

DOHERTY
& WALLACE
& PILLSBURY
MURPHY P.C.

Attorneys at Law

1414 Main Street, One Monarch Place • Springfield, MA 01144-1900
Telephone 413-733-3111 • Fax 413-734-3910 • E-Mail dwpm@dwpm.com

Point of View

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RECENT DEVELOPMENTS IN TAX LAW

by Brenda Doherty, Esq.

Congress continues to pass a variety of new laws. Below is a summary of some key developments enacted during the second quarter of 2009.

Guidance on the limited subsidy for COBRA continuation coverage of unemployed workers. The American Recovery and Reinvestment Act of 2009 (ARRA) provides a 65% subsidy for COBRA continuation premiums for up to 9 months for workers who have been involuntarily terminated, and for their families. This subsidy also applies to health care continuation coverage if required by states (including Massachusetts, other than employers with fewer than 11 employees) for small employers.

In most instances the federal subsidy works as follows: the employer advances the 65% subsidy to the health plan and is reimbursed through a payroll tax credit. To qualify for premium assistance, a worker must be involuntarily terminated between September 1, 2008

and December 31, 2009. The subsidy is not taxable when received, but higher income recipients – those with modified adjusted gross income above \$125,000 (\$250,000 for joint filers) – will have to pay back part or all of it at tax return time. This subsidy has been the subject of much guidance from the IRS, posted at <http://www.irs.gov/newsroom/article/0,,id=204505,00.html>. This guidance includes the following posts:

Early May: the IRS posted Q&As on its web site providing additional guidelines on recovery of the COBRA premium subsidy by way of a payroll credit claimed on Form 941, and clarifying when the subsidy begins and ends.

Late May: the Department of Labor released a form that terminated workers (or their qualifying family members) can use to request expedited review of their being denied the COBRA premium subsidy.

Early June: the IRS added 19 new Q&As confirming that the premium subsidy will not be reported to the IRS or the recipients on either Form W-2 or Form 1099, and clarified a number of other topics, including events that will be treated as involuntary termination for COBRA subsidy purposes, who is entitled to claim the payroll tax credit for the premium subsidy, and recordkeeping requirements.

Business cell phone substantiation requirements may be eased. An employee may exclude from gross income the business use of an employer-provided cell phone as a working condition fringe benefit. However, because cell phones are so-called listed property, strict substantiation requirements must be satisfied for business cell phone usage to qualify for the exclusion. Additionally, any personal usage of an employer-provided cell phone is a taxable fringe benefit. Thus, the current rules require documentation of the business and personal use of the cell phone. The IRS is currently considering three alternative methods to simplify the substantiation requirements applicable to employee usage of employer-provided cell phones: a minimal personal use method, a safe harbor substantiation method, and a statistical sampling method (or some combination of the three).

Cash-for-clunkers law. President Obama recently signed legislation in to law that gives a cash incentive for individuals and businesses to trade in older gas-guzzling vehicles for new more fuel-efficient ones. The incentive takes the form of a voucher of \$3,500 or \$4,500 depending on the type of vehicle traded in and the fuel efficiency of the vehicle purchased. The new vehicle must be purchased between July 1 and November 1 of 2009. The vouchers are not treated as gross income for purposes of the Internal Revenue Code (for for

federal or state assistance programs).

IRA rollover pitfall to avoid. Subject to certain limited exceptions, withdrawing funds from an IRA before reaching 59-1/2 triggers a 10% penalty. One way to avoid the penalty is to take a series of substantially equal periodic payments (SOSE or SOSEPP), not less frequently than annually, for the life (or life expectancy) of the IRA owner or the joint lives (or joint life expectancies) of the IRA owner and his designated beneficiary. The IRS has been fairly unforgiving on inadvertent good faith errors with respect to SOSEPPS: in one case an owner took advantage of this exception, but later moved her IRA funds out of equities and into safer certificates of deposit at another institution after the market soured. In a private ruling, the IRS said that this move triggered the 10% penalty for *all* years going back to when she started taking the periodic payments. The IRS said that the rollover of the IRA to the new institution was a modification of the periodic payments that triggered imposition of the back penalties under a so-called recapture rule. It was irrelevant that the move was inspired by safety concerns, and that the individual was willing to take the payments out of the new IRA. The IRS also refused to allow her to correct the situation by placing the funds back into the original IRA. Note, however, that a new private ruling issued on July 17 indirectly calls that conclusion into question. The ruling provides relief where an amount was erroneously rolled over into the IRA from which periodic payments were being taken following a rollover from the original IRA from which the payments commenced. The ruling did not affirmatively address whether the original rollover constituted a modification but assumed that it did not. Note also: there is an education exception to this somewhat harsh rule: another litigated matter involved a taxpayer who took advantage of the SOSEPP exception. She subsequently varied the

amount to access additional funds for her son's education. The IRS maintained that this was a modification triggering the penalty. However, the Tax Court overruled the IRS, holding there is no penalty because of the exception for IRA funds withdrawn before age 59-1/2 for education, and that the rules allow an individual to qualify for more than one exception at the same time.

Claiming motor vehicle sales tax deduction. For 2009, there is a new deduction for state and local sales and excise taxes paid on the purchase of new cars, light trucks, motor homes and motorcycles after February 16, 2009 and before January 1, 2010. The deduction generally is available regardless of whether you itemize deductions on Schedule A or claim the standard deduction. The deduction is limited to the tax on up to \$49,500 of the purchase price of an eligible motor vehicle. This dollar limitation is imposed on a per vehicle basis, so taxpayers can deduct taxes on one or more purchases of qualifying motor vehicles, up to the limit on each one.

New guidance on life settlements. The IRS recently lifted some of the uncertainty surrounding life settlements by explaining their tax consequences. Until recently, individuals who no longer needed a life insurance policy had few options: they could surrender the policy to the issuing insurance company for its cash surrender value, or they could stop paying the premiums and let the policy lapse. For a term insurance or other policy without cash surrender value, the only choice was to let the policy lapse. Now, for some individuals, there is a secondary insurance market in which they may be able to sell a policy for more than its cash surrender value or even sell a policy without cash surrender value, such as a term policy. These transactions are called life settlements. This is an important development for anyone contemplating a life settlement because they will now be in a position to gauge how much

they will be left with after tax once they reach an agreement on the settlement amount and fees.



Brenda Doherty joined the firm in 2001, after working in the corporate department of a law firm in Boston, and then for legal services. Brenda practices in the areas of corporate law, estate planning and taxation. She is a member of the education committee of the Community Foundation of Western Massachusetts, is vice chair of the Springfield Zoning Board of Appeals, serves on the board of directors of Western Massachusetts Legal Services and the advisory board of Downey Side, and participates in the firm's Boland Elementary School tutoring program. Brenda is an adjunct faculty member at Western New England Law School's LL.M. program in estate planning and elder law.