AMERICAN PAYROLL ASSOCIATION

Legislative Updates

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Ohio Conference for Payroll Professionals – August 22-23, 2019

Legislative Actions

TIGTA Releases Report on IRS Progress for TCJA Guidance

The Treasury Inspector General for Tax Administration (TIGTA) released its report on an audit to determine the status of the IRS's efforts to develop and issue guidance for the Tax Cuts and Jobs Act (TCJA) changes [TIGTA Audit Report 2019-14-025, 5-14-19].

What TIGTA found
IRS Chief Counsel began working on TCJA changes shortly after its passage and "has made significant progress in identifying, creating, and issuing the published guidance needed to educate the public about the impact the TCJA will have on its tax obligations," the report said. IRS Chief Counsel determined 72 of the 119 (61%) TCJA provisions administered by the IRS would need published guidance. By the beginning of the 2019 filing season, the IRS published 79 guidance products and four more were issued by March 2019. The IRS still plans to issue more than 90 guidance products.

Published guidance
As of the end of March 2019, the IRS published guidance on 83 changes made by the TCJA. Here are some that affect payroll.

Moving expenses. The exclusion for qualified moving expense reimbursements from an employee's taxable income is suspended for 2018-2025. The exclusion is still available for members of the U.S. Armed Forces on active duty who move because of a permanent change of station. The IRS issued this guidance in Notice 2018-75.

Business meals. In October 2018, the IRS issued Notice 2018-76, which provides transitional guidance on the deductibility of expenses for certain business meals under IRC §274.

Employer credit for paid family and medical leave. The TCJA created a business credit of up to 25% of the wages paid to a qualifying employee while on family and medical leave. In Notice 2018-71, the IRS provided guidance on the employer credit and also announced it intends to publish proposed regulations. In February, the IRS released Form 8994, *Employer Credit for Paid Family and Medical Leave*, and its instructions, which employers will use to claim the cred.

Provisions with no planned guidance
Of the 47 provisions the IRS determined do not require published guidance, two involve payroll.

Qualified bicycle commuting costs. The qualified transportation fringe benefit for bicycle commuters that allows an employer to exclude up to $20 per month for reimbursements of bicycle commuting costs is suspended for tax years 2018 through 2025. These reimbursements are now subject to federal income tax withholding and FICA and FUTA taxes.

Guidance to be issued

The IRS plans to issue more than 90 additional guidance products to explain TCJA changes. These include a notice of proposed rulemaking (NPRM) and a revenue procedure on the limitation on deductions by employers for fringe benefits; and an NPRM on the prohibition on cash, gift cards, and other nontangible personal property as employee achievement awards.

Military Spouses Allowed to Elect Servicemember's Domicile

Spouses of servicemembers can now elect to use the servicemember's domicile for state taxation instead of being required to establish it on their own. If a servicemember is a legal domiciliary of a particular state for tax purposes, the spouse can unilaterally elect to also be a resident of that same state. This change in the law went into effect on December 31, 2018, so spouses can make this election for state and local returns for taxable year 2018 filed in the 2019 income tax filing season. At the end of 2018, passage of the Veterans Benefits and Transitions Act of 2018 (VBTA; Pub. L. 115-407) amended the provision.

Information for state taxes

Employers that withheld state income tax based on the original rule throughout 2018 do not have to go back and correct the withholding based on the VBTA change. Affected employees will need to follow state guidance to elect the domicile and receive a refund of state income tax withheld.

Federal Tax Levies

The IRS has issued a 2019 Publication 1494, *Tables for Figuring Amount Exempt From Levy on Wages, Salary, and Other Income*, with updated exempt amounts based on the number of dependents claimed instead of the number of exemptions. The IRS has also updated Form 668-W, *Notice of Levy on Wages, Salary, and Other Income*, and Form 668-D, *Release of Levy*, to reflect changes made by the TCJA. Form 668-W and Form 668-D are available in the Resource Library on the APA website (https://www.americanpayroll.org/news-resources/resource-library).

Beginning with the revised levy table for 2018, there is now a column for zero dependents, and the Number of Exemptions Claimed on Statement heading has been changed to Number of Dependents Claimed on Statement to conform to the TCJA. The examples have been updated, too.

New Notice Updates Instructions

The IRS created new Notice 1439, *Figuring the Amount Exempt From Levy on Wages, Salary, and Other Income – Forms 668-W, 668-W(ACS) and 668-W(ICS)*, that updates instructions for the three versions of Form 668-W, Notice of Levy on Wages, Salary, and Other Income [https://www.irs.gov/pub/irs-pdf/n1439.pdf].

Changes Made by the TCJA

The TCJA affects how the amount exempt from a federal tax levy on wages is computed. For 2019, the standard deduction for those filing as single is $12,200 and $24,400 for those married filing jointly.

For years when the personal exemption is zero, the amount exempt from levy is the sum of $4,200 (as adjusted for inflation for 2019) multiplied by the number of the taxpayer's dependents for the taxable year, plus the standard deduction, divided by 52. For an employee in 2019 who is a single filer with one dependent, the calculation works out to $315.39 per week [($12,200 + $4,200) ÷ 52].

Employees who do not return the form. If the employee does not return Form 668-W Parts 3 and 4, the exempt amount is calculated as if the employee had returned them indicating married filing separate with no dependents (zero). Employers should not use the information on the employee's Form W-4, *Employee's Withholding Allowance Certificate*, to determine the amount exempt from levy.

NOTE: Employees who do not have a copy of Part 3 of the Form 668-W may use the sample Statement of Dependents and Filing Status found in Notice 1439.

Moving Expenses

The TCJA suspends the exclusion from income of employer-paid, job-related moving expenses for taxable years 2018 through 2025. During those years, employer payments and reimbursements for moving expenses will be subject to federal income tax withholding and FICA and FUTA taxes, including payments from the employer to third parties on behalf of the employee (e.g., payments to a moving company).

The ability of a taxpayer to deduct qualified moving expenses under IRC §217 is also suspended through 2025, so the employee cannot deduct expenses for which the employer makes no payments or reimbursements.

Armed Forces Exception

However, during the suspension period, the exclusion from income still applies to employer payments or reimbursements of job-related moving expenses for members of the Armed Forces (or their spouse or dependents) on active duty who move pursuant to a military order and incident to a permanent change of station.

A permanent change of station includes:

- A move from your home to the servicemember's first post of active duty,
- A move from one permanent post of duty to another, and
- A move from the servicemember's last post of duty to the individual's home or to a nearer point in the United States. The move must occur within 1 year of ending of active duty or within the period allowed under the Joint Travel Regulations.

IRS Clarifies Code P Reporting for Reimbursements in 2018 for Moving Costs Incurred in 2017

The IRS informed employers that reported an amount on Form W-2 in Box 12, Code P, for non-military moves that they do not need to file corrected forms with the Social Security Administration or the IRS [IRS, Clarification on Code P Reporting in Box 12 of the 2018 Form W-2, 3-19-19; https://www.irs.gov/forms-pubs/clarification-on-code-p-reporting-in-box-12-of-the-2018-form-w-2-19-mar-2019]. Employers can tell employees to omit Code P amounts when entering Form W-2 information for tax return purposes, and they do not have to issue Forms W-2c to these employees.

Stock Options

Generally, under IRC §83, employees must recognize income in the tax year that their right to stock is transferable or is not subject to a substantial risk of forfeiture. For income tax purposes, the TCJA adds a new section to the IRC, §83(i), which allows qualified employees to elect to defer the income attributable to qualified stock transferred to the employee by a qualified employer. For FICA purposes, when an employee elects the income deferral, the stock options are treated as nonqualified stock options.

This provision is effective for stock options exercised after December 31, 2017. The TCJA also provides transition relief. Until the IRS issues regulations or other guidance implementing the 80% and employer notice requirements, employers will be treated as complying with the law if they can show that they complied with a reasonable good faith interpretation of the law's requirements.

Employment taxes (including income tax withholding). An employer that fails to deduct and withhold federal income tax under §3402 is liable for the payment of the tax whether or not the employer collects it from the employee, unless §3402(d) applies. Section 3402(d) provides that if the employer fails to deduct and withhold the correct amount of income tax withholding, and thereafter the income tax against which the tax under §3402 may be credited is paid, the tax imposed under §3402(a) shall not be collected from the employer. Section 3402(d) does not relieve the employer from liability for any penalties in respect of the failure to deduct and withhold.

Effective date. Section 83(i) applies to stock attributable to stock options exercised, or RSUs settled, after December 31, 2017. The IRS anticipates that this guidance will be incorporated into future regulations that will apply to any taxable year ending on or after December 7, 2018. Any future guidance, including regulations, addressing the issues covered by this notice, such as the establishment of more restrictive mechanisms to ensure a corporation's income tax withholding requirements are satisfied, will only apply going forward.

IRS Offers Guidance on Form W-2 Box 12 Codes GG and HH Reporting

The IRS's Office of Chief Counsel provided guidance on what information employers should report using Codes GG and HH in Box 12 of Form W-2, *Wage and Tax Statement*. Guidance was also provided on how these codes affect reporting on Form 941, *Employer's Quarterly Federal Tax Return*.

