



April 1, 2016

**VIA FEDERAL eRULEMAKING PORTAL: <http://www.regulations.gov>**

Ms. Bernadette Wilson  
Acting Executive Officer  
Executive Secretariat  
Equal Employment Opportunity Commission  
131 M Street, NE  
Washington, DC 20507

**RE: Agency Information Collection Activities: Report of the Employer Information Report (EEO-1) and Comment Request**

Dear Ms. Wilson:

The OFCCP Institute submits the following Comment in response to the U. S. Equal Employment Opportunity Commission (“EEOC”) Proposed Report of the Employment Information Request Report (“EEO-1 Report”) and Comment Request (“Report”), published in the Federal Register on February 1, 2016.<sup>1</sup>

**I. BACKGROUND ON THE INSTITUTE**

The OFCCP Institute is submitting this Comment on behalf of its Members and the Comment addresses the proposed EEO-1 Report.<sup>2</sup>

The OFCCP Institute is a national not-for-profit membership organization that trains and educates Federal contractors and subcontractors (collectively “contractors”) in understanding and complying with their affirmative action and equal employment obligations.<sup>3</sup> The OFCCP Institute helps contractors understand and effectively respond to and comply with the new complex and technology-based affirmative action and non-discrimination compliance obligations through training and education.

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<sup>1</sup> Report of the Employer Information Report (EEO-1) and Comment Request, 81 Fed. Reg. 5113 (February 1,

<sup>2</sup> *Id.*

<sup>3</sup> The OFCCP Institute, *Home Page*, <https://theofccpinstitute.org/> (last visited April 1, 2016). The OFCCP Institute is not affiliated with the U.S. Department of Labor’s Office of Federal Contract Compliance Programs.

The OFCCP Institute is submitting this Comment on behalf of its Members that are representative of nine diverse industries, with over 498,000 employees, annual revenues ranging from below \$10 million to over \$1 billion, and a total of 8,965 separate establishments.<sup>4</sup>

The OFCCP Institute recognizes the responsibility of all employers to compensate employees in a nondiscriminatory manner and to eradicate compensation discrimination where it exists. The OFCCP Institute and its Members (collectively the “Institute”) applaud all efforts to make the workplace free from all forms of discrimination, and support and practice nondiscrimination in compensation and in other terms and conditions of employment. To that end, The Institute agrees that the EEOC has a role in enforcement efforts that focus on compensation. However, The Institute believes that the EEOC’s proposed compensation data collection program will not achieve its stated goals.

## **II. FOCUS OF THIS COMMENT**

The Institute is deeply concerned about the nature of the Report and many of its constituent elements. A central focus of this Comment will be on the unreasonable and baseless burden estimates relied upon by the EEOC in the Report. Because of the wealth of reliable data provided by the Members with respect to the burdens created by the Report, The Institute will show that the burden estimates offered in the Report are erroneous in every respect. In what follows, The Institute will present evidence which the Office of Management and Budget (“OMB”) should use to reject the Report because of the EEOC’s failure to address the cost of implementing and complying with the requirements proposed by the Report.

## **III. THE EEOC’S PAPERWORK REDUCTION ACT BURDEN ESTIMATE IS UNREALISTIC**

### **A. Paperwork Reduction Act**

The Report was published by the EEOC under the Paperwork Reduction Act (“PRA”).<sup>5</sup> The purposes of PRA are to (1) “minimize the paperwork burden...from the collection of information by or for the Federal Government” and (2) “ensure the greatest possible public benefit from and maximize the utility of information created, collected, maintained, used, shared and disseminated by or for the Federal Government.”<sup>6</sup>

As explained below, The Institute believes that the changes to EEO-1 Report as proposed by EEOC do not meet the requirements of the PRA.

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<sup>4</sup> See Members Survey Results, Appendix A at 1.

<sup>5</sup> Report of the Employer Information Report (EEO-1) and Comment Request, 812 Fed. Reg. at 5118.

<sup>6</sup> 44 U.S.C. § 3501; see also 81 Fed. Reg. at 5116 (citing these purposes as the “focus” for why W-2 earnings were selected as the measure of pay for the Revision).

## **B. The Report Underestimates the EEO-1 Report Burden**

The EEOC in the Report significantly changed the way it calculated its estimate of the revised EEO-1 survey respondents' reporting hour burden from what it used for the current EEO-1 Report.<sup>7</sup> Prior to 2016, the EEOC assessed the burden hour costs for filing the annual EEO-1 Report based upon the total number of EEO-1 reports filed with the agency.<sup>8</sup>

In the proposed Report, the EEOC changed the annual burden estimate from the total number of reports filed to the number of companies expected to file EEO-1 reports.<sup>9</sup> This change in calculations decreased the number of filers from 307,103 to 67,146 in the course of a single year and, concomitantly, reduced the estimate of the number of hours needed to file EEO-1 reports with no explanation for how this reduction is accomplished.<sup>10</sup> The EEOC claims that the new burden calculation "more accurately reflect[s] the way employers collect and submit the data for filing because the vast majority of employers file electronically and rely upon HRIS to populate their EEO-1 Reports."<sup>11</sup> That is not supported by the agency's data.

It does not appear that EEOC sought to confirm the change in the burden calculation with employers who actually complete EEO-1 reports. Members who file EEO-1 reports believe that in making this change, EEOC is confusing electronic filing, with electronic *uploading*. A significant portion of contractors take advantage of electronic filing but, according to Members this still requires the employer to manually enter its employment data into the EEO-1 report.

Based on the Member responses, it is clear that EEOC has substantially underestimated the amount of time and money employers spend filing the *current* EEO-1 report. In The OFCCP Institute's survey, Members estimated it took them, on average, 91.14 hours and cost them an average of \$10,293.21 annually to complete the current EEO-1 report. These numbers are *thirty times more than* the 3.4 hours and \$159.92 estimated by the EEOC for filing, certifying, and submitting their FY 2015 EEO-1 reports.<sup>12</sup>

In addition, the proposed new methodology underestimates the time, effort and expense incurred by large multi-establishment employers such as the Members who have prepared and submitted, on average, 355 Reports per year.<sup>13</sup>

## **C. The EEOC Substantially Underestimates Burden of Changes**

### *1. Sage Report did not calculate burden of revised EEO-1 report*

The EEOC commissioned the National Academy of Sciences ("NAS") to complete a report with regard to the collection of data. The resulting NAS Report, as discussed further on in this Comment, stated that the federal enforcement agencies needed a comprehensive plan for the

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<sup>7</sup> NAS Report at 90.

<sup>8</sup> 81 Fed. Reg. at 5120.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> See Members Survey Results, App. A at A-4.

<sup>13</sup> Report of the Employer Information Report (EEO-1) and Comment Request, 812 Fed. Reg. at 5119.

use of the earnings data before initiating any data collection.<sup>14</sup> The agencies told NAS that they wanted to use the compensation data to target “potentially noncompliant firms.”<sup>15</sup> In response, the NAS panel drafting the NAS Report pointed out that the agencies did not outline “specific mechanisms by which the data would be assembled, assessed, compared and used in a targeting operation.”<sup>16</sup> The NAS panel determined that a fundamental question needed to be addressed: “how earnings data should be integrated into the compliance programs that have to-date been triggered mainly by a compliant process, which, in their absence, includes relatively few complaints about pay matters.”<sup>17</sup> Without a comprehensive plan that includes the form of the data collection, the panel concluded that the actual burden on employers and the costs and benefits of the collection could not be determined reliably.<sup>18</sup> The NAS panel also reported to the EEOC that:

...it is important to clearly understand the requirement and potential uses of data as a first step in determining their fitness for use, that is, the quality of the data. Although it is assumed that, if these data are collected, they could greatly enhance the enforcement process, until EEOC and its cooperating agencies gain experience with collecting, processing, and using earnings data in field investigations and in litigation, it will not be known if the data are of sufficient reliability to support enforcement.<sup>19</sup>

The EEOC did not follow the recommendations of the NAS Report. It hired Sage Computing to perform a “pilot study” but Sage did not develop and test any data collection tool with employers, as recommended by NAS.<sup>20</sup> In the “pilot study,” Sage admitted that although it sent out burden cost surveys to EEO-1 participants, it did not receive any quantitative data from those respondents.<sup>21</sup> So, EEOC, in developing its burden cost estimates, did not use any data from actual employers who file EEO-1 reports.<sup>22</sup>

## 2. *EEOC vastly underestimated implementation and annual costs*

For purposes of “marrying” the information from an employer’s payroll system to its HRIS system, EEOC estimated that it would take an HRIS professional earning \$47.22 per hour for and 8 hours of work to complete the task.<sup>23</sup> Based on this calculation, the EEOC determined that an average employer will incur a one-time implementation cost of \$377.76 to perform this

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<sup>14</sup> See Members Survey Results, App. A at A-3.

<sup>15</sup> National Research Council. *Collecting Compensation Data from Employers*. Washington, DC: The National Academies Press, 2013 at 2 (“NAS Report”), available at [http://www.nap.edu/catalog.php?record\\_id=13496](http://www.nap.edu/catalog.php?record_id=13496).

<sup>16</sup> *Id.* at 87.

<sup>17</sup> *Id.*

<sup>18</sup> NAS Report at 87.

<sup>19</sup> *Id.*

<sup>20</sup> Sage Computing, *Final Report To Conduct a Pilot Study for How Compensation Earnings Data Could Be Collected From Employers on EEOC’s Survey Collection Systems (EEO-1, EEO-4, and EEO-5 Survey Reports) and Develop Burden Cost Estimates for Both EEOC and Respondents for Each of EEOC Surveys (EEO-1, EEO-4, and EEO-5)*, (Sept. 2015) at 109 (“Sage Report”), <http://www.eeoc.gov/employers/eeo1survey/pay-pilot-study.pdf>.

<sup>21</sup> *Id.*

<sup>22</sup> Report of the Employer Information Report (EEO-1) and Comment Request, 81 Fed. Reg. at 5120.

<sup>23</sup> *Id.*

step.<sup>24</sup>

The EEOC estimated 6.6 annual burden hours to complete the proposed EEO-1 Report.<sup>25</sup> The agency had previously calculated that it takes 3.4 hours to prepare the current EEO-1 and it now estimates that it would take an additional 3.2 hours annually to include the newly required W-2 data and hours worked data of the proposed EEO-1 Report. Using the labor cost of \$24.23 an hour, the agency estimated completing the new W-2 and hours worked information in the revised EEO-1 Report will cost each employer \$159.92 annually.<sup>26</sup>

Based on The Institute's Member survey, 74% of Members reported that employees' W-2 earnings data and EEO-1 data are in two different systems and that those systems do not communicate with each other in a way that would allow W-2 earnings data to be reported electronically into the EEO-1 snapshot data fields.<sup>27</sup> Only 4% reported that its W-2 data and its EEO-1 report data came from the same system.<sup>28</sup>

In order to enable the two systems to communicate so that the proposed EEO-1 Report can be produced, 75% of the Members responded that they would have to develop or purchase new software to enable their companies to match their EEO-1 data with W-2 data, at an average cost of \$33,000. In addition to the development costs, Members expect an average on-going burden of maintenance of the new system of 156 hours, as well as an average annual cost of \$8,918.75.

