Hot Topics for 2015

Presented Tuesday, November 18, 2015
Housekeeping

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- Questions
- Today’s topic
- Speaker
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Vicki M. Lambert, CPP, is President and Academic Director of *The Payroll Advisor™*, a firm specializing in payroll education and training. The company’s website [www.thepayrolladvisor.com](http://www.thepayrolladvisor.com) offers a subscription payroll news service which keeps payroll professionals up-to-date on the latest rules and regulations.

As an adjunct faculty member at Brandman University, Ms. Lambert is the creator of and instructor for the *Practical Payroll Online* payroll training program, which is approved by the APA for recertification credits.
What We Will Cover...

- Salary level test
- Economic realities test
- Sick Leave laws
- Mailing paychecks
- Using FIT to pay FICA
- Deceased employees
- Accelerating W-2 deadlines
What is the latest with the DOL on the new dollar amounts for exempt employees?
Proposes substantial changes to salary thresholds for executive, administrative and professional.

Also applies to the highly-compensated variant of those exemptions.

Presents no changes to the duties standards for any exemption.
Did solicit comments on number of topics including duties

60-day comment period was allowed

Comment period closed on September 4, 2015

DOL received over 247,000 comments
Proposed Salary Level-Exempt Employees

- Will increase to $921 per week or $47,892 annually
- To prevent levels from becoming outdated the proposal includes update mechanism
- If approved in late 2015 the rate will be $951 a week or $49,452 annually
- For 2016 the estimate is $970 weekly and $50,440 annually
- Highly compensated will increase to $122,148

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These changes indicate a 102% or a 113% increase over current rate

Rational is the new level reflects the 40th percentile of earnings for full-time salaried employees

Highly compensated reflects level at 90th percentile for full-time salaried employees

Different rates will be used in American Samoa and for motion picture industry
Scope of Proposal

- Does not apply to outside sales
- Does not apply to computer employees paid hourly at $27.63 per hour
- Do not affect other exemptions not based on section 13(a)(1) of FLSA...
Does Not Apply To...

Section 7(i) commissioned employees (retail or service)

Seasonal amusement or recreational establishment employees

Motor Carrier Act exemptions (section 13(b)(1))

Certain employees of rail and air carriers sections 13(b)(2) & (b)(3)
What Happens Now?

DOL reviews the comments and prepares final rule for review by Office of Management and Budget

Then published in Federal Register

May be Congressional challenges but some form will eventually become law

Final rule probably in early to mid 2016 then 60-120 days to become effective after that
Not making specific proposals about standard duties tests but did seek comments on whether the tests are working

Should they adopt the California “primarily engaged in” standard for exempt status

Whether to place other limits on the amount of non-exempt activities an exempt employees may perform

Whether to allow nondiscretionary bonuses or even commissions to satisfy a portion (perhaps 10%) of the required salary
Economic Realities Test
The FLSA definition of employ, which includes “to suffer or permit to work,” was specifically designed to broadly cover as many workers as possible.

The economic reality of the worker’s relationship with the employer determines whether the worker is economically dependent on the employer (and therefore, an employee) or is in business for himself or herself (and therefore, an independent contractor).
Things to Consider

- No single “economic realities” factor determines whether a worker is an employee or an independent contractor.
- The six factors presented by the DOL are not exclusive.
- Courts may consider additional factors that shed light on whether a worker is an employee or an independent contractor.
- The factors should not be applied as a checklist or scorecard.
- What matters is whether the totality of the circumstances indicates the worker is an employee or independent contractor.
Significant Factors For Economic Realities Test

1. Is the work an integral part of the employer’s business?
2. Does the worker’s managerial skill affect his or her opportunity for profit and loss?
3. Relative investments of the worker and the employer
4. The worker’s skill and initiative
5. The permanency of the worker’s relationship with the employer
6. Employer control of employment relationship
Work is integral to the employer's business if it is a part of the production process or is a service that the employer is in business to provide.

If the work performed is integral to the employer’s business, the worker is more likely economically dependent on the employer.
Work Integral to the Business

- For example, the work of a carpenter is integral to the operation of a construction company because the company is in the construction business and the carpenter performs the construction on behalf of the company.

- On the other hand, a worker engaged by the construction company to repair its copier is not performing work that is integral to its business.
Managerial Skill for Profit/Loss

- This factor should focus on the worker’s managerial skill and whether this skill affects the worker’s profit and loss.