Code GG. For Code GG, the question was whether the code should be used to report only the current year income inclusion of amounts that were deferred in a previous year. The answer was no. The gross income from equity grants under §83(i) for the calendar year is reported regardless of the year in which the deferral was made.

Code HH. For Code HH the question was whether employers should report a running total of deferred amounts including prior year deferrals or whether the amount is limited to the current year deferrals. The answer was that the total amount of deferrals under §83(i) is only for the current calendar year and does not include prior year deferrals.

Form 941. Under §83(i), FICA taxation is not deferred, which means that reporting on Lines 5a through 5e remains unchanged. Form 941, Line 2, wages, tips and other compensation, is not affected until income is includable under §83(i).

Fringe Benefit Changes Affecting Employers

Qualified Transportation Fringe Benefits

The TCJA eliminates the business tax deduction that employers were allowed for the costs incurred by the employer to provide qualified transportation fringe benefits (qualified parking, transit passes, van pools, and bicycle commuting costs) to their employees. This provision is in effect from 2018 through 2025.

NOTE: This provision does not affect the taxability of the benefits to employees, including the purchase of these benefits on a pretax basis. And IRS personnel have made it clear that the IRS considers an amount deducted from an employee's salary on a pretax basis to pay for a qualified transportation fringe benefit to be an employer expense incurred for the benefit that is subject to the deduction prohibition.

For tax-exempt organizations, the TCJA also defines as unrelated business taxable income any expenses paid or incurred for providing qualified transportation fringe benefits, a parking facility used in connection with qualified parking, or any on-premises athletic facility, provided the amounts are not deductible under §274. This provision is effective for amounts paid or incurred after December 31, 2017, and there is no expiration date.

However, while the House version of the TCJA eliminated the employer's deduction of the expense of providing an on-premises athletic facility under §274, the final version did not. Therefore, it would seem that nonprofit organizations do not have to include the cost of providing such a facility in their unrelated business income.

Meals

Under the TCJA, employers may still generally deduct 50% of the food and beverage expenses associated with operating their trade or business (e.g., meals consumed by employees on work travel) on their corporate tax return. From 2018 through 2025, the legislation expands this 50% limitation to expenses of the employer associated with providing food and beverages to employees through an eating facility that meets requirements for de minimis fringes and for the convenience of the employer. This provision only affects the employer's ability to deduct its costs of providing these meals. It does not make the value of the meals taxable to employees.

IRS Issues Transitional Guidance on Deduction for Business Meals

The IRS issued transitional guidance on the deductibility of expenses for certain business meals under IRC §274, which was amended by Public Law 115-97, known as the Tax Cuts and Jobs Act (TCJA) [Notice 2018-76, 2018-42 IRB 599; https://www.irs.gov/pub/irs-irbs/irb18-42.pdf].

Deductions allowed. The guidance states that taxpayers may continue to claim an income tax deduction equal to 50% of an otherwise allowable business meal expense if:

1. The expense is an ordinary and necessary expense under IRC §162(a) paid or incurred during the taxable year in carrying on any trade or business;
2. The expense is not lavish or extravagant under the circumstances;
3. The taxpayer, or an employee of the taxpayer, is present at the furnishing of the food or beverages;
4. The food and beverages are provided to a current or potential business customer, client, consultant, or similar business contact; and
5. In the case of food and beverages provided during or at an entertainment activity, the food and beverages are purchased separately from the entertainment, or the cost of the food and beverages is stated separately from the cost of the entertainment on one or more bills, invoices, or receipts. The entertainment disallowance rule may not be circumvented through inflating the amount charged for food and beverages.

Interim guidance impacts employers, not employees. This interim guidance does not affect the employment tax treatment of food and beverages provided to employees. Reimbursements and advances for employees' business meal expenses continue to be excluded from income for federal income tax withholding, social security, Medicare, and Federal Unemployment Tax Act (FUTA) tax purposes so long as all the requirements of an accountable plan are met (see The Payroll Source ®, §3.3-5).

Regulations to be proposed. The IRS intends to publish proposed regulations about deducting expenses for certain business meals, but Notice 2018-76 can be relied on until then.

Listed Property

Under IRC §280F(d)(4), certain items provided by employers to employees for business purposes that can be easily adapted to personal use are known as "listed property." For these items, heightened substantiation rules apply. The TCJA removed computers and peripheral equipment from the definition of listed property beginning in 2018.

Paid Family and Medical Leave Tax Credit

The TCJA created a new tax credit for employers that provide paid FMLA leave to their employees. Employers may take a general business tax credit equal to 12.5% of wages paid to employees on FMLA leave if the employees are paid at least 50% of their normal wages. The tax credit increases by 0.25% for each percentage point that wage payments exceed 50%. The maximum employer tax credit is 25% of wages paid to employees during the 12 weeks of FMLA leave.

> **Example:** An employer paying an employee on FMLA 66% of the employee's wages will be eligible for the PFMLTC of 16.5% of the wages paid the employee.

The TCJA defines an "eligible employer" as one that has a written policy in place that provides at least two weeks of annual paid family and medical leave to full-time employees and a proportional amount of paid leave to part-time employees.

A "qualifying employee" is defined as an employee who has been employed by the employer for one year or more, and in the preceding year did not receive compensation in excess of 60% of the amount used to define a highly compensated employee. That would set the compensation limit at $72,000 (60% of the threshold for a highly compensated employee in 2018, which was $120,000).

If an employer's policy requires employees use available paid leave such as vacation leave, personal leave, or other medical or sick leave, this paid leave is not considered to be family and medical leave for the tax credit. Leave paid by a state or local government is also not considered to be family medical leave for the tax credit.

> **Example:** An employer provides paid FMLA leave in the following situation:
> - Employee has worked for the employer for more than one year
> - Employee is out of work for four weeks
> - Employee's weekly salary is $1,300
> - Employee is paid 60% of salary while on paid family leave
> - The employer's Paid Family Leave Credit rate is 15% of wages paid (12.5% + (2.5% X (60% - 50%))
> - Wages paid the employee while out of work $3,120 ($1,300 X 60% X 4)
> - Employer Paid Family Leave Credit is $720 ($3,120 X 15%)

The tax credit is available for wages paid in 2018 and 2019. It does not apply to wages paid in tax years beginning after December 31, 2019.

IRS Q&As on Credit for Paid Family and Medical Leave

In September 2018, the IRS provided guidance on the employer credit for providing paid family and medical leave under IRC §45S and also announced it intends to publish proposed regulations [Notice 2018-71, 2018-41 IRB 548]. This guidance expands the eight FAQs the IRS issued in April 2018. The notice is effective as of September 24, 2018, and applies to wages paid in 2018 and 2019.

Topics covered in the Q&As. The Q&As contain 34 entries covering four topics: eligible employers; family and medical leave; minimum paid leave requirements; and calculating and claiming the credit.

2019 Legislative Agenda

Trump Administration Releases Fiscal 2020 Budget Proposal

On March 11, 2019, President Trump released his proposed budget for the 2020 fiscal year, which is available on the Office of Management and Budget's website at https://www.whitehouse.gov/omb/budget/. Many non-defense agencies would see severe budget cuts.

IRS

For the IRS, the budget calls for an increase of $200 million to $11.5 billion in 2020. The budget includes $200 million for additional tax enforcement and compliance activities. Here are other IRS items addressed:

Lowered W-2 e-filing threshold. The budget proposes expanding mandatory electronic filing of Forms W-2. The budget proposes reducing the mandatory electronic filing threshold from 250 to 10 Forms W-2.

Worker classification. The budget proposes to: (1) establish a new safe harbor that allows a service recipient to classify a service provider as an independent contractor and requires withholding of individual income taxes from payments to this independent contractor at a rate of 5% on the first $20,000 of payments, and (2) raise the reporting threshold for payments to all independent contractors from $600 to $1,000, and reduce the reporting threshold for third-party settlement organizations from $20,000 and 200 transactions per payee to $1,000 without regard to the number of transactions. Form 1099-K would be required to be filed with the IRS by January 31 of the year following the year for which information is reported.

Payroll service provider (PSP) fraud. The budget includes a provision renewing two provisions related to PSP fraud. First, change-of-address confirmations relating to an employer making employment tax payments must be sent to both the old and new addresses. Second, the IRS must give special consideration to an offer-in-compromise from a victim of PSP fraud.

SSA

The SSA would see a decrease to its budget, from $10.5 billion to $10.1 billion.

DOL

The budget requests $10.9 billion for the DOL, which is a 9.7% decrease from the 2019 enacted level. The budget highlights specific items, including:

Paid parental leave. The budget includes a proposal to establish a federal-state paid parental leave program within the unemployment insurance (UI) program to provide six weeks of benefits for mothers, fathers, and adoptive parents to begin in 2022.

Expanded access to health coverage. More small businesses would be allowed to form Association Health Plans (AHPs). The budget increases funding for the Employee Benefits Security Administration to develop policy, regulations, and enforcement capacity to enable more employers to adopt the AHP model.

