



CCH

a Wolters Kluwer business

# PaySource®

April 2007  
Number 142

## SPRING HAS SPRUNG AND SO HAVE THE STUDENTS!

By: Theo Anne Opie, LL.B. © CCH Canadian Limited.

Year-end is behind you and now people's thoughts are turning to summer vacations and other seasonal business activities. Whether it is your own payroll department or other divisions within your workplace, summer means the return of students to fill those seasonal jobs and/or staffing gaps due to annual vacations.

Proper integration of summer students into your workplace and into your payroll will ensure that your organization makes both the correct withholdings from, and payments to, summer students and avoids any misunderstandings or complaints regarding compensation when the summer job is over. Therefore, this article will do three things. First, it will discuss how to set up the students and outline the forms and information that you require. Second, it will summarize the required statutory deduction and third, it will discuss employment standards issues that often create problems for employers of summer students.

### Setting Up the Student Employee

Setting students up on the payroll correctly is imperative. The responsibility lies with the employer to establish whether or not an employee-employer relationship exists. In general, an employment relationship does exist for summer students. Therefore, you cannot pay summer students through accounts payable and summer students should be placed on your payroll.

Summer students should also receive a commencement package that includes not only required forms for payroll and HR, but also the details about the actual job. Information should include location and description of the employment, start and end dates for the position,

## Inside

### Hot News Items

2007 Budget Season: Alta.; Man.; N.S.; P.E.I.; and Yukon .....	4
--	---

### Need To Know

Man. Employment Standards Law on April 30, 2007 .....	6
Man. New Statutory Holiday .....	6
N.S. Meal Break Entitlements Now Law	6
Minimum Wage Increase: N.S. and Que.	6

### Recent Cases/Rulings

Deferred Salary Leave Plan .....	7
Benefits from a Wage Loss Replacement Plan and CSST – Tax Reporting .....	7
Withholding – Gratuities .....	8
Withholding – Retiring Allowance and Legal Fees .....	8
Engineer an employee, not an independent contractor.....	8

the name of the immediate supervisor, hours of work, breaks, statutory holidays, if and when overtime applies, etc. You might also wish to provide company-related information such as the company directory, Web site addresses, the internal corporate intranet site (if you have one) and any other information that will help the summer students feel comfortable and part of the organization.

From a payroll perspective, the following forms and information should either be included in the commencement package or obtained after hiring.

- TD1 forms – federal and provincial (completed based on province of employment). The TD1 form captures the basic data necessary to start the payment process for the student – data such as name, address, Social Insurance Number (SIN) and net claim code for income tax deductions.
- Remember to ask to see the student's SIN card (once hired) to verify the name and Social Insurance Number. Also, remember that if the SIN begins with "9", the employer should check the expiry date of the SIN and the student must be able to provide a work permit which authorizes the student to work in Canada.

### PAYSOURCE

Published monthly as the newsletter complement to PAYSOURCE, by CCH Canadian Limited. For subscription information, see your CCH Account Manager or call 1-800-268-4522 or (416) 224-2248 (Toronto).

#### For CCH Canadian Limited

RICHARD BROWNE, Editor  
(416) 224-2224, ext. 6441  
e-mail: Richard.Browne@wolterskluwer.com

CHERYL FINCH, B.A., LL.B., Director of Editorial  
Legal and Business Markets  
(416) 228-6128  
e-mail: Cheryl.Finch@wolterskluwer.com

JIM ITSOU, B.Com., Marketing Manager  
(416) 228-6158  
e-mail: jim.itsou@wolterskluwer.com

#### Editorial Board

THEO ANNE OPIE, LL.B.,  
Member, Canadian Payroll Association's  
Federal Government Relations Advisory Council  
e-mail: Teddy.Opie@wolterskluwer.com

PUBLICATIONS MAIL AGREEMENT NO. 40064546  
RETURN UNDELIVERABLE CANADIAN ADDRESSES TO  
CIRCULATION DEPT.  
330-123 MAIN ST  
TORONTO ON M5W 1A1  
email circdept@publisher.com

© 2007, CCH Canadian Limited  
90 Sheppard Ave. East, Suite 300  
Toronto, Ontario M2N 6X1

## Handling Statutory Deductions

Now that the student is on your payroll, the next issue is the correct handling of statutory deductions. Each of the statutory deductions – Canada/Quebec Pension Plan (CPP/QPP) contributions, Employment Insurance (EI) premiums and income taxes – is discussed below in their order of priority.

