

**OFFICE OF ADMINISTRATIVE LAW**

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**SUSAN LAPSLEY**  
 Director

*Debra Bowen*  
 DEBRA BOWEN  
 SECRETARY OF STATE

Date: January 29, 2010

To: William Hays Weissman

From: Chapter Two Compliance Unit

Subject: **2010 OAL DETERMINATION NO. 3 (S)**  
**(CTU2009-1130-01)**  
 (Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;  
 Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation language from the *California Employer*, Fourth Quarter 2009, concerning the provision of tax forms

On November 30, 2009, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether the following language found in the *California Employer*, dated Fourth Quarter 2009, attached as Exhibit A, that was issued by the Employment Development Department (EDD) constitutes an underground regulation:

Individuals, partnerships, corporations, or other organizations engaged in a trade or business in California may have a requirement to report independent contractor payment made in the course of their business.

For 2009, if the IRS or FTB requires that you provide an information return (Form 1099) to an independent contractor, failure to provide such form by February 1, 2010, may result in a penalty as imposed under Section 13052.5 of the California Unemployment Insurance Code or Section 19175 of the Revenue and Taxation Code. ...

In issuing a determination, OAL renders an opinion only as to whether a challenged rule is a "regulation" as defined in Government Code section 11342.600,<sup>1</sup> which should have been, but was not adopted pursuant to the Administrative Procedure Act (APA).<sup>2</sup>

In determining whether a challenged rule is a "regulation" that should be adopted pursuant to the

<sup>1</sup> "Regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

<sup>2</sup> Such a rule is called an "underground regulation" as defined in California Code of Regulations, title 1, section 250, subsection (a):

"Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

APA, OAL looks to see whether the challenged rule is merely a restatement of existing law. A rule which merely restates a California statute or controlling federal statute does not meet the definition of a "regulation" in Government Code section 11342.600 and is, therefore, not an underground regulation.

Unemployment Insurance Code section 13052.5, subdivision (a), states:

(a) In addition to the penalty imposed by Section 19183 of the Revenue and Taxation Code (relating to failure to file information returns), if any person, or entity fails to report amounts paid as remuneration for personal services as required under Section 13050 of this code or Section 6041A of the Internal Revenue Code on the date prescribed thereof (determined with regard to any extension of time for filing), that person or entity may be liable for a penalty determined under subdivision (b).

Revenue and Taxation Code section 19175 states:

(a) In addition to the penalty imposed by Section 19183 (relating to failure to file information returns), if any person or entity fails to report amounts paid as remuneration for personal services as required under Section 13050 of the Unemployment Insurance Code or Section 18631 on the date prescribed therefor (determined with regard to any extension of time for filing), that person or entity may be liable for a penalty determined under subdivision (b).

....

(c) The penalty imposed by subdivision (a) shall be assessed against that person or entity required to file a return under Section 13050 of the Unemployment Insurance Code or Section 18631.

....

(e) The penalty imposed under subdivision (a) shall be in lieu of the penalty imposed under Section 13052.5 of the Unemployment Insurance Code (relating to unreported compensation). In the event that a penalty is imposed under this section and Section 13052.5 of the Unemployment Insurance Code, only the penalty imposed under Section 13052.5 of the Unemployment Insurance Code shall apply.

Unemployment Insurance Code section 13050 requires:

(a) Every employer or person required to deduct and withhold from an employee a tax under Section 986, 3260, or 13020, or who would have been required to deduct and withhold a tax under Section 13020 (determined without regard to Section 13025) if the employee had claimed no more than one withholding exemption, shall furnish to each employee in respect of the remuneration paid by the person to the employee during the calendar year, on or before January 31 of the succeeding year, or, if his or her employment is terminated before the close of the calendar year, on the day on which the last payment of remuneration is made, a written statement showing all of the following:

....

Internal Revenue Code section 6041A subsection (a) states:

Returns regarding remuneration for services. If-

- (1) any service-recipient engaged in a trade or business pays in the course of such trade or business during any calendar year remuneration to any person for services performed by such person, and
- (2) the aggregate of such remuneration paid to such person during such calendar year is \$600 or more, then the service-recipient shall make a return, according to the forms or regulations prescribed by the Secretary, setting forth the aggregate amount of such payments and the name and address of the recipient of such payments. For purposes of the preceding sentence, the term “service-recipient” means the person for whom the service is performed.