Establishing a UI solvency standard**.** The budget proposes setting a minimum solvency standard to encourage states to maintain sufficient balances in their UI trust funds. States below this minimum standard would be expected to increase UI taxes to build up trust fund balances. States that do not build up sufficient reserves would be subject to Federal Unemployment Tax Act credit reductions.

DHS

E-Verify. The budget proposes mandatory, nationwide use of E-Verify, the internet-based system that allows businesses to determine the eligibility of new employees to work in the United States. Federal contractors are already required to use E-Verify.

Increase worksite enforcement penalties. The budget proposes to increase all penalty amounts against employers that violate Immigration and Nationality Act provisions on the unlawful employment of aliens by 35%.

Mobile Workforce Bill Reintroduced

The Mobile Workforce State Income Tax Simplification Act (S. 604) was introduced in the U.S. Senate on March 28, 2019. As of April 7, 2019, there were 35 senators who had indicated their support for the legislation. It is expected that the legislation will also be introduced in the U.S. House of Representatives during the current legislative session, which runs from 2019 through 2020.

The legislation would protect employers and their employees who travel to another state to work for short periods of time from having to report nonresident state income taxes when working fewer than 30 days in that state. APA has long supported this legislation and serves on the steering committee of the Mobile Workforce Coalition, which has been pushing for the legislation since 2007 (www.mobileworkforcecoalition.org).

Need for Change. In a 2017 letter to the House Judiciary Committee, APA offered two main reasons to support the legislation:

- It reduces employer burden through improved compliance capabilities. Because of the extreme complexity of state tax regulations, compliance for many employers is exceedingly difficult. There often is confusion about whether a business has formed nexus for tax purposes in a state where the business does not have a physical presence or regularly provide services.
- It treats employees fairly. Currently, if an employee performing temporary services in another state receives wages in excess of that state's tax threshold and that state has a higher tax rate than the state of residence, that employee suffers an irretrievable tax increase. This is especially true if the employee's home state does not have an income tax.

The Proposed Requirements. During APA's 2017 Capital Summit, Liz Malm, Senior Policy Analyst and Economist at Multistate Associates and Associate Director of the Mobile Workforce Coalition, and Aziza Farooki, Director of Policy at the Council on State Taxation, described the provisions of the bill:

- An employee's earnings would be subject to tax in the state(s) where the employee is present and performing duties 30 days or more during the calendar year.
- Employees who perform duties in a nonresident state for 30 days or more are subject to tax and employers are subject to withholding in the nonresident state from the commencement of the employee's duties in the nonresident state.
- Professional entertainers and athletes, public figures, and certain movie and television production employees are excluded.
- The bill has no impact on state reciprocity agreements that currently exist or that might be considered.

Opposition. The proposed legislation is supported by both Republicans and Democrats. Opposition comes from the Multistate Tax Commission and Federation of Tax Administrators, along with a few unions that would prefer a 14- or 20-day threshold and exceptions for all high-income employees. However, these alternatives were considered and rejected as the current proposed legislation was being developed.

ULC Approves Uniform Wage Garnishment Act; States Yet to Act

In July 2016, efforts to create a model state act to standardize the process for wage garnishments culminated with the Uniform Law Commission's (ULC) approval of the Uniform Wage Garnishment Act (UWGA) at its annual meeting. Where adopted, the UWGA would significantly alter a state's garnishment process.

Highlights of the UWGA. The UWGA attempts to limit the involvement of the courts, which is expected to reduce costs.

The legal process will begin in the court, but once an employer is served with a garnishment order, the employer (or its agent) will deal directly with the creditor (or its agent). Any party to the garnishment – creditor, employee/debtor, and employer/garnishee – retains the ability to petition the court if necessary.

Once the garnishment is served, an employer would have 21 days to reply to the creditor and provide notice of the garnishment to the employee. Withholding starts on the payday following 30 days after the employer notifies the employee. Remittances are to be made within five days of payday. This ensures employees have sufficient time to address the wage garnishments, including the ability to contest them in court. It also provides sufficient time to ensure that the order makes its way to the personnel responsible for implementing it.

In any state enacting the UWGA, a wage garnishment must be served in the state where the employee's principal place of employment is located, with limited exceptions. This provision should provide employees with access to the court proceeding without having to travel out of state. The order must also be served on an employer's registered agent. This is to ensure that the order is served to an address of record and received by a responsible individual.

The garnishment also must include a separate notice for the employer to provide to the employee. The ULC worked with plain-language experts to craft a notice that is proven to be easily understood. The notice explains the garnishment process, how it affects the employee, and which steps are available to the employee.

Multiple garnishments of equal priority may be processed at the same time, with amounts divided equally among them. This provision would not alter a state's rules regarding orders with priority. A child support order would continue to be withheld in full before a creditor garnishment would be considered.

When the garnishment is served, the creditor must declare the amount owed. The garnishment ceases when either the employer's records show that the debt has been paid in full, the creditor notifies the employer that the garnishment has been dismissed, or the debtor no longer works for the employer. Once the employment relationship ends, the employer has 21 days to notify the creditor's agent. Once notified, the creditor must seek dismissal of the garnishment within 21 days.

The UWGA provides for an administrative fee, in an amount set by the state, to be paid by the creditor when the order is served. When the UWGA is presented to the states, it will contain an alternative provision for a two-fee structure. Rather than a single fee, intended to cover the entire estimated administrative cost up front, the order might require a lesser up-front fee followed by another fee to be withheld from each payment.

The UWGA provides sanctions for both creditors and employers that act in bad faith or fail to fulfill their obligations. For employers, the sanctions range from $5 to $20 a day, but they can be imposed only after the creditor or employee notifies the employer that it has not complied with the order. Once notified, the employer has time to comply. Any sanctions the employer pays to the creditor must be applied to the employee's debt, and the employer is prohibited from recouping those amounts from the employee. A creditor that wrongly seeks a garnishment may be fined up to $1,000 and also be subject to further sanctions.

Next Steps. APA and the ULC have been working together to develop a plan for introducing the UWGA in state legislatures. In 2017, bills were introduced in Nebraska and Colorado. Although neither legislature passed the UWGA, it was a positive step to have it introduced. APA will continue working with the ULC and encourage more states to introduce the legislation in 2019. Full text of the UWGA may be found on the ULC website (https://www.uniformlaws.org/home). On the homepage, type "garnishment" in the search window search and then click on the link for the Wage Garnishment Act

House Unanimously Passes Bill to Reform IRS

On April 9, the U.S. House of Representatives unanimously passed H.R. 1957, the Taxpayer First Act of 2019. The bill would "modernize and improve" the IRS. Companion legislation (S. 928) has been introduced in the Senate. The Taxpayer First Act would establish an independent office of appeals, restrict use of private debt collectors, and improve the IRS's cybersecurity and identity protection capabilities.

Here are some payroll-related sections from the bill:

Electronic Forms 1099. The legislation would require the creation of an online platform for businesses to prepare and file Forms 1099. The platform would maintain a record of completed, filed, and distributed forms and would have a user interface and functionality similar to the Business Services Online Suite of Services provided by the Social Security Administration. The legislation requires the platform to be available by January 1, 2023.

Lowered electronic filing threshold. The IRS currently requires electronic filing when a business files more than 250 information returns. The legislation would lower the threshold to 100 in calendar year 2021 and then to 10 thereafter.

Payment with debit and credit cards. The legislation would allow the IRS to accept payments from debit or credit cards for taxes due if taxpayers also pay the credit card transaction fees associated with the payments.

Authentication of e-Services users. The legislation would require the IRS to verify individuals who apply to open an e-Services account before they are able to use its tools. This provision would be effective 180 days after the legislation is enacted.

The Senate has not voted on the legislation.

Regulatory Actions and Agency Guidance

IRS Data Affirms Payroll's Vital Role in Nation's Tax System

The IRS recently released the 2018 Internal Revenue Service Data Book, which provides statistics that underscore the importance of payroll professionals to the integrity of the American tax system [Publication 55B, Internal Revenue Service Data Book, 2018, 5-20-19].

Employment taxes are primary source of federal revenue

The IRS Data Book reports that, of the $3.47 trillion paid into the Treasury in Fiscal Year 2018 (October 1, 2017 – September 30, 2018), $2.42 trillion was transmitted by employers for employment taxes. This represents nearly 70% of all federal revenue. Payroll payments included: $1.35 trillion in withheld individual income taxes, $1.05 trillion in employer and employee FICA (social security and Medicare) taxes, $8.8 billion in unemployment insurance tax, and $6.3 billion in Railroad Retirement Tax Act taxes.

Other data for FY 2018

Employment tax penalties. Compliance with employment tax requirements continues to be a problem area. The IRS Data Book reports in FY 2018 the IRS assessed 4.92 million civil penalties, which amounted to $4.8 billion and an average penalty assessment of nearly $1,000 ($982.79). Of these, 2.63 million were for failure to pay for a total of $956 million, and 1.20 million were federal tax deposit penalties for a total of $2.98 billion and an average failure to deposit penalty assessment of nearly $2,500 ($2,481.19). The IRS also abated more than 645,000 employment tax penalties totaling $2.77 billion.

