ADP National Account Services
Outsourcing for HR, Benefits and Payroll

TECH FLEX

MAY 2009 **ISSUE V**

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DOL AND CMS ISSUE DRAFT ARRA STATUS DENIAL APPEALS FORMS

On May 4, 2009 via the Federal Register, the Department of Labor (DOL) and Centers for Medicare and Medicaid Services (CMS) released drafts of a proposed appeal form to be used by individuals who are denied treatment as an “assistance eligible individual” by their former employer in relation to the American Recovery and Reinvestment Act of 2009 (ARRA). An assistance eligible individual (AEI) is a person who is eligible for and elects Consolidated Omnibus Budget Reconciliation Act (COBRA) coverage and who was involuntarily terminated from employment on or after September 1, 2008 and on or before December 31, 2009.

As way of background, ARRA provides that a person qualifying as an AEI will have paid the required premium for coverage elected under the provisions of the COBRA if they pay 35% of the COBRA premium. The remaining 65% will be paid on the AEI's behalf generally by the former employer who will be reimbursed in the form of a credit to payroll taxes owed by the employer to the Internal Revenue Service. For additional information on the ARRA COBRA provisions including the premium subsidy, please see the February 2009 Tech Flex. [LINK]

ARRA also provides that where an individual requests the COBRA subsidy (or by payment of 35% of the applicable COBRA premium) and the group health plan denies that request, the individual has the right to appeal the denial to the DOL or CMS. ARRA further requires that a determination of the individual's appeal must be decided "within 15 business days after receipt of such individual's application for review." All determinations made by the responsible governmental agency are final and "a reviewing court shall grant deference to such determination."

When finalized the DOL appeal form will be used by individuals covered by group health plans of private employers subject to the federal COBRA requirements. Whereas the final CMS appeals form will be used by individuals covered by group health plans of federal, state, and local government employers or group health plans that are subject to a COBRA-comparable state law.

For a copy of the draft documents submitted by the DOL , please click on the following link:

DOL Appeals Information

For a copy of the draft documents submitted by CMS, please click on the following link:

CMS Appeals Information

IRS ISSUES FURTHER ARRA PREMIUM SUBSIDY GUIDANCE

On May 1, 2009, the Internal Revenue Services (IRS) released additional frequently asked questions in relation to the 65% premium reduction available for coverage under the Consolidated Omnibus Budget and Reconciliation Act (COBRA). As reported in a previous Tech Flex, the American Recovery and Reinvestment Act of 2009 (ARRA) provided an opportunity to pay reduced COBRA premiums to employees who are involuntary terminated anytime from September 1, 2008 through December 31, 2009 (and the spouses and/or dependent children of such employees). For additional ARRA COBRA information, please see the February 2009 Tech Flex. [LINK]

Three of the newly released frequently asked questions address administration and eligibility issues. One of the new FAQs discusses how the COBRA premium subsidy applies to employers in Puerto Rico, the United States Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands. The other two questions discuss when the premium subsidy is first available and the period of time that it is available.

Two additional questions focus on Form 941 preparation. Under ARRA, the COBRA premium subsidy amount is initially paid by the individual's former employer and then reimbursed by the government through a reduction of the employer's payroll tax obligation as reported quarterly on Form 941. One of the new questions provides insight on how to determine the number of individuals receiving the premium subsidy that should be reported on line 12b of the Form 941. In addition, the question clarified that each individual who received the subsidy is counted as one individual, regardless of whether the premium subsidy was provided for insurance covering more than one individual. For example, if the COBRA premium subsidy was provided for family coverage covering the former employee, the former employee's spouse and his/her three dependent children, only one individual would be included on line 12b. The second question provides information on how a plan sponsor or other entity entitled to claim reimbursement of a subsidy paid would claim the funds paid for COBRA coverage when the entitled recipient does not have payroll tax liabilities. This situation could occur for example in the case of a multiemployer plan that does not have employees.