Internal Revenue Code section 6041A, subsection (e) requires:

...Every person required to make a return under subsection (a)...shall furnish to each person whose name is required to be set forth in such return a written statement showing:

- (1) The name, address, and phone number of the information contact of the person required to make such a return, and
- (2) In the case of subsection (a), the aggregate amount of payments to the person required to be shown on such return. The written statement required under the preceding sentence shall be furnished to the person on or before January 31, of the year following the calendar year for which the return under subsection (a) was made.

Unemployment Insurance Code section 13050 and Internal Revenue Code section 6041A, require that employers and service recipients provide employment information to employees or service providers by January 31 of each year. If they do not, a penalty may be assessed pursuant to Unemployment Insurance Code section 13052.5 or Revenue and Taxation Code section 19175. February 1, the date noted in the language challenged in your petition, is the first day the penalty may be assessed if the information is not provided.

The language challenged in your petition notifies employers and service recipients that they may be required to comply with the Unemployment Insurance Code and/or the Internal Revenue Code. If they do not comply by the statutorily imposed date, they may face a penalty pursuant to the Unemployment Insurance Code or the Revenue and Taxation Code. The challenged language is a mere restatement of law and does not further “implement, interpret, or make specific the law enforced or administered by EDD.” It does not meet the definition of “regulation” in Government Code section 11342.600.

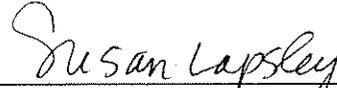
For the reasons discussed above, we find that the rule challenged by your petition is not an underground regulation.<sup>3</sup>

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<sup>3</sup> The rule challenged by your petition is the proper subject of a summary disposition letter pursuant to title 1, section 270 of the California Code of Regulations. Subdivision (f) of section 270 provides:

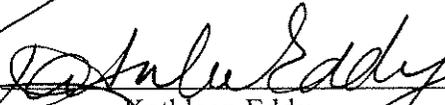
- (f)(1) If facts presented in the petition or obtained by OAL during its review pursuant to subsection (b) demonstrate to OAL that the rule challenged by the petition is not an underground regulation, OAL may issue a summary disposition letter stating that conclusion. A summary disposition letter may not be issued to conclude that a challenged rule is an underground regulation.
- (2) Circumstances in which facts demonstrate that the rule challenged by the petition is not an underground

The issuance of this summary disposition does not restrict your right to adjudicate the alleged violation of section 11340.5 of the Government Code.



SUSAN LAPSLEY

Director



Kathleen Eddy

Senior Counsel

Copy: Shanon Pavao

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regulation include, but are not limited to, the following:

(A) The challenged rule has been superseded.

(B) *The challenged rule is contained in a California statute.*

(C) The challenged rule is contained in a regulation that has been adopted pursuant to the rulemaking provisions of the APA.

(D) The challenged rule has expired by its own terms.

(E) An express statutory exemption from the rulemaking provisions of the APA is applicable to the challenged rule. (Emphasis added.)

# Exhibit A

# CALIFORNIA EMPLOYER

Fourth Quarter 2009

## New e-Services for Employers!

The Federal/State Employment Taxes (FSET) Program has just added two new forms. You can now file the following forms using FSET:

- DE 6 – Quarterly Wage and Withholding Report
- DE 7 – Annual Reconciliation Statement
- DE 34 – Report of New Employee(s)
- DE 542 – Report of Independent Contractor(s)



The program provides a standardized method for reporting federal and state employment tax and wage information as a file attachment over the Internet using eXtensible Markup Language (XML).

You can either develop your own FSET software or you can use the services of an approved FSET software provider by going to EDD's Web site at [www.edd.ca.gov](http://www.edd.ca.gov), then select the "Payroll Tax" Tab, select "e-Services" in the "Quick Link" section, then select any of the FSET applications. Look for the link to "approved FSET providers" on the Federal/State Employment Taxes (FSET) homepage.

If you have any questions about FSET or would like to be-

come an FSET software provider, please call the FSET toll-free number (866) 592-1651.

**Just Pay It** is a new, secure, easy, and convenient Electronic Funds Transfer (EFT) option that allows you to make your *Payroll Tax Deposit* (DE 88) online directly from your checking or savings account. You can use *Just Pay It* if you are registered as an employer with EDD and have an active EDD employer account number. All you need is your bank's routing number along with your savings or checking account number. Payments made before 3:00 p.m. Pacific Time will settle on the next banking day.

You do not need to be enrolled in EDD's EFT Program to use *Just Pay It*. In fact, *Just Pay It* is perfect for employers who are not yet enrolled in the EFT Program, but need to make a payment right away. It is also perfect for employers who make infrequent deposits. And, the best part of all, there is no processing fee to use *Just Pay It*. To learn how to use *Just Pay It*, go to <https://eddservices.edd.ca.gov>, select EFT, then select *Just Pay It*, or call us at (916) 654-9130.