### CPP/QPP

Generally, summer students are deemed to be in pensionable employment once they are 18 years old. Therefore, unless a summer student is under 18 or falls into some other exempted category, you must withhold CPP/QPP contributions. Summer students who have not turned 18 are not in pensionable employment and as such no CPP/QPP contributions are to be withheld. If the summer student turns 18 during the period of employment, CPP/QPP contributions must begin the first of the month following his or her 18th birthday.

### EI

There is no age restriction for EI and most employment in Canada is deemed insurable. Individuals pay EI premiums for each hour of work in insurable employment. Therefore, EI premiums must be deducted from all summer student earnings up to the annual maximum. In addition, at the end of the student's employment, you must issue a Record of Employment (ROE) to the student.

### Income Tax

The final statutory deduction in order of priority is income tax. Employers must withhold income tax based on the "province of employment". As noted above, all summer students should have completed both the federal and provincial TD1 forms. This is important for a number of reasons. First, if the student does not complete the TD1 forms, you must deduct/withhold on the basis that the student is an unmarried person without dependants, i.e., only the basic personal amount would apply. Second, students often have tuition fees and credits they can claim in addition to the basic personal amount, and this will reduce his or her taxable income, and therefore, the amount of income tax withholdings. Once the full net claim amount is determined from the completion of the TD1, you will either enter the amount in your payroll system, which in turn will calculate the appropriate federal and provincial tax withholdings, or you will need to look up the net claim code from the applicable payroll deductions tables (T4032) to determine the tax withholdings. Finally, in many cases, a student's employment income from all employers will be less than the total amount claimed on the TD1. For example, for 2007, the basic personal amount is \$8,929.

The student is enrolled in college/university full-time and claims \$400 for 8 months for a total of \$3,200. Finally, the student pays tuition fees of \$6,000 for the year. The total claimed by the student on the TD1 is \$18,129. The back of the TD1 form then asks the employee/student “Will your total employment income for the year be less than your total claim amount on line 12 on the front page?” and to check off yes or no. If the student claims yes, then no income tax withholdings at source are required. Note that a “no” requirement to withhold income tax at source will very much depend on each student’s individual situation. Employers should also keep in mind that many students work part-time during the school term and may have other employment income.

## Employment Standards Requirements

The incorrect handling of employment standards requirements with respect to summer students can be a real problem for employers. Three of the most common problems relate to wages, statutory holidays and vacation pay.

### Wages

Summer students are entitled to receive at least the minimum wage for their hours worked.

### Entitlement to Paid Statutory Holidays

Incorrect handling of statutory holiday pay is a common problem. Summer students are generally entitled to a statutory holiday with pay after they have completed the qualifying period.

There are no qualifying periods in **Manitoba, Ontario, Quebec or Saskatchewan**. In the other jurisdictions, an employee must have been employed for a specified number of days before he or she qualifies for a paid statutory holiday.

In **Nova Scotia**, an employee must be entitled to receive pay for 15 days in the 30 days immediately prior to the holiday. Note: This does not mean “worked”. For example, if the employee is off on a training program (i.e., team-building exercises, health and safety training to learn how to operate equipment) and is paid for attending, those days count as “being entitled to receive pay”.

In **Alberta, the Northwest Territories and Nunavut**, an employee must have worked 30 days in the 12 months immediately prior to the holiday before he or she qualifies for a paid statutory holiday.

In **British Columbia, Newfoundland & Labrador, Prince Edward Island, the Yukon, and the federal jurisdiction**, an

employee must be employed for 30 days prior to the holiday to qualify.

Finally, in **New Brunswick**, an employee must be employed for 90 days prior to the holiday to qualify.