As to the cost of preparing a second W-2, the Members reported creating one W-2 cost them an average of \$16,388.64 for a workforce.<sup>29</sup> The cost of mining and processing earnings information for a second, mid-year W-2, as required by the EEOC, would cost significantly more, as the mid-year would have to be compiled and vetted for this single purpose.

In addition to the costs of the software update and on-going software costs as well as the costs for a second W-2, Members expect preparation of the first revised EEO-1 Report to take an average of 254.67 hours and to cost \$34,469.38.<sup>30</sup> After the first year, Members estimate preparing the revised EEO-1 Report will cost them annually 87 hours and \$7,863.83.<sup>31</sup>

Based on these estimates provided by our Members, the EEOC's burden and cost estimates, which are not based on any input from employers who file EEO-1 reports, are not realistic and as a result their burden estimates do not meet the requirements of the PRA.

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 5119.

<sup>26</sup> *Id.*

<sup>27</sup> See Members Survey Results, App. A at A-4.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

## IV. COMMENT ON SPECIFIC PROVISIONS OF THE REPORT

### A. Background

The issue of gender pay discrimination has been a major focus of the Obama Administration since its first days in office. President Obama signed The Lilly Ledbetter Fair Pay Act on January 29, 2009 right after his inauguration.<sup>32</sup> After his State of the Union Address in 2010<sup>33</sup> in which he discussed the gender pay gap, President Obama established the National Equal Pay Enforcement Task Force (“Task Force”).<sup>34</sup> The Task Force issued its recommendations in July 2010, which included a directive that federal EEO enforcement agencies should “collect data on the private workforce to better understand the scope of the pay gap and target enforcement efforts.”<sup>35</sup> To this end the Task Force suggested the EEOC commission a study from NAS to learn what “data it should collect to most effectively enhance its wage discrimination law enforcement efforts.”<sup>36</sup> The EEOC did so, and NAS issued its report, “Measuring and Collecting Pay Information from U.S. Employers by Gender, Race, and National Origin,” in 2012.<sup>37</sup> Among NAS’s recommendations to EEOC was that the EEOC should collect “rates of pay,” not “actual earnings or pay bands;”<sup>38</sup> that it should run a pilot study to test any compensation data collection instrument;<sup>39</sup> and that the agency needed a plan to protect the confidentiality of the pay data.<sup>40</sup>

In 2014, President Obama issued a Presidential Memorandum to the U.S. Department of Labor (“DOL”), “Advancing Pay Equality Through Compensation Data Collection.”<sup>41</sup> This Presidential Memorandum resulted in a Notice of Proposed Rulemaking (“NPRM”) from the U.S. DOL’s Office of Federal Contract Compliance Programs (“OFCCP”) on August 8, 2014, which would have required certain federal contractors to submit compensation data reports to OFCCP.<sup>42</sup> That NPRM has now been abandoned and replaced by this Report.<sup>43</sup> However, the

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<sup>32</sup> Lilly Ledbetter Fair Pay Act, Pub.L. 111-2, 123 Stat. 5-7 (2009).

<sup>33</sup> White House Office of the Press Secretary, *Remarks by the President in State of the Union Address* (January 27, 2010; 9:11 pm), available at <https://www.whitehouse.gov/the-press-office/remarks-president-state-union-address>.

<sup>34</sup> White House Office of the Press Secretary, *Fact Sheet: New Steps to Advance Equal Pay on the Seventh Anniversary of the Lilly Ledbetter Fair Pay Act* (January 29, 2010), <https://www.whitehouse.gov/the-press-office/2016/01/29/fact-sheet-new-steps-advance-equal-pay-seventh-anniversary-lilly>; see also White House Equal Pay Task Force, *Home Page*, <https://www.whitehouse.gov/issues/equal-pay>.

<sup>35</sup> National Equal Pay Enforcement Task Force Report, White House Equal Pay Task Force, Exec. Office of the President, (March 4, 2016), available at [https://www.whitehouse.gov/sites/default/files/rss\\_viewer/equal\\_pay\\_task\\_force.pdf](https://www.whitehouse.gov/sites/default/files/rss_viewer/equal_pay_task_force.pdf).

<sup>36</sup> *Id.*

<sup>37</sup> NAS Report, available at [http://www.nap.edu/catalog.php?record\\_id=13496](http://www.nap.edu/catalog.php?record_id=13496).

<sup>38</sup> *Id.* at 89

<sup>39</sup> *Id.* at 88.

<sup>40</sup> *Id.* at 90-91.

<sup>41</sup> Presidential Documents; Memorandum for the Secretary of Labor, Advancing Pay Equality Through Compensation Data Collection, 79 Fed. Reg. 20751 (April 11, 2014).

<sup>42</sup> Government Contractors, Requirement to Report Summary Data on Employee Compensation, 79 Fed. Reg. 46563 (August 8, 2014). The OFCCP also rejected the NAS Report’s recommendation to use “rates of pay” as the measure of compensation and chose to use the W-2. *Id.* at 46564.

<sup>43</sup> Report of the Employer Information Report (EEO-1) and Comment Request, 81 Fed. Reg. at 5115 (citing to footnote 23 noting that OFCCP’s elected not to issue a final rule for its own pay collection data proposed rule in favor of utilizing the EEO-1 report).

focus of the Report is the same as OFCCP’s NPRM—to maximize efficiency and effectiveness in enabling the federal enforcement agencies towards entities for which reported data suggest potential discrepancies in worker compensation.<sup>44</sup>

## **B. EEOC Should Not Collect W-2 Data**

As outlined in David Fortney’s written testimony, submitted on behalf of The OFCCP Institute, at the EEOC’s March 16, 2016 Public Hearing, the biggest flaw with the proposal is the EEOC’s decision to reject the NAS recommendation of using rates of pay and to use W-2 compensation data instead.<sup>45</sup> The stated goal of the Report is to compare the distributions of pay variances within current race, gender and ethnicity classifications, by EEO-1 Job Categories and salary bands of employers in the same industry **or** metropolitan area to find “statistics of interest.”<sup>46</sup> Even if, the EEOC could find “statistics of interest,” which is highly questionable, The Institute is certain that the proposed use of W-2 data will not enable the EEOC to find any data relating to pay discrimination.

The definition of “compensation” used by the IRS for purposes of the W-2 is extremely broad as it includes many items not generally considered *earned* income.<sup>47</sup> The Institute, in its Letter of Comment to the OFCCP on the same subject, objected to its proposal to use W-2 data for the same reason.<sup>48</sup> As in its letter to OFCCP, The Institute is providing the following partial list of earnings included in the IRS definition of compensation:<sup>49</sup>

- Base pay
- Over-time
- Allowances and reimbursements - (including travel, transportation, moving or other business expense allowances or reimbursements)
- Advance commissions
- Signing bonuses
- Retention bonuses
- Performance bonuses
- Equity adjustments
- Differential wage payments
- Government cost-of-living allowances
- Nonqualified deferred compensation plans
- Notes received for services
- Severance pay
- Profit-sharing
- Accrued leave payment
- Outplacement services
- Sick pay
- Educational Assistance (if applicable)

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<sup>44</sup> 79 Fed. Reg. at 20751.

<sup>45</sup> Written Testimony of David S. Fortney, Esq. Fortney & Scott, LLC: Hearing of Public Input into the Proposed Revisions to the EEO-1 Report Before the U.S. Equal Employment Opportunity Commission (March 16, 2016), available at <http://www.eeoc.gov/eeoc/meetings/3-16-16/fortney.cfm> (“Remarks of David S. Fortney, Esq.” Addressing the Proposed Report of the Employer Information Report (EEO-1”).

<sup>46</sup> Report of the Employer Information Report (EEO-1) and Comment Request, 81 Fed. Reg. at 5118 (noting the EEOC and OFCCP would develop a software tool that would allow investigators to highlight “statistics of interest”).

<sup>47</sup> U.S. Internal Revenue Serv. Publication No. 5, *Wages, Salaries and Other Earnings*, (last visited April 1, 2016), <http://www.irs.gov/publications/p17/ch05.html>.

<sup>48</sup> The OFCCP Institute, Comments on the Office of Federal Contract Compliance Programs Proposed Rule: Government Contractors: Requirement to Report Summary Compensation Data on Employee Compensation, p. 9-11 (January 5, 2015) available at <https://www.regulations.gov/#!documentDetail;D=OFCCP-2014-0004-0047>.

<sup>49</sup> U.S. INTERNAL REVENUE SERV., 5. *Wages, Salaries and Other Earnings*, <http://www.irs.gov/publications/p17/ch05.html> (last visited April 1, 2016).

- Back pay awards
- Employee achievement awards
- Group-term life insurance

In response to a question from EEOC Commissioner Chai Feldblum, The Institute is attaching to this Comment as Appendix B, a copy of the IRS instruction sheet for W-2s. One look at the instructions shows that W-2 income data is over-inclusive.<sup>50</sup> It also includes elements that are the result of benefits, employee choice, and which are highly variable year-to-year.<sup>51</sup>

The variability of W-2 data is why the NAS Report recommended that the EEOC use “rate of pay, not actual earnings or pay bands.”<sup>52</sup> The NAS expert panel explained that while pay band collection “is attractive in that it aligns with the way human resources managers tend to look at compensation,” the best data is “most likely to be rates of pay.”<sup>53</sup> The Sage Report, referred to by EEOC as the “Pilot Study,” rejected the NAS recommendation to use “rates of pay” and argued that W-2 definition should be used because it “considers all earned income, including supplemental pay components such as overtime pay, shift differentials and nonproduction bonuses.”<sup>54</sup> The Sage Report supported its argument that W-2 data should be used by citing a 2014 *Aon Hewitt* survey that found “91 percent of organizations offer a variable pay program and expect to spend 12.7 percent on variable pay for salaried exempt employees in 2015.”<sup>55</sup> The Sage Report further supported its argument by saying, without any support, that “extracting W-2 data may not create a measurable burden for most respondents.”<sup>56</sup>

Based on the questions asked of David Fortney and others at the public hearing,<sup>57</sup> it is clear that the EEOC is concerned that if it does not use W-2 definition of pay that it will be missing large amounts of pay for executives and others.<sup>58</sup> However, even the Sage Report found that only 12.7 percent of pay is currently “variable,” which includes such “blue-collar” earnings as overtime and shift differentials but does not include the stock options of Wall Street traders of such apparent concern to the agency. The EEOC is placing an enormous burden on employers to collect a small amount of additional pay.

