

Payroll Trends

3rd Quarter 2008

Daylight Savings Time

Daylight Saving Time ends at 2:00 a.m. local time on Sunday, November 2, 2008. As time will revert back one hour, this results in one extra hour of work for any employees working overnight on this date. Under state and federal laws, employees must be paid for actual hours worked and this could impact both regular and overtime pay calculations for hourly workers.

Passport Card

The U.S. Citizenship and Immigration Service has announced the new U.S. passport card may be used as an I-9 employment verification document. The card is used to enter the U.S at land and sea entry points for travel to Canada, Mexico, Bermuda and the Caribbean islands. It will provide a less expensive and smaller alternative to the regular passport book.

It may be used as a "List A" document by a newly hired employee as identification and to prove work eligibility.

Tool Plan Payments

The IRS issued a coordinated paper on July 2, 2008, stating the IRS position on employee tool and reimbursement plans. The paper indicates that all tool and reimbursement plans reviewed to date by the IRS do not meet accountable plan requirements and are therefore payments that must be included in gross income of the employee, subject to W-2 reporting and all federal employment taxes. The paper goes on to identify why this type recharacterization is an abuse of the accountable expense plan rules and are not allowable.

Mileage Reimbursement

Effective July 1, 2008, the standard mileage rate increased from 50.5 cents to 58.5 cents per mile for reimbursement of business miles. The reimbursement rate for moving and medical expense increased to 27 cents, with the rate for charitable mileage remaining at 14 cents per mile. The change in rates expires on December 31, 2008, so look for new rates to be released prior to the end of the year.

Cell Phones

With some prodding from Congress, the IRS is considering relaxing some of the rules that currently require personal use of an employer-provided cell phone to be tracked and included as income to the employee. The IRS has acknowledged today's business environment has made tracking personal use difficult and that a de minimis use rule may be appropriate. With rapidly changing technology, it is difficult to keep pace with rules and regulations, whether by the government or with corporate policies.

Minimum Wage Impacts

The minimum wage increased July 24, 2008, to \$6.55 an hour and will be followed on July 24, 2009 with an increase to \$7.25. These increases also affect the minimum wage in various states, and can also have ripple effects to other calculations

The IRS has again reminded employers and employees that the minimum wage increases have no impact on the credit for employer social security taxes paid on cash tips, the 45B credit. This is because the credit calculation is locked into the minimum wage used prior to January 1, 2007.

However, the minimum wage increase does have an impact on the calculation of garnishments to repay debts, under both federal and state laws. Federal law limits garnishments to repay debt to 25% of disposable earnings for the week, or the amount disposable earnings exceeds 30 times the federal minimum hourly wage then in effect.

Automatic Benefit Enrollment

The U.S. Department of Labor (DOL) has issued an advisory letter advising that ERISA preempts state laws that would prevent employers from automatically enrolling of employees into certain benefit plans. ERISA states that the federal provisions supersede any and all state laws related to employee benefit plans. The DOL indicates the federal law was intended to provide a uniform body of benefit laws.

Retirement Calculator

The Social Security web site has a new retirement estimator providing a personalized social security retirement benefits. This planning tool allows an immediate calculation based on an individual's personal social security earnings record. This new interactive tool allows the comparison of different retirement options by changing stop work dates or expected future earnings. As a secure site, the calculations can only be viewed online and can not be printed. No personal information is displayed on the site. This is a great tool for employers to refer employees with "what if" questions regarding their retirement and can be found at www.socialsecurity.gov/estimator.

GAO

The General Accounting Office (GAO) has reported to Congress on the "tax gap" for payroll taxes. The tax gap for payroll taxes is the difference between what employers should pay and the amount that is actually remitted to the government.. The amount is staggering, especially when you consider the many ways it penalizes honest businesses that comply with their reporting and tax payment responsibilities.

Although no one likes to pay taxes, everyone could pay less if the "tax cheats" could be eliminated. Therefore, the honest businesses have a tremendous stake in the collection and/or prosecution of those who utilize collected payroll taxes for other uses in their businesses.

According to the report, over 1.6 million businesses owe more than \$58 billion in unpaid payroll taxes as of September 30, 2007, the last full fiscal year for which data is available. This includes over 100,000 businesses over two years in arrears, and over 14,000 businesses over five years in

arrears in paying their payroll tax obligations. Compounding this even further are those businesses that do not properly classify workers or pay them “off the books” to avoid payroll taxes entirely, and that are not included in the amounts in this study.

Another result of the payment shortfalls is that amounts must be transferred from the general fund to the Social Security and Medicare accounts, preventing those funds from being used for other purposes.

According to the GAO report, the major business segments with unpaid taxes are construction, professional services and healthcare. These three industries account for around 30% of the outstanding payroll taxes in the study.

The IRS has historically considered the tax system as a voluntary compliance program and tailored their collection efforts accordingly. Therefore, some collection tools available are almost reluctantly used in order to allow voluntary payment, even of past-due amounts with increasing balances. Current IRS policy requires payroll tax collection cases be assigned to a revenue officer for personal contact that creates a much slower collection process than starting with the automated procedures used for other taxes. This slower initial response then slows the filing of any tax liens and assessment of available payroll tax penalties.

Under current law, Trust Fund Recovery Penalties (TFRP) can be assessed against the owners and officers of a business for unpaid payroll taxes. However, the study indicates it can take over a year, and sometimes several years, for the cases to make it to this point under current procedures. This means more taxes and penalties are accruing against the business, with the less likely hood of the balances being collected from the business or owners. In addition, TFRP are considered a separate collection case, resulting in inconsistent treatment depending on the specific revenue officer.