### Example:

A summer student who has not worked for the employer before, and who started work on May 1, 2007, would qualify for the Victoria Day statutory holiday in Manitoba, Ontario, Quebec and Saskatchewan but would not qualify in Alberta, British Columbia, Northwest Territories, Nunavut, the Yukon, and the federal jurisdiction. (Note: Victoria Day is not a statutory holiday in New Brunswick, Newfoundland and Labrador, Nova Scotia or Prince Edward Island)

To avoid incorrect payments, be sure to monitor the completion of any qualifying period, whether or not the employee worked the regularly scheduled shift on the day before and the day after the statutory holiday (this is required in most provinces), and whether any other exceptions apply. For example, British Columbia has special rules for agricultural workers and high-tech industries, Ontario has exceptions for agricultural workers and the hospitality industry (i.e., restaurants, hotels, and resorts), and almost all provinces provide exceptions for continuous operations (i.e., industrial plants and hospitals).

### Entitlement to Vacation Pay

While summer students are not employed long enough to qualify for actual vacation time, they are still entitled to vacation pay. While vacation pay is usually calculated as a percentage (i.e., 4%) of the total wages earned within the year of entitlement, the definition of wages used to calculate vacation pay varies from province to province.

Vacation pay earned by summer students must be paid to the student at the end of their period of employment. However, when the vacation pay must actually be paid varies from as early as the actual time of termination of employment to as late as 14 days from the date of termination. Therefore, be sure to check the specifics for your province of employment.

For further details on exemptions and exceptions please refer to the following materials:

- The rules regarding exempted employment categories for CPP/QPP are located in the “CPP/QPP” section of PAYSOURCE at ¶30,105, ¶30,110 and ¶30,150.
- The rules regarding exempted employment categories for EI are located in the “Employment Insurance” section of PAYSOURCE at ¶35,210 and ¶35,215.

- The current minimum wage rates across Canada are located in the “Employment Standards” section of PAYSOURCE at ¶5505.
- The rules regarding entitlement to statutory holidays/statutory holiday pay are located in the “Employment Standards” section of PAYSOURCE at ¶5400 *et seq.* The rules regarding vacation pay/payment of vacation pay are located in the “Employment Standards” section of PAYSOURCE at ¶5300 *et seq.* and ¶6480.

Theo Anne Opie is a member of the Canadian Payroll Association’s Federal Government Relations Advisory Council and writes for PAYSOURCE.

## Hot News Items

### 2007 Budget Season

Budget season is upon us once again. With this Report, the federal government and all provincial and territorial governments except Newfoundland and Labrador have issued their 2007 Budgets. Highlights of new Budgets relating to payroll are reproduced below and all previously reported Budgets are located in the Budgets & New Developments section of PAYSOURCE at ¶180,156 and ¶180,158.

#### Alberta

The 2007 Alberta Budget of April 19, 2007, presented by Finance Minister Lyle Oberg, contained the following measures related to payroll.

#### *Personal Income Tax Credits*

##### Indexation of Credits

Alberta indexes its personal income tax system to ensure that inflation does not artificially increase the amount of tax individuals pay. For the 2007 tax year, personal tax credits will increase 3.6 per cent, saving Albertans \$92 million. This increase means that personal tax credits will be as follows for 2007:

- basic, spousal and eligible dependant amounts – \$15,435
- age amount – \$4,301
- infirm dependant amount – \$4,160
- pension income amount – \$1,189
- disability amount – \$7,131
- caregiver amount – \$4,160

#### Education Amounts

The tax system provides relief to post-secondary students in recognition of the importance of continuing education. In addition to tax credits for tuition fees, students can claim education amounts, which compensate them for other costs of living while still a student. As many students do not earn enough to pay taxes, they can also transfer these credits to spouses, parents or grandparents, or carry them forward to future years. For 2007, the government will increase the allowable education amount over and above the increase due to indexation. The amount will rise 26 per cent, from \$475 to \$600 per month for full-time students and from \$143 to \$180 per month for part-time students. This will reduce revenue by \$3 million in 2007-08, increasing to \$10 million annually in future years.

See Commentary at ¶25,156.

#### Manitoba

The 2007 Manitoba Budget of April 4, 2007, presented by Finance Minister Greg Selinger, contained the following measures related to payroll.