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<sup>50</sup> See IRS Wage and Income Statement Forms, Appendix B. Appendix B includes relevant pages within the W-2 instructions that explain the wide range of income that must be reported on the W-2 that far exceeds wages.

<sup>51</sup> *Id.*

<sup>52</sup> NAS Report at 89-90.

<sup>53</sup> *Id.*

<sup>54</sup> Sage Report at 7.

<sup>55</sup> *Id.* at 7-8.

<sup>56</sup> *Id.* at 8.

<sup>57</sup> The U.S. Equal Employment Opportunity Press Release, *EEOC Hears Wide Range of Views at Public Hearing on Proposed Changes to EEO-1 Form*, (March 16, 2016) <http://www.eeoc.gov/eeoc/newsroom/release/3-16-16.cfm>; see also Public Input into the Proposed Revisions to the EEO-1 Report; Hearing Before the U.S. Equal Employment Opportunity, *Agenda and List of Panelists* (March 16, 2016) available at <http://www.eeoc.gov/eeoc/meetings/3-16-16>.

<sup>58</sup> Remarks of David S. Fortney, Esq. Addressing the Proposed Report of the Employer Information Report (EEO-1).

### **C. Collecting Data by EEO-1 Job Categories Will Not Provide Useable Data**

Although NAS recommended that the EEOC not collect compensation by pay bands,<sup>59</sup> the proposed EEO-1 Report is proposing to collect compensation by pay bands within EEO-1 Job Categories.<sup>60</sup> Both David Fortney's written<sup>61</sup> and oral testimony<sup>62</sup> at the EEOC public hearing pointed out that using EEO-1 Job Categories and the 12 salary pay bands will not provide the same results as a properly conducted pay analysis.<sup>63</sup>

When questioned, 57% of The Institute Members said they did not believe that the proposed pay bands accurately capture and categorize employees within each of the EEO-1 pay categories.<sup>64</sup> It is clear that use of the proposed 12 pay bands and the EEO-1 Job Categories will not provide the EEOC and OFCCP with accurate indicators of where there might be pay discrimination but rather is more likely to lead to additional wasted effort by agencies and employers alike.

### **D. Requiring a Second W-2 Data Query Significantly Increases Burden**

The decision by EEOC to retain the September 30<sup>th</sup> date for EEO-1 filing will require employers to create a separate W-2 for the sole purposes of the EEO-1 Report.<sup>65</sup> Echoing the results of the Sage Report,<sup>66</sup> the EEOC stated in support of its Report that "because payroll records are cumulative, generating reports at any given point in time should not be complicated for employers with automated payroll systems."<sup>67</sup> The W-2 data can be imported into a HRIS, and a data field can be established to accumulate W-2 data for the EEO-1."<sup>68</sup>

The Institute surveyed its Members to determine what it would cost for them to create the additional W-2 statement per year as required by the Report.<sup>69</sup> In response, the Members stated that they currently spend \$16,388.64 annually compiling W-2s for their organizations.<sup>70</sup> Because mid-year earnings data required to complete the EEO-1 must be extracted, vetted, and verified, despite the assertion in the Report that employers will simply be able to push a button to create the additional W-2, the Members know the burden is great and the costs high.<sup>71</sup>

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<sup>59</sup> NAS Report at 89-90.

<sup>60</sup> Report of the Employer Information Report (EEO-1) and Comment Request, 81 Fed. Reg. at 5113, 5117.

<sup>61</sup> Remarks of David S. Fortney, Addressing the Proposed Report of the Employer Information Report (EEO-1) at 7-8.

<sup>62</sup> See *supra* Footnote 57.

<sup>63</sup> Remarks of David S. Fortney, Addressing the Proposed Report of the Employer Information Report (EEO-1) at 7-8; see also *supra* Footnote 57.

<sup>64</sup> The U.S. Equal Employment Opportunity Press Release, *EEOC Hears Wide Range of Views at Public Hearing on Proposed Changes to EEO-1 Form*, (March 16, 2016) <http://www.eeoc.gov/eeoc/newsroom/release/3-16-16.cfm>; see also Public Input into the Proposed Revisions to the EEO-1 Report; Hearing Before the U.S. Equal Employment Opportunity, *Agenda and List of Panelists* (March 16, 2016) available at <http://www.eeoc.gov/eeoc/meetings/3-16-16>.

<sup>65</sup> 81 Fed. Reg. at 5117.

<sup>66</sup> Sage Report at 7.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Members Survey Results, App. A at A-4.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

First, as EEOC did reluctantly recognize, the majority of employers store W-2 data in a separate payroll system. In fact, 88% of The Institute's Members store W-2 data in a separate payroll system.<sup>72</sup> Second, 79% of Members use their HRIS system to produce their current EEO-1 systems.<sup>73</sup> For 74% of Members, their payroll and HRIS systems do not currently communicate with each other.<sup>74</sup> So, in order to report W-2 data to EEOC, 75% of the Members will have to develop a new software system in order to provide the W-2 data with the EEO-1 report.<sup>75</sup> The anticipated cost to develop such new software system would be:<sup>76</sup>

Hours: Mean of 358.5

Cost: Mean of \$33,466.67

The costs in time and money may very well understate the actual costs for employers as they will have to blend records from two tax years into one document. In addition to the unnecessary cost of requiring employers to produce a second W-2 solely to report to the EEOC, the second W-2 will not be representative of what any employee was paid in a particular full year and the EEOC will not be able to achieve the purposes for which it claims to need the information.

#### **E. Reporting Annualized Base Pay Would Be Less Burdensome**

Using annualized base pay would be significantly less burdensome for employers and would be a more accurate data analysis tool. As discussed above, requiring employers to report W-2 earnings will require integration of contractors' HRIS and payroll systems, costing employers' significant time and money to blend W-2 data from two different calendar years found in separate employer computer systems.<sup>77</sup> However, as David Fortney pointed out in its written and oral testimony for the EEOC's Public Hearing, employees' annualized base pay can be reported out of contractors' HRIS.<sup>78</sup> According to The Institute's Member survey, 88% of the Members can report that annualized base pay out of their HRIS.<sup>79</sup> For 79% of the Members, reporting annualized base pay/hourly rates would be less burdensome than to generate than W-2 earnings.<sup>80</sup>

The use of annualized base pay will allow the employer to pull a report for EEO-1 purposes and would solve the IT integration costs and burdens described above. As previously discussed, the NAS recommended the EEOC collect data on rates of pay, not actual earnings.<sup>81</sup>

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<sup>72</sup> Report of the Employer Information Report (EEO-1) and Comment Request, 81 Fed. Reg. at 5117.

<sup>73</sup> Members Survey Results, App. A at A-4.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Supra* Section III. D.

<sup>78</sup> Remarks of David S. Fortney, Esq. Addressing the Proposed Report of the Employer Information Report (EEO-1); *see also* Public Input into the Proposed Revisions to the EEO-1 Report; Hearing Before the U.S. Equal Employment Opportunity, *Agenda and List of Panelists* (March 16, 2016) available at <http://www.eeoc.gov/eeoc/meetings/3-16-16>.

<sup>79</sup> *See* Members Survey Results, App. A at A-4.

<sup>80</sup> *Id.*

<sup>81</sup> NAS Report at 89.

Base pay offers a common comparator among all contractors, which is something that W-2 earnings cannot achieve and is the only standardized data point that can provide meaningful calculations for what is envisioned in the Report.<sup>82</sup> In contrast, W-2 type data is completely unstandardized and would lead to false indicators. For example, imagine two employees earning \$50,000 per year. The employer uses a September 1 snapshot for the EEO-1 report. The first employee has been employed for over a year with a W-2 of \$50,000, while the other employee was hired on August 31<sup>st</sup> with a W-2 of \$137.00. The second employee would be categorized in band 1 (\$19,239 and under) while the first employee would be reported in band 6 (\$49,920 - \$62,919). This would lead to a false conclusion that the two employees are earning two different salaries. Conversely, the reporting of base pay would lead to the proper and accurate conclusion that these two employees are earning the same amount. Consistent with other types of similar reports and analyses, The Institute strongly recommends and urges the EEOC to modify the Report to require the reporting of annualized base pay as the standardized compensation data point.

#### **F. Annualized Base Pay Would Eliminate Hours Worked Requirement**

The reason the EEOC is collecting hours worked under its proposal is so the agency can compare hourly rates using W-2 data.<sup>83</sup> However, using annualized base pay will eliminate the need to include “hours worked” and will significantly reduce the burden on employers. The EEOC even recognizes that many employers do not track hours for exempt employees and asks for input on how such hours should be reported.<sup>84</sup>

In The Institute’s Member survey, 54% responded that they do not track the hours of exempt employees.<sup>85</sup> Of the Members who track the hours of exempt employees, 36% track only their exempt employees’ billable or chargeable hours with all non-billable hours not being tracked.<sup>86</sup> Therefore, only 9% of the Members responding have records of all the actual hours worked for exempt employees.<sup>87</sup>

Generally, “hours worked” data is not kept in HRIS systems. Currently for nonexempt employees, only 17% of Members kept the “hours worked” data in the HRIS system.<sup>88</sup> For nonexempt employees, 54% house the hours worked data in their payroll system while 29% retain hours worked in a system separate from either their HRIS or payroll systems.<sup>89</sup> It should be noted that of the Members responding, 8% do not track hours for their nonexempt employees.<sup>90</sup>

As hours worked are not generally kept by employers for their exempt employees, the EEOC’s suggestion that employers use 40 worked per week for full-time exempt employees

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<sup>82</sup> 81 Fed. Reg. at 5117.

<sup>83</sup> Report of the Employer Information Report (EEO-1) and Comment Request, 81 Fed. Reg. at 5117.

<sup>84</sup> *Id.*

<sup>85</sup> See Members Survey Results, App. A at A-3.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

(2,080 hours per year) and 20 hours worked for part-time exempt employees (1,040 hours per year) would not provide the agency with accurate hours worked.<sup>91</sup> The Institute recommends that the EEOC eliminate its burdensome proposal to collect hours worked and use annualize base pay instead.

