

Section 6051.—Receipts for Employees

26 CFR 31.6051-1: Statements for employees.

T.D. 8636

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 31 and 301

Time for Furnishing Wage Statements on Termination of Employer's Operations

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations concerning the time for furnishing wage statements to employees and for filing wage statements with the Social Security Administration upon the termination of an employer's operations. These regulations will affect employers and their employees in the year the employer ceases to pay wages. These regulations are intended to improve the wage reconciliation process between the Social Security Administration and the IRS.

EFFECTIVE DATE: These regulations are effective January 1, 1997.

ADDRESSES: Send submissions to: CC:DOM:CORP:T:R (EE-83-89), Room 5228, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. In the alternative, submissions may be hand delivered between the hours of 8 a.m. and 5 p.m. to: CC:DOM:CORP:T:R (EE-83-89), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Jean M. Casey, (202) 622-6040 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

On December 22, 1994, the Federal Register (59 FR 65982 [EE-83-89, 1995-1 C.B. 845]) published a notice of proposed rulemaking which required an employer to furnish Forms W-2 to

employees and to file Forms W-2 and W-3 with the Social Security Administration (SSA) at the same time that the employer is required to file the final Form 941 with the IRS.

Written comments responding to the notice of proposed rulemaking were received. A public hearing was held on May 8, 1995, pursuant to a notice published in the Federal Register on March 24, 1995 (60 FR 15526). After consideration of the comments that were received in response to the notice of proposed rulemaking and at the hearing, the IRS and Treasury adopt the proposed regulations, as amended and revised by this Treasury decision.

Explanation of Revisions and Summary of Comments

Availability of Forms W-2

The regulations, as proposed, would have required an employer who ceases paying wages to furnish Form W-2 to employees and file Forms W-2 and W-3 with SSA on or before the date on which the final Form 941 is required to be filed with the IRS. Form 941 is generally due quarterly, on or before the last day of the first calendar month following the period for which it is made (*i.e.*, April 30, July 31, October 31, and January 31). Consequently, if an employer ceased paying wages in the first quarter of the calendar year, the Forms 941, W-2 and W-3 would be due by April 30. Some commentators expressed concern that Forms W-2 and W-3 are not available in the first quarter of the calendar year. Commentators questioned whether using prior year Forms W-2 was an acceptable alternative if current year forms were unavailable.

Under the Internal Revenue Code and the existing regulations, an employee may request the Form W-2 at any time during the year if the employee is terminated and there is no reasonable expectation on the part of the employer or the employee of further employment during the calendar year. Therefore, Forms W-2 are available from the IRS, either through the mail or at the district offices, in January of each year. Specifications for the private printing of substitute Forms W-2, however, are not always available during the first quarter of the calendar year. Thus, during this period, employers may be limited to using the Forms W-2 printed by the IRS. Neither prior year Forms W-2 nor

the prior year specifications for the private printing of substitute Forms W-2 should be used for filing Forms W-2 on an expedited basis for the current year because such procedures could result in significant processing errors.

Availability of Magnetic Media Specifications

Commentators questioned whether magnetic media specifications would be available in the first quarter of the calendar year for employers who are required to file on an expedited basis under the proposed regulations. Regulation section 301.6011-2 and Notice 90-15, 1990-1 C.B. 326, generally require an employer to file Forms W-2 with SSA on magnetic media if the employer is required to file 250 or more Forms W-2 in a calendar year. Employers who do not meet the 250 return threshold may also file their Forms W-2 with SSA on magnetic media.

It is not certain that magnetic media specifications, which are issued by SSA, will be available in the first quarter of the calendar year for employers who are required to file on an expedited basis. The Commissioner has the authority to provide for reasonable extensions of time, upon written application, for an employer to furnish Forms W-2 to employees and file Forms W-2 and W-3 with SSA. To assure that filers need not shift from magnetic media to paper filings in order to comply with the expedited filing requirements, the final regulations affirm that the Commissioner may adopt automatic extension procedures where appropriate.

It is anticipated that the Commissioner will establish automatic extension procedures to the extent necessary to permit employers that terminate operations a reasonable period of time, after the issuance of specifications, to make their filings on magnetic media.

It is further anticipated that these procedures will include appropriate automatic extensions of time to file expedited Forms W-2 both for employers required to file on magnetic media and for employers who have filed on magnetic media in the past whether or not required to do so. Even though Forms W-2 are furnished to employees on paper, the automatic extension procedures are anticipated to apply to the employee copy of the Form W-2 as well as the SSA copy in order to avoid the complexities and potential errors

that could arise from processing these forms at significantly different times.

