



American Payroll Association

Government Relations • Washington, DC

March 7, 2017

Internal Revenue Service

CC:PA:LPD:PR (Notice 2017-09) - Room 5205

P.O. Box 7604

Ben Franklin Station

Washington, DC 20224

By email: Comments@irs.counsel.treas.gov

Re: Internal Revenue Service Notice 2017-09 -- De Minimis Error Safe Harbor to the Internal Revenue Code §§ 6721 and 6722 Penalties

Dear Mr. Bond:

Thank you for the opportunity to comment on Internal Revenue Service (IRS) Notice 2017-09 regarding Section 202 of the Protecting Americans from Tax Hikes Act of 2015 (PATH Act; Pub. L. 114-113) that amended IRC §§ 6721 and 6722 to establish a safe harbor from penalties for failure to file correct information returns and failure to furnish correct payee statements for certain de minimis errors.

ABOUT THE AMERICAN PAYROLL ASSOCIATION (APA)

Established in 1982, the APA is a nonprofit professional association serving the interests of more than 20,000 payroll professionals and their employers in the United States. The APA's primary mission is to educate members and the payroll industry about the best practices associated with paying America's workers while complying with all applicable federal, state, and local laws. The APA's Government Relations Task Force (GRTF) works with legislative and executive branches at the federal and state levels to assist employers with understanding their legal obligations with significant emphasis on minimizing the administrative burden on government, employers, and individual workers.

The GRTF IRS Issues Subcommittee maintains a close relationship with the IRS to ensure that APA's members receive the latest information about federal tax law changes and the IRS receives meaningful feedback on its programs, regulations, guidance, and tax forms.

SPECIFIC COMMENTS AND RECOMMENDATIONS

The following are APA's comments and recommendations on Notice 2017-09:

- The “Section 2. Background” on page 2 is where the IRS first references the \$100 and \$25 limitations. APA recommends that the IRS clarify that these amounts are for each individual box on each information return or payee statement and not per batch. An example also would be helpful.
- In Section 3.01 on page 3 the notice states that if an employee makes an election to receive a corrected form (e.g., Form W-2c), and the employer furnishes a corrected statement to the employee and files a corrected information return with the IRS within 30 days of the date of the election, the error will be treated as attributable to “reasonable cause and not willful neglect” and the information reporting penalties will not apply. However, the notice also says that the 30-day requirement to provide the corrected form does not apply where “specific rules” allow more time to furnish and file a corrected form. The notice refers to IRS regulations that require employers to furnish and file corrected Forms W-2 by the deadline for furnishing and filing Forms W-2 for the year during which the error was discovered. APA requests that the IRS clarify whether these rules governing corrected Forms W-2 are “specific rules” giving employers more time to comply with an employee’s election to receive a corrected form.
- In the election process under Section 3.03 on page 6, the employee is responsible for identifying the types of statements to which the employee’s election applies. The language in Notice 2017-09 does not specify that the types of statements must be those that the employee would otherwise receive. The IRS likely did not intend to require employers to provide corrected forms when an original form was not required. This should be clarified in the notice and subsequent regulations.
- In Section 3.03 at the bottom of page 6 the notice uses the word “or” in referencing how an employer should proceed when the type of statement and calendar year in an election are not specified. This could be read to imply that if a calendar year is not specified, the election applies to all statements. APA recommends that the IRS use the word “and” to clarify the IRS’s intent. The type of statement and calendar year are two different pieces of information requiring separate instructions for employers (i.e., if the type of statement is not specified then the employer should assume all statements; if the calendar year is not specified, the employer should assume all calendar years going forward).

- Section 4 on page 8 reserves for future rulemaking how an employer must present the election opportunity to an employee. Employers find it difficult to assess the desirability of such an approach without understanding this requirement. Employees can request a corrected Form W-2, and the IRS's guidance explains what information employees must provide when doing so, but the guidance does not outline what information employers must provide to employees. For example, would an employer be required to advise employees of each specific error found, with related amounts and other details, or will employers be permitted to communicate a general policy of not amending for de minimis amounts unless the employee generally elects otherwise?
- Notice 2017-09 does not include any examples of how the de minimis safe harbor would work. APA recommends that the IRS offer some examples of when an employer may use the de minimis safe harbor as well as examples of when the safe harbor would not apply.

Again, thank you for the opportunity to comment on IRS Notice 2017-09. If you have any questions or if we can be of further service to you, please contact Alice Jacobsohn at 202-248-3901 or ajacobsohn@americanpayroll.org.

Sincerely,

Rebecca Harshberger

Rebecca Harshberger, CPP
American Payroll Association
Cochair, IRS Issues
Subcommittee

Stephanie Salavejus

Stephanie Salavejus, CPP
American Payroll Association
Cochair, IRS Issues
Subcommittee

Alice P. Jacobsohn

Alice P. Jacobsohn, Esq.
American Payroll Association
Senior Manager, Government
Relations