The topics covered in this issue are:

Benefits:
- IRS Comments Further on New Proposed Cafeteria Plan Regulations
- Priority Guidance for 2007-2008 Released by IRS
- Massachusetts Revises Cafeteria Plan Filing Requirement

Payroll:
- Social Security Number No Match Regulations Released – But Court Order Blocks Implementation
- Oregon Issues Wage Garnishment Mandate
- Texas Institutes Lump Sum Payment Restrictions Where Employee Paying Child Support

IRS COMMENTS FURTHER ON NEW PROPOSED CAFETERIA PLAN REGULATIONS

As reported in the August 2007 Tech Flex (LINK) the Internal Revenue Service (IRS) released and published the new proposed cafeteria plan regulations in the Federal Register on August 6, 2007. The IRS proposed that the new regulations apply for plan years beginning on or after January 1, 2009 but also stated that employers may generally rely on the new proposed rules until final regulations are issued.

The new proposed regulations generally maintain the current rules under which cafeteria plans, including the health and dependent care flexible spending account (FSA) are currently administered. Per the Preamble to the new proposed regulations, the rules “remain substantially unchanged in the new proposed regulations, with certain clarifications.”

On September 12, 2007, ADP personnel attended a conference sponsored by the Employer’s Council on Flexible Compensation (ECFC) which featured three IRS representatives who were instrumental in the writing of the new proposed cafeteria plan regulations.

During the conference, the IRS actively encouraged the submission of comments in relation to the new proposed regulations. The IRS emphasized that the recently released proposed cafeteria plan regulations may be revised based on comments received.
ADP intends to submit comments to the IRS. We encourage plan sponsors and all other interested parties to provide comments as well. The IRS stated that this comment period represents the best chance of impacting the cafeteria plan regulations. Once the regulations become finalized, any successful effort to alter the regulations becomes more difficult.

The IRS will accept written or electronic comments through November 5, 2007. Written comments must be submitted to the following address:

CC:PA:LPD:PR (REG–142695–05)
Room 5203, Internal Revenue Service
PO Box 7604, Ben Franklin Station
Washington, DC 20044

Written submissions may also hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. EST to the following address:

CC:PA:LPD:PR (REG–142695–05)
Courier’s Desk, Internal Revenue Service
1111 Constitution Avenue NW
Washington, DC

Comments may be submitted electronically via the Federal eRulemaking Portal as follows:


It is also important to note that the IRS will be holding a public hearing on the new proposed cafeteria plan regulations on November 15, 2007 at 10 a.m. EST at the following location:

IRS Auditorium
Internal Revenue Building
1111 Constitution Avenue
Washington, DC

In the event a party wishes to submit a topic for discussion at the public hearing, outlines of the topic must be submitted to the IRS via one of the methods above no later than October 25, 2007.

Should you have a question concerning submissions of comments, the hearing, and/or to be placed on the building access list to attend the hearing, please contact Oluwafunmilayo Taylor of the IRS Publications and Regulations Branch at (202) 622–7180.

To review the new proposed regulations, please click on the link provided below:

PRIORITY GUIDANCE PLAN FOR 2007-2008 RELEASED

The Internal Revenue Service (IRS) released its 2007-2008 Priority Guidance Plan. The plan contains 303 items relating to tax regulations and other administrative guidance to be completed over a twelve-month period from July 2007 through June 2008.

As has been the case since 2002, the IRS will update the Priority Guidance Plan periodically throughout the applicable twelve-month period. The updates generally reflect (1) additional guidance that the IRS intends to release by the end of the period and (2) responses to recent developments, such as the enactment of tax legislation that may occur during the year.

The following are examples of the regulations and guidance, in relation to benefits and payroll, included in the released plan.

Benefits:

- Guidance regarding the treatment of incidental health insurance benefits provided under a profit-sharing or stock bonus plan;
- Update of Employee Plans Compliance Resolution System (EPCRS);
- Update of model notice under §402(f) relating to rollover distributions;
- Guidance on automatic enrollment under §§ 414(w), 401(k)(13) and 401(m)(12), as added by the Pension Protection Act 2006;
- Guidance on discrete issues regarding Health Savings Accounts (HSAs);
- Proposed regulation under §4980B regarding calculation of the applicable premium for COBRA continuation coverage;
- Final regulations under §3121 regarding the definition of salary reduction agreement.

Payroll:

- Proposed regulations under §409A on the calculation of income inclusion and additional taxes;
- Guidance regarding reporting and income tax withholding under §409A;
- Guidance under §409A on funding restrictions applicable to nonqualified deferred compensation;
- Guidance on qualified nonpersonal use vehicles;
- Update of the regulations under §423 regarding employee stock purchase plans;
Revenue Ruling on income tax withholding with respect to supplemental wages for employees who do not receive regular wages;

Regulations for adjusting overpayment or underpayment of employment taxes.