Information returns. The IRS received 2.75 billion information returns, which included Forms 1099-MISC, 1042-S, and W-2. Of the returns received, 2.39 billion (86.9%) were filed electronically; 35 million (1.3%) were filed on paper; and 325 million (11.8%) were categorized as other (which includes Forms W-2 processed by the Social Security Administration and then filed with the IRS). If the forms processed by the SSA are included in the number of e-filed returns, the e-filing percentage increases to 98.7%

IRS Proposes Rules to Allow Truncated SSNs on W-2s Furnished to Employees

On September 20, 2017, the IRS issued proposed regulations to allow employers to truncate employee social security numbers (SSNs) on copies of Forms W-2, *Wage and Tax Statement*, furnished to employees. [82 F.R. 43920, 9-20-17; https://www.gpo.gov/fdsys/pkg/FR-2017-09-20/pdf/2017-19910. pdf]. The proposed regulations were to be effective beginning with the 2018 forms furnished to employees in 2019, however the regulations have not yet been finalized.

The IRS proposed the regulations to help prevent identity theft. If finalized, the regulations would allow employers to voluntarily truncate (i.e., mask) SSNs so that they appear in the form of IRS truncated taxpayer identification numbers (TTINs), which display only the last four digits of a taxpayer identification number (TIN) and use X's or asterisks for the first five digits. Truncated SSNs would appear as either XXX-XX-1234 or ***-**-1234. The proposed regulations, which were issued in 2017, had a delayed effective date and would have applied to the Forms W-2 required to be filed or furnished to employees after December 31, 2018. The delayed date was intended to give states time to develop systems to process state income tax returns that are filed with Forms W-2 containing truncated SSNs.

Background

The Protecting Americans from Tax Hikes (PATH) Act of 2015 amended IRC §6051 by requiring employers to include an "identifying number for the employee" on Form W-2 rather than the employee's "social security account number." This change gave the Department of the Treasury the authority to issue guidance to allow or require the use of truncated SSNs on Form W-2. The proposed regulations would implement this provision of the PATH Act.

Truncation Allowed on Employee W-2 Copies

The proposed regulations would amend Treas. Reg. §31.6051-1 to permit employers to truncate employees' SSNs to appear in the form of a TTIN on copies of Forms W–2 that are furnished to employees under IRC §6051 (copies B, C, and 2).

Group-term life insurance. The proposed regulations also would amend Treasury Reg. §1.6052-2 to permit employers to truncate employees' SSNs on copies of Forms W-2 furnished to employees under IRC §6052(b) regarding the payment of wages in the form of group-term life insurance.

Truncation Not Allowed in Other Instances

Forms W-2 filed with the SSA. Treasury Reg. §301.6109-4(b)(2)(iii) prohibits the use of TTINs on any return, statement, or other document that is required to be filed with or furnished to the IRS. The proposed regulations would amend Treasury Reg. §31.6051-2 and §301.6109-4 to clarify that employers may not truncate an employee's SSN to appear in the form of a TTIN on a copy of a Form W-2 filed with the Social Security Administration (SSA) (copy A). Both the IRS and SSA need the full SSN on Forms W-2 to identify individuals.

Employer's EIN. The employer may not truncate its own employer identification number (EIN) on copies of Form W-2 furnished to employees or filed with the SSA.

Third-party sick pay statements furnished to employers. Treasury Reg. §31.6051-3 would be amended to clarify that a payee's SSN may not be truncated to appear in the form of a TTIN on a statement furnished to the employer of a payee who received sick pay from a third party because a statute specifically requires this statement to contain the employee's SSN. However, the proposed regulations would permit employers to truncate payees' SSNs on copies of Forms W-2 furnished to payees that report the third-party sick pay, in accordance with the general rule governing the reporting of wages to employees on Forms W-2, because IRC §6051(f)(2) does not specifically require SSNs.

IRS Proposes Regulations to Increase Number of Electronically Filed Information Returns

The IRS proposed regulations that would require that all information returns, regardless of type, be taken into account to determine whether a business meets the 250-return threshold that determines whether information returns must be filed electronically [83 F.R. 24948, 5-31-18; https://www.gpo.gov/fdsys/pkg/FR-2018-05-31/pdf/2018-11749.pdf]. The proposed regulations would also require electronic filing of corrected information returns, regardless of the number of corrected returns being filed, if the business is required to electronically file information returns.

Proposed Regulations Make Two Changes

Aggregation of forms. The proposed regulations would aggregate all of a business' information returns to determine if the 250-return threshold is met. For example, under the proposed regulations, if a business is required to file 200 Forms 1099-MISC, *Miscellaneous Income*, and 200 Forms W-2, *Wage and Tax Statement*, that business must file all its Forms 1099-MISC and W-2 electronically because it is required to file, in the aggregate, at least 250 information returns covered by Treas. Reg. §301.6011-2(b).

Corrected forms. The proposed regulations would require that corrected information returns be filed electronically, regardless of the number of corrected returns being filed, if a business is required to file information returns electronically. The proposed regulations provide this example: Company Y files 300 original Forms 1099-MISC for the 2018 calendar year. Later, Company Y files 70 corrected Forms 1099-MISC for the 2018 calendar year. Because Company Y is required to file 250 or more information returns for the calendar year, Company Y must file its original 300 Forms 1099-MISC, as well as its 70 corrected Forms 1099-MISC for the 2018 calendar year, electronically.

Effective date. As proposed the regulations would have been effective for information returns required to be filed after December 31, 2018, and for corrected information returns filed after December 31, 2018. However, when these materials went to press the regulation had not been finalized.

Waivers still allowed. The proposed regulations do not amend the existing regulations allowing persons who are required to file returns electronically to request a hardship waiver of the electronic filing requirement.

IRS Issues Proposed Regulations on Hardship Distributions for 401(k) Plans

The IRS issued proposed regulations to amend existing regulations relating to hardship distributions from 401(k) plans [83 F.R. 56763, 11-14-18; https://www.gpo.gov/fdsys/pkg/FR-2018-11-14/pdf/2018-24812.pdf]. The proposed regulations reflect statutory changes affecting 401(k) plans, including those made by the Bipartisan Budget Act of 2018 (Pub. L. 115-123).

Proposed Updates to Retirement Plan Provisions
Two provisions included in Public Law 115-123 remove restrictions on hardship withdrawals and distributions from 401(k) plans. The proposed regulations modify the rules for determining whether a distribution is necessary to satisfy an immediate and heavy financial need by eliminating (1) any requirement that an employee be prohibited from making elective contributions and employee contributions after receipt of a hardship distribution, and (2) any requirement to take plan loans prior to obtaining a hardship distribution. In particular, the proposed regulations eliminate the requirement that a plan suspend an employee's ability to contribute to the plan for at least six months after a hardship distribution is made.

Employers Do Not Have to Allow §457 Plan Withdrawals for Disasters
In a recent information letter, the IRS informed a taxpayer seeking a withdrawal from a §457 plan to make repairs after Hurricane Irma that the plan is not required to make special distributions [IRS Information Letter 2018-0024, 9-28-18; https://www.irs.gov/pub/irs-wd/18-0024.pdf].

Background
IRC §457 retirement plans are set up by certain employers, including state and local governments, to provide a means for employees to contribute part of their pay toward retirement. To help ensure funds are available at retirement, IRC §457(d) prohibits early plan withdrawals while workers are still employed except when the plan participant is faced with an unforeseeable emergency. Whether a participant satisfies the plan's rules for a withdrawal is determined by the plan administrator.

Distributions Are Not Required
Victims affected by Hurricane Irma were helped by Public Law 115-63, the Disaster Tax Relief and Airport and Airway Extension Act of 2017). The law authorizes retirement plans, including §457 plans, to make distributions to individuals who suffered an economic loss because of Hurricane Irma. These distributions, which had to be made before January 1, 2019, are eligible for favorable tax treatment. However, a §457 plan is not required to make special distributions on account of Hurricane Irma, and even if it does, the plan may impose conditions on obtaining a distribution.

Publication 976, *Disaster Relief*, contains more information on disaster distributions and tax relief for businesses and individuals (https://www.irs.gov/pub/irs-pdf/p976.pdf).

IRS Upholds Student Loan Repayment Feature Under 401(k) Plan

In a Private Letter Ruling (PLR), the IRS determined that an employer could amend its 401(k) plan to offer a student loan repayment (SLR) benefit without violating the contingent benefit prohibition under IRC §401(k)(4)(A) [IRS PLR 201833012, 8-17-18; https://www.irs.gov/pub/irs-wd/201833012.pdf].

The Proposed SLR Benefit Program

Under the proposed amendment to the plan, the employer would be allowed to make "SLR nonelective contributions." These nonelective contributions are ones the employer makes to the plan on behalf of the employee on the condition that the employee makes SLRs. The program would be voluntary. An employee participating in the program would still be eligible to make elective contributions but would not be eligible to receive regular matching contributions for those contributions.

