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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 31

REG-144908-02

RIN 1545-BB66

Federal Unemployment Tax Deposits—De Minimis Threshold

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations relating to the deposit of Federal Unemployment Tax Act (FUTA) taxes. The proposed regulations would provide an additional exception to the FUTA deposit requirements for taxpayers that qualify for the de minimis exception to the deposit requirements applicable to Federal Insurance Contribution Act (FICA) and withheld income taxes. The regulations affect small employers required to make deposits of FUTA taxes.

DATES: Written or electronically generated comments and requests for a public hearing must be received by October 15, 2003.

ADDRESSES: Send submissions to: CCPA:RU (REG-144908-02), room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CCPA:RU (REG-144908-02), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC. Alternatively, taxpayers may submit comments electronically via the Internet directly to the IRS Internet site at www.irs.gov/regs.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Heather L. Dostaler, (202) 622-4940; concerning submissions of comments and requests for a public hearing, Treena Garrett of the Regulations Unit at (202) 622-7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

The current rules relating to the deposit of FUTA taxes require employers to deposit taxes on a quarterly basis. The only generally applicable exception to this requirement is for employers whose accumulated FUTA taxes (i.e., FUTA taxes for the current quarter plus undeposited FUTA taxes for prior quarters) do not exceed \$100. These employers are not subject to the deposit requirements until the quarter in which accumulated FUTA taxes exceed \$100. Similarly, if FUTA tax liability for a calendar year exceeds deposits for the year, the employer may remit the balance with the annual return only if it does not exceed \$100. In all other cases, the balance must be deposited with an authorized financial institution.

An employer is also generally required to deposit FICA taxes and withheld income taxes (employment taxes) on at least a monthly basis and file a quarterly or annual employment tax return. For any return period in which the employer's total liability for these taxes is less than \$2,500, the employer may satisfy its deposit obligation by remitting the tax with a timely filed employment tax return. An employer that qualifies for this exception with respect to employment taxes accumulated during a return period may, nevertheless, be required to deposit FUTA taxes for that period if the amount of accumulated FUTA taxes exceeds \$100.

Explanation of Provisions

The proposed regulations would provide an additional exception to the FUTA deposit requirements for employers that are permitted to satisfy their obligation to deposit employment taxes by remitting the taxes with the employment tax return (de minimis depositors). Thus, an employer will not be required to deposit FUTA taxes for a quarter if the amount of the employer's accumulated FICA taxes and withheld income taxes for the quarter is less than \$2,500 and those taxes are remitted with the employer's timely filed employment tax return for the quarter. The employer will remain subject to the FUTA deposit requirements and will be required to deposit accumulated FUTA taxes for any quarter in which the amount of accumulated FICA taxes and withheld income taxes is at least \$2,500 and the amount of accumulated FUTA taxes exceeds \$100. The proposed regulations would also permit an employer that is a de minimis depositor for the last calendar quarter of a year to remit the balance of its FUTA tax liability for the year with a timely filed return. These additional exemptions from the FUTA deposit requirements will lessen burdens on small business owners, especially those employing part-time or seasonal workers.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 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) does not apply to these regulations, and, because these regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small

Business Administration for comment on their impact.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and 8 copies) and electronic comments that are submitted timely to the IRS. The IRS and Treasury specifically request comments on the clarity of the proposed regulations and how they can be made easier to understand. All comments will be available for public inspection and copying. A public hearing may be scheduled if requested in writing by any person that timely submits comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these regulations is Heather L. Dostaler of the Office of Associate Chief Counsel, Procedure and Administration (Administrative Provisions and Judicial Practice Division).

List of Subjects in 26 CFR Part 31

Employment taxes, Income taxes, Penalties, Pensions, Railroad retirement, Reporting and recordkeeping requirements, Social security, Unemployment compensation.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 31 is proposed to be amended as follows:

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

Paragraph 1. The authority citation for part 31 continues to read in part as follows:

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

Par. 2. In § 31.6302(c)-3, paragraphs (a)(2) and (a)(3) are revised to read as follows:

§31.6302(c)-3 Use of Government depositories in connection with tax under the Federal Unemployment Tax Act.

(a) * * *

(2) Special rules—(i) De minimis rule for deposit of taxes attributable to payments made after December 31, 2003. The provisions of paragraph (a)(1) of this section do not apply to a period described therein if the period ends after December 31, 2003, and the taxpayer is a de minimis depositor of employment taxes as defined in §31.6302-1(e) (Federal Insurance Contributions Act (FICA) taxes and withheld income taxes) for such period. A taxpayer is a de minimis depositor of employment taxes for a period described in paragraph (a)(1) of this section if—

(A) The period is a single calendar quarter and, under the de minimis rule of §31.6302-1(f)(4), the taxpayer is permitted to satisfy its obligation to deposit employment taxes accumulated during the quarter by remitting the taxes with a timely filed return; or

(B) The period includes two or more calendar quarters and, under the de minimis rule of §31.6302-1(f)(4), the taxpayer is permitted to satisfy its obligation to deposit employment taxes accumulated during the last quarter in the period by remitting the taxes with a timely filed return.

(ii) Special rule where accumulated amount does not exceed \$100. The provisions of paragraph (a)(1) of this section do not apply with respect to a period described therein if the amount of the tax imposed by section 3301 for the period as computed under the provisions of section 6157 plus amounts not deposited for prior periods in the same calendar year does not exceed \$100. Thus, an employer is not required to make a deposit for a period unless the tax for the period plus tax not deposited for prior periods exceeds \$100.