#### *Personal Income Tax Rates and Credits*

##### Personal Tax Rates

Effective January 1, 2008, the middle bracket tax rate falls from 13.0% to 12.75% and the threshold between the middle and top brackets rises from \$65,000 to \$66,000. As a result, taxable income between \$30,544 and \$66,000 is taxed at 12.75%, down from 13.0% for income up to \$65,000, and down from 17.4% for income between \$65,000 and \$66,000. This change benefits all taxpayers with taxable income in excess of \$30,544; in total they save \$17.9 million on a full-year basis.

This is the beginning of a plan, subject to budget balancing requirements, to reduce the first bracket rate to 10.5% and the middle bracket rate to 12.75% by 2011. At the same time, the entire middle tax bracket will be moved upwards to the range between \$35,000 and \$70,000. These further changes, when complete, are projected to save Manitoba income tax payers an additional \$77 million annually; all taxpayers will benefit. As budgetary circumstances permit, additional rate and threshold changes will be introduced to give middle-income earners an over-all saving of 10% compared to 2007.

See Commentary at ¶25,172.

##### Personal Tax Credits

Effective January 1, 2008, the Basic Personal Amount is increased by \$200 to \$8,034 and the the maximum spouse



or common-law partner amount is raised from \$6,482 to \$8,034, to equal the Basic Personal Amount.

As well, effective January 1, 2008, the treatment of the Family Tax Reduction (FTR) will be adjusted and rolled into a new non-refundable tax credit. The calculation of Manitoba tax currently involves four steps once taxable income has been determined: a) Manitoba tax on taxable income is calculated; from which b) non-refundable tax credits are subtracted; c) the Family Tax Reduction (FTR) is subtracted; and d) other credits are subtracted. Effective January 1, 2008, the FTR is folded into a renamed Manitoba Family Tax Benefit under the non-refundable tax credit block. One calculation step is removed, and the process is streamlined. This change does not affect eligibility, or reduce benefits for any taxpayers. The measure saves taxpayers \$1.5 million annually on a full-year basis. Benefits are available for the taxpayer, and for an inclusive list of dependants including: a spouse or equivalent; children under 18; and other disabled relatives over 18 who are dependent upon the taxpayer. There is an additional amount for any of the above who are disabled or 65 and over.

See Commentary at ¶25,174.

### ***Health & Post Secondary Education Tax Levy (Payroll Tax)***

Effective January 1, 2008, the payroll exemption under this levy is raised from \$1 million to \$1.25 million of annual payroll. In addition, the threshold below which employers pay a reduced rate is raised from \$2 million to \$2.5 million. The full-year revenue impact of this measure is \$7.0 million. Less than 5% of all Manitoba employers currently pay this tax. The new higher threshold benefits one-third of those paying: 200 employers will be fully exempted and an additional 600 will pay less tax.

See Commentary at ¶50,315.

## **Nova Scotia**

The 2007 Nova Scotia Budget of March 23, 2007, presented by Finance Minister Michael Baker, contained the following measures related to payroll.

### ***Personal Income Tax Rates and Credits***

In 2006/2007 Nova Scotia implemented changes to personal income tax that will see the Basic Personal Allowance – the money people earn before they have to start paying taxes – increase \$250 each year for four years.

As of January 1, 2007, the province adjusted the Basic Personal Amount exempted from Personal Income Taxes to \$7,481. This is an increase of \$250, or 3.46 per cent over

the amount for 2006. Nova Scotia's other non-refundable credits will also grow by 3.46 per cent this year.

The amount of the tax credits for each of 2007, 2008 and 2009 is follows:

- Basic Personal Amount: \$7,481 (2007); \$7,731 (2008); \$7,981 (2009)
- Spousal Amount: \$6,352 (2007); \$6,565 (2008); \$6,778 (2009)
- Eligible Dependant Amount: \$6,352 (2007); \$6,565 (2008); \$6,778 (2009)
- Caregiver Amount: \$4,320 (2007); \$4,465 (2008); \$4,610 (2009)
- Amount for Infirm Dependents: \$2,468 (2007); \$2,551 (2008); \$2,633 (2009)
- Age Amount: \$3,653 (2007); \$3,775 (2008); \$3,897 (2009)
- Pension Income Amount: \$1,035 (2007); \$1,069 (2008); \$1,104 (2009)
- Disability Amount: \$4,441 (2007); \$4,596 (2008); \$4,738 (2009)

See Commentary at ¶25,204.