## Seminars Offer Valuable Tax Help

We offer seminars on tax-related topics to help you understand and comply with California payroll tax laws. Some seminars are presented in partnership with federal or state agencies to provide information on related federal tax and labor law topics.

These courses are customized to benefit new employers, established businesses, bookkeepers, and payroll agents.

Some upcoming seminars are shown below. To view a complete list of seminar topics, dates and locations, or to register for a seminar, call our Taxpayer Assistance Center at (888) 745-3886 or visit [www.edd.ca.gov/Payroll\\_Tax\\_Seminars/](http://www.edd.ca.gov/Payroll_Tax_Seminars/)

Seminars are conducted with no charge to participants.

**Employee or Independent Contractor Tax Seminars** include the factors that determine whether a worker is an employee or an independent contractor plus the basics of statutory employment.

Fresno 12-08-09  
Ventura 12-15-09

**State Payroll Tax Workshops** provide hands-on training in calculating taxes and completing payroll tax forms.

Atwater 12-10-09  
Oakland 12-08-09

**Federal/State Basic Payroll Tax Seminars** cover federal and state payroll reporting requirements, including forms, payment requirements, electronic filing and independent contractor reporting.

Sacramento 12-08-09  
San Francisco 12-16-09  
San Jose 12-16-09  
West Covina 12-16-09

**State Labor Law and Payroll Tax Seminars** are co-presented by the Employment Development Department and the Department of Industrial Relations. Topics include employer reporting and payment requirements, common wage and hour law application, and basics of how to distinguish between employees and independent contractors.

Los Angeles 12-10-09  
Fresno 12-16-09

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# Furnish employees with Form W-2 by Feb. 1, 2010

As an employer, you are required to prepare a federal *Wage and Tax Statement* (Form W-2) for each of your employees. For 2009, you must provide employees with Form W-2 by February 1, 2010, as provided in Section 13050 of the California Unemployment Insurance Code (CUIC).

Employers who fail to provide a Form W-2 to each employee, or who furnish a false or fraudulent statement, are subject to a penalty of fifty dollars (\$50) for each such failure as imposed under Section 13052 of the CUIC. In addition, failure to provide such form may also result in a penalty as imposed under Section 13052.5 of the CUIC.

The amount of the penalty is determined based upon the unreported remuneration for personal services multiplied by the maximum rate (9.3%) as provided under Section 17041 of the Revenue and Taxation Code.

Forms W-2 provide information to employees, the Social Security Administration, the Internal Revenue Service and state and local governments. Use Boxes 15 through 19 of the Form W-2 to report the following state and local income tax information:

<b>Box 15</b> (Employer's state ID number)	Enter your EDD employer account number.
<b>Box 16</b> (State wages, tips, etc.)	Enter California PIT wages.
<b>Box 17</b> (State income tax)	Enter California PIT withheld
<b>Box 19</b> (Local income tax) [If Box 19 has local income taxes, use Box 14 (Other)]	Enter the abbreviation "CASDI" and the amount of SDI withheld. (Note: if the wages were not subject to SDI, show "CASDI 0" (zero). If your employees are covered under an authorized Voluntary DI plan, enter "VPDI" and the VPDI amount actually withheld.)

For additional information on Form W-2 reporting requirements or instructions on completing Form W-2, please refer to IRS publications *Employer's Tax Guide* (Publication 15, Circular E) and *2009 Instructions for Forms W-2 and W-3*, respectively. To obtain these publications, access the IRS Web site at [www.irs.gov](http://www.irs.gov) or call IRS at (800) 829-3676.

For more information on completing the "State" information on Form W-2, please refer to your *California Employer's Guide* (DE 44) or contact us at (888) 745-3886.

If the employee performs services in more than one state, contact the other state(s) for guidance on how to complete the Form W-2 for that state.

## 2010 California SDI and PIT Deposit Requirements

If Your Federal Deposit Schedule/Requirement is	And You Have Accumulated State PIT Withholding of	If Payday Is	PIT and SDI Deposit Is Due By
Next Banking Day	Less than \$350	Any day	Quarterly
	\$350 to \$500	Any day	15 <sup>th</sup> of the following month
	More than \$500	Any day	Next Banking Day
Semiweekly	Less than \$350	Any day	Quarterly
	\$350 to \$500	Any day	15 <sup>th</sup> of the following month
	More than \$500	Wed., Thurs., or Fri.	Following Wednesday
	More than \$500	Sat., Sun., Mon., or Tues.	Following Friday
Monthly	Less than \$350	Any day	Quarterly
	\$350 or more	Any day	15 <sup>th</sup> of the following month
Quarterly or Annually	Less than \$350	Any day	April 30, 2010 August 2, 2010 November 1, 2010 January 31, 2011
	\$350 or more	Any day	15 <sup>th</sup> of the following month

For more information and special situations concerning deposit rules and frequencies, refer to the *California Employers Guide* (DE 44), visit our Web site at [www.edd.ca.gov/Payroll\\_Taxes/File\\_and\\_Pay.htm](http://www.edd.ca.gov/Payroll_Taxes/File_and_Pay.htm), or call (888) 745-3886.