(iii) The provisions of this paragraph (a)(2) are illustrated by the following examples. In the examples, A's FUTA tax rate, after the credit for contributions to state unemployment funds, is assumed to be 0.8 percent. The examples are as follows:

Example 1. In 2004, Employer A makes quarterly returns of employment taxes. In the first quarter, A's only employees are part-time workers B and C, who are each paid an annual salary of \$15,000 in semi-monthly installments. Both B and C claim single filing status with one exemption on Form W-4 and each is paid \$3,750 during the first quarter. The employees' share of FICA tax for the quarter is \$573.75 ($.0765 \times (\$3,750 + \$3,750)$), A's matching FICA tax is also \$573.75, and Federal income tax withheld from B and C is \$518. Thus, the amount of accumulated employment taxes for the quarter (\$1,665.50) is less than \$2,500 and, under the de minimis rule of §31.6302-1(f)(4), A is permitted to satisfy its obligation to deposit employment taxes by remitting the taxes with a timely filed return. A's FUTA tax liability for the first quarter is \$60 ($.008 \times (\$3,750 + \$3,750)$). Because A is a de minimis depositor under paragraph (a)(2)(i) of this section and A's FUTA tax liability does not exceed \$100, both of the exceptions in this paragraph (a)(2) apply and A is not required to deposit FUTA taxes for the first calendar quarter.

Example 2. On April 16, 2004, A hires part-time worker D, who is also paid an annual salary of \$15,000 in semi-monthly installments and who also claims single filing status with one exemption on Form W-4. During the second quarter, B and C are each paid \$3,750 and D is paid \$3,125. The employees' share of FICA tax for the quarter is \$812.81 ($.0765 \times (\$3,750 + \$3,750 + \$3,125)$), A's matching FICA tax is also \$812.81, and Federal income tax withheld from B, C, and D is \$734. Again, the amount of accumulated employment taxes for the quarter (\$2,359.62) is less than \$2,500 and, under the de minimis rule of §31.6302-1(f)(4), A is permitted to satisfy its obligation to deposit employment taxes by remitting the taxes with a timely filed return. The FUTA tax applies only to the first \$7,000 that each employee is paid during the calendar year. Thus, for both B and C, amounts paid in the second quarter are subject to the FUTA tax only to the extent they do not exceed \$3,250 (the \$7,000 annual limit less first quarter wages of \$3,750). A's FUTA tax liability for the second quarter is \$77 ($.008 \times (\$3,250 + \$3,250 + \$3,125)$) and A has an accumulated FUTA tax liability in the amount of \$137. Accordingly, the exception in paragraph (a)(2)(ii) of this section does not apply. A is, however, a de minimis depositor under paragraph (a)(2)(i) of this section and is, therefore, not required to deposit FUTA taxes for the second calendar quarter.

Example 3. On June 30, 2002, B and C quit employment with A. The following day, A hires E, a full-time employee who is paid an annual salary of \$40,000 in semi-monthly installments and who also claims single filing status with one exemption on Form W-4. During the third quarter, D is paid \$3,750 and E is paid \$10,000. The employees' share of FICA tax for the quarter is \$1,051.88 ($.0765 \times (\$3,750 + \$10,000)$), A's matching FICA tax is also \$1,051.88, and Federal income tax withheld from D and E is \$1,609. The de minimis rule of §31.6302-1(f)(4) does not apply because the amount of accumulated employment taxes for the quarter (\$3,712.76) is not less than \$2,500 and A may not satisfy its obligation to deposit employment taxes by remitting the taxes with a timely filed return. All amounts paid to D in the third quarter are subject to the FUTA tax because the total amount paid to D through the end of the quarter

does not exceed the \$7,000 annual limit. The tax also applies to the first \$7,000 paid to E. A's FUTA tax liability for the third quarter is \$86 (.008 x (\$3,750 + \$7,000)) and A has an accumulated FUTA tax liability of \$223. Because A is not a de minimis depositor under paragraph (a)(2)(i) of this section and A's accumulated FUTA tax liability exceeds \$100, neither of the exceptions in this paragraph (a)(2) apply and A is required to deposit the accumulated FUTA tax liability on or before October 31, 2004.

(3) Requirement for deposit in lieu of payment with return. If the amount of tax reportable on a return on Form 940 for a calendar year beginning after December 31, 2003, exceeds by more than \$100 the sum of the amount deposited by the employer pursuant to paragraph (a)(1) of this section for such calendar year and the employer does not qualify as a de minimis depositor under paragraph (a)(2)(i) of this section during the last quarter of the calendar year, the employer shall, on or before the last day of the first calendar month following the calendar year for which the return is required to be filed, deposit the balance of the tax due with an authorized financial institution. If the amount of tax reportable on a return on Form 940 for a calendar year beginning after December 31, 2003, does not exceed by more than \$100 the sum of the amount deposited by the employer pursuant to paragraph (a)(1) of this section for such calendar year or if the employer qualifies as a de minimis depositor under paragraph (a)(2)(i) of this section during the last quarter of the calendar year, the employer may, on or before the last

day of the first calendar month following the calendar year for which the return is required to be filed, remit the balance of the tax at the time and place fixed for filing the return.

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Deputy Commissioner for Services and Enforcement.