## **Prince Edward Island**

The 2007 Prince Edward Island Budget of April 10, 2007, presented by Provincial Treasurer Mitch Murphy, contained the following measures related to payroll.

### ***Personal Income Tax Rates and Credits***

For 2007, the Personal Income Tax Brackets will increase by 2% and the threshold amounts for the Basic personal amount; Spousal amount and the Age amount will also increase by 2%.

The High Income Surtax Amount will also be increased so that middle income families will no longer pay the surtax.

Also effective for 2007, the value of the personal income tax education amounts will double for both full and part-time students. The education credit will now be based on an aggregate of \$400 per month that an individual is a full-time student, and \$120 per month that an individual is a part-time student.

In 2008, the Personal Income Tax Brackets and the threshold amounts for the Basic personal amount; Spousal amount and the Age amount will increase by 4%.

See Commentary at ¶25,220.

## Yukon

The 2007 Yukon Budget of April 19, 2007, presented by Finance Minister Dennis Fentie, contained no new tax increases/decreases affecting payroll.

## Need To Know

### Manitoba Employment Standards Amendments Law on April 30, 2007

The most comprehensive changes to the *Employment Standards Code* in 30 years come into effect April 30, 2007.

With Report Nos. 140 dated February 2007, and 141 dated March 2007 we began the process of incorporating the new Manitoba Employment Standards into PAYSOURCE.

With this Report, we complete the incorporation of the revisions into the "Employment Standards" section of PAYSOURCE at the following section:

- Hours of Work and Overtime Wages at ¶5626.

### Manitoba to Get New February Statutory Holiday

Labour and Immigration Minister Nancy Allan recently introduced legislation that would establish Manitoba's new holiday in February.

Manitoba currently has seven holidays. The new day would bring the province to eight which will keep Manitoba's position below the national average. The new holiday would be on the third Monday in February, consistent with Alberta and Saskatchewan.

The proposed legislation allows for shopping on the same basis as is currently the case with Sundays and several other statutory holidays.

Provision for the new February statutory holiday is found in Bill 21, *The Statutory Holidays Act (Various Acts Amended)* which received first reading April 12, 2007 and second reading April 18, 2007. The progress of the Bill will be noted in future Reports.

### Nova Scotia Meal Break Entitlements Now Law

The addition of meal breaks was passed by Bill 83 (now S.N.S. 2006, c. 32), *An Act to Amend Chapter 246 of*

*the Revised Statutes, 1989, of the Labour Standards Code, to Provide Employees with a Rest or Eating Break* which was previously summarized in Report No. 139 dated January 2007.

Effective April 1, 2007, the *Labour Standards Code* provides that an employee is entitled to a rest or eating break of at least one half-hour at intervals such that as a result no employee is required to work longer than 5 consecutive hours without a rest or eating break. Where an employee works more than 10 consecutive hours, the employee is entitled to at least one rest or eating break of at least one half-hour and other rest or eating breaks totalling at least one half-hour for each five consecutive hours of work. Where it is necessary for medical reasons, an employee is entitled to a rest or eating break at some other time.

The meal break entitlement does not apply

1. where an accident occurs, urgent work is necessary or unforeseeable or unpreventable circumstances occur;
2. where it is unreasonable for an employee to take a meal break;
3. to an employee whose terms of employment are determined by a collective agreement; or
4. in any other case prescribed by the regulation.

Where an employee has worked for five hours and has not been provided a rest or eating break, the employee is entitled to eat while working.

The new meal break requirements have been incorporated into the "Employment Standards" section of PAYSOURCE at ¶5632.

### Minimum Wage Increase Reminders

The new minimum wage rates have been incorporated into the "Employment Standards" section of PAYSOURCE at ¶5505, ¶5536 and ¶5538.

### Nova Scotia

On May 1, 2007, the minimum wage will increase to \$7.60 per hour, up from the current level of \$7.15 per hour. The minimum wage for inexperienced workers – those with less than three months employed in the type of work they are hired to do – will rise to \$7.15 per hour from \$6.70.