### **G. The Report Will Not Encourage Employers to Self-Audit Their Pay**

The EEOC argued in the Report that the addition of pay data may encourage employers to self-monitor and comply voluntarily if they uncover pay inequities.<sup>92</sup> When this question was asked of The Institute Members they responded resoundingly in the negative.<sup>93</sup>

- 95% reported they would not make pay adjustments based on the results of the EEO-1 Report.<sup>94</sup>
- Nevertheless, 65% expect that their companies will receive outside pressure to publicly release the EEO-1 Report.<sup>95</sup>
- 60% also anticipate that they will face pressure to make salary adjustments based on the difference between their results and the published industry standard.<sup>96</sup>
- 95% do not believe that making adjustments based on published industry standards is a valid reason for making salary adjustments.<sup>97</sup>
- 95% do not think the EEO-1 Report will provide utility to them.<sup>98</sup>

So if one of the reasons the EEOC wants to implement the Report is to encourage employers to self-monitor their pay, the Report is not the correct vehicle. If the EEOC really wants to encourage employers to self-monitor, The Institute would suggest that the agency add a Safe Harbor for those employers who annually self-monitor their compensation.

## **V. CONFIDENTIAL PAY DATA**

Nothing in the Report discusses the steps the EEOC will use to ensure that the pay data will be secure.<sup>99</sup> As previously mentioned, the NAS Report, in its last two recommendations, discussed the very confidential nature of compensation data and the need for EEOC to develop new ways to protect that confidentiality.<sup>100</sup> Even the Sage report, stated that once compensation data is collected it will be “imperative” to assure private employers that the data collection is secure.<sup>101</sup> However, the Report made no specific recommendations as to how EEOC will achieve this necessary goal.<sup>102</sup> Despite the focus in both the NAS and Sage Reports, the Report

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<sup>91</sup> 81 Fed. Reg. at 5117.

<sup>92</sup> Report of the Employer Information Report (EEO-1) and Comment Request, 81 Fed. Reg. 5115.

<sup>93</sup> See Members Survey Results, App. A at A-5.

<sup>94</sup> See Members Survey Results, App. A at A-5.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> See generally Report of the Employer Information Report (EEO-1) and Comment Request, 81 Fed. Reg. 5113.

<sup>100</sup> NAS Report at 90-91.

<sup>101</sup> Sage Report at 107.

<sup>102</sup> See generally Report of the Employer Information Report (EEO-1) and Comment Request, 81 Fed. Reg. 5113

does not discuss any additional protections it plans to provide for this highly confidential pay data.<sup>103</sup>

### **A. EEOC Must Take Steps to Improve Data Security**

The NAS Report in its recommendations to EEOC stated that the agency should implement data protection techniques to protect the confidentiality of the pay data that the employers will be submitting.<sup>104</sup>

The EEOC's response both in the Report<sup>105</sup> and in the Sage Report<sup>106</sup> does not address the concerns raised by the NAS panel.<sup>107</sup> As the EEOC learned in a 2012 meeting with EEOC survey respondents on the proposed EEO-1 Report changes, the primary concern of EEO-1 respondents to the changes was the confidentiality of the data.<sup>108</sup> The Institute strongly urges the agency to "implement[s] appropriate data protection techniques" as recommended by NAS.<sup>109</sup>

### **B. The Agencies Need to Expand Title VII's Data Protection**

NAS's final recommendation to EEOC was to "seek legislation that would increase the ability of the agency to protect confidential data"<sup>110</sup> and "specifically authorize data-sharing agreements with other agencies with legislative authority to enforce antidiscrimination laws and should extend Title VII penalties to non-agency employees."<sup>111</sup> Currently, only EEOC personnel are subject to criminal sanctions if EEO-1 data public is made public.<sup>112</sup> When EEO-1 data is transferred to OFCCP, the data is only protected by the Freedom of Information Act ("FOIA").<sup>113</sup>

The Institute urges that EEOC act on the NAS's recommendation<sup>114</sup> and join with OFCCP in seeking new legislative protections to extend the EEOC criminal sanctions to OFCCP and any others that receive data from the revised EEO-1 Report.<sup>115</sup> As a result, The Institute believes that these legislative changes need to be enacted *before* the OFCCP and others receive pay data from the EEO-1 Report.

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<sup>103</sup> *Id.* at 5118.

<sup>104</sup> NAS report at 90-91.

<sup>105</sup> 81 Fed. Reg. at 5118.

<sup>106</sup> Sage Report at 107.

<sup>107</sup> NAS Report at 90.

<sup>108</sup> Sage Report at 8-9.

<sup>109</sup> *Id.*

<sup>110</sup> NAS Report at 90.

<sup>111</sup> *Id.*

<sup>112</sup> Title VII, 42 U.S.C. § 2000e-8(e)(2015).

<sup>113</sup> 5 U.S.C. § 552(2009).

<sup>114</sup> NAS Report at 90.

<sup>115</sup> Report of the Employer Information Report (EEO-1) and Comment Request 81 Fed. Reg. at 5118.

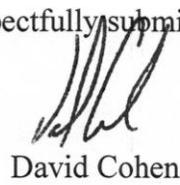
**VI. CONCLUSION**

The Institute and its Members thank the EEOC for the opportunity to submit this Comment. The Institute looks forward to working with the agency to create regulations that are both effective and efficient both for the agency and for employers.

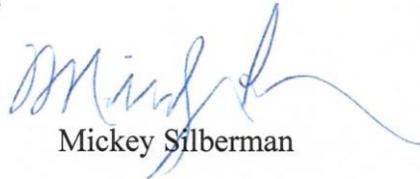
Respectfully submitted,



David Fortney



David Cohen



Mickey Silberman

The OFCCP Institute  
On behalf of the Members

## **Appendix A: OFCCP Institute Members Survey Results**

## Appendix A: OFCCP Institute Members Survey Results

### I. Company Data

**A. Industry** – The Institute’s Consortium of Federal contractor survey respondents represents a diverse set of industries, including:

1. Agriculture, Forestry, Fishing and Hunting
2. Manufacturing
3. Transportation and Warehousing
4. Finance and Insurance
5. Professional, Scientific, and Technical Services
6. Administrative and Support and Waste
7. Educational Services
8. Health Care and Social Assistance
9. Other Services (except Public Administration)

**B. Annual Revenue** – the ranges in the following table represents the Consortium respondents’ annual revenue

Revenue Ranges	Response Percent	Response Count
Below \$10MM	4.2%	1
\$10MM - \$49.9MM	8.3%	2
\$50MM - \$99.9MM	8.3%	2
\$100MM - \$249.9MM	16.7%	4
\$250MM - \$499.9MM	8.3%	2
\$500MM - \$999.9MM	12.5%	3
Over \$1 billion	41.7%	10

II. **Employee Data** – The total number of employees represented by the Consortium survey respondents is over 498,000

1. **Mean:** 22,652
2. **Median:** 5,500
3. **Percent of part-time employees**
  1. **Mean:** 7%
  2. **Median:** 2%

III. **Establishment Data** – the total number of establishments represented by the Consortium survey respondents is 8,965

1. **Mean:** 408
2. **Median:** 45

**B. Establishments over 50:** 1,544

1. **Mean:** 74
2. **Median:** 24

**C. Establishments with fewer than 50:** 7,663

1. **Mean:** 348
2. **Median:** 27

**D. EEO-1 Reports**

1. **Total:** 8,518
2. **Mean:** 355
3. **Median:** 33

	<b>Type 1</b>	<b>Type 2</b>	<b>Type 3</b>	<b>Type 4</b>	<b>Type 6</b>	<b>Type 8</b>	<b>Type 9</b>
<b>Total</b>	684	53	28	817	6,480	412	44
<b>Mean</b>	86	3	2	58	540	69	6
<b>Median</b>	11	1	1	26	18	15	3

**IV. Data Systems**

**A. EEO-1 Report Data**

1. Approximately **79%** of the Consortium respondents reported that HRIS houses and reports their EEO-1 report data
2. Approximately **4%** of the Consortium respondents reported that Payroll houses and reports their EEO-1 report data
3. Approximately **17%** of the Consortium respondents reported that another systems or method is used to house and report their EEO-1 report data

**B. W-2 Report Data**

1. Approximately **8%** of the Consortium respondents reported that HRIS houses and reports their W-2 report data
2. Approximately **88%** of the Consortium respondents reported that Payroll houses and reports their W-2 report data
3. Approximately **4%** of the Consortium respondents reported that another system houses and reports their W-2 report data

**C. Hours Tracked**

1. Approximately **54%** of Consortium respondents reported that they do not track the number of hours for exempt employees
2. Approximately **8%** of Consortium respondents reported that they do not track the number of hours for non-exempt employees
3. **Systems housing hours worked for exempt employees**
  1. **HRIS:** 27%
  2. **Payroll:** 55%
  3. **Other:** 18%
4. **Types of hours tracked for exempt employees**
  1. **All:** 55%
  2. **Only billable:** 36%
  3. **Other:** 9%
5. Approximately 36% of Consortium respondents reported that hours tracked for exempt employees would not be an accurate report of all hours worked
6. **Systems housing hours worked for non-exempt employees**
  1. **HRIS:** 17%
  2. **Payroll:** 54%
  3. **Other:** 29%

**V. Report Preparation and Burden Estimates**

- A. Approximately **88%** of Consortium respondents reported that base pay is housed within their HRIS
- B. Approximately **79%** of Consortium respondents reported that base pay/hourly rates would be less burdensome to generate than W-2 type earnings for the EEO-1 report data
- C. Current estimated costs associated with generating current W-2 reports each year
  - 1. **Mean:** \$16,388.64
  - 2. **Median:** \$10,000
- D. Current number of hours and cost associates with generating the current EEO-1 report
  - 1. **Hours**
    - 1. **Mean:** 91.14
    - 2. **Median:** 40
  - 2. **Cost**
    - 1. **Mean:** \$10,293.21
    - 2. **Median:** \$5,000
- E. Approximately **57%** of Consortium respondents do not believe that the proposed pay bands accurately capture and categorize employees within each EEO-1 pay category
- F. Approximately **74%** of Consortium respondents reported that if their EEO-1 report data and W-2 data come from two different systems, those systems do **not** communicate with each other
  - 1. This would require **75%** of respondents to develop a new software system
  - 2. **Anticipated cost of developing a new system**
    - 1. **Hours:**
      - a. **Mean:** 358.5
      - b. **Median:** 225
    - 2. **Cost**
      - a. **Mean:** \$33,466.67
      - b. **Median:** \$20,000
- G. Estimated burden once the system is developed:
  - 1. **Hours**
    - 1. **Mean:** 156
    - 2. **Median:** 40
  - 2. **Cost**
    - 1. **Mean:** \$8,918.75
    - 2. **Median:** \$4,000
- H. Estimated burden during first full reporting cycle (2017) to complete Component 2
  - 1. **Hours**
    - 1. **Mean:** 254.67
    - 2. **Median:** 80
  - 2. **Cost**
    - 1. **Mean:** \$34,469.38
    - 2. **Median:** \$10,000
- I. Estimated annual burden to prepare and submit Component 2 each year thereafter
  - 1. **Hours**
    - 1. **Mean:** 87
    - 2. **Median:** 28