It is also anticipated that the published procedure will provide for an automatic extension to a specified date which permits employers a reasonable period of time after the issuance of specifications to make their filings on magnetic media. This date will be communicated to filers sufficiently early in the year to permit adequate systems planning. In providing for these procedures, it is necessary to balance the practical issues of compliance with the concern for timely submission of information to SSA. Thus, if prior to a future year, it is anticipated that specifications will be issued sufficiently early in the year to permit a reasonable period of time for filing, while still complying with the due dates otherwise required in this regulation, the Commissioner may suspend the automatic extension procedures for that year. Discretionary extensions would continue to be considered on a case-by-case basis.

Comments are requested on the automatic extension procedures and their implementation.

Regulation section 301.6011-2(c)(4) provides that the Commissioner may, upon application, waive the requirement to file on magnetic media in the case of hardship. The final regulations clarify that the unavailability of the specifications for magnetic media filing of Form W-2 will be treated as creating a hardship. Therefore, an employer has the option of applying for a waiver from the requirement to file Forms W-2 on magnetic media and may instead file the Forms W-2 on paper. The employer must apply for a waiver within 45 days of the due date of the return.

Employers may also contact their local SSA Magnetic Media Coordinator for guidance on how to report on magnetic media. The Coordinators are listed in the annual Technical Instructions Bulletin (TIB-4) published by SSA.

Extension Procedures

Regulation section 31.6051-1(d)(2) provides procedures for an employer to request an extension of time to furnish Forms W-2 to employees. Regulation section 31.6081(a)-1 provides similar procedures for employers to request an extension of time to file Forms W-2 and W-3 with SSA. These procedures apply to employers who are required to furnish Forms W-2 to employees or file

Forms W-2 and W-3 with SSA on an expedited basis. Thus, an employer who, under the final regulations, is required to furnish and file the Forms W-2 on an expedited basis may request an extension of time if necessary.

Additional month to provide Forms W-2 and W-3 to SSA

Under existing regulations Forms W-2 and W-3 are due to SSA one month after they are due to the employees. This provides employers an opportunity to correct any errors found by employees before filing the Forms W-2 with SSA. Some commentators noted that providing the Forms W-2 to SSA at the same time the forms are provided to the employees eliminates the opportunity for corrections currently provided by the regulations. To minimize the need for employers to file corrected Forms W-2 (Form W-2c, Statement of Corrected Income and Tax Amounts), the final regulations include a suggested one month additional period for providing the Forms W-2 to SSA. Thus, Forms W-2 would be due to employees at the same time as the final Form 941 (generally one month after the end of the quarter). Forms W-2 and W-3 would be due to SSA two months after the final Form 941 is due.

Modification of Revenue Procedure 84-77

In Revenue Procedure 84-77, 1984-2 C.B. 753, the IRS provided procedures for preparing and filing certain forms, including Form 941, Form W-2 and Form W-3, when a successor employer acquires substantially all of the property (1) used in a trade or business of a predecessor employer, or (2) used in a separate unit of a trade or business of a predecessor, and in connection with, or immediately after the acquisition (but during the same calendar year) the successor employs individuals who were employed in the trade or business of the predecessor immediately prior to the acquisition. Under the standard procedure described in Rev. Proc. 84-77, both the predecessor and successor employer report the wages they paid employees on Form W-2. Under the alternate procedure, the predecessor is relieved from furnishing Form W-2 to any employee who is employed by the successor employer and from filing such Forms W-2 with SSA. Instead, the suc-

cessor employer assumes the predecessor's reporting obligation for those employees. The preamble to the proposed regulation stated that, other than modifying the time frame for the standard procedure, the proposed regulation would not affect the validity of Rev. Proc. 84-77.

One commentator questioned whether the proposed regulation expedited the filing requirements for the predecessor employer with regard to individuals who are not employed by the successor employer. If the predecessor employer ceases to pay wages, (i.e., is required to file a final Form 941), the predecessor employer is required under these regulations to furnish Forms W-2 on an expedited basis to those individuals who are not employed by the successor employer. The predecessor employer must also file Forms W-2 and W-3 with SSA on an expedited basis for those individuals who are not employed by the successor employer. Revenue Procedure 84-77 is being modified to reflect this change.