The SLR nonelective contributions would be made without regard to whether the employee makes any elective contributions throughout the year. If the employee does not make a SLR, but does make an elective contribution during a pay period, the employer would make a matching contribution for that pay period ("true-up matching contribution"). Both SLR nonelective contributions and true-up matching contributions would be subject to the same vesting schedule as regular matching contributions. The SLR nonelective contribution would also be subject to all applicable plan qualification requirements.

SLR Allowed

In this case, the SLR nonelective contributions are conditioned on whether an employee makes a SLR during a pay period and are not conditioned (directly or indirectly) on the employee making elective contributions under a cash or deferred arrangement. Because an employee who makes SLRs and receives SLR nonelective contributions is still permitted to make elective contributions, the SLR nonelective contribution is not conditioned (directly or indirectly) on the employee electing to have the employer make or not make contributions under the arrangement in lieu of receiving cash. Therefore, the IRS allowed the SLR in this instance.

NOTE*:* Private Letter Rulings respond to the specific situations presented in the request for the ruling and may not be cited as precedent. However, they do provide insight on how the IRS may view similar situations.

Proposed Regulations Would Expand Use of HRAs

The IRS, the U.S. Department of Labor (DOL), and the Department of Health and Human Services (HHS) issued proposed regulations to allow employers to fund tax-exempt health reimbursement arrangements (HRAs) to help pay for employees' health insurance premiums [83 F.R. 54420, 10-29-18; https:// www.gpo.gov/fdsys/pkg/FR-2018-10-29/pdf/2018-23183.pdf],

What Is an HRA?

An HRA is paid for solely by the employer and not provided pursuant to a salary reduction election or under a §125 cafeteria plan. It reimburses the employee for medical care expenses incurred by the employee and the employee's spouse, dependents, and adult children until the year they reach age 27 and provides reimbursements up to a maximum dollar amount for a coverage period, with any unused portion of the maximum dollar amount at the end of the coverage period carried forward to increase the maximum reimbursement amount in subsequent coverage periods (see *The Payroll Source*®, §4.1-6). Reimbursements under HRAs are excludable from employees' income and wages for federal income tax and employment tax purposes.

Proposed Regulations

Current regulations prohibit employers from funding HRAs to pay for employees' individual health insurance premiums. The proposed regulations would permit employers that offer traditional group health coverage to provide an HRA of up to $1,800 per year (indexed to inflation) to reimburse employees for qualified medical expenses, including stand-alone dental benefits or premiums for short-term insurance plans. The proposed regulations would be effective for plan years beginning on or after January 1, 2020.

IRS Offers Guidance for ALEs That Offer HRAs

The IRS offers guidance on how proposed regulations for IRC §4980H would apply to an applicable large employer (ALE) that offers an employee coverage under a health reimbursement arrangement (HRA) [Notice 2018-88, 11-19-18; https://www.irs.gov/pub/irs-drop/n-18-88.pdf].

Background

In late October 2018, proposed regulations were issued to allow employers to fund tax-exempt HRAs to help pay for employees' health insurance premiums (83 F.R. 54420, 10-29-18; https://www.gpo.gov/fdsys/pkg/FR-2018-10-29/pdf/2018-23183.pdf. An HRA is paid for solely by the employer and not provided pursuant to a salary reduction election or under a §125 cafeteria plan (see *The Payroll Source*®, §4.1-6). Reimbursements under HRAs are excludable from employees' income and wages for federal income tax and employment tax purposes.

Current regulations prohibit employers from funding HRAs to pay for employees' health insurance premiums. The proposed regulations would allow employers that offer traditional group health coverage to fund up to $1,800 per year in an HRA to reimburse employees for certain medical expenses, including stand-alone dental benefits or premiums for short-term insurance plans. The proposed regulations would be effective for plan years beginning on or after January 1, 2020.

IRS Issues Final Regulations on Recordkeeping Requirements for Charitable Contributions Made by Payroll Deduction

The IRS issued final regulations under IRC §170 on substantiating charitable contributions made by payroll deduction [83 F.R. 36417, 7-30-18; https://www.gpo.gov/fdsys/pkg/FR-2018-07-30/pdf/2018-15734.pdf].

The regulations, which were effective as of July 30, 2018, implement provisions of the Pension Protection Act of 2006 (PPA; Pub. L. 109-280), which amended the Internal Revenue Code to require substantiation of all monetary charitable contributions, not just those of at least $250. The IRS proposed these regulations in August 2008, and the final regulations make no substantive changes in relation to charitable contributions made through payroll deduction (73 F.R. 45908, 8-7-08; https://www.gpo.gov/fdsys/pkg/FR-2008-08-07/pdf/E8-17953.pdf).

IRC §170(f)(8): Contributions of $250 or More
For a contribution of $250 or more, §170(f)(8) provides that no deduction is allowed unless it is substantiated by a contemporaneous written acknowledgment of the contribution by the donee organization containing:

- the amount of cash and a description of any property other than cash contributed;
- a statement of whether the donee organization provided any goods or services in exchange for the contribution; and
- a description and good faith estimate of the value of any goods or services provided in exchange for the contribution.

IRC §170(f)(17): All Contributions
The PPA changed the recordkeeping requirements for taxpayers claiming deductions for cash contributions to charities, including contributions made by payroll deduction. The PPA added IRC §170(f)(17), effective for contributions made in taxable years beginning after August 17, 2006, which provides that no deduction is allowed for *any monetary gift* unless it is substantiated by a record.

Contributions Made by Payroll Deduction
Under §170(f)(17), a charitable contribution made by payroll deduction must be substantiated by:

- A pay stub, Form W-2, or other document furnished by the employer that sets forth the amount withheld during a taxable year by the employer for the purpose of payment to a donee organization, and
- A pledge card or other document prepared by or at the direction of the donee organization that shows the name of the donee organization.

To substantiate a single contribution of $250 or more made by payroll deduction for purposes of §170(f)(8), the pledge card or other document prepared by the donee organization must include a statement to the effect that the organization does not provide goods or services in exchange for contributions made by payroll deduction.

Previous Guidance Now Obsolete
IRS Notices 2006-110 (2006-51 IRB 1127) and 2008-16 (2008-4 IRB 315) provided transitional guidance under §170(f)(17). These notices provided that taxpayers could rely on them until final regulations became effective. Notices 2006-110 and 2008-16 are obsolete as of July 30, 2018.

IRS to Issue Regulations on Definition of Qualifying Relative

The IRS plans to issue proposed regulations to clarify the definition of "qualifying relative" for head of household filing status under IRC §2(b) and the new $500 tax credit for other dependents under IRC §24(h) (4) [Notice 2018-70, 8-28-18; https://www.irs.gov/pub/irs-drop/n-18-70.pdf]. Public Law 115-97, known as the Tax Cuts and Jobs Act, changed the exemption amount in §151(d) to zero for tax years 2018 through 2025. This created confusion concerning the definition of a qualifying relative. IRC §152(d)(1)(B) requires that the qualifying relative have gross income that is less than the exemption amount, which the IRS said will be treated as $4,150 for 2018 ($4,200 for 2019; adjusted annually for inflation) rather than zero.

IRS Warns Payroll Professionals of Tax Scams in Annual Dirty Dozen List

The IRS released its annual "dirty dozen" list of tax scams, which includes schemes the IRS has identified as aimed at payroll professionals [IR-2019-26]. The IRS continues to warn taxpayers and businesses about the ongoing threat of internet phishing scams that lead to tax-related fraud and identity theft. The IRS set up a landing page to answer many questions about phishing and online scams (https://www. irs.gov/privacy-disclosure/report-phishing).

Phishing Scams Target Payroll
Phishing scams targeting payroll and human resources are known as business email compromise (BEC) or business email spoofing (BES) scams. Depending on the variation, a criminal may pose as a business asking the recipient to pay a fake invoice; an employee seeking to re-route a direct deposit; or someone in a position of trust, such as an executive or other recognizable employee, requesting to initiate a wire transfer.

The W-2 phishing scam has been a hot topic for the past few years. The IRS warned of the BEC/BES direct deposit scam in December (IR-2018-255, 12-17-18, https://www.irs.gov/newsroom/irs-security-summit-partners-warn-tax-professionals-of-fake-payroll-direct-deposit-and-wire-transfer-emails).

W-2 scam. The IRS cautioned that all employers may be targets for the W-2 scam, which it credits as one of the more dangerous email scams. Payroll employees are sent emails that appear to be from an executive or organization leader. The message starts with a simple greeting and asks for sensitive Form W-2 information. Because employees believe they are corresponding with a company executive, it may take weeks for someone to realize a data theft has occurred.

Direct deposit scam. This scam generally involves emails that impersonate an employee, often an executive, that are sent to payroll or human resources. The email from the "employee" asks to change the direct deposit account for payroll purposes. The "employee" provides a new bank account and routing number controlled by the thief.

Wire transfer scam. These emails impersonate a company executive and are sent to the company employee responsible for wire transfers. The email requests a wire transfer be made to a specific account controlled by the thief.

IRS Stops $24.2 Billion in Fraudulent Refunds Between 2015-2018

The IRS and its Security Summit partners announced they have stopped $24.2 billion in fraudulent tax refunds between 2015 and 2018, which is "major progress in the fight against tax-related identity theft" [IR-2019-66, 4-8-19].