- The issue is not whether the worker possesses skills, but whether the skills are managerial and suggest that the worker is operating as an independent business.
Managerial skills that suggest independent contractor status include the ability to make independent business decisions, such as deciding to make business investments or hire helpers.

Deciding to work more jobs or longer hours is not such a business decision.

When analyzing this factor, it is also important to consider whether the worker faces a possible loss as a result of these independent business decisions.
Relative Investment

- The worker must make some investment (and undertake some risk for a loss) to indicate he or she is an independent business.

- Merely purchasing tools to perform a particular job is not a sufficient investment to indicate an independent business.

- The worker’s investment must also compare favorably with the employer’s investment to suggest the worker is an independent contractor.
A worker’s investment compares favorably when:

- The investment is substantial and
- The investment is used for the purpose of sustaining a business beyond the job or project the worker is performing.
Both employees and independent contractors may be skilled, even highly skilled, workers.

Specialized skills, such as computer programming, do not necessarily indicate independent contractor status.

To suggest the worker is an independent contractor, the skills should demonstrate that the worker exercises independent business judgment or initiative.
A permanent or indefinite relationship with the employer suggests the worker may be an employee.

However, the absence of a permanent or indefinite relationship does not automatically indicate the worker is an independent contractor.
What matters is whether the impermanence is a result of:

- *The worker’s choice* (which suggests independent contractor status) or
- *The structure of that particular industry or employer* (which may indicate the worker is an employee).
Control

- An independent contractor typically works relatively free from control by an employer (or anyone else, including the employer’s clients).

- This factor includes who controls:
  - Hiring and firing,
  - The amount of pay,
  - The hours of work, and
  - How the work is performed.
Control

- The employer’s lack of control does not automatically indicate the worker is an independent contractor.
- An employer can still exercise control over the worker even if the worker teleworks or works offsite.
- To be considered an independent business, the worker must also exercise control over meaningful aspects of the work.
Who has passed one? Who is now prevented from passing one? Where do we stand?

Sick Leave Laws
Sick Leave

- Emeryville, CA, Eugene, OR; Montgomery County, MD, New York City; Oakland, CA; Philadelphia, PA; Pittsburgh, PA; Portland, OR; San Diego, CA; San Francisco, CA; Seattle, WA; Tacoma, WA; and District of Columbia have enacted and passed court cases

- NJ: Bloomfield, East Orange, Irvington, Jersey City, Newark, Passaic, Paterson, Montclair, Trenton

- State of California, Connecticut, Massachusetts and Oregon
Who Has Banned It for Locals

- Arizona; Florida; Georgia; Indiana; Kansas; Michigan; Missouri; North Carolina; Tennessee and Wisconsin

- But that doesn’t mean the state is not considering a bill

- Almost every state legislation has introduced a bill to mandate sick leave in 2015

- Most were deferred or died in committee but movement is growing
If I mail the employee's regular paycheck when is he considered paid? When I mail it or when he gets it?
Paying Employees

- No provision on federal level of when to pay employees
- 48 states have a regulation on how often an employee must be paid in the private sector
- Alabama and Florida do not
- Daily, weekly, biweekly, semi-weekly and monthly are permitted depending on state
- Usually can pay exempt employees at a longer interval—such as monthly than a nonexempt
Wording is different but all basically agree that the employee must be paid on a day that is specified by the employer to the employee.

Most specify the employee must be paid within a certain number of days after you close the payroll.

For example:
<table>
<thead>
<tr>
<th>Within 5 Days</th>
<th>Within 6 Days</th>
<th>Within 7 Days</th>
<th>Within 8 Days</th>
<th>Within 9 Days</th>
<th>Within 10 Days</th>
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<td>Washington if other than monthly</td>
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Illinois: If biweekly or semimonthly within 13 days
Wisconsin: 31 days
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<th>Within 11 Days</th>
<th>Within 12 Days</th>
<th>Within 14 Days</th>
<th>Within 15 Days</th>
<th>Within 16 Days</th>
<th>Within 20 Days</th>
<th>No Requirements</th>
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<td>South Carolina</td>
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Paying Employees

- No state gives permission to pay late if the check is mailed
- No state gives the U.S. Postal Service the responsibility to pay on time
- That is reserved only for the employer
- In fact, Arizona states that if the employer mails the check it must be mailed within 5 days after closing the payroll—therefore if you close the payroll on Friday, you must mail the check by the following Wednesday

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The IRS and state tax agencies do accept the mailing date as the date paid or filed if you mail a deposit or a return.