## Watch the mail for 2010 tax rate information

You will receive your *Notice of Contribution Rates and Statement of Unemployment Insurance (UI) Reserve Account (DE 2088)* for calendar year 2010 by December 31, 2009.

The DE 2088 statement informs each employer of their 2010 tax rates and reserve account activity.

Please carefully review all of the items. For more information about the DE 2088

and your protest rights, refer to the *Explanation of the Notice of Contribution Rates and the Statement of UI Reserve Account (DE 2088C)* enclosed with the DE 2088.

For 2010, the UI taxable wage limit and the Employee Training Tax (ETT) taxable wage limit is \$7,000 per employee. The ETT rate will remain at \$0.1 (.001).

The DE 2088 notifies employers of their 2010 State Disability Insurance rate and

taxable wage limit, and if they are subject to ETT. For questions about your statement, please call us at (916) 653-7795. When you call, have your DE 2088 and your employer account number available.

If you have moved and have a change of address and/or agent update, please inform EDD immediately to receive your DE 2088 by December 31, 2009.

## Tips for a trouble-free annual reconciliation

Each year, employers file an *Annual Reconciliation Statement (DE 7)* or an *Employer of Household Worker(s) Annual Payroll Tax Return (DE 3HW)* to reconcile payroll tax payments and the total subject wages reported for the year. Here are some tips to help avoid potentially costly mistakes.

### DE 7 Annual Reconciliation Statement

Compare the amounts reported on the forms below:

DE 7 Total Subject Wages (item C)	<b>Should match</b>	DE 6 (Item M) total of all four quarters
DE 7 PIT Withheld (item G)	<b>Should match</b>	DE 6 (item O) total of all four quarters and total of all Forms W-2 (box 17) plus Forms 1099R (box 10)
DE 7 Contributions and Withholdings Paid for the Year (item I)	<b>Should match</b>	Total of DE 88 Payroll Tax Deposits (item G). <b>Note:</b> Verify that the deposits being reconciled are for year 2009. Do not include deposits made for other years or any penalty and interest paid.
DE 6 Grand Total of PIT Wages (item N) total of all four quarters	<b>Should match</b>	Total of all Forms W-2 (box 16)

### DE 3HW Employer of Household Worker(s) Annual Payroll Tax Return

Compare the amounts reported on the forms below:

DE 3HW Total Subject Wages (item A).	<b>Should match</b>	DE 3BHW (item H) total of all four quarters
DE 3HW PIT Withheld (item E)	<b>Should match</b>	DE 3BHW (item J) total of all four quarters and total of all Forms W-2 (box 17) plus Forms 1099R (box 10)
DE 3BHW Grand Total PIT Wages (item 1) total of all four quarters	<b>Should match</b>	Total of all Forms W-2 (box 16)

Complete and mail a DE 88 for any underpaid deposits. Include pay date, deposit schedule, and quarter covered. Household employers who file an *Employer of Household Worker(s) Annual Payroll Tax Return (DE 3HW)* should send payment with the DE 3HW. All others should use a DE 88 Coupon.

**Note:** Failure to fully complete the DE 88 may result in your payment being posted to the wrong quarter and/or year.

To correct most errors on previously filed DE 3BHWs, DE 6s, DE 3HWs, and/or DE 7s, complete and mail a *Tax and Wage Adjustments Form (DE 678)* available at [www.edd.ca.gov/pdf\\_pub\\_ctr/de678.pdf](http://www.edd.ca.gov/pdf_pub_ctr/de678.pdf). An instruction sheet for completing the DE 678 is also available at [www.edd.ca.gov/pdf\\_pub\\_ctr/de678i.pdf](http://www.edd.ca.gov/pdf_pub_ctr/de678i.pdf). For more information or assistance, call our Taxpayer Assistance Center at (888) 745-3886.

## Furnish independent contractors with Form 1099

Individuals, partnerships, corporations, or other organizations engaged in a trade or business in California may have a requirement to report independent contractor payments made in the course of their business.