For a copy of the revised IRS frequently asked questions, please click on the link provided below.

http://www.irs.gov/newsroom/article/0,,id=204708,00.html

INFORMATION PROVIDED BY IRS ON ARRA HCTC PROVISIONS

The Internal Revenue Service (IRS) revised its webpage to address the changes made to the Health Care Tax Credit (HCTC) as a result of the enactment of the American Recovery and Reinvestment Act of 2009 (ARRA).

As way of background, on August 6, 2002, the Trade Assistance Act (TAA) was signed into law. The TAA legislation expanded the benefits available to workers who lose their jobs as a result of import competition or transfer of production to other countries. **One of the TAA benefits comes in the form of a tax credit**. Specifically, an eligible individual may take a federal income tax credit for up to a specified percentage (currently 65%) of the premiums for Consolidated Omnibus Budget Reconciliation Act (COBRA) coverage, or other qualified health insurance. The TAA COBRA benefit is available to the qualifying individual and his or her qualifying family members. For more information in relation to the HCTC, please see the October 2002 Tech Flex. [LINK]

Specifically, ARRA changed the TAA and HCTC to include an increased tax credit amount, an expanded definition of eligible individual and qualified health insurance and also extended the length of coverage available under the COBRA for certain HCTC eligible individuals through 2010.

Increased HCTC:

Effective May 1, 2009, through the end of 2010, the HCTC premium subsidy to purchase qualified health insurance will increase from the current level of 65% to 80%.

Expanded Definition of Eligible Individual:

ARRA loosened the definition of an eligible TAA recipient to eliminate the requirement that an individual be enrolled in a training program if the individual is receiving unemployment compensation. It also expanded the TAA program to include service sector and public agency workers who have lost employment.

Expanded Definition of Qualified Health Insurance

The ARRA also expanded qualified health insurance to include coverage funded by voluntary employees' beneficiary association (VEBA) trusts that are created in bankruptcy proceedings where an employer's retiree medical obligation is eliminated and replaced with a separate VEBA trust.

Extended COBRA Coverage for Certain HCTC-Eligible Individuals <u>Through 2010</u>

In addition, the ARRA provides an extended COBRA period for HCTC-individuals who experience certain COBRA qualifying events. Specifically, in event of termination (other than for gross misconduct) or reduction in hours, COBRA coverage must continue until (1) the death of the Pension Benefit Guaranty Corporation individual (and in the case of the surviving spouse or dependent child, 24 months after the death of the PBGC-individual), and (ii) for the entire period an individual is otherwise TAA-eligible. **However, the extension of COBRA as described above is not required to be provided beyond December 31, 2010.**

To access the updated IRS webpage, please click on the link provided below:

http://www.irs.gov/individuals/article/0,,id=109960,00.html

IRS RELEASES 2010 HSA LIMITS

On May 14, 2009, the Internal Revenue Service (IRS) via Revenue Procedure 2009-29, released inflation-adjusted health savings account (HSA) contributions and high-deductible health plan (HDHP) limitations for calendar-year 2010.

The following limits are indexed for inflation and released annually by June 1 for the following year as established under the Tax Relief and Health Care Act of 2006.

2010 annual HSA contribution limits:

Self-only HDHP coverage: $3,050 (up $50 from 2009)
Family HDHP coverage: $6,150 (up $200 from 2009)

2010 annual HDHP minimum deductibles:

Self-only coverage: $1,200 (up $50 from 2009)
Family coverage: $2,400 (up $100 from 2009)

2010 annual HDHP maximum out-of-pocket:

Self-only coverage: $5,950 (up $150 from 2009)
Family coverage: $11,900 (up $300 from 2009)

Catch up contributions for individuals who are age 55 or older increased will remain at $1,000 for 2010.

For a copy of Revenue Procedure 2009-29 please click on the link provided below.

http://www.irs.gov/pub/irs-drop/rp-09-29.pdf

IRS UPDATES PUBLICATION 15

The Internal Revenue Service (IRS) updated its 2009 Publication 15 (Circular E) Employer's Tax Guide to conform with the applicable provisions of the American Recovery and Reinvestment Act of 2009 (ARRA). Publication 15 includes the Wage Withholding and Advance Earned Income Credit Payment Tables which should be used in determining the correct amount of employee tax withholding in conjunction with the employee's submitted "Employee's Withholding Allowance Certificate" (Form W-4).