ADP will continue to monitor the release of the scheduled upcoming IRS guidance, as applicable to our service offerings, including changes to the Priority Guidance Plan. Any relevant updates will be provided in future issues of the Tech Flex.

For a copy of the IRS 2007-2008 Priority Guidance Plan, please click on the link provided below:


MASSACHUSETTS REVISES CAFETERIA PLAN FILING REQUIREMENT

As reported in the May 2007 Tech Flex (LINK) the “Massachusetts Health Care Reform Act” (Act) was enacted in an effort to ensure that all Massachusetts state residents over age 18 have affordable, comprehensive medical coverage. The law requires employers with 11 or more employees working in Massachusetts to establish an Internal Revenue Code §125 (§125) plan for employees. In addition, the Connector, an administrative entity created to administer the new law, originally established a July 1, 2007 filing deadline for employers to submit their §125 plans. The Connector later postponed that filing date to October 1, 2007 and stated that it would not accept §125 plan documents prior to September 1, 2007. On September 5, 2007, the Connector issued Administrative Information Bulletin 03-07 that eliminated the proactive employer filing requirement. Now employers are only required to submit their plan documents upon request by the Connector.

Specifically the bulletin states:

Each 151F Employer shall, upon the request of the Connector, submit a copy of its 125 Cafeteria Plan(s) to the Connector within seven (7) business days of the Connector’s request. Any Section 125 Cafeteria Plan maintained by a 151F Employer that is not available to any Employees employed at a Massachusetts location is not subject to the filing requirement.

For more information on the Massachusetts Health Care Reform Act, please click on the links to the May and July 2007 Tech Flex editions as provided above. For a copy of Massachusetts Administrative Information Bulletin 03-07, please click on the link provided below:

SOCIAL SECURITY NUMBER NO MATCH REGULATIONS RELEASED - BUT COURT ORDER DELAYS IMPLEMENTATION

On August 15, 2007, the United States Immigration and Customs Enforcement (ICE) issued final regulations describing an employer's obligations and options for avoiding liability for knowingly hiring illegal aliens. The regulations address situations where the employer received either a social security number no-match letter from the Department of Homeland Security (DHS) or the Social Security Administration (SSA).

The final ICE no-match regulations were scheduled to go into effect on September 14, 2007. However, as a result of a lawsuit filed on August 29 by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), the American Civil Liberties Union, the National Immigration Law Center (NILC), and other local labor movements, a federal district court placed a temporary hold on the DHS social security number no-match regulations. A hearing on the request to permanently bar the implementation of the DHS rule is scheduled for October 1 before U.S. District Court Judge Charles Breyer.

The Temporary Restraining Order can be found at:

http://www.aclu.org/pdfs/immigrants/aflcio_v_chertoff_tro.pdf

The complaint in the lawsuit can be found at:

http://www.aclu.org/pdfs/immigrants/aflcio_v_chertoff_complaint.pdf

OVERVIEW OF THE ICE FINAL REGULATIONS

Under federal law, it is unlawful for an employer to continue to allow an employee to work in the United States where the employer has knowledge that the alien is (or has become) unauthorized to work in the U.S.

8 USC §1324a(a)(2) states

(2) Continuing employment. It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.

The newly released ICE regulations clarify that an employer will be considered to be in violation of the above statute by either having actual or constructive knowledge that an employee is not authorized for employment in the U.S. Further, the ICE regulations provide the following examples demonstrating what will be considered “constructive knowledge”:

- Written notice from the SSA that the combination of a name and SSN submitted for an employee does not match SSA records.

- Written notice from DHS that the immigration status or employment authorization document presented or referenced by the employee in competing Form I-9 was assigned to another person or that there is no agency record that the Form I-9 was assigned to anyone.

As background, the DHS sends out a no match letter to an employer when the immigration-status or employment-authorization documentation presented or referenced by the employee is
inconsistent with the agency's records. Similarly, the SSA sends out a no match letter when the combination of a name and social security number submitted for an employee fails to match. Employers who receive a no-match letter and follow the safe harbor procedures will be deemed not to have constructive knowledge that an employee is unauthorized to work in the United States (U.S.).

The ICE regulations state that if an employer fails to take reasonable steps within 90 days of receiving a no-match letter, the employer may be liable for the employment of unauthorized worker. However, the final regulations also provide a roadmap of “reasonable steps” that, if followed, may result in an employer avoiding liability for the employment of unauthorized workers. Below is a brief summary of the steps.

**Step 1:**

The employer must review its records within 30 days after receiving a no-match letter to determine whether the discrepancy results from a typographical, transcription, or similar clerical error in its records, or in its communication to the SSA or DHS. If there is such an error, the employer must correct its records, inform the relevant agencies (in accordance with the letter’s instructions, if any, otherwise in any reasonable way). The employer must also verify with the relevant agency that the information in the employer's files matches the agency's record. The employer should also record the manner, date, and time of the verification.