This in no way applies to wages.

Two totally separate codes and purposes.

The U.S. Postal Service does not “accept responsibility” for getting the payment there on time!
I failed to withhold FICA on a fringe benefits and the employee has terminated—can I take the FICA out of the withheld FIT?
Taxing Fringe Benefits—The Basics

- All taxable fringe benefits must be reported on the Form W-2 for FICA in boxes 3 and 5
- IRS states that if you fail to withhold the proper tax you are liable for the tax not withheld from the employee’s wages
- In addition if you pay the tax that becomes taxable income and must be reported and taxed
Robbing FIT to Pay FICA

- All of this creates a large amount of work on the part of the employer
- It would be easier to just put the amount of the fringe benefit on the employee’s wages and take the amount of the FICA due out of the FIT withheld

Can I do it?
According to the IRS...

- No it is not permitted by the IRS
- This is stated clearly in Pub. 15-B page 28 paragraph 1 left column

Paying your employee's share of social security and Medicare taxes. If you choose to pay your employee's social security and Medicare taxes on taxable fringe benefits without deducting them from his or her pay, you must include the amount of the payments in the employee's income. Also, if your employee leaves your employment and you have unpaid and uncollected taxes for noncash benefits, you are still liable for those taxes. You must add the uncollected employee share of social security and Medicare tax to the employee's wages. Follow the procedure discussed under Employee’s Portion of Taxes Paid by Employer in section 7 of Publication 15-A. Do not use withheld federal income tax to pay the social security and Medicare tax.
How do I handle deceased employee wages including child support withholding?
For the final payment of wages including accrued PTO or vacation you must withhold social security and Medicare taxes

Must be reported on Form W-2 but only under boxes 3 and 5 for social security and Medicare

Do not put in box 1 for FIT taxable wages

Report amount in box 3 of Form 1099-MISC

Use name and TIN of estate or beneficiary
No special dispensation for termination check

In most cases, all normal deductions for garnishments will be withheld

This includes child support, tax levies and creditor garnishments

Voluntary deductions would depend on company policy as well
In the Year After Death

- Do not report on the Form W-2
- Do not withhold social security or Medicare taxes
- Report in box 3 of Form 1099-MISC
- Deductions should be verified but usually are no longer valid after the year of death
The latest on which states have moved the filing deadline and what the IRS is thinking of doing

Accelerated Forms W-2 Filings
Based on recent study under the Government Accountability Office (GAO) IRS estimates it pays over $5 billion in fraudulent identity theft refunds while catching over $24 billion

Fraud takes advantage of the IRS’ “look-back” compliance model where the IRS issues the tax refund before completing all compliance checks
Two ways to stop this fraud:

1. Move up the reporting date for employers
2. Require all employers to file electronically
3. OR do both!
Treasury is now asking for a date of January 31 as the due date for filing Forms W-2 with SSA.

Also asking that only employers with 10 or less Forms W-2 be able to file on paper.

Not only prevents this fraud but saves money.

Costs IRS approximately $0.50 more to process a paper form than an electronic one.
It isn’t just the IRS who has this problem
States do as well
Some have taken the step already to prevent this fraud by either:
1. Moving up the due date of the Forms W-2 or;
2. Requiring employers to file electronically only
3. OR both

The following chart shows the current due dates for the states that require filing of W-2s
## State Year End Filing

<table>
<thead>
<tr>
<th>January 31</th>
<th>February 15</th>
<th>February 28</th>
<th>Last Day In February</th>
<th>March 15</th>
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Forms W-2 do not need to be filed with state: California, Iowa, Maine (if filing on paper), New York, Oklahoma, and Oregon

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What Does the Future Hold?

- Treasury is pushing this as a cost savings measure in Congress
- SSA reading machines for paper are getting old and must be replaced
- Need to make the decision by June 30th to affect 2016 Forms W-2
- Bills are being introduced in state legislatures next year to address the issue as well
How Can Ascentis Help Me?

Process payroll
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- 100% accuracy
- Reduce processing time by up to 30%

Employee portal
- Paycheck data
- Paystubs
- Tax forms
- Paycheck simulation tools
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