The news is part of the key annual indicators the Security Summit analyzes to mark its progress in combating identity theft. Here are other results:

- In 2018, the IRS stopped 649,000 confirmed fraudulent returns that tried to obtain $3.1 billion in refunds. The IRS stopped fraudulent returns claiming $6 billion in 2017, $6.4 billion in 2016, and $8.7 billion in 2015, for a grand total of $24.2 billion.
- Between 2015 and 2018, the number of taxpayers reporting they were identity theft victims fell 71%. In 2018, the IRS received 199,000 reports from taxpayers compared to 677,000 in 2015. This was the third consecutive year this number declined. There were 242,000 identity theft reports in 2017 and 401,000 in 2016.
- Between 2015 and 2018, the number of confirmed identity theft returns stopped by the IRS declined by 54%. For 2018, there was a slight (9%) uptick in the number of confirmed identity theft returns: 649,000 compared to 597,000 in 2017. But the 2018 count is still significantly below the 883,000 in 2016 and the 1.4 million in 2015.

Identity thieves take aim at businesses

The IRS also warned businesses that they may be targets of identity thieves. The IRS said the number of businesses reporting they are victims of tax-related identity theft increased by 10% for 2018, with 2,450 reports compared to 2,233 reports in 2017. Although many of these reports center on thieves filing fictitious business tax returns, identity thieves use several different tactics affecting payroll professionals. Thieves may file a fraudulent quarterly tax payment or use stolen employer identification numbers to create fraudulent Forms W-2.

Thieves also may use phishing scams known as business email compromise or business email spoofing scams. Depending on the scam variation, a criminal may pose as a business asking the recipient to pay a fake invoice; an employee seeking to reroute a direct deposit; or someone in a position of trust, such as an executive or other recognizable employee, requesting to initiate a wire transfer. These types of scams made the IRS's annual "dirty dozen" list of tax scams for their severity (IR-2019-26, 3-4-19).

DOL Issues Opinion Letter on Worker Classification

The U.S. Department of Labor's (DOL) Wage and Hour Division (WHD) issued an opinion letter that addresses whether workers for a virtual marketplace company were employees or independent contractors under the Fair Labor Standards Act (FLSA) [DOL, U.S. Department of Labor Issues New Wage and Hour Opinion Letter, Concludes Service Providers for a Virtual Marketplace Company Are Independent Contractors, 4-30-19; https://www.dol.gov/newsroom/releases/whd/whd20190429].

The opinion letter analyzes the situation under a six-factor test derived from U.S. Supreme Court precedent to conclude the virtual marketplace workers were independent contractors [Opinion Letter FLSA2019-6].

The situation
A virtual marketplace company operating in the on-demand or sharing economy asked the WHD to determine whether its workers, called service providers, were employees or independent contractors.

Before the company allows service providers to use its platform, the company requires them to provide basic information, including a name, contact information, and social security number. Service providers must also self-certify their experience and qualifications, complete a background check through an accredited third party, and complete an identity check through a different vendor. Service providers must also acknowledge and accept a terms of use agreement and a service agreement, which states that the company provides only a platform for connecting service providers with customers and disclaims any employment relationship between the company and the service providers. These agreements state that only the service providers, and not the company, will provide services to consumers in the virtual marketplace. The agreements also classify the service providers as independent contractors.

Economic dependence is the 'touchstone'
The letter stated that economic dependence is the touchstone in determining whether a relationship is employee/employer or independent contractor. The WHD uses this six-factor test:

1. The nature and degree of the potential employer's control;
2. The permanency of the worker's relationship with the potential employer;
3. The amount of the worker's investment in facilities, equipment, or helpers;
4. The amount of skill, initiative, judgment, or foresight required for the worker's services;
5. The worker's opportunities for profit or loss; and
6. The extent of integration of the worker's services into the potential employer's business.

The determination
The company only provided a referral service and did not receive services from service providers. The service providers did not work directly for the company, and there was no permanency in their relationship. The service providers were not economically dependent on the company, which provided little to no control over them.

The company did not require service providers to: undergo training; accept or complete a certain number of jobs; work exclusively for the company; set a certain schedule; or perform their work in a certain manner.

The company had no investment in the service providers' facilities or equipment. The service providers also were not integrated into the company's business as they did not develop, maintain, or operate the company's platform.

The WHD found, based on the facts, the service providers were independent contractors.

Searching opinion letters
Employers can search available opinion letters to see if their situations have been addressed by the DOL by visiting https://www.dol.gov/whd/opinion/search/fullsearch.htm.

DOL Proposes $679 Weekly Salary Threshold for 'White Collar' Exemption

The U.S. Department of Labor (DOL) published a proposed rule that would increase the minimum salary level for the Fair Labor Standards Act (FLSA) "white collar" exemptions from $455 to $679 per week (or from $23,660 per year to $35,308 per year) with an anticipated start date of January 2020 [84 F.R. 10900, 3-22-19; https://www.govinfo.gov/ content/pkg/FR-2019-03-22/pdf/2019-04514.pdf]. The DOL initially announced the proposal on March 7, although it was not published in the *Federal Register* until March 22 [DOL, *U.S. Department of Labor Releases Overtime Update Proposal*, 3-7-19; https://www.dol.gov/newsroom/releases/osec/osec20190307]. The DOL predicted its proposed rule "would make more than a million more American workers eligible for overtime."

The proposed required amount of compensation per week may be translated into equivalent amounts for periods longer than one week. The proposed requirement would be met if the employee is compensated biweekly on a salary basis of $1,358, semimonthly on a salary basis of $1,471, or monthly on a salary basis of $2,942. However, the shortest period of payment to meet this proposed compensation requirement is one week.

The latest information on the white collar exemptions and other payroll topics is available on the APA website in the Hot Topics section under the Compliance tab at https://www.americanpayroll.org/ compliance/compliance-overview/hot-topics.

Background
The white collar regulations implement exemptions from the FLSA's minimum wage and overtime pay requirements for executive, administrative, professional, and certain other employees. The overtime threshold was last updated in 2004. A 2016 final rule that would have increased the overtime threshold to $913 was invalidated by a court order before it could go into effect.

After the 2016 final rule was invalidated, the DOL published a Request for Information in the *Federal Register* allowing the public to comment on the overtime rule in July 2017 (82 F.R. 34616, 7-26-17; https://www.gpo.gov/fdsys/pkg/FR-2017-07-26/pdf/2017-15666.pdf). The DOL reviewed the more than

240,000 submissions it received. In 2018, the DOL held listening sessions across the country to hear the public's ideas on updating the white collar regulations (see PAYROLL CURRENTLY, Issue 9, Vol. 26).

Other Provisions in the Proposed Rule
In addition to increasing the minimum salary level to $679 a week, the proposed rule would also:

- Increase the salary requirement for Highly Compensated Employees (HCEs) from $100,000 to $147,414 per year.
- Allow employers to use nondiscretionary bonuses and incentive payments (including commissions) that are paid annually or more frequently to satisfy up to 10% of the standard salary level. Under this proposal, employers must pay exempt employees 90% of the standard salary level ($611.10 per week), and if at the end of the 52-week period the salary paid plus the additional payments do not equal the standard salary level for 52 weeks ($35,308), the employer would have one pay period to make up for the shortfall (up to 10% of the standard salary level, $3,530.80). The use of bonuses in the salary level was part of the 2016 final rule; however, the required frequency has been changed. Under the 2016 rule payments would have been required on a quarterly basis or more frequently.

The proposed rule would work in a similar manner for HCEs, but employers have would have a one-month deadline to make the payment. If an HCE's total annual compensation does not total at least $147,414 by the last pay period of the 52-week period, the employer may, during the last pay period or within one month after the end of the 52-week period, make one final payment sufficient to achieve the required level.

- Create special salary levels for Puerto Rico, the Virgin Islands, Guam, and the Commonwealth of the Northern Mariana Islands (CNMI), and add a separate special salary level for American Samoa. For Puerto Rico, the DOL proposes to set a special salary level of $455 per week, which is the level currently in effect under the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA). For the Virgin Islands, Guam, and the CNMI, the DOL proposes setting a special salary level of $455 per week. For American Samoa, the special salary level is proposed at $380 per week.
- Update the special weekly base rate for the motion picture industry to $1,036 per week (or a proportionate amount based on the number of days worked).

The proposed rule does not make changes to the job duties test, and it does not include a provision to automatically adjust the salary threshold. However, the DOL recognized the need to adjust the salary level on a more frequent basis. The DOL proposes adjusting the standard salary and HCE thresholds every four years through the notice and comment process.

DOL Proposes Rule to Update Regular Rate Determination Under FLSA

The U.S. Department of Labor (DOL) published a proposed rule to clarify and update regular rate requirements under §7(e) of the Fair Labor Standards Act (FLSA) [84 F.R. 11888, 3-29-19; https://www.govinfo.gov/ content/pkg/FR-2019-03-29/pdf/2019-05687.pdf]. The regulations have not been updated in decades, and the DOL said the proposed rule "would better define the regular rate for today's workplace practices."