**2. Cost**

**1. Mean:** \$7,863.83

**2. Median:** \$4,000

**J.** The following departments were reported to assist with preparing and submitting the report:

1. Compliance
2. Legal
3. IT
4. General HR
5. Payroll
6. Finance and Accounting
7. Diversity and Inclusion

**VI. Utility**

- A.** **95%** of Consortium respondents reported that they did not think the Employee Information Report would provide utility
- B.** **95%** of Consortium respondents reported that they would not make pay adjustments based on the results of the report
- C.** **65%** of Consortium respondents anticipate that their company will receive outside pressure to publicly release the report
- D.** **60%** of Consortium respondents anticipate that they will face pressure to make salary adjustments based upon the differential between their company's results and the published industry standard
- E.** **95%** of Consortium respondents reported that they did not think making adjustments based upon the published industry standard was a valid reason for making salary adjustments

**VII. EEO-1 Job Category**

- A.** Approximately **84%** of Consortium respondents reported that it is common within their organization to have employees that are promoted, demoted, or transferred from one EEO-1 job category to another during the course of a year
- B.** Approximately **84%** of Consortium respondents reported that their company has individual establishments that file an EEO-1 report that have EEO-1 job categories with fewer than five individuals
- C.** Approximately **81%** of Consortium respondents reported that they were concerned that their data would not remain confidential due to the size of employee population in the EEO-1 category

## **Appendix B: IRS Wage and Income Statement Forms (“W-2”)**

## General Instructions for Forms W-2 and W-3

**(Including Forms W-2AS, W-2CM, W-2GU, W-2VI, W-3SS, W-2c, and W-3c)**

Section references are to the Internal Revenue Code unless otherwise noted.

Contents	Page
Future Developments .....	1
What's New .....	1
Reminders .....	1
Need Help? .....	4
How To Get Forms and Publications .....	4
Common Errors on Forms W-2 .....	5
General Instructions for Forms W-2 and W-3 .....	5
Special Reporting Situations for Form W-2 .....	7
Penalties .....	13
Specific Instructions for Form W-2 .....	14
Specific Instructions for Form W-3 .....	21
General Instructions for Forms W-2c and W-3c .....	23
Special Situations for Forms W-2c and W-3c .....	23
Specific Instructions for Form W-2c .....	25
Specific Instructions for Form W-3c .....	26
Form W-2 Reference Guide for Box 12 Codes .....	28
Form W-2 Box 13 Retirement Plan Checkbox Decision Chart .....	28
Nonqualified Deferred Compensation Reporting Example Chart .....	29
Index .....	31

### Future Developments

For the latest information about developments related to Forms W-2 and W-3 and their instructions, such as legislation enacted after they were published, go to [www.irs.gov/w2](http://www.irs.gov/w2).

### What's New

**New due date for filing with SSA.** The due date for filing 2016 Forms W-2, W-2AS, W-2CM, W-2GU, W-2VI, W-3 and W-3SS with the SSA is now January 31, 2017, whether you file using paper forms or electronically.

**Extensions of time to file.** Extensions of time to file Form W-2 with the SSA are no longer automatic. For filings due on or after January 1, 2017, you may request one 30-day extension to file Form W-2 by submitting a complete application on Form 8809, Application for Extension of Time to File Information Returns, including a detailed explanation of why you need additional time and signed under penalties of perjury. The IRS will only grant the extension in extraordinary circumstances or catastrophe. See *Extension to file* for more information. This does not affect extensions of time to furnish Forms W-2 to employees. See *Extension of time to furnish Forms W-2 to employees* for more information.

**Penalties increased.** Higher penalties apply for:

- Failure to file correct Forms W-2 by the due date,
- Intentional disregard of filing requirements,
- Failure to furnish Forms W-2, and
- Intentional disregard of payee statement requirements.

The higher penalty amounts apply to returns required to be filed after December 31, 2015 and are indexed for inflation. See *Penalties* for more information.

**New penalty safe harbor.** Forms W-2 with incorrect dollar amounts may fall under a new safe harbor for certain de minimis errors. See *Penalties* for more information.

**Same-sex marriage.** For federal tax purposes, marriages of couples of the same sex are treated the same as marriages of couples of the opposite sex. The term "spouse" includes an individual married to a person of the same sex. However, individuals who have entered into a registered domestic partnership, civil union, or other similar relationship that is not considered a marriage under state law are not considered married for federal tax purposes. For more information, see Revenue Ruling 2013-17, 2013-38 I.R.B. 201, available at [https://www.irs.gov/irb/2013-38\\_IRB/ar07.html](https://www.irs.gov/irb/2013-38_IRB/ar07.html). Notice 2013-61 provides special administrative procedures for employers to make claims for refunds or adjustments of overpayments of social security and Medicare taxes with respect to certain same-sex spouse benefits before expiration of the period of limitations. Notice 2013-61, 2013-44 I.R.B. 432 is available at [https://www.irs.gov/irb/2013-44\\_IRB/ar10.html](https://www.irs.gov/irb/2013-44_IRB/ar10.html).

**Third-party sick pay recap reporting.** See Form 8922, Third-Party Sick Pay Recap.

### Reminders

**TIP** *Get it done faster... E-file your Forms W-2 and W-2c with the SSA. See E-filing.*

**Rejected wage reports from the Social Security Administration (SSA).** The SSA will reject Form W-2 electronic and paper wage reports under the following conditions:

- Medicare wages and tips are less than the sum of social security wages and social security tips,
- Social security tax is greater than zero; social security wages and social security tips are equal to zero, and
- Medicare tax is greater than zero; Medicare wages and tips are equal to zero.

Additionally, Forms W-2 and W-2c electronic and paper wage reports for household employers will be rejected under the following conditions:



*Requests for an extension of time to furnish Forms W-2 to employees are not automatically granted. If approved, an extension will generally be for no more than 15 days from the due date, unless the need for up to a total of 30 days is clearly shown. See Pub. 1220. Requests for an extension of time to furnish recipient statements for more than 10 payers must be submitted electronically.*

**Undeliverable Forms W-2.** Keep for 4 years any employee copies of Forms W-2 that you tried to but could not deliver. However, if the undelivered Form W-2 can be produced electronically through April 15th of the fourth year after the year at issue, you do not need to keep undeliverable employee copies. Do not send undeliverable employee copies of Forms W-2 to the Social Security Administration (SSA).

**Taxpayer identification numbers (TINs).** Employers use an employer identification number (EIN) (00-0000000). Employees use a social security number (SSN) (000-00-0000). When you list a number, separate the nine digits properly to show the kind of number. Do not accept an IRS individual taxpayer identification number (ITIN) in place of an SSN for employee identification or for Form W-2 reporting. An ITIN is only available to resident and nonresident aliens who are not eligible for U.S. employment and need identification for other tax purposes. An ITIN will expire for any taxpayer who fails to file a federal income tax return for five consecutive tax years. You can identify an ITIN because it is a 9-digit number formatted like an SSN beginning with the number "9" and with a number in one of the following ranges in the fourth and fifth digit: 70-88, 90-92, or 94-99 (for example, 9NN-70-NNNN). Do not auto populate an ITIN into box a—Employee's social security number on Form W-2. See section 4 of Pub. 15 (Circular E).



*An individual with an ITIN who later becomes eligible to work in the United States must obtain an SSN from the Social Security Administration.*

The IRS uses SSNs to check the payments that you report against the amounts shown on employees' tax returns. The SSA uses SSNs to record employees' earnings for future social security and Medicare benefits. When you prepare Form W-2, be sure to show the correct SSN for each employee. Do not truncate the employees' SSNs on Form W-2. For information about verifying SSNs, see section 4 of Pub. 15 (Circular E) or visit the SSA's Employer W-2 Filing Instructions & Information website at [www.socialsecurity.gov/employer](http://www.socialsecurity.gov/employer).



*Form W-2 e-filed with the SSA must contain the same TINs as shown on all copies of Form W-2 furnished to employees.*

## Special Reporting Situations for Form W-2

**Adoption benefits.** Amounts paid or expenses incurred by an employer for qualified adoption expenses under an adoption assistance program are not subject to federal income tax withholding and are not reportable in box 1. However, these amounts (including adoption benefits paid

from a section 125 (cafeteria) plan, but not including adoption benefits forfeited from a cafeteria plan) are subject to social security, Medicare, and railroad retirement taxes and must be reported in boxes 3 and 5. (Use box 14 if railroad retirement taxes apply.) Also, the total amount must be reported in box 12 with code T.

For more information on adoption benefits, see Notice 97-9, 1997-1 C.B. 365, which is on page 35 of Internal Revenue Bulletin 1997-2 at [www.irs.gov/pub/irs-irbs/irb97-02.pdf](http://www.irs.gov/pub/irs-irbs/irb97-02.pdf). Advise your employees to see the Instructions for Form 8839, Qualified Adoption Expenses.

**Agent reporting.** An agent who has an approved Form 2678, Employer/Payer Appointment of Agent, should enter the following in box c of Form W-2:

(Name of agent)  
Agent for (name of employer)  
Address of agent

Each Form W-2 should reflect the EIN of the agent in box b. An agent files one Form W-3 for all of the Forms W-2 and enters its own information in boxes e, f, and g of Form W-3 as it appears on the agent's related employment tax returns (for example, Form 941). Enter the client-employer's EIN in box h of Form W-3 if the Forms W-2 relate to only one employer (other than the agent); if not, leave box h blank.

If the agent (a) is acting as an agent for two or more employers or is an employer and is acting as an agent for another employer, and (b) pays social security wages to an individual on behalf of more than one employer, the agent should file separate Forms W-2 for the affected employee reflecting the wages paid by each employer.

See Rev. Proc. 2013-39, 2013-52 I.R.B. 830 available at [www.irs.gov/irb/2013-52\\_IRB/ar15.html](http://www.irs.gov/irb/2013-52_IRB/ar15.html); and Form 2678 instructions for procedures to be followed in applying to be an agent.