The IRS made the following modifications to Publication 15:

- New tables for withholding and advance earned income credit (EIC) payments have been developed due to changes made to the tax law by ARRA. The new tables can be found in Publication 15-T, New Wage Withholding and Advance

Earned Income Credit Payment Tables (For Wages Paid Through December 2009).

- On page 11, the first sentence under *Employee business expense reimbursements* has been changed and now reads "A reimbursement or allowance arrangement is a system by which you pay the advances, reimbursements, and charges for your employees' business expenses."

- On page 11 under *Accountable plan*:

    - The last sentence in item (1) has been changed and now reads "The reimbursement or advance must be paid for the expense and must not be an amount that would have been paid by the employee."

    - Item (2) has been changed and now reads "They must substantiate these expenses to you within a reasonable period of time."

    - Item (3) has been changed and now reads "They must return any amounts in excess of substantiated expenses within a reasonable period of time."

- On page 20 in the *Caution* under the section titled *How to figure the advance EIC payment*, amounts previously reported as "$35,464" and "$38,584" now read "$35,463" and "$40,463," respectively.

- On page 24 under *How to deposit with a FTD coupon* three new paragraphs were added at the end of this section to advise the Financial Agent cannot process foreign checks. If a check written on a foreign bank to pay a federal tax deposit is sent to the Financial Agent, generally you will be charged a deposit penalty and will receive a bill in the mail. You will be charged a deposit penalty and will receive a bill in the mail.

For a copy of the revised Publication 15, please click on the link provided below:

http://www.irs.gov/pub/irs-pdf/p15.pdf

GUIDANCE ISSUED ON DIFFERENTIAL MILITARY WAGE PAYMENTS

On April 16, 2009, the Internal Revenue Service (IRS) released Revenue Ruling 2009-11 providing guidance on the new rules effective for wages paid on or after January 1, 2009 in relation to the tax treatment of differential wage payments made by employers to their employees that are on active duty in military for a period of greater than 30 days. As background, compensation paid by an employer to an employee while on military duty that represents the difference between the employee's regular pay and the pay provided by the state or government is known as supplemental (or differential) military pay. The taxation of supplemental military pay is dependent on the circumstances of the employee's military service.

Under the **previous regulations** in effect for wages paid on or before December 31, 2008, the following rules applied:

- If the supplemental military pay was provided while the employee was on temporary assignment (30 days or less) with the state National Guard or the Armed Forces Reserve, it was considered wages subject to federal income withholding or social security, Medicare and federal unemployment tax act (FUTA) taxes.

- If the supplemental military pay was provided while the employee was on active duty (more than 30 days) with the United States Armed Forces or on an indefinite assignment with the state National Guard, the IRS considered the employment relationship to be broken. The result of the previous IRS position was that military supplemental pay received while on active duty was not subject to federal income tax withholding, or social security, Medicare or FUTA taxes.

In cases where the military duty was temporary, the supplemental military pay was considered wages and had to be reported on the employee's Form W-2. However, if the military service was active or indefinite, the supplemental military pay was not considered wages and if the amount paid is $600 or greater must be reported on Form 1099-MISC in Box 3 titled "Other Income."

New Law Impact

On June 17, 2007, President Bush signed into law the "Heroes Earnings Assistance and Relief Tax Act of 2008" which contained provisions that impact the taxation of supplemental military pay.

As a result of the new law, the definition of wages is amended for purposes of federal income tax withholding to include any supplemental military payment made by employer to an employee. Due to the change in the law any supplemental military payment made by an employer should be included as wages for federal income tax purposes regardless as to whether the employee is on temporary assignment or active duty. In addition, supplemental military pay would be treated as compensation for retirement plan purposes.