**Step 2:**

If the Step 1 actions do not resolve the discrepancy, the employer must request within 30 days a confirmation of the records from the employee. If the employee indicates that errors are present, the employer must take the necessary actions needed to correct the records and resubmit the records to the relevant agencies. The employer should also verify that the agency(ies) update their records accordingly. If the employee confirms the records, the employer should request the employee pursue the matter personally with the relevant agency.

**Step 3:**

If the no-match discrepancy is not resolved within 90 days of the receipt of the no-match letter by the employer, the safe harbor requires the employer and employee to complete a new Form I-9 within three days of the expiration of the 90-day period, subject to the following restrictions:

- No document containing the social security number or alien number that prompted the no-match letter as no receipt for an application for a replacement of such document, can be used to establish employment authorization and/or identity.

- No document without a photograph can be used to establish identity (or both identity employment authorization).

If the verification procedure fails to verify the employee's identity and work authorization, the employer must decide whether to terminate the employee. As part of the decision-making process, the employer should consider (perhaps with its legal counsel) whether the DHS would determine that the employer had constructive knowledge that the employee was an unauthorized alien.

An employer could elect to follow other avenues to resolve a no-match letter that would be considered reasonable by the DHS. However, the following procedures other than those described as “reasonable procedures” in the safe harbor guidance may result in the DHS
determining that an employer had “constructive knowledge” of the employee’s unauthorized status.

Finally, it is important to note that the final ICE regulations specifically address the issue of “constructive knowledge” and would not preclude the DHS finding that an employer had actual knowledge that an employee was not authorized to work in the U.S. Consequently, an employer with actual knowledge could not avoid liability by adhering to the safe harbor procedures as set out in the final ICE regulations.

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


OREGON ISSUES WAGE GARNISHMENT MANDATE

A new Oregon law relating to the garnishment of wages was enacted on June 20, 2007. Oregon Senate Bill 303 provides that wages owed by a garnishee (employer) to a debtor (employee) are not subject to garnishment for certain pay periods under certain circumstances (see below).

Effective for writs of garnishment delivered on or after January 1, 2008, wages owed by an employer to an employee-debtor for a specific pay period are not subject to garnishment if:

- Before the writ was delivered to the garnishee, the garnishee entered into an agreement with a financial institution or other third party to act as payroll administrator for the garnishee’s payroll;

- The debtor’s wages are paid by direct deposit to a financial institution, or by an instrument issued to the debtor by the payroll administrator;

- Before the writ was delivered, the garnishee issued instructions to the payroll administrator to pay the debtor's wages; and

- The writ is delivered within two business days before the debtor's normal payday for the pay period, or the writ is delivered more than two business days before the debtor's normal payday for the pay period but the garnishee is unable to cancel the instructions to the payroll administrator using reasonable efforts.

For a copy of Oregon Senate Bill 303, please click on the link provided below:

http://www.leg.state.or.us/07reg/measpdf/sb0300.dir/sb0303.a.pdf
TEXAS ISSUES GUIDANCE IN RELATION TO CHILD SUPPORT

As a result of Texas Senate Bill 228 (SB 228), effective September 1, 2007, any employer that has received an income withholding order for child support from the Title IV-D agency for an employee, may not pay that employee a lump sum payment (e.g. bonus or commission payment) of $500 or more without notifying the agency. The agency will determine whether all or part of the lump sum payment should be applied to child support arrearages.

After notifying the agency, the employer may not make the lump sum payment to the employee before the earlier of:

- The 10th day after the date on which the employer notified the agency; or
- The date on which the employer receives authorization from the agency.

Where the employer is notified by the agency, the employer may make the payment only in accordance with the agency directions.

Further, SB 228 requires that an employer must withhold from severance pay the same amount that would have been withheld under the child support order as if the severance pay was paid as the regular wages for a current employee.

SB 228 states:

An employer receiving an order or writ of withholding…shall withhold from any severance pay owed an obligor an amount equal to the amount the employer would have withheld under the order or writ if the severance pay had been paid as the obligor’s usual earnings as a current employee.”

Finally, Texas SB 228 allows the Attorney General of Texas to levy a penalty of $25 for each occurrence in which an employer knowingly fails to report an employee in relation to new hire reporting requirements. In addition, a penalty of $500 will apply for each occurrence in which the failure to report the new hire is the result of a conspiracy between the employer and the employee to not supply a required report or to submit a false or deficient report.

For a copy of Texas SB 228, please click on the link provided below:

http://www.capitol.state.tx.us/tlodocs/80R/billtext/html/SB00228F.htm