*Generally, an agent is not responsible for refunding excess social security or railroad retirement (RRTA) tax withheld from employees. If an employee worked for more than one employer during 2016 and had more than \$7,347 in social security and Tier 1 RRTA tax withheld, he or she should claim the excess on the appropriate line of Form 1040, Form 1040A, or Form 1040NR. If an employee had more than \$4321.80 in Tier 2 RRTA tax withheld from more than one employer, the employee should claim a refund on Form 843, Claim for Refund and Request for Abatement.*

**Archer MSA.** An employer's contribution to an employee's Archer MSA is not subject to federal income tax withholding or social security, Medicare, or railroad retirement taxes if it is reasonable to believe at the time of the payment that the contribution will be excludable from the employee's income. However, if it is not reasonable to believe at the time of payment that the contribution will be excludable from the employee's income, employer contributions are subject to income tax withholding and social security and Medicare taxes (or railroad retirement taxes, if applicable) and must be reported in boxes 1, 3, and 5. (Use box 14 if railroad retirement taxes apply.)

You must report all employer contributions to an Archer MSA in box 12 of Form W-2 with code R. Employer

contributions to an Archer MSA that are not excludable from the income of the employee also must be reported in boxes 1, 3, and 5 (box 14 if railroad retirement taxes apply).

An employee's contributions to an Archer MSA are includible in income as wages and are subject to federal income tax withholding and social security and Medicare taxes (or railroad retirement taxes, if applicable). Employee contributions are deductible, within limits, on the employee's Form 1040.

For more information, see Pub. 969, Health Savings Accounts and Other Tax-Favored Health Plans, and Notice 96-53, which is found on page 5 of Internal Revenue Bulletin 1996-51 at [www.irs.gov/pub/irs-irbs/irb96-51.pdf](http://www.irs.gov/pub/irs-irbs/irb96-51.pdf).

**Clergy and religious workers.** For certain members of the clergy and religious workers who are not subject to social security and Medicare taxes as employees, boxes 3 and 5 of Form W-2 should be left blank. You may include a minister's parsonage and/or utilities allowance in box 14. For information on the rules that apply to ministers and certain other religious workers, see Pub. 517, Social Security and Other Information for Members of the Clergy and Religious Workers, and section 4 in Pub. 15-A.

**Deceased employee's wages.** If an employee dies during the year, you must report the accrued wages, vacation pay, and other compensation paid after the date of death. Also report wages that were available to the employee while he or she was alive, regardless of whether they actually were in the possession of the employee, as well as any other regular wage payment, even if you may have to reissue the payment in the name of the estate or beneficiary.

If you made the payment after the employee's death but in the same year the employee died, you must withhold social security and Medicare taxes on the payment and report the payment on the employee's Form W-2 only as social security and Medicare wages to ensure proper social security and Medicare credit is received. On the employee's Form W-2, show the payment as social security wages (box 3) and Medicare wages and tips (box 5) and the social security and Medicare taxes withheld in boxes 4 and 6. Do not show the payment in box 1.

If you made the payment after the year of death, do not report it on Form W-2, and do not withhold social security and Medicare taxes.

Whether the payment is made in the year of death or after the year of death, you also must report it in box 3 of Form 1099-MISC, Miscellaneous Income, for the payment to the estate or beneficiary. Use the name and taxpayer identification number (TIN) of the payment recipient on Form 1099-MISC. However, if the payment is a reissuance of wages that were constructively received by the deceased individual while he or she was still alive, do not report it on Form 1099-MISC.

**Example.** Before Employee A's death on June 15, 2016, A was employed by Employer X and received \$10,000 in wages on which federal income tax of \$1,500 was withheld. When A died, X owed A \$2,000 in wages and \$1,000 in accrued vacation pay. The total of \$3,000

(less the social security and Medicare taxes withheld) was paid to A's estate on July 6, 2016. Because X made the payment during the year of death, X must withhold social security and Medicare taxes on the \$3,000 payment and must complete Form W-2 as follows.

- Box a – Employee A's SSN
- Box e – Employee A's name
- Box f – Employee A's address
- Box 1 – 10000.00 (does not include the \$3,000 accrued wages and vacation pay)
- Box 2 – 1500.00
- Box 3 – 13000.00 (includes the \$3,000 accrued wages and vacation pay)
- Box 4 – 806.00 (6.2% of the amount in box 3)
- Box 5 – 13000.00 (includes the \$3,000 accrued wages and vacation pay)
- Box 6 – 188.50 (1.45% of the amount in box 5)



Employer X also must complete Form 1099-MISC as follows.

- Boxes for recipient's name, address, and TIN—the estate's name, address, and TIN.
- Box 3: 3000.00 (Even though amounts were withheld for social security and Medicare taxes, the gross amount is reported here.)

If Employer X made the payment after the year of death, the \$3,000 would not be subject to social security and Medicare taxes and would not be shown on Form W-2. However, the employer would still file Form 1099-MISC.

**Designated Roth contributions.** Under section 402A, a participant in a section 401(k) plan, under a 403(b) salary reduction agreement, or in a governmental 457(b) plan that includes a qualified Roth contribution program, may elect to make designated Roth contributions to the plan or program in lieu of elective deferrals. Designated Roth contributions are subject to federal income tax withholding and social security and Medicare taxes (and railroad retirement taxes, if applicable) and must be reported in boxes 1, 3, and 5. (Use box 14 if railroad retirement taxes apply.)

Section 402A requires separate reporting of the yearly designated Roth contributions. Designated Roth contributions to 401(k) plans will be reported using code AA in box 12; designated Roth contributions under 403(b) salary reduction agreements will be reported using code BB in box 12; and designated Roth contributions under a governmental section 457(b) plan will be reported using code EE in box 12. For reporting instructions, see *Box 12—Codes for Code AA, Code BB, and Code EE*.

**Educational assistance programs.** Employer-provided educational assistance that qualifies as a working condition benefit is excludable from an employee's wages. For employer-provided educational assistance that does not qualify as a working condition benefit, a \$5,250 exclusion may apply if the assistance is provided under an educational assistance program under section 127. See Pub. 970, Tax Benefits for Education, and

section 2 of Pub. 15-B for more information. Also see *Box 1—Wages, tips, other compensation*.

**Election workers.** Report on Form W-2 payments of \$600 or more to election workers for services performed in state, county, and municipal elections. File Form W-2 for payments of less than \$600 paid to election workers if social security and Medicare taxes were withheld under a section 218 (Social Security Act) agreement. Do not report election worker payments on Form 1099-MISC.

If the election worker is employed in another capacity with the same government entity, see Rev. Rul. 2000-6, which is on page 512 of Internal Revenue Bulletin 2000-6 at [www.irs.gov/pub/irs-irbs/irb00-06.pdf](http://www.irs.gov/pub/irs-irbs/irb00-06.pdf).

**Employee business expense reimbursements.**

Reimbursements to employees for business expenses must be reported as follows.

- Generally, payments made under an accountable plan are excluded from the employee's gross income and are not reported on Form W-2. However, if you pay a per diem or mileage allowance and the amount paid for substantiated miles or days traveled exceeds the amount treated as substantiated under IRS rules, you must report as wages on Form W-2 the amount in excess of the amount treated as substantiated. The excess amount is subject to income tax withholding and social security and Medicare taxes (or railroad retirement taxes, if applicable). Report the amount treated as substantiated (that is, the nontaxable portion) in box 12 using code L. See *Box 12—Codes for Code L—Substantiated employee business expense reimbursements*. (Use box 14 if railroad retirement taxes apply.)
- Payments made under a nonaccountable plan are reported as wages on Form W-2 and are subject to federal income tax withholding and social security and Medicare taxes (or railroad retirement taxes, if applicable). (Use box 14 if railroad retirement taxes apply.)

For more information on accountable plans, nonaccountable plans, amounts treated as substantiated under a per diem or mileage allowance, the standard mileage rate, the per diem substantiation method, and the high-low substantiation method, see Pub. 463, *Travel, Entertainment, Gift, and Car Expenses*; and section 5 of Pub. 15 (Circular E).

**Employee's social security and Medicare taxes (or railroad retirement taxes, if applicable) paid by employer.** If you paid your employee's share of social security and Medicare taxes rather than deducting them from the employee's wages, you must include these payments as wages subject to federal (or American Samoa, CNMI, Guam, or U.S. Virgin Islands) income tax withholding and social security, Medicare, and federal unemployment (FUTA) taxes. If you paid your employee's share of railroad retirement taxes, you must include these amounts as compensation subject to railroad retirement taxes. The amount to include as wages and/or compensation is determined by using the formula contained in the discussion of *Employee's Portion of Taxes Paid by Employer* in section 7 of Pub. 15-A and in Rev. Proc. 83-43, 1983-24 I.R.B. 60.



*This does not apply to household and agricultural employers. If you pay a household or agricultural employee's social security and Medicare taxes, you must include these payments in the employee's wages for income tax withholding purposes. However, the wage increase due to the tax payments is not subject to social security, Medicare, or FUTA taxes. For information on completing Forms W-2 and W-3 in this situation, see the Instructions for Schedule H (Form 1040) and section 4 of Pub. 51 (Circular A).*

**Foreign agricultural workers.** You must report compensation of \$600 or more paid in a calendar year to an H-2A visa agricultural worker for agricultural labor. If the H-2A visa agricultural worker furnishes a valid taxpayer identification number, report these payments in box 1 of Form W-2. If the worker does not furnish a valid taxpayer identification number, report the payments on Form 1099-MISC. See *Form 1099-MISC* below.

On Form W-2, no amount should be reported in boxes 3 or 5. In most cases, you do not need to withhold federal income tax from compensation paid to H-2A visa agricultural workers. Employers should withhold federal income tax only if the H-2A visa agricultural worker and the employer agree to withhold. The H-2A visa agricultural worker must provide a completed Form W-4. If the employer withholds income tax, the employer must report the tax withheld in box 2 of Form W-2 and on line 8 of Form 943. See Pub. 51 (Circular A).

**Form 1099-MISC.** If the H-2A visa agricultural worker fails to furnish a taxpayer identification number to the employer, and the total annual payments made to the H-2A visa agricultural worker are \$600 or more, the employer must begin backup withholding on the payments made until the H-2A visa agricultural worker furnishes a valid taxpayer identification number. Employers must report the compensation paid and any backup withholding on Forms 1099-MISC and Form 945, *Annual Return of Withheld Federal Income Tax*. See the 2016 Instructions for Form 1099-MISC and the 2016 Instructions for Form 945.

For more information, enter "foreign agricultural workers" in the search box on [IRS.gov](http://IRS.gov).

**Fringe benefits.** Include all taxable fringe benefits in box 1 of Form W-2 as wages, tips, and other compensation and, if applicable, in boxes 3 and 5 as social security and Medicare wages. Although not required, you may include the total value of fringe benefits in box 14 (or on a separate statement). However, if you provided your employee a vehicle and included 100% of its annual lease value in the employee's income, you must separately report this value to the employee in box 14 (or on a separate statement). The employee can then figure the value of any business use of the vehicle and report it on Form 2106, *Employee Business Expenses*. Also see Pub. 15-B for more information.