Some commentators asked how the proposed regulations apply in the context of mergers. If a final Form 941 is not filed because a merger does not involve the cessation of business operations but only a change in corporate or business form, the expedited filing requirements are inapplicable.

Use of an agent

One commentator suggested the final regulations provide an exception from expedited filing for an employer that appoints an agent to assume the employer's reporting obligation. A similar exception was suggested in the case of a controlled group of corporations in which one member of the group acts as the payroll agent for the group. Because there is no practically effective enforceable manner for shifting liability for reporting from an employer to an agent and for assuring that the agent will satisfy the reporting obligations, these suggestions were not adopted.

Application to Returns filed by Employers for Employees in Guam, U.S. Virgin Islands, American Samoa, Commonwealth of the Northern Mariana Islands and Puerto Rico.

One commentator questioned whether the proposed regulations applied to wage statements furnished to employees

and filed with SSA by employers for employees in Guam, U.S. Virgin Islands, American Samoa, Commonwealth of the Northern Mariana Islands and Puerto Rico. While these employers file variations of the Forms 941, W-2 and W-3, they are subject to the filing requirements for Forms 941, W-2 and W-3. In addition, employees of these employers receive social security credit on the same basis as employers who file the Forms 941, W-2 and W-3. Thus, these employers are subject to the regulations.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to these regulations, and, therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding these regulations was submitted to the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Jean M. Casey, Office of the Associate Chief Counsel (Employee Benefits and Exempt Organizations), IRS. However, other personnel from the IRS and Treasury Department participated in their development.

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Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 31 and part 301 are amended as follows:

PART 31—EMPLOYMENT TAXES AND COLLECTION OF INCOME TAX AT SOURCE

Paragraph 1. The authority citation for part 31 is amended by adding the following entries in numerical order to read as follows:

Authority: 26 U.S.C. 7805 * * *

Section 31.6051-1(d) also issued under 26 U.S.C. 6051.

Section 31.6051-2 also issued under 26 U.S.C. 6051 * * *

Section 31.6071-1 also issued under 26 U.S.C. 6071 * * *

Section 31.6081-1 also issued under 26 U.S.C. 6081 * * *

Par. 2. Section 31.6051-1, paragraph (d) is amended as follows:

- 1. Paragraph (d)(1) is redesignated as (d)(1)(i).
- 2. Paragraph (d)(1)(ii) is added.
- 3. Paragraph (d)(2) is revised.

The addition and revision read as follows:

§31.6051-1 Statements for employees.

* * * * *

(d) * * * (1)(i) * * *

(ii) *Expedited furnishing*—(A) *General rule.* If an employer is required to make a final return under §31.6011(a)-6(a)(1) (relating to the final return for Federal Insurance Contributions Act taxes and income tax withholding from wages) on Form 941, or a variation thereof, the employer must furnish the statement required by this section on or before the date required for filing the final return. See §31.6071(a)-1(a)(1). However, if the final return under §31.6011(a)-6(a)(1) is a monthly return, as described in §31.6011(a)-5, the employer must furnish the statement required by this section on or before the last day of the month in which the final return is required to be filed. See §31.6071(a)-1(a)(2). Except as provided in paragraph (d)(2)(i) of this section, in no event may an employer furnish the statement required by this section later than January 31 of the year succeeding the calendar year to which it relates. The requirements set forth in this paragraph (d)(1)(ii) do not apply to employers with respect to employees whose wages are for domestic service in the private home of the employer. See §31.6011(a)-1(a)(3).

(B) *Requests by employees.* An employer is not permitted to furnish a statement pursuant to the provisions of the third sentence of paragraph (d)(1)(i) of this section (relating to written requests by terminated employees for Form W-2) at a time later than that required by the provisions of paragraph (d)(1)(ii)(A) of this section.

(C) *Effective date.* This paragraph (d)(1)(ii) is effective January 1, 1997.

(2) *Extensions of time*—(i) *In general*
(a) The Director, Martinsburg Computing Center, may grant an extension of time in which to furnish to employees the statements required by this section. A request may be made by a letter to the Director, Martinsburg Computing Center. The request must contain:

(1) *The employer's name and address*;

(2) *The employer's taxpayer identification number*;

(3) *The type of return (i.e., Form W-2)*; and

(4) *A concise statement of the reasons for requesting the extension.*

(b) The application must be mailed or delivered on or before the applicable due date prescribed in paragraph (d)(1) of this section for furnishing the statements required by this section.