It is important to note that the revised taxation rules effective in relation to supplemental military pay paid after December 31, 2008 did **not** change the rules in relation to social security, Medicare of FUTA taxes. Therefore, employees on active duty receiving supplemental military pay will continue to not be subject to employment taxes.

The guidance provided in Revenue Ruling 2009-11 revolves around a situation where employees of an employer are called or voluntarily enlist for active military services for periods of longer than 30 days. These employees are provided wage payments by the employer in amounts equal to the difference between the pay the employee receives for military service and the wages the employee would have received had the employee remained actively employed.

For a copy of Revenue Ruling 2009-11, please click on the link provided below:

http://www.irs.gov/pub/irs-drop/rr-09-11.pdf

VIRGINIA ALLOWS MANDATED ELECTRONIC PAY FOR NEW HIRES

Legislation in Virginia has been signed into law (Virginia Senate Bill 1264) authorizing employers to pay wages and salaries to an employee hired after January 1, 2010, by credit to a prepaid debit card or card account. The new law allows an employer to do this without the employee's affirmative written consent, **if** the employee fails to designate a financial institution to which payment could be made by electronic automated fund transfer. In addition, the employer must arrange for the card or card account to be issued through a network system through which the employee will have the ability to make at least one free withdrawal or transfer per pay period, which withdrawal may be for any amount in the card or card account, using such card at a participating financial institution.

Currently, payment via prepaid debit card or card account requires the affirmative consent of the employee, unless the employee has not designated a financial institution to which payment by electronic automated fund transfer could be made and the employee is employed at an amusement park.

For a copy of Virginia Senate Bill 1264, please click on the link provided below:

http://leg1.state.va.us/cgi-bin/legp504.exe?091+ful+CHAP0728

NEW YORK STATE ENACTS COMMUTER TRANSPORTATION TAX

On May 8, 2009, the state of New York enacted Assembly Bill 8180 (A8180), Metropolitan Commuter Transportation Mobility Tax, effective March 1, 2009 for employers, January 1, 2009 for self employed individuals and September 1, 2009 for public school districts located within the Metropolitan Commuter District. The purpose of this new tax is to fund the Metropolitan Transportation Authority (MTA).

The Metropolitan Commuter Transportation Mobility Tax (MCTMT), is a new tax imposed on certain employers and self-employed individuals engaging in business within the Metropolitan Commuter Transportation District (MCTD). The MCTD includes New York (Manhattan), Bronx, Kings (Brooklyn), Queens, Richmond (Staten Island), Rockland, Nassau, Suffolk, Orange, Putnam, Dutchess, and Westchester counties.

The MCTM Tax applies to:

- Employers who are required to withhold New York State income tax from employee wages and whose payroll expense exceeds $2,500 in any calendar quarter.
    - o Payroll Expense is defined as wages and compensation as defined in Sections 3121 and 3231 of the Internal Revenue Code.
    - o Employer means an employer required by Section 671 of Article 22 of the New York Tax Law to deduct and withhold tax from wages, other than any agency or instrumentality of the United States, the United Nations, or an interstate agency or public corporation created pursuant to an agreement compact with another state or the Dominion of Canada.
- Individuals with net earnings from self-employment allocated to the MCTD that exceed $10,000 for the tax year. (This includes partners in partnerships and members of a limited liability corporation treated as a partnership.)

The MCTM Tax rate is:

- Employers: 0.34% calculated on an employer's total payroll expense for employees employed within the MCTD.
- Individuals: 0.34% calculated on the net earnings from self-employment allocated to the MTCD during the tax year.

The MCTMT will be administered by the New York State Department of Taxation and Finance. The MCTMT is due quarterly, and per A8180 the first payment is due October 31, 2009.

For a copy of New York Assembly Bill 8180, please click on the link provided below:

http://assembly.state.ny.us/leg/?bn=A08180&sh=t

PROPOSAL TO EXPAND FMLA INTRODUCED

On April 28, 2009, the Family and Medical Leave Inclusion Act (HR 2132) was introduced in the United States House of Representatives. HR 2132 proposes to amend the Family and Medical Leave Act of 1993 (FMLA) to permit leave to care for a same-sex spouse, domestic partner, parent-in-law, adult child, sibling, or grandparent who has a serious health condition.