*If you used the commuting rule or the vehicle cents-per-mile rule to value the personal use of the vehicle, you cannot include 100% of the value of the use of the vehicle in the employee's income. See Pub. 15-B.*

**Golden parachute payments (not applicable to Forms W-2AS, W-2CM, W-2GU, or W-2VI).** Include any golden parachute payments in boxes 1, 3, and 5 of Form W-2. Withhold federal income, social security, and Medicare taxes (or railroad retirement taxes, if applicable) as usual and report them in boxes 2, 4, and 6, respectively. (Use box 14 if railroad retirement taxes apply.) Excess parachute payments are also subject to a 20% excise tax. If the excess payments are considered wages, withhold the 20% excise tax and include it in box 2 as income tax withheld. Also report the excise tax in box 12 with code K. For definitions and additional information, see Regulations section 1.280G-1 and Rev. Proc. 2003-68, 2003-34 I.R.B. 398, available at [www.irs.gov/irb/2003-34\\_IRB/ar16.html](http://www.irs.gov/irb/2003-34_IRB/ar16.html).

**Government employers.** Federal, state, and local governmental agencies have two options for reporting their employees' wages that are subject to only Medicare tax for part of the year and both social security and Medicare taxes for part of the year.

The first option (which the SSA prefers) is to file a single set of Forms W-2 per employee for the entire year, even if only part of the year's wages are subject to both social security and Medicare taxes. Check "941" (or "944") in box b of Form W-3 or check "941-SS" in box b of Form W-3SS. The wages in box 5 of Form W-2 must be equal to or greater than the wages in box 3 of Form W-2.

The second option is to file one set of Forms W-2 for wages subject only to Medicare tax and another set for wages subject to both social security and Medicare taxes. Use a separate Form W-3 to transmit each set of Forms W-2. For the Medicare-only Forms W-2, check "Medicare govt. emp." in box b of Form W-3. For the Forms W-2 showing wages subject to both social security and Medicare taxes, check "941" (or "944") in box b of Form W-3 or check "941-SS" in box b of Form W-3SS. The wages in box 5 of Form W-2 must be equal to or greater than the wages in box 3 of Form W-2.

**Group-term life insurance.** You must include in boxes 1, 3, and 5 (or 14, if railroad retirement taxes apply) the cost of group-term life insurance that is more than the cost of \$50,000 of coverage, reduced by the amount the employee paid toward the insurance. Use Table 2-2 in Pub. 15-B to determine the cost of the insurance. Also, show the amount in box 12 with code C. For employees, you must withhold social security and Medicare taxes, but not federal income tax. For coverage provided to former employees, the former employees must pay the employee part of social security and Medicare taxes (or railroad retirement taxes, if applicable) on the taxable cost of group-term life insurance over \$50,000 on Form 1040. You are not required to collect those taxes. However, you must report the uncollected social security tax (or railroad retirement taxes, if applicable) with code M and the uncollected Medicare tax (or RRTA Medicare tax, if applicable) with code N in box 12 of Form W-2. However, any uncollected Additional Medicare Tax (on the cost of group-term life insurance, which, in combination with other wages, is in excess of \$200,000) is not reported with code N in box 12.

**Health flexible spending arrangement (FSA).** For plan year 2016, a cafeteria plan may not allow an employee to request salary reduction contributions for a health FSA in excess of \$2,550 (as indexed for inflation).

If a cafeteria plan timely complies with the written plan requirement limiting health FSA salary reduction contributions, but one or more employees are erroneously allowed to elect a salary reduction of more than \$2,550 for a plan year, the cafeteria plan will continue to be a section 125 cafeteria plan for that plan year if:

- The terms of the plan apply uniformly to all participants,
- The error results from a reasonable mistake by the employer (or the employer's agent) and is not due to willful neglect by the employer (or the employer's agent), and
- Salary reduction contributions in excess of \$2,550 are paid to the employee and reported as wages for income tax withholding and employment tax purposes on the employee's Form W-2 (or Form W-2c) for the employee's taxable year in which, or with which, ends the cafeteria plan year in which the correction is made.



*The salary reduction contribution limit of \$2,550 does not include any amount (up to \$500) carried over from a previous year.*

For more information, see Notice 2012-40, 2012-26 I.R.B. 1046, available at [www.irs.gov/irb/2012-26\\_IRB/ar09.html](http://www.irs.gov/irb/2012-26_IRB/ar09.html) and Notice 2013-71, 2013-47 I.R.B. 532 available at [www.irs.gov/irb/2013-47\\_IRB/ar10.html](http://www.irs.gov/irb/2013-47_IRB/ar10.html).

**Health savings account (HSA).** An employer's contribution (including an employee's contributions through a cafeteria plan) to an employee's HSA is not subject to federal income tax withholding or social security, Medicare, or railroad retirement taxes (or FUTA tax) if it is reasonable to believe at the time of the payment that the contribution will be excludable from the employee's income. However, if it is not reasonable to believe at the time of payment that the contribution will be excludable from the employee's income, employer contributions are subject to federal income tax withholding, social security and Medicare taxes (or railroad retirement taxes, if applicable), and FUTA tax, and must be reported in boxes 1, 3, and 5 (use box 14 if railroad retirement taxes apply), and on Form 940, Employer's Annual Federal Unemployment (FUTA) Tax Return.

You must report all employer contributions (including an employee's contributions through a cafeteria plan) to an HSA in box 12 of Form W-2 with code W. Employer contributions to an HSA that are not excludable from the income of the employee also must be reported in boxes 1, 3, and 5. (Use box 14 if railroad retirement taxes apply.)

An employee's contributions to an HSA (unless made through a cafeteria plan) are includible in income as wages and are subject to federal income tax withholding and social security and Medicare taxes (or railroad retirement taxes, if applicable). Employee contributions are deductible, within limits, on the employee's Form 1040. For more information about HSAs, see Notice 2004-2, Notice 2004-50, and Notice 2008-52. Notice 2004-2, 2004-2 I.R.B. 269, is available at [www.irs.gov/irb/2004-02\\_IRB/ar09.html](http://www.irs.gov/irb/2004-02_IRB/ar09.html). Notice 2004-50, 2004-33 I.R.B.

196, is available at [www.irs.gov/irb/2004-33\\_IRB/ar08.html](http://www.irs.gov/irb/2004-33_IRB/ar08.html). Notice 2008-52, 2008-25 I.R.B. 1166, is available at [www.irs.gov/irb/2008-25\\_IRB/ar10.html](http://www.irs.gov/irb/2008-25_IRB/ar10.html). Also see Form 8889, Health Savings Accounts (HSAs), and Pub. 969.

**Lost Form W-2—reissued statement.** If an employee loses a Form W-2, write “REISSUED STATEMENT” on the new copy and furnish it to the employee. You do not have to add “REISSUED STATEMENT” on Forms W-2 provided to employees electronically. Do not send Copy A of the reissued Form W-2 to the SSA. Employers are not prohibited (by the Internal Revenue Code) from charging a fee for the issuance of a duplicate Form W-2.

**Military differential pay.** Employers paying their employees while they are on active duty in the United States uniformed services should treat these payments as wages. Differential wage payments made to an individual while on active duty for periods scheduled to exceed 30 days are subject to income tax withholding, but are not subject to social security, Medicare, and unemployment taxes. Report differential wage payments in box 1 and any federal income tax withholding in box 2. Differential wage payments made to an individual while on active duty for 30 days or less are subject to income tax withholding, social security, Medicare, and unemployment taxes, and are reported in boxes 1, 3, and 5. See Rev. Rul. 2009-11, 2009-18 I.R.B. 896, available at [www.irs.gov/irb/2009-18\\_IRB/ar07.html](http://www.irs.gov/irb/2009-18_IRB/ar07.html).

**Moving expenses.** Report moving expenses as follows.

- Qualified moving expenses that an employer paid to a third party on behalf of the employee (for example, to a moving company) and services that an employer furnished in kind to an employee are not reported on Form W-2.
- Qualified moving expense reimbursements paid directly to an employee by an employer are reported only in box 12 of Form W-2 with code P.
- Nonqualified moving expense reimbursements are reported in boxes 1, 3, and 5 (use box 14 if railroad retirement taxes apply) of Form W-2. These amounts are subject to federal income tax withholding and social security and Medicare taxes (or railroad retirement taxes, if applicable).

For more information on qualified and nonqualified moving expenses, see Pub. 521, Moving Expenses.

**Nonqualified deferred compensation plans.** Section 409A provides that all amounts deferred under a nonqualified deferred compensation (NQDC) plan for all tax years are currently includible in gross income to the extent not subject to a substantial risk of forfeiture and not previously included in gross income, unless certain requirements are met. Generally, section 409A is effective with respect to amounts deferred in tax years beginning after December 31, 2004, but deferrals made before that year may be subject to section 409A under some circumstances.

It is not necessary to show amounts deferred during the year under an NQDC plan subject to section 409A. If you report section 409A deferrals, show the amount in box 12 using code Y. For more information, see Notice 2008-115,

2008-52 I.R.B. 1367, available at [www.irs.gov/irb/2008-52\\_IRB/ar10.html](http://www.irs.gov/irb/2008-52_IRB/ar10.html).

Income included under section 409A from an NQDC plan will be reported in box 1 and in box 12 using code Z. This income is also subject to an additional tax of 20% that is reported on Form 1040. For more information on amounts includible in gross income and reporting requirements, see Notice 2008-115 available at [www.irs.gov/irb/2008-52\\_IRB/ar10.html](http://www.irs.gov/irb/2008-52_IRB/ar10.html). For information on correcting failures to comply with section 409A and related reporting, see Notice 2008-113, 2008-51 I.R.B. 1305, available at [www.irs.gov/irb/2008-51\\_IRB/ar12.html](http://www.irs.gov/irb/2008-51_IRB/ar12.html); Notice 2010-6, 2010-3 I.R.B. 275, available at [www.irs.gov/irb/2010-3\\_IRB/ar08.html](http://www.irs.gov/irb/2010-3_IRB/ar08.html); and Notice 2010-80, 2010-51 I.R.B. 853, available at [www.irs.gov/irb/2010-51\\_IRB/ar08.html](http://www.irs.gov/irb/2010-51_IRB/ar08.html).

See the *Nonqualified Deferred Compensation Reporting Example Chart*.