(c) In any case in which an employer is unable, by reason of illness, absence, or other good cause, to sign a request for an extension, any person standing in close personal or business relationship to the employer may sign the request on his behalf, and shall be considered as a duly authorized agent for this purpose, provided the request sets forth a reason for a signature other than the employer's and the relationship existing between the employer and the signer. For provisions relating to extensions of time for filing the Social Security Administration copies of the statement, see §31.6081(a)-1(a)(3).

(ii) *Automatic Extension of Time.* The Commissioner may, in appropriate cases, publish procedures for automatic extensions of time to furnish Forms W-2 where the employer is required to furnish the Form W-2 on an expedited basis.

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Par. 3. Section 31.6051-2, paragraph (c), first sentence is revised to read as follows:

§31.6051-2 Information returns on Form W-3 and Internal Revenue Service copies of Form W-2.

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(c) *Cross references.* For provisions relating to the time for filing the information returns required by this section and to extensions of the time for filing, see §§ 31.6071(a)-1(a)(3) and 31.6081(a)-1(a)(3), respectively. * * *

Par. 4. Section 31.6071(a)-1(a)(3) is amended as follows:

1. Paragraph (a)(3)(i) is removed.

2. Paragraph (a)(3)(ii) is redesignated as paragraph (a)(3)(i) and the heading is revised.

3. A new paragraph (a)(3)(ii) is added.

The addition and revision read as follows:

§31.6071(a)-1 Time for filing returns and other documents.

(a) * * *

(3) * * * (i) *General rule.* * * *

(ii) *Expedited filing*—(A) *General rule.* If an employer who is required to make a return pursuant to §31.6011(a)-1 or §31.6011(a)-4 is required to make a final return on Form 941, or a variation thereof, under §31.6011(a)-6(a)(1) (relating to the final return for Federal Insurance Contributions Act taxes and income tax withholding from wages), the return which is required to be made under §31.6051-2 must be filed on or before the last day of the second calendar month following the period for which the final return is filed. The requirements set forth in this paragraph (a)(3)(ii) do not apply to employers with respect to employees whose wages are for domestic service in the private home of the employer. See §31.6011(a)-1(a)(3).

(B) *Effective date.* This paragraph (a)(3)(ii) is effective January 1, 1997.

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Par. 5. Section 31.6081(a)-1(a)(3) is revised to read as follows:

§31.6081(a)-1 Extensions of time for filing returns and other documents.

(a) * * *

(3) *Information returns of employers on Forms W-2 and W-3*—(i) *In general.* The Director, Martinsburg Computing Center, may grant an extension of time in which to file the Social Security Administration copy of Forms W-2 and the accompanying transmittal form which constitutes an information return under paragraph §31.6051-2(a). The request must contain a concise statement of the reasons for requesting the extension. The request must be mailed or delivered on or before the date on which the employer is required to file the Form W-2 with the Social Security Administration.

(ii) *Automatic Extension of Time.* The Commissioner may, in appropriate cases, publish procedures for automatic extensions of time to file Forms W-2 where the employer is required to file the Form W-2 on an expedited basis.

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PART 301—PROCEDURE AND ADMINISTRATION

Par. 6. The authority citation for part 301 continues to read in part as follows:

Authority: 26 U. S. C. 7805 * * *

Par. 7. Section 301.6011-2(c)(4)(i) is revised to read as follows:

§301.6011-2 Required use of magnetic media.

* * * * *

(c) * * *

(4) *Waiver.* (i) The Commissioner may waive the requirements of this section if hardship is shown in a request for waiver filed in accordance with this paragraph (c)(4)(i). The principal factor in determining hardship will be the amount, if any, by which the cost of filing the information returns in accordance with this section exceeds the cost of filing the returns on other media. Notwithstanding the forgoing, if an employer is required to make a final return on Form 941, or a variation thereof, and expedited filing of Forms W-2 is required, the unavailability of specifications for magnetic media filing will be treated as creating a hardship. See §31.6071(a)-1(a)(3)(ii). A request for waiver should be filed at least 45 days before the due date of the information return in order for the Service to have adequate time to respond to the request for waiver. The waiver will specify the type of information return and the period to which it applies and will be subject to such terms and conditions regarding the method of reporting as may be prescribed by the Commissioner.

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Margaret Milner Richardson,
Commissioner of Internal Revenue.

Approved December 12, 1995.

Leslie Samuels,
Assistant Secretary of the Treasury

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