### Quebec

On May 1, 2007, the Quebec general minimum wage will increase to \$8.00 per hour, up from the current level of

\$7.75. The minimum wage for employees receiving gratuities will also increase to \$7.25 per hour up from the current level of \$7.00.

## Recent Cases and Rulings

### *Deferred Salary Leave Plan*

The situation the CRA was asked to review involved an employee having signed a salary deferral contract for the period of June 29, 2002 to December 29, 2006. His leave of absence was instead taken from May 14 to November 11, 2005 and he resigned from his employment on May 15, 2006. To collect the balance due under the contract, the employer received a series of postdated cheques from the employee and withheld his last two pays. The CRA was asked how the following items would be treated for tax purposes: the last two pays withheld by the employer; the postdated cheques if received before the end of 2006; and the postdated cheques if received in 2007. The CRA was also asked how to report those amounts on the employee's 2006 T4.

The CRA confirmed that the salary paid by the employer to the employee in 2005, while he was on a leave of absence, had to be included in his income for the Year 2005. For the Year 2006, only the salary received by the employee for that year reduced by the two pays withheld by his employer would have to be reported by the employer in Box 14 of the employee's T4 and included by the employee in his 2006 income. This income would also be reduced by the employee's postdated cheques given to the employer in 2006 and 2007 to reimburse any prepaid salary received from the employer under the deferred salary leave plan. For any reimbursement made in 2007 after the preparation of the employee's 2006 T4, the employer would have to produce an amended 2006 T4 to the employee. The CRA noted that certain conditions outlined in Regulation 6801(a) were not met. The mechanics of the deferred salary leave plan provide that the leave of absence must be taken at the expiry of the deferral period (July 1, 2002 to December 29, 2006), but in this case the leave of absence was taken from May 14 to November 2005. As a result, the employee could have to include the total amount of earned income in the deferral period preceding the leave of absence. In the absence of any promissory note or acknowledgment of debt evidencing a loan by the employer to the employee, it is unlikely that the prepaid salary would be treated as a loan subject to the application of subsection 6(9) of the Act and more likely that it would be included in the employee's office or employment income under subsection 5(1).

Technical Interpretation, Business and Partnerships Division, November 16, 2006, Document No. 2006-0203131E5

### *Benefits from a Wage Loss Replacement Plan and the CSST – Tax Reporting*

The issue considered by the CRA involved an employee having filed a claim with Commission de la Santé et de la Sécurité du Travail ("CSST") in Year 1 but who received a response only in Year 2. He received \$40,000 of wage loss replacement benefits from his employer in Year 1 before the CSST made its decision, \$10,000 of regular salary from his employer in Year 1 after he had recovered from his disability and \$30,000 from the CSST in Year 2 after the CSST had rendered its decision. The CSST reported the \$30,000 benefit on a T5007 in the employee's name. The employer reversed the journal entries in respect of the \$40,000 paid in Year 1. The employer was required by the collective agreement to reimburse the employee for the difference between his net salary of \$33,000 and the \$30,000 paid by the CSST. The employee received his \$65,000 salary from his employer in Year 2. The CRA was asked how the reporting tax forms should be prepared by the employer to report the various amounts paid to the employee in Year 1 and Year 2. The CRA was also asked if and/or how the tax forms prepared for the previous year should be amended.

The CRA offered the following comments. The employer is required to report the \$10,000 salary paid to the employee in Year 1 in Box 14 of a Year 1 T4 prepared in the employee's name. The \$65,000 salary paid in Year 2 and the \$3,000 compensation amount also paid in Year 2 must be reported in Box 14 of a Year 2 T4. Those amounts are taxable to the employee under subsection 5(1) of the Act and must be included on Line 101 of his tax return. Assuming that the employer made a contribution to the wage loss replacement plan and that the employee did not make any contribution to the plan, the full amount of \$40,000 is reportable in Box 28 of a T4A prepared in the employee's name with Code 07 in Box 38. The amount is taxable under paragraph 6(1)(f) of the Act and the employee must include it on Line 104 of his tax return. Relying on chapter 7 of its T4001 Guide, it is the CRA's view that the employer cannot retroactively amend the \$40,000 paid to the employee in Year 1 to treat it as a CSST benefit or modify the Year 1 T4A. Instead, the employer must prepare a Year 2 T4 in the employee's name showing the amount of \$40,000 in the "Other information" section with a Code 077. This would allow the employee to report it on Line 229 of his tax return and claim a deduction under paragraph 8(1)(n) of the Act. The \$30,000 received from the CSST is reportable on a T5007, taxable under paragraph 56(1)(v) of the Act and reported on Line 144 of the employee's tax return but also deductible under paragraph 110(1)(f) and reported on Line 250 of the tax return.