For 2009, if the IRS or FTB requires that you provide an information return (Form 1099) to an independent contractor, failure to provide such form by February 1, 2010, may result in a penalty as imposed under Section 13052.5 of the California Unemployment Insurance Code or 19175 of the Revenue and Taxation Code.

The amount of the penalty is determined

based upon the unreported remuneration for personal services multiplied by the maximum rate (9.3%) as provided under Section 17041 of the Revenue and Taxation Code.

If you do not use the official IRS Form 1099 to furnish the statement to recipients, see *General Rules and Specifications for Substitute Forms 1096, 1098, 1099, 5498, W-2C, and 1042-S*, IRS Publication 1179 for rules for substitute statements.

To obtain Form 1099 reporting requirements and instructions, refer to the IRS Web site at [www.irs.gov](http://www.irs.gov), see IRS Publication 1220, or call (800) 829-3676.

### Annual Interest Rate Will Be 4 Percent

For the period January 1 through June 30, 2010, the annual interest rate will be 4 percent (0.04), compounded daily.

The daily interest factor will be 0.000110. Interest is charged on all

delinquent taxes, interest, and certain penalties.

If you have any questions about the annual interest rate for 2010, please call the Taxpayer Assistance Center at (888) 745-3886.

## Taxable value of meals and lodging

Meals and/or lodging that you provide to your employees should be treated as wages for Unemployment Insurance, Employment Training Tax, and State Disability Insurance. Meals are subject to California Personal Income Tax (PIT) withholding unless the meal is furnished to your employees on your business premises and it is for your convenience. Lodging is also subject to PIT withholding unless it is furnished for your convenience and the employee is required to accept lodging on your business premises as a condition of employment.

Each year, the value of meals and lodging is adjusted based on the cost-of-living indexes. Please use the values shown below for 2010. These values do not apply where higher values of meals and lodging are stipulated in a union agreement or contract of hire, or are required for compliance with minimum wage laws. For more information, visit our Web site at [www.edd.ca.gov](http://www.edd.ca.gov) or call us at (888) 745-3886.

### Employees\*

Meals	Value
Breakfast	\$2.25
Lunch	\$3.15
Dinner	\$4.95
3 meals per day	\$10.35
A meal not identified as breakfast, lunch, or dinner	\$3.60

### Lodging Value

The value is set at 66-2/3 percent of the ordinary rental value to the public, but not in excess of \$1,190 per month or less than \$38.60 per week.

\* Maritime employees' values of lodging are different than all other employees and are shown in the above table on the right. Lodging values for maritime employees apply only when the facilities meet specific minimum standards.

### Maritime Employees

Licensed Personnel	Value
Meals	\$10.35
Quarters	\$8.05
Total per day	\$18.40
Unlicensed Personnel	Value
Meals	\$10.35
Quarters	\$5.45
Total per day	\$15.80

### Fishermen

Lodging value is \$38.60 per week and \$5.45 per day for periods of less than a week.

## Supplemental Wages Rate Change

For supplemental wages paid on or after November 1, 2009, the rate of withholding shall be 6.6 percent. For stock options and bonus payments that constitute wages paid on or after November 1, 2009, the rate of withholding shall be 10.23 percent. Additional information about supplemental wages is available in the *California Employer's Guide* (DE 44), or the Information Sheet: *Personal Income Tax Withholding - Supplemental Wage Payments, Moving Expense Reimbursement - WARN Act Payments* (DE 231PS).

*Just a Reminder!*

### Federal Earned Income Tax Credit Notification (EITC)

As of January 1, 2008 employers are required to notify their employees about the availability of the EITC. Written notification must be provided to employees in person or by mail. Notification must be provided within one week before or after, or at the same time, that you provide an annual wage summary, including, Form W-2 or Form 1099.

For more information about this requirement, visit: [www.edd.ca.gov/Payroll\\_Taxes/Earned\\_Income\\_Tax\\_Credit\\_Notification.htm](http://www.edd.ca.gov/Payroll_Taxes/Earned_Income_Tax_Credit_Notification.htm). For additional information about the EITC go to [www.irs.gov](http://www.irs.gov)

## CALIFORNIA EMPLOYER



This newsletter is published quarterly by the Employment Development Department of the California Labor and Workforce Development Agency. It is distributed with tax forms to all employers who are subject to the provisions of the Unemployment Insurance Code.

EDD is a recipient of federal and state funds. It is an equal opportunity employer/program and is in compliance with Section 504 of the Rehabilitation Act and the Americans with Disabilities Act. To request alternate formats, call (916) 654-9029.

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