Act and its implementing regulations do not require employers to reimburse workers under the H-2A and H-2B nonimmigrant visa programs for relocation expenses even when such costs result in the workers being paid less than the minimum wage [74 F.R. 13261, 3-26-09; <http://edocket.access.gpo.gov/2009/pdf/E9-6623.pdf>].

The DOL explained that the preamble accompanying the regulations cited above included a discussion interpreting the FLSA to the effect that “inbound travel expenses of H-2B workers do not primarily benefit their employers.” Prior to the issuance of that preamble discussion, however, courts uniformly had held that such relocation expenses were primarily for the benefit of employees.

The DOL said the matter concerns important issues as to whether various pre-employment expenses incurred by workers lawfully may result in their weekly wages being reduced below the minimum wage, and cited “potential adverse impacts” of the interpretation “on our nation’s most vulnerable workers, including low-wage U.S. workers and foreign guest workers.” ■



STATE AND LOCAL NEWS

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Arizona

Tax amnesty program established. A tax amnesty program is established from 5-1-09 through 6-1-09. The Department of Revenue (DOR) may abate or waive civil penalties (all or part) and impose interest at a reduced rate for tax liabilities, including withholding tax liabilities that were or could have been assessed for the covered taxable periods. For tax returns filed monthly or quarterly (such as withholding tax returns), amnesty is limited to filing periods beginning on or after 1-1-03 and ending before 1-1-08. No administrative, civil, or criminal action may be brought against a participating employer for failure to comply with the tax requirements. For information and guidelines about the program, visit www.azdor.gov/taxamnesty [S.B. 1003A, L. 2009].

New Jersey

Tax amnesty program established. A tax amnesty program will begin on 5-4-09 and end on 6-15-09. It applies to state tax liabilities for returns due on or after 1-1-02 and before 2-1-09. All penalties, referral cost fees, and half of the interest due as of 5-1-09 will be waived so long as the tax owed and the remaining interest is paid in full during the amnesty period. In addition, all filing requirements must be satisfied for delinquent returns. An eligible employer that fails to participate in the program will be subject to an additional 5% penalty on any state tax liabilities that are not satisfied during the amnesty period. The Department of Taxation (DOT) is developing a special tax amnesty website and plans to establish a Call Center the week of 4-27-09 [A.B. 3819, L. 2009; DOT Notice, *New Jersey Tax Amnesty Program*, 3-20-09].

Ohio

Online filing and payment system enhancements offered. Beginning 3-30-09, Ohio Business Gateway (OBG) will offer new tools to make it easier for employers to file returns and make payments for different types of taxes, including withholding taxes. The most significant enhancement allows third-party representatives, with employer approval, to sign on to the OBG and file returns for multiple clients [Department of Taxation, Information Release G 2008-01, issued 3-09].

Wisconsin

Deferral of first quarter UI tax payment permitted. Employers with a first quarter unemployment insurance (UI) tax liability of \$1,000 or more may defer up to 60% of the payment. By 4-30-09, employers must file an online election to take the deferral at <http://dwd.wisconsin.gov/UI> (click on the "Employer UI Account Information" link). The required installment payments are due as follows: 30% of the total first quarter tax liability is due by 7-31-09; 20% is due by 10-31-09; and 10% is due by 1-31-10. Interest will not be assessed so long as payments and quarterly reports are received on time (tax and wage reports must be filed electronically). Otherwise, interest will be assessed retroactive to 4-30-09 [Department of Workforce Development, *Unemployment Insurance Update*, 1st Quarter 2009].

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PAYROLL CURRENTLY NEWSLETTER

Payroll Currently (ISSN 1065-6529) is published biweekly by the American Payroll Institute Inc., in cooperation with The American Payroll Association, 30 East 33rd Street, 5th Floor, New York, NY 10016-5386; Tel: 212-686-2030; Fax: 212-686-4080. 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 2009 American Payroll Association. All rights reserved. Printed in the USA.