Technical Interpretation, Business and Partnerships Division, January 25, 2007, Document No. 2006-0213961E5

## **Withholding – Gratuities**

In Window on Canadian Tax ¶4863, we reported that it was the CRA's view that an employer is required to withhold income tax with respect to certain gratuities paid to employees. The withholding requirement applied to amounts billed by the employer to a customer as a gratuity and gratuities paid by a customer when the customer settles his or her account with a credit card. Withholding would not be required with respect to amounts left by the customer as cash on the table.

In a recent interpretation, the CRA notes that the withholding requirement under subsection 153(1) "is dependant on the level of employer control over" the distribution of the gratuities. "An employer is considered to have control over the tips where the employer is able to direct how the tips will be paid", which would include "a policy whereby the tips are a mandatory service charge added to the clients' bills or pursuant to a sharing arrangement set out in an employment contract that outlines how the tips will be divided". The employer is also considered to have control over tips that are included in the employer's business income. "Credit card tips directed at a server where the tip amount is not included with the rest of the bill payment as business income of the employer, or subject to a sharing arrangement, would not be considered to be under the control of the employer and therefore would not be subject to payroll withholding".

Technical Interpretation, Business and Partnerships Division, February 5, 2007, Document No. 2006-0202891E5

## **Withholding Tax – Retiring Allowance and Legal Fees**

As noted in Interpretation Bulletin IT-337R4, tax should be withheld pursuant to paragraph 153(1)(c) from a payment of a retiring allowance. Regulation 100(3) sets out the various deductions that reduce the amount on which tax should be withheld. There is no provision in the regulations that would reduce the withholding for legal fees incurred in negotiating a wrongful dismissal settlement. There would be no withholding with respect to the legal fees if these are specifically identified as a reimbursement by the payer.

Where a specifically identifiable portion of the payment is a reimbursement of legal fees, this portion of the payment would be included in income under paragraph 56(1)(f.1), not 56(1)(a)(ii), and the payer can withhold on the net amount. The deductible portion of the legal fees would be determined under paragraph 60(o.1). The gross payment should be reported on the T4A information slip and return.

Technical Interpretation, Business and Partnerships Division, February 15, 2007, Document No. 2006-0202981E5

## **Mechanical engineer was an employee, not an independent contractor**

During 2002 and 2003, the taxpayer was a mechanical engineer, and provided computer drafting and design services to a firm of consulting engineers ("Hidi"). In disallowing business expense deductions claimed by the taxpayer for 2002 and 2003, the Minister assessed him for those years as having received income from employment from Hidi. The taxpayer appealed to the Tax Court of Canada.

The taxpayer's appeal was dismissed. Recent case law dealing with the independent contractor versus employee status issue has tended to examine the intentions of the parties in certain circumstances (see *Royal Winnipeg Ballet v. The Queen*, 2006 DTC 6323(F.C.A.)). However, the taxpayer's relationship with Hidi did not fall within the ambit of this line of cases. Not only was there conflicting evidence about the intentions of the parties, but other factors were more determinative than the parties' intentions. Only in "close cases" are the parties' intentions given significant weight. Applying the well-established criteria in *Wiebe Door Services Ltd. v. M.N.R.*, 87 DTC 5025(F.C.A.) and *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*(S.C.C.), it could be shown that the taxpayer's income for 2002 and 2003 was derived from employment with Hidi. The Minister's assessments were affirmed accordingly.

*Maliyar*, (Tax Court of Canada), 2007 DTC 337.