The proposed rule does not make sweeping changes. Instead it clarifies whether certain perks, benefits, or miscellaneous items must be included in the regular rate of pay. The DOL created several resources to provide additional information on the proposed rule, including: a dedicated webpage, *Notice of Proposed Rulemaking: Regular Rate* (https://www.dol.gov/whd/overtime/regularrate2019.htm); which provides links to a fact sheet; and a frequently asked questions webpage.

Regular Rate Requirements

The FLSA generally requires overtime pay of at least 1½ times the regular rate of pay for hours worked in excess of 40 hours per workweek. Regular rate requirements define what forms of payment employers include and exclude in the regular rate calculation when determining overtime rates.

Listed Exclusions From the Regular Rate
The proposed rule confirms that employers may exclude these from an employee's regular rate of pay:

- The cost of providing wellness programs, onsite specialist treatment, gym access and fitness classes, and employee discounts on retail goods and services;
- Payments for unused paid leave, including paid sick leave;
- Pay for time that would not otherwise qualify as ''hours worked,'' including bona fide meal periods, unless an agreement or established practice indicates that the parties have treated the time as hours worked;
- Reimbursed expenses, even if not incurred solely for the employer's benefit;
- Reimbursed travel expenses that do not exceed the maximum travel reimbursement or per diem permitted under the federal system (reimbursements exceeding this amount are also excluded if they are considered reasonable);
- Discretionary bonuses;
- Benefit plans, including accident, unemployment, and legal services; and
- Tuition programs.

Discretionary bonuses. The proposed rule would modify the language in 29 C.F.R. §778.211(c) and add a new paragraph (d) with examples to clarify that, under longstanding principles, neither the label assigned to a bonus nor the reason it was paid conclusively determine whether it is discretionary. The terms of the statute and the specific facts determine whether a bonus is discretionary. Under FLSA §7(e) (3), a bonus is discretionary and, therefore, excludable, if both the fact that the bonus is to be paid and the amount are determined at the employer's sole discretion at or near the end of the bonus period. The bonus also must not be paid pursuant to any prior contract, agreement, or promise.

Tuition reimbursements. The proposed rule would add an example to clarify that certain tuition programs offered by employers may be excludable from the regular rate. The DOL also said some employer tuition programs may be excludable from the regular rate under FLSA §7(e)(1) as "sums paid as gifts." The DOL is considering whether tuition programs provided pursuant to a bona fide plan may be excludable under §7(e)(4). The DOL specifically requested comments on tuition benefits provided by employers.

Two Changes
The DOL also proposed two changes to the existing regulations.

Call-back pay. The proposed rule would eliminate the restriction in §§778.221 and 778.222 that "call-back" pay and other payments similar to call-back pay must be "infrequent and sporadic" to be excludable from an employee's regular rate. The proposed rule states that these payments "must not be so regular that they are essentially prearranged."

Basic rate. The proposed rule would update "basic rate" regulations under FLSA §7(g)(3). Currently, employers using an authorized basic rate may exclude from the overtime calculation any additional payment that would not increase total overtime compensation by more than $0.50 a week on average for overtime workweeks in the period for which the employer makes the payment. The proposed rule would change the $0.50 limit to 40% of the federal minimum wage (currently $2.90). This rate has not been updated since 1966.

DOL Issues Proposed Rule for Joint Employer Status

On April 9, the U.S. Department of Labor (DOL) issued a proposed rule "to revise and clarify the responsibilities of employers and joint employers to employees" under the Fair Labor Standards Act (FLSA) [84 FR 14043, 4-9-19, https://www.govinfo.gov/content/pkg/FR-2019-04-09/pdf/2019-06500.pdf]

The DOL also created a webpage dedicated to the proposed rule (https://www.dol.gov/whd/flsa/ jointemployment2019/) that provides links to additional resources including a fact sheet, frequently asked questions, and examples of joint employment situations.

Background
The FLSA allows "joint employer situations where an employer and a joint employer are jointly responsible for the employee's wages." The proposed rule would ensure joint employers clearly understand their responsibilities to pay at least the federal minimum wage for all hours worked and overtime for all hours worked over 40 in a workweek. The proposed rule reiterates that "a joint employer is jointly and severally liable with the employer and any other joint employers for all wages due to the employee under the [FLSA]." The DOL has "not meaningfully revised its joint employer regulation since 1958."

The Four-Factor Test
The DOL proposes a four-factor test to replace the "not completely disassociated" standard. The test considers whether the potential joint employer actually exercises the power to:

- hire or fire the employee;
- supervise and control the employee's work schedules or conditions of employment;
- determine the employee's rate and method of payment; and
- maintain the employee's employment records.

The proposal includes examples to further clarify joint employer status. The proposed rule provides guidance on how to apply the test; explains additional factors that should and should not be considered; and clarifies a business model (such as a franchise), certain business practices (participation in an association health or retirement plan), and contractual agreements do not make joint employer status more or less likely.

The DOL also said additional factors may be relevant to the joint employer analysis, but only if they are indicative of whether the potential joint employer is: exercising significant control over the terms and conditions of the employee's work, or otherwise acting directly or indirectly in the interest of the employer in relation to the employee.

Economic Dependence: Not Relevant
The DOL also said whether an employee is economically dependent on the potential joint employer is not relevant in determining the economic reality of the potential joint employer's status under the FLSA. Economic dependence measures whether a worker is an employee or an independent contractor, not whether an employer may be a joint employer.

The DOL said three economic dependence factors are not relevant to determining joint employer status. The factors are whether the employee:

- is in a specialty job or a job that otherwise requires special skill, initiative, judgment, or foresight;
- has the opportunity for profit or loss based on his or her managerial skill; and
- invests in equipment or materials required for work or the employment of helpers.

DOL Issues Three Opinion Letters on FLSA Topics

The U.S. Department of Labor's (DOL) Wage and Hour Division (WHD) issued three opinion letters that address compliance under the Fair Labor Standards Act (FLSA) [DOL, U.S. Department of Labor Issues New Wage and Hour Opinion Letters, 4-2-19; https://www.dol.gov/newsroom/releases/whd/whd20190402].

Opinion letter topics
The three opinion letters address these very specific FLSA issues.

Residential care facilities and the "8 and 80" overtime system. Although this opinion letter does not reach a conclusion as to whether the "youth residential care facility" in question qualified as a "residential care institution" on the facts presented, it restates the allowances for residential care facilities' use of the "8 and 80" overtime system (Opinion Letter FLSA2019-3). Under the "8 and 80" system, a hospital or residential care institution may, pursuant to a prior agreement or understanding with its employees, calculate overtime over a consecutive, 14-day period rather than a workweek under 29 C.F.R. §778.601. Employers that use this method must pay overtime for all hours worked over 8 in any workday and over 80 hours in a 14-day period. However, any premium payments for daily overtime hours may be credited toward the overtime payments due for hours worked in excess of 80 in the 14-day period.

Nutritional outreach Instructors' exemption as teachers. The next opinion letter addresses whether nutritional outreach instructors employed by a public university are exempt from overtime pay requirements (Opinion Letter FLSA2019-4). The letter said these instructors fell under the teacher exemption in 29 USC §213(a)(1) since their primary duty is "teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge" and they do so as employees of an "educational establishment" as defined in 29 C.F.R. §541.303(a).

Agricultural exemptions. This letter addresses specific farm activities and whether they fall under the agricultural exemption (Opinion Letter FLSA2019-5). Under 29 USC §213(b)(12), employees employed in agriculture are exempt from overtime. The letter explains primary and secondary agricultural activities listed in 29 USC §203(f) and also points to Field Assistance Bulletin 2013-1, which discusses how to determine whether a farmer's processing of its own agricultural products is subordinate to or independent from its farming activities.

The letter stated that a farm's activities of cutting or freezing its own fruit, vegetables, or meat can qualify as secondary agriculture if they are subordinate to farming operations and do not amount to an independent business. The employees performing those activities would be exempt from overtime pay requirements. In such situations, the farmer's employees who pack and store the cut or frozen products and deliver them from the farm to market would also be working in secondary agriculture.

Searching opinion letters
Employers can search available opinion letters to see if their situations have been addressed by the DOL by visiting https://www.dol.gov/whd/opinion/search/fullsearch.htm.

DOL Updates Minimum Wage for Federal Contractors for 2019

Pursuant to Executive Order (EO) 13658 and its implementing regulations, the U.S. Department of Labor (DOL) has issued a notice announcing that beginning January 1, 2019:

- The minimum wage rate that generally must be paid to workers performing work on or in connection with covered federal contracts is $10.60 per hour (up from $10.35).
- The required minimum cash wage that generally must be paid to tipped employees performing work on or in connection with covered contracts is $7.40 per hour (up from $7.25) [83 F.R. 44906, 9-4-18; https://www.gpo.gov/fdsys/pkg/FR-2018-09-04/pdf/2018-19166.pdf].

EO raises the minimum wage. EO 13658, signed by President Obama on February 12, 2014, raised the hourly minimum wage paid by contractors to workers performing work on covered federal contracts to $10.10 per hour beginning January 1, 2015 with annual inflation adjustments thereafter.