Currently the FMLA allows an employee to take job protected leave to provide care in relation to the serious health condition of the employee's "child, spouse, or parent."

For a copy of HR 2132, please click on the link provided below:

http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.2132.IH:

MODIFICATIONS TO FMLA PROPOSED

Legislation in the House of Representatives was introduced that if enacted would nullify certain provisions of the final Family and Medical Leave Act (FMLA) regulations that became effective on January 16, 2009. Specifically, the Family and Medical Leave Restoration Act (HR 2161) would, among other nullifications, prohibit employers from directly contacting an employee's medical provider, denying attendance bonuses because of the employee's use of FMLA, and remove limitations placed on the use of accrued paid leave by the employee.

HR 2161 proposes to reinstate the previous regulations in relation to the following:

Employer Contacting Employee Health Care Provider

Under the **previous regulation**, an employer was NOT allowed to contact an employee's health care provider in relation to the medical certification (Form WH-380). However, a health care provider working for an employer may contact the employee's health care provider, with the employee's permission, for purposes of clarification and authentication of the medical certification.

The final regulations eliminated the prohibition against an employer contacting the employee's health care directly with certain restrictions. The employer may contact the employee's health care provider**, without the employee's permission**, for purposes of clarification and authentication of the medical certification (whether initial certification or recertification) after the employer has given the employee an opportunity to cure any deficiencies in relation to the medical certification.

Perfect Attendance Bonuses

Under the **previous regulation,** it was stated that "many employers pay bonuses in different forms to employees for job-related performance such as perfect attendance, safety…and exceeding production goals." As bonuses for perfect attendance and safety do not require performance by the employee, but rather reward based on the lack of accidents and occurrences or days missed from work, an employee who takes FMLA leave but met all the requirements for a perfect attendance bonus, absent the FMLA leave, could not be disqualified for the bonus because of the FMLA leave (i.e. FMLA was not counted as an absence from work for perfect attendance bonus purposes).

The final regulations modified the treatment of perfect attendance awards to allow employers to deny a "perfect attendance" award to an employee who takes FMLA leave as long as the employer treats employees taking non-FMLA leave the same.

Specifically, final regulation § 825.215(c)(2) states:

“if a bonus or other payment is based on the achievement of a specified goal such as hours worked, products sold or perfect attendance, and the employee has not met the goal due to FMLA leave, then the payment may be denied, unless otherwise paid to employees on an equivalent leave status for a reason that does not qualify as FMLA leave. For example, if an employee who used paid vacation leave for a non-FMLA purpose would receive the payment, then the employee who used paid vacation leave for an FMLA-protected purpose also must receive the payment.”

Substitution of Paid Leave for FMLA

Generally FMLA leave is unpaid. However, under the **previous regulation**, an employee could choose to substitute paid leave (e.g. vacation) for FMLA. Further, if an employee did not choose to substitute accrued paid leave, the employer could require the employee to substitute accrued paid leave for FMLA. If an employee used paid leave under circumstances which did not qualify as FMLA, the leave could not be counted against the 12 weeks of FMLA leave to which the employee was entitled. For example, paid sick leave used for a medical condition which is not a serious health condition could not be counted against the employee’s 12 weeks of FMLA time. If the employee elected or the employer mandated substituted paid leave for an FMLA qualifying reason, the paid leave and FMLA leave will run concurrently.

Also, the **previous regulation** stated that when an employee or employer elected to substitute paid leave, and the employer’s paid leave program applied less stringent procedural standards for taking leave than the FMLA (e.g., notice or certification requirements) only the less stringent requirements could be imposed.

The final regulations stipulate that the terms and conditions of an employer’s paid leave policies apply and must be followed by the employee in order to substitute any form of accrued paid leave such as paid vacation, personal leave, paid time off or sick leave in lieu of unpaid FMLA.