At the urging of Congress and from their own initiatives, the IRS is targeting businesses that repeatedly do not remit payroll taxes timely and continue to accumulate unpaid taxes. This includes the filing of tax liens more promptly (against the business and owner/officers) to help assure the ultimate collection of the taxes. Specific procedures are also being implemented to assess Trust Fund penalties against owners and officers much more promptly than in the past, ideally within six to seven months.

The GAO report showed thousands of businesses filing payroll tax reports 10 or more times showing payroll taxes due, but not remitting the taxes. The IRS is instituting procedures to more quickly move cases of repeat offenders (businesses and responsible owners/officers) to judicial action. By not paying taxes due and continuing in business, these employers are using tax funds for other business purposes, at least an abusive practice, and possibly a criminal activity.

A recent example of criminal charges are those filed this August against the owner, and his associates, of a group of employee leasing companies. They are charged with conspiracy, failure to remit payroll taxes, wire fraud and obstruction of IRS proceedings. The accumulated total of unpaid payroll taxes for this one indictment exceeds \$180 million not remitted to the federal government.

If the GAO recommendations for better monitoring, prioritization and utilization of collection tools are really implemented by the IRS, honest business taxpayers will be the winners and not the losers they often appear to be under the current IRS policy.

For information on the full report, go to www.gao.gov.

De Minimis

In a letter from the Office of Chief Counsel dated June 27, 2008, the IRS has reiterated there is no de minimis dollar amount for fringe benefits. The letter was in response to a question regarding an employer's practice of requiring all non-cash gifts with a value over \$50 be processed through payroll and subject to payroll taxes.

The letter states that the dollar amount is used by the employer as a rule of convenience in administering the de minimis rule and is not imposed by the IRS. The letter further states that there can be no cut-off amount for what defines de minimis, since to do so would require accounting for the item and by definition disqualify it as de minimis.

The tax code defines a de minimis fringe benefit as any property or service the value of which (after taking into account the frequency with which the employer provides similar fringes to other employees) is so small as to make accounting for it unreasonable or administratively impracticable.

Tax regulations provide some examples of de minimis type items, but places no valuation on any of them. Examples include the following:

- Occasional secretarial services by the company.
- Occasional personal use of the company copying machine as long as there is sufficient control and restriction on personal use and personal use of the machine does not exceed 15%.
- Occasional cocktail parties, group meals and picnics for employees and their guest.
- Traditional birthday or holiday gifts of property (not cash) with low fair market value.
- Occasional theater or sporting event tickets.
- Coffee, doughnuts and soft drinks.
- Local telephone calls.
- Flowers, fruit, books or similar property provided to employees under special circumstances, such as accident, illness, outstanding performance or family crisis.

Although not covered by the letter, it is always prudent to remember there is never a de minimis cash payment that can be made to an employee. Cash, or cash equivalent awards (gift cards or certificates, etc.) of any type to employees are taxable income to the employee. The only exception is length-of-service awards for service increments of five years or more, and only if a ceremony is held.

For more information, go to www.irs.gov and look for INFO2009-0023, Internal Revenue Code Section 132(e)(1) and Regulation 1.132-6(e)(1).

Per Diem

The General Services Administration (GSA) has issued the maximum federal per diem rates for the fiscal year beginning October 1, 2008. These rates may be used by employers in lieu of reimbursement for actual expenses by their employees for each day of travel within the continental United States. The employee must still substantiate the time, place and business purpose for each day of per diem payment.

Per diem rates that exceed the federal rates for the locality of travel must be included as wages for payroll tax purposes.

The lowest lodging rate remains \$70, while the highest locality rate has increased to \$360. The six meal and incidental expense (M&IE) rates remain unchanged for the new fiscal year at \$39 to \$64. The standard rate for specific locations not shown on the list will consist of a lodging rate of \$70 and M&IE rate of \$39, for a combined maximum standard rate per day of travel of \$109. Specific location combined rates range up to \$424 in New York City during peak seasons.

The GSA also has a simplified, high-low method for employers to use due to varying rates in based on the time of year in certain areas of the country.

Also available are special meal rates for workers in the transportation industry.

More information and the complete new rates effective October 1, 2008, can be found at www.gsa.gov/perdiem. The rates are periodically adjusted during the year, so you may wish to check for changes at least quarterly if you use any of the rates for travel reimbursement.

Year End

Those involved in year-end payroll compliance and reporting realize that planning and preparation can reduce the work and effort necessary to meet all the various deadlines for filing and updating payroll-related activities. Yet many of us are so busy, year-end slips up on us before we are adequately prepared.

Therefore, it is never too early to identify the parties inside and outside your organization who will provide data, services, etc. to allow the work to be done timely and accurately. Agreements should be reached early on who is responsible for what, and when items will be provided. Follow-up to reinforce the agreements and allow for adjustments where necessary.

Turn all of your employees into "auditors" by asking them to verify the information on their paychecks is accurate. This includes confirming the name matches that shown on their social security card, addresses are correct, and that YTD items on pay stubs appear correct. Also solicit questions from employees that may cut down on retroactive adjustments.

The social security web site provides updated information on how names should be entered on W-2s for filing purposes (hyphenated names, prefixes and suffixes, etc.). Information is also available on matching payroll records to social security information.

During the fourth quarter, keep bank accounts reconciled to timely identify potential checks for reissue or cancellation. Also keep payroll and accounting records reconciled to assure everything is ready to balance to W-2s and other payroll filings.

Where possible, enter term life, awards and prizes, personal auto usage, club dues, etc. into payroll in advance to reduce the log jams that can occur at year-end.

Last, but not least, consider allowing us to partner with you, or provide additional services, for 2009 to help with your compliance needs.