Rates for Seasonal Recreational Services Workers
On September 26, 2018, the DOL published a final rule in the Federal Register exempting seasonal recreational services workers' wages to implement EO 13838, signed by President Trump on May 25, 2018 (83 F.R. 48537, 9-26-18; https://www.gpo.gov/fdsys/pkg/FR-2018-09-26/pdf/2018-20757.pdf). The EO exempts federal workers who provide seasonal recreational services for the general public (e.g., hunting, fishing, horseback riding, camping, mountaineering activities) from the minimum wage requirements of EO 13658. The exemption does not apply to federal contractors who provide lodging and food services associated with the seasonal recreational activities (see PAYROLL CURRENTLY, Issue 7, Vol. 26).

DOL Revises Guidance for FLSA Tip Credit and Dual Jobs

The U.S. Department of Labor's (DOL) Wage and Hour Division (WHD) issued a Field Assistance Bulletin (FAB) offering guidance on a recent change to the DOL's Field Operations Handbook (FOH) concerning whether tipped employees are working dual jobs [FAB2019-2, 2-15-19; https://www.dol.gov/whd/FieldBulletins/fab2019_2.pdf]. Under the revision to the FOH, the WHD will no longer prohibit an employer from taking a tip credit based on the amount of time an employee spends performing duties related to a tip-producing occupation that are performed contemporaneously with direct customer-service duties or for a reasonable time immediately before or after performing such direct-service duties.

Background
Under the Fair Labor Standards Act (FLSA), employers may pay "tipped employees" only $2.13 per hour in wages, as long as the employee's tips are enough to make up the remainder of the minimum hourly wage in effect (currently $7.25 per hour). A tipped employee is an employee engaged in an occupation in which the employee customarily and regularly receives more than $30 a month in tips (see *The Payroll Source®*, §2.5-1).

The FLSA (29 USC §203(m)) and DOL regulations (29 CFR §531.56) permit employers to take the tip credit based on whether the employee's "job" or "occupation" is tipped. When an employer employs a worker in both a tipped and non-tipped occupation, such as a server job and a maintenance job, the tip credit is available only for the hours the employee works in the tipped occupation. In this dual job scenario, the employer may take a tip credit for the time that the tipped employee spends performing duties related to the tipped occupation, even though such duties are not by themselves directed toward producing tips. For example, a server who also cleans and sets tables, makes coffee, and occasionally washes dishes or glasses is engaged in duties related to a tipped occupation, even though the server is not tipped for these related duties.

Revisions to the FOH
The previous interpretation of 29 C.F.R. §531.56(e) by the DOL in the FOH focused on whether the employee's "duties" were tipped and excluded from the tip credit any time an employee in a tipped occupation spent performing related, non-tipped duties in

excess of 20% in the workweek. The WHD explained that this prior interpretation created confusion for the public over whether 29 C.F.R. §531.56(e) requires certain related, non-tipped duties to be excluded from the tip credit. Section 531.56(e) in fact includes non-tipped duties in the tip credit unless they are unrelated to the tipped occupation or part of a separate, non-tipped occupation in a “dual job” scenario. In response, the WHD issued Opinion Letter FLSA2018-27 formally rescinding the previous interpretation, setting a 20% limit on related, non-tipped duties, and revised FOH 30d00(f) (see PAYROLL CURRENTLY, Issue 12, Vol. 26).

Under the revised FOH, on and after November 8, 2018, WHD staff will determine whether a tipped employee’s non-tipped duties are related to the tipped occupation using these principles:

- Non-tipped duties listed as examples in 29 C.F.R. § 531.56(e) and non-tipped duties listed as core or supplemental for the appropriate tip-producing occupation in the Tasks section of the Details report in the Occupational Information Network (O*NET; https://www.onetonline. org/) are related duties.
- An employer may take a tip credit for any amount of time an employee spends on related, non-tipped duties performed contemporaneously with tipped duties, or for a reasonable time immediately before or after performing the tipped duties, regardless whether those duties involve direct customer service.
- Employers may not take a tip credit for time spent performing any tasks that are not contained in 29 C.F.R. §531.56(e), or in the O*NET task list for the employee’s tipped occupation, or—for a new occupation without an O*NET description—in the O*NET task list for a similar occupation. Some of the time a tipped employee spends performing these tasks that are unrelated to the employee’s tipped occupation may be subject to the de minimis rule in 29 C.F.R. §785.47.

The WHD reminds employers that they remain prohibited from keeping tips received by their employees, regardless of whether the employer takes a tip credit under the FLSA. Moreover, employers electing to use the tip credit provision must ensure tipped employees receive at least the minimum wage when direct (or cash) wages and the tip credit amount are combined.

SSA Began Sending ‘No Match’ Letters in April

The Social Security Administration (SSA) started sending Employer Correction Request Notices (EDCOR) in early April to employers that timely e-filed 2018 Forms W-2, *Wage and Tax Statement*, containing at least one name and social security number (SSN) mismatch, said SSA Program Manager Matt Newton on the April 4 payroll industry call. SSA will send the letters in batches every two weeks from the beginning of April until May or as long as it takes the agency to finish, Newton said. In September, SSA expects to begin sending letters to employers that filed 2018 Forms W-2 late or on paper with a name and SSN mismatch, but the date is subject to change.

SSA began sending initial notices to employers and third-party providers last summer (see PAYROLL CURRENTLY, Issue 8, Vol. 26). Unlike the summer 2018 initial notices, this year's letter will inform employers of the number of mismatches and that corrections are needed. The letter also will provide instructions for finding mismatches and how to correct them. SSA will not send letters or notices to individual employees.

Help With 'No Match' Letters
SSA's EDCOR webpage provides online tools to assist employers, including sample notices, frequently asked questions, and step-by-step instructions for correcting mismatches. The webpage contains a link to sample EDCOR notices (https://www.ssa.gov/employer/examplenotice.html), including an employer correction request (https://www.ssa.gov/employer/notices/EmployerCorrectionRequest.pdf) and a third-party provider notification (https://www.ssa.gov/employer/notices/ThirdPartyLetter.pdf). Newton also said that explanatory videos have been added to the website.

How to Find and Correct Mismatches
The notices SSA sends will explain how employers can use the Employer Report Status within SSA's Business Services Online (BSO) to find mismatches. To use BSO, employers must complete a one-time registration process (https://www.ssa.gov/bso/bsowelcome.htm). The notice directs employers to review the name and SSN information they submitted on Forms W-2 and to provide necessary corrections on Form W-2c within 60 days of receipt of the letter.

New NACHA Rules Will Expand Same-Day ACH Transactions

In September 2018, NACHA's voting membership approved rules to expand same-day ACH capabilities [NACHA, *Same Day ACH Will Be Enhanced to Meet ACH End-User Needs*, 9-14-18; https://www. nacha.org/news/same-day-ach-will-be-enhanced-meet-ach-end-user-needs].

Background
NACHA's original rules allowing for same-day ACH transactions contained provisions limiting the effectiveness of same-day ACH for payroll-related transactions, such as low per-transaction dollar limits and early deadlines, especially for employers on the West Coast. In December 2017, NACHA proposed rules that would address these limitations. NACHA has approved the proposed rules with some modifications.

New ACH Rules
The rules will:

- Add a third same-day ACH processing window. The third processing deadline will be 4:45 p.m. ET/1:45 p.m. PT to provide originating depository financial institutions (ODFIs) in the Pacific Time Zone with an afternoon window. The receiving depository financial institution (RDFI) must make funds available to customers by the end of its processing day. This rule is effective on March 19, 2021.

NOTE: NACHA announced the effective date of this rule, which was originally scheduled to become effective on September 18, 2020, will be delayed by six months. [NACHA, ACH Operations Bulletin 2-2019, 3-12-19; https://www.nacha.org/news/ach-operations-bulletin-2-2019-effective-date-new-same-day-ach-window-deferred-six-months]. The delay resulted from the Federal Reserve Board of Governors' notice to NACHA "that it will not be able to provide timely notification of its approval for Federal Reserve services necessary to enable the new window by the deadline provided for in the rule."

- Provide faster fund availability to receivers of both same-day ACH and non-same-day ACH credits. This rule change affects both same-day ACH and non-same-day ACH transactions and is effective on September 20, 2019.

For same-day ACH credit transactions, the rule establishes three deadlines to make funds available based on when the RDFI receives the ACH file. For transactions received during the first processing window, the deadline to make funds available to customers will be moved up to 1:30 p.m. local time (the current deadline is 5:00 p.m. local time). For transactions initiated during the second processing window, the deadline to make funds available will remain at 5:00 p.m. local time. For transactions initiated during the new third processing window, the deadline to make funds available will be the end of the RDFI's processing day.

For non-same-day ACH transactions, the rule establishes an earlier deadline to make funds available for ACH transactions that the RDFI receives before 5:00 p.m. The funds from these transactions must be available by 9:00 a.m. local time on the settlement date.

Increase the dollar limit on same-day ACH transactions. The limit per same-day ACH transaction increases to $100,000, effective on March 20, 2020.