Examples:

- If an employer’s paid personal leave policy requires two days notice for the use of personal leave, an employee seeking to substitute personal leave for unpaid FMLA leave would need to meet the two-day notice requirements prior to receiving the paid personal leave.

- Where an employer’s policy requires vacation leave be taken in full-day increments, an employee substituting vacation for FMLA leave would not have the right to use less than a full day of vacation leave.

In addition, HR 2161 would revise section 825.308(b) of the FMLA to permit an employer to require recertification of a medical condition no earlier than--

(A) the expiration of the length of time indicated in the original certification of the medical condition; or

(B) 1 year after obtaining the original certification for a medical condition, if the original certification indicated that the condition would last longer than 1 year.

The final and current FMLA regulations allow that an employer may request certification no more often than every 30 days and only in connection with an absence by the employee. If the medical certification indicates that the minimum duration of the condition is more than 30 days, an employer must wait until that minimum duration expires before requesting a recertification. For example, if the medical certification states than an employee will be unable to work, whether continuously or on an intermittent basis for a period of 40 days, the employer must wait 40 days before requesting a recertification.

However, an employer may request recertification in less than 30 days in the following circumstances.

1. The employee requests an extension of the leave

2. The circumstances described in the last certification, such as the duration or frequency of the absence or the severity or nature of the illness has changed.

HR 2161 also proposes to revise section 825.115 (a) and (c) to remove the requirements for a specific number of periodic visits for treatment by a health care provider in order to qualify for leave for a serious health condition or chronic condition and to require only the treatment that the health care provider determines proper. The final regulations defined the term "periodic" as treatment by a health care provider as "at least twice a year."

For a copy of HR 2161, please click on the link provided below:

http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.2161.IH:

NEW JERSEY RELEASES FINAL PAID LEAVE REGULATIONS

As reported in a previous Tech Flex, New Jersey Governor, Jon Corzine, on May 2, 2008 signed legislation that entitled employees in the state to take up to six weeks of paid leave per year after the birth or adoption of a child or to take care of a seriously ill relative. The new law providing benefits beginning July 1, 2009 allows parents to take paid leave any time during the first year after a child's birth or adoption. Employees also can take leave to care for a seriously ill child, spouse, parent or domestic partner receiving inpatient care in a health care facility or under continuing supervision of a health care provider. For more information on the New Jersey paid Leave provisions, please see the May 2008 Tech Flex [LINK].

New Jersey regulators have now issued three sets of final regulations on the state's paid family leave law to provide employers with guidance on: (1) implementation and administration; (2) state taxation of the benefits; and (3) electronic contribution reporting and payment requirements.

For a copy of the final regulations, please click on the link provided below:

http://lwd.state.nj.us/labor/forms_pdfs/tdi/fli_adopted_regs.pdf

WASHINGTON STATE DELAYS PAID PARENTAL LEAVE PROGRAM

On May 8, 2007 Washington State Governor, Chris Gregoire, signed into law the Family Leave Insurance (FLI) program. Under the legislation, employees in the state are entitled to up to 5 weeks of paid family leave "because of the birth of a child of the employee and in order to care for the child," or "because of the placement of a child with the employee for adoption." The law also provides certain employees with re-employment after taking leave.

The paid family leave insurance benefits, originally slated to be effective October 1, 2009, are payable to an eligible employee "during a period in which the individual is unable to perform his or her regular or customary work because he or she is on family leave" to care for a newborn or newly adopted child.

However, on April 25, 2009, the legislature via the enactment of Washington Senate Bill 6158 has delayed the effective date for three years until October 1, 2012. In addition to the current economic conditions, another reason provided as a reason for the delay is that a funding mechanism to fund the leave benefits has yet to be determined.

For a copy of legislation delaying the implementation of the paid parental leave program, please click on the link provided below:

Washington Senate Bill 6158

For additional information on the provisions of the Washington Family Leave Insurance program, please the link to the June 2007 Tech Flex provided below:

June 2007 Tech Flex

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