**Railroad employers (not applicable to Forms W-2AS, W-2CM, W-2GU, or W-2VI).** Railroad employers must file Form W-2 to report their employees' wages and income tax withholding in boxes 1 and 2. You must file a separate Form W-3 to transmit the Forms W-2 if you have employees covered under the Federal Insurance Contributions Act (FICA) (social security and Medicare) and the Railroad Retirement Tax Act (RRTA).

- On the Form W-3, check the “CT-1” checkbox in box b “Kind of Payer” used to transmit Forms W-2 for employees with box 1 wages and box 2 tax withholding. On the Form W-2, use box 14 for employees covered by RRTA tax, report the RRTA compensation, Tier 1, Tier 2, Medicare, and any Additional Medicare Tax withheld. Label them “RRTA compensation,” “Tier 1 tax,” “Tier 2 tax,” “Medicare tax,” and “Additional Medicare Tax.” Include tips reported by the employee to the employer in “RRTA compensation.”
- On the Form W-3, check the “941” checkbox in box b “Kind of Payer” used to transmit Forms W-2 for employees covered by social security and Medicare. On the Form W-2, complete boxes 3, 4, 5, 6, and 7 to show the social security and Medicare wages and taxes. These boxes apply only to covered social security and Medicare wages and taxes. They are **not** to be used to report railroad retirement compensation and taxes.

**Repayments.** If an employee repays you for wages received in error, do not offset the repayments against current year wages unless the repayments are for amounts received in error in the current year. Repayments made in the current year, but related to a prior year or years, must be repaid in gross, not net, and require special tax treatment by employees in some cases. You may advise the employee of the total repayments made during the current year and the amount (if any) related to prior years. This information will help the employee account for such repayments on his or her federal income tax return.

If the repayment was for a prior year, you must file Form W-2c with the SSA to correct only social security and Medicare wages and taxes, and furnish a copy to the employee. Do not correct “Wages, tips, other compensation” in box 1, or “Federal income tax withheld”

in box 2, on Form W-2c. Also, do not correct any Additional Medicare Tax withheld on the repaid wages (reported with Medicare tax withheld in box 6) on Form W-2c. File the "X" return that is appropriate for the return on which the wages or compensation was originally reported (Forms 941-X, 943-X, 944-X, or CT-1X). Correct the social security and Medicare wages and taxes for the period during which the wages or compensation was originally paid. For information on reporting adjustments to Forms 941, 941-SS, 943, 944, or Form CT-1, see section 13 of Pub. 15 (Circular E), the Instructions for Form CT-1X, or section 9 of Pub. 51 (Circular A).



*Tell your employee that the wages paid in error in a prior year remain taxable to him or her for that year. This is because the employee received and had use of those funds during that year. The employee is not entitled to file an amended return (Form 1040X) to recover the income tax on these wages. Instead, the employee is entitled to a deduction (or a credit, in some cases) for the repaid wages on his or her Form 1040 for the year of repayment. However, the employee is entitled to file an amended return (Form 1040X) to recover Additional Medicare Tax on these wages, if any. Refer your employee to Repayments in Pub. 525.*

**Scholarship and fellowship grants.** Give a Form W-2 to each recipient of a scholarship or fellowship grant only if you are reporting amounts includible in income under section 117(c) (relating to payments for teaching, research, or other services required as a condition for receiving the qualified scholarship). Also see Pub. 15-A and Pub. 970. These payments are subject to federal income tax withholding. However, their taxability for social security and Medicare taxes (or railroad retirement taxes, if applicable) depends on the nature of the employment and the status of the organization. See *Students, scholars, trainees, teachers, etc.*, in section 15 of Pub. 15 (Circular E).

**Sick pay.** If you had employees who received sick pay in 2016 from an insurance company or other third-party payer and the third party notified you of the amount of sick pay involved, you may be required to report the information on the employees' Forms W-2. If the insurance company or other third-party payer did not notify you in a timely manner about the sick pay payments, it must prepare Forms W-2 and W-3 for your employees showing the sick pay. For specific reporting instructions, see section 6 of Pub. 15-A.

**SIMPLE retirement account.** An employee's salary reduction contributions to a SIMPLE (savings incentive match plan for employees) retirement account are not subject to federal income tax withholding but are subject to social security, Medicare, and railroad retirement taxes. Do not include an employee's contribution in box 1, but do include it in boxes 3 and 5. (Use box 14 if railroad retirement taxes apply.) An employee's total contribution also must be included in box 12 with code D or S.

An employer's matching or nonelective contribution to an employee's SIMPLE retirement account is not subject to federal income tax withholding or social security, Medicare, or railroad retirement taxes, and is not to be shown on Form W-2.

For more information on SIMPLE retirement accounts, see Notice 98-4, 1998-1 C.B. 269. You can find Notice 98-4 on page 25 of Internal Revenue Bulletin 1998-2 at [www.irs.gov/pub/irs-irbs/irb98-02.pdf](http://www.irs.gov/pub/irs-irbs/irb98-02.pdf).

**Successor/predecessor employers.** If you buy or sell a business during the year, see Rev. Proc. 2004-53 for information on who must file Forms W-2 and employment tax returns. Rev. Proc. 2004-53, 2004-34 I.R.B. 320, is available at [www.irs.gov/irb/2004-34\\_IRB/ar13.html](http://www.irs.gov/irb/2004-34_IRB/ar13.html).

**Terminating a business.** If you terminate your business, you must provide Forms W-2 to your employees for the calendar year of termination by the due date of your final Forms 941, 944, or 941-SS. You also must file Forms W-2 with the SSA by the last day of the month that follows the due date of your final Forms 941, 944, or 941-SS. If filing on paper, make sure you obtain Forms W-2 and W-3 preprinted with the correct year. If e-filing, make sure your software has been updated for the current tax year.

However, if any of your employees are immediately employed by a successor employer, see *Successor/predecessor employers* above. Also, for information on automatic extensions for furnishing Forms W-2 to employees and filing Forms W-2, see Rev. Proc. 96-57, which is on page 14 of Internal Revenue Bulletin 1996-53 at [www.irs.gov/pub/irs-irbs/irb96-53.pdf](http://www.irs.gov/pub/irs-irbs/irb96-53.pdf).



*Get Schedule D (Form 941), Report of Discrepancies Caused by Acquisitions, Statutory Mergers, or Consolidations, for information on reconciling wages and taxes reported on Forms W-2 with amounts reported on Forms 941, 941-SS, 943, or 944.*

**Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) makeup amounts to a pension plan.** If an employee returned to your employment after military service and certain makeup amounts were contributed to a pension plan for a prior year(s) under the USERRA, report the prior year contributions separately in box 12. See the *TIP* above Code D in *Box 12—Codes*. You also may report certain makeup amounts in box 14. See *Box 14—Other in Specific Instructions for Form W-2*.

Instead of reporting in box 12 (or box 14), you may choose to provide a separate statement to your employee showing USERRA makeup contributions. The statement must identify the type of plan, the year(s) to which the contributions relate, and the amount contributed for each year.

**Virtual currency.** For federal tax purposes, virtual currency is treated as property. Bitcoin is an example of virtual currency. Transactions using virtual currency (such as Bitcoin) must be reported in U.S. dollars.

The fair market value of virtual currency (such as Bitcoin) paid as wages is subject to federal income tax withholding, FICA tax, and FUTA tax and must be reported on Form W-2. Notice 2014-21, 2014-16 I.R.B. 938 describes how virtual currency is treated for federal tax purposes and is available at [www.irs.gov/irb/2014-16\\_IRB/ar12.html](http://www.irs.gov/irb/2014-16_IRB/ar12.html).

The penalty applies if you fail to provide the statement by January 31, 2017, if you fail to include all information required to be shown on the statement, or if you include incorrect information on the statement.

The amount of the penalty is based on when you furnish the correct payee statement. This penalty is an additional penalty and is applied in the same manner, and with the same amounts, as in *Failure to file correct information returns by the due date*.

**Exceptions to the penalty.** An inconsequential error or omission is not considered a failure to include correct information. An inconsequential error or omission cannot reasonably be expected to prevent or hinder the payee from timely receiving correct information and reporting it on his or her income tax return or from otherwise putting the statement to its intended use. Errors and omissions that are never inconsequential are those relating to:

- A dollar amount,
- A significant item in a payee's address, and
- The appropriate form for the information provided, such as whether the form is an acceptable substitute for the official IRS form.

See *Exceptions to the penalty in Failure to file correct information returns by the due date*, for additional exceptions to the penalty for failure to file correct payee statements.

**Intentional disregard of payee statement requirements.** If any failure to provide a correct payee statement (Form W-2) to an employee is due to intentional disregard of the requirements to furnish a correct payee statement, the penalty is \$530 per Form W-2 with no maximum penalty.

**Civil damages for fraudulent filing of Forms W-2.** If you willfully file a fraudulent Form W-2 for payments that you claim you made to another person, that person may be able to sue you for damages. If you are found liable, you may have to pay \$5,000 or more in damages. You may also be subject to criminal sanctions.

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## Specific Instructions for Form W-2

**How to complete Form W-2.** Form W-2 is a multi-part form. Ensure all copies are legible. Send Copy A to the SSA; Copy 1, if required, to your state, city, or local tax department; and Copies B, C, and 2 to your employee. Keep Copy D, and a copy of Form W-3, with your records for 4 years.

Enter the information on Form W-2 using black ink in 12-point Courier font. Copy A is read by machine and must be typed clearly with no corrections made to the entries and with no entries exceeding the size of the boxes. Entries completed by hand, in script or italic fonts, or in colors other than black cannot be read by the machines. Make all dollar entries on Copy A without the dollar sign and comma but with the decimal point (0000.00). Show the cents portion of the money amounts. If a box does not apply, leave it blank.

Send the whole Copy A page of Form W-2 with Form W-3 to the SSA even if one of the Forms W-2 on the page is blank or void. Do not staple Forms W-2 together or to Form W-3. File Forms W-2 either alphabetically by

employees' last names or numerically by employees' SSNs.

Also see the *Caution in How To Get Forms and Publications*.

**Calendar year basis.** The entries on Form W-2 must be based on wages paid during the calendar year. Use Form W-2 for the correct tax year. For example, if the employee worked from December 21, 2016, through January 8, 2017, and the wages for that period were paid on January 10, 2017, include those wages on the 2017 Form W-2.

**Multiple forms.** If necessary, you can issue more than one Form W-2 to an employee. For example, you may need to report more than four coded items in box 12 or you may want to report other compensation on a second form. If you issue a second Form W-2, complete boxes a, b, c, d, e, and f with the same information as on the first Form W-2. Show any items that were not included on the first Form W-2 in the appropriate boxes.

Do not report the same federal, American Samoa, CNMI, Guam, or U.S. Virgin Islands tax data to the SSA on more than one Copy