Proskauer

Deadline Approaching for Employer Return Requirements for ISOs and ESPPs – New Reporting Requirements for 2011

January 21, 2011

Section 6039 of the Internal Revenue Code of 1986, as amended (the "Code") requires corporations to furnish their employees (including former employees) with information statements with regard to (i) the exercise of an incentive stock option ("ISO") described in Code Section 422(b) and (ii) the transfer of shares granted under certain employee stock purchase plans meeting the requirements of Code Section 423 ("ESPP") during calendar year 2010. The Internal Revenue Service (the "IRS") recently issued final regulations under Code Section 6039 addressing the employer return and employee information statement requirements for transfers of stock pursuant to the exercise of ISOs and through ESPPs and clarifying certain reporting requirements (a more detailed explanation of the final regulations may be found in our January 2009 (January 31 Deadline Approaching) and 2010 (February 1, 2010 Deadline Approaching) Client Alerts).

Reporting Requirements

Reporting to Employees

Employers are required to provide information statements to employees on the Form 3921 (for ISOs) and Form 3922 (for ESPPs) by **January 31** of the following year in which a transfer of stock occurs pursuant to an exercise of an ISO or through an ESPP, as applicable.

Reporting to IRS

Employers were not required to file the Forms 3921 and 3922 with the IRS for such transfers that occurred in years prior to 2010. Beginning in 2011, Forms 3921 and 3922 are also required to be filed with the IRS by no later than **February 28** (paper) or **March 31** (electronic) of the following year in which a transfer of stock occurs pursuant to an exercise of an ISO or through an ESPP, as applicable.

Forms and Instructions

The IRS has made a sample Form 3921 available at http://www.irs.gov/pub/irs-pdf/f3921.pdf

The IRS has made a sample Form 3922 available at http://www.irs.gov/pub/irs-pdf/f3922.pdf

The IRS has made instructions to both Forms available at http://www.irs.gov/pub/irs-pdf/i3921.pdf

Penalties For Failure To Timely File

A corporation (including private and public corporations) may be subject to penalties if it fails to furnish the applicable form in a timely manner, fails to include all the required information, or includes incorrect information in the form. The corporation has an obligation to file the applicable form with the IRS and the employee and will be liable for penalties with respect to each failure to file. For a failure relating to the filing with the IRS, the penalty is up to $50 for each form the corporation fails to furnish or furnish correctly, up to a maximum for each calendar year of $250,000. For a failure relating to employee information requirements, the penalty is $50 for each form the corporation fails to furnish or furnish correctly, up to a maximum for each calendar year of $100,000. Where the failure to furnish accurate statements or returns was due to an intentional disregard of the requirement, higher penalties may be imposed.

Other Reporting Obligations

The new reporting rules do not replace the existing rules requiring a corporation to report and withhold on any taxable income recognized by an employee on the exercise of an option. The final regulations only provide for enhanced reporting requirements with respect to return and information statements.

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For more information on how to satisfy the reporting requirements under the final regulations, please contact a member of our ERISA Practice Center.

Related Professionals

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