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Immigration eNews

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Tax Withholding and Foreign Workers

Employers commonly experience difficulty with knowing what taxes to withhold from foreign workers. Errors caused by withholding certain taxes when a foreign student is exempt and not withholding when a worker is no longer a student can subject an employer to IRS penalties. The chart below should be used as a reference only. It is not a substitute for professional tax advice nor should it be relied upon when making any withholding determinations.

VISA CATEGORY	TAXES WITHHELD	COMMENTS
H, E and L visa	<p>Income Tax - Federal, State and Local</p> <p>**FICA (Social Security and Medicare)</p>	<p>**If a U.S. based company transfers an employee from a parent or affiliated entity in a country which has entered into a bilateral Social Security agreement (Totalization agreement) with the United States, i.e., France, to work in the U.S. for less than five years, and the employee can provide evidence that he/she is still paying into that country's social security system, i.e., a certificate from that country's social security authority, the employee is exempt from FICA tax.</p>
F visa (<u>working pursuant to Practical Training</u>) and J visa	<p>Income Tax - Federal, State and Local</p> <p>***If resident alien, then must pay FICA and FUTA. A student in F or J status may be considered a resident alien after living in the U.S. for five years. A J Trainee may be considered a resident alien if the J Trainee has spent more than two years in the U.S. in J or F status within the last six years.</p>	<p>***To claim an exemption from FICA the individual must be (i) a nonresident alien for tax purposes, (ii) present in the United States under an educational immigration status, i.e., F or J, and (iii) the primary holder of such immigration status and receiving income through legal employment. If an individual is in Optional or Curricular Practical Training and working at a corporate entity, the individual remains FICA-exempt for as long as he/she fulfills the three criteria indicated above. In addition, wages paid to nonresident aliens in F and/or J status are exempt from FUTA taxes.</p>

Immigration Destined for Discussion on Senate Floor this Month

Senate Judiciary Committee Chairman Arlen Specter (R-Pa.) has said that he does not know whether his committee can produce a bipartisan immigration bill given the dissent he is facing regarding the provisions in his "Chairman's Mark." Senators who sponsor two competing measures on immigration have expressed dissatisfaction with Specter's draft bill.

Senator John McCain (R-Ariz.) and Senator Edward Kennedy (D-Mass.) have co-sponsored another bill (S. 1033) that would create a new guestworker program that would be open to the estimated 11 million undocumented aliens currently in the United States. Under the McCain/Kennedy measure, undocumented workers could apply for green cards if they pay a \$2,000 fine and wait six years.

Senator McCain said he disapproves of provisions in Senator Specter's bill that would require foreign workers to return to their home countries when their visas expire. Senator Specter's draft measure would create a new guestworker program that would allow foreign workers to come to the United States to work for six years, but they then would be required to return to their home countries.

Senator Specter's bill would give conditional nonimmigrant work authorization and status to undocumented aliens who were physically present and employed in the United States before January 4, 2004. That conditional visa has no time limit, and those workers presumably would be allowed to apply for green cards through normal channels.

Senator John Cornyn (R-Texas), who sponsors another immigration bill (S. 1438) with Senator Jon Kyl (R-Ariz.), has indicated that Senator Specter's proposal with regard to undocumented workers is not good enough because it gives illegal immigrants the opportunity to become legal

residents.

Like the McCain/Kennedy bill, the Cornyn/Kyl measure would create a new guestworker program. Unlike the McCain/Kennedy bill, however, the Cornyn/Kyl measure would require all current undocumented workers to return to their home countries within five years.

Senate Majority Leader William Frist (R-Tenn.) has prepared an alternate strategy to facilitate an immigration debate if Senator Specter and the Judiciary Committee fail to produce a bill. If necessary, Senator Frist is prepared to put forth his own immigration bill and bring it directly to the floor, bypassing the committee.

Senator Frist has the option either of bringing his own bill to the Senate floor or a House-passed immigration enforcement bill (H.R. 4437). If Senator Frist opts to bring his own bill to the floor, it will likely focus largely on border security.

A border security bill on the Senate floor would not preclude debate about a new guestworker program or adjusting the status of the 11 million undocumented workers. Senator McCain has already promised to offer guestworker amendments to any immigration bill that hits the Senate floor. Last year, Senator Frist pledged to allow such debate to occur.

Lost Earning Awards Permitted for Injured Undocumented Workers by New York High Court

Undocumented workers who were injured on construction sites in New York are not barred by the Immigration Reform and Control Act of 1986 from filing claims under state law for lost wages, absent proof that they provided false documentation, the New York Court of Appeals ruled Feb. 21, 2006 in a 5-2 decision (*Balbuena v. IDR Realty LLC*, N.Y., No. 19, 2/21/06).

Judge Victoria A. Gaffeo wrote the majority opinion and indicated that preventing these workers from recovering lost wages would condone conduct by employers that contravenes the immigration act by encouraging employment of undocumented aliens and the state labor laws by promoting unsafe work conditions.

The majority opinion relied on the U.S. Supreme Court's 2002 decision in *Hoffman Plastic Compounds Inc. v. NLRB* 535 U.S. 137, 169 LRRM 2769 (2002), which denied back pay in an unfair labor practice dispute to an undocumented alien who had provided fraudulent documentation to the errant employer.

Georgia State Bill Penalizes Public Contractors of Unauthorized Workers

In late February, a state bill that would penalize public contractors who hire illegal immigrants by not allowing them to claim the salary of those employees as a business expense on their state income tax return was approved by a Georgia Senate committee. The bill now goes to the full state Senate.

The provisions of the bill that apply to employers would require the employer to maintain proof that the workers are legal residents. The provision applies to any employee paid more than \$600 a year.

The bill is aimed at curbing illegal immigration. In addition to the business tax code provisions, the bill would require proof of legal residence for anyone 18 years of age or over seeking public

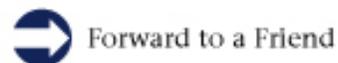
benefits and would require public contractors to hire only legal residents.

The bill also would require police to verify the legal status of any person arrested for a criminal violation, and creates penalties for human smuggling.

Temporary Protected Status Extension for El Salvador, Honduras and Nicaragua

The Department of Homeland Security, in a continuing effort to assist El Salvador, Honduras and Nicaragua in recovering from the natural disasters that affected the Central American region, has announced its decision to extend Temporary Protected Status (TPS) for an additional 12 months for all three countries. Under this extension, nationals of those three countries who have already been granted and remain eligible for TPS will be able to continue living in the United States for an additional 12 months. This extension of these TPS designations will expire on September 9, 2007 for El Salvador and on July 5, 2007 for Honduras and Nicaragua.

The U.S. Citizenship and Immigration Service will provide additional information about the re-registration process and answers to frequently asked questions upon publication of Notices in the Federal Register. This information likely will address questions facing employers and workers about continued employment authorization for individuals in TPS. Re-registration applications will not be accepted before the registration period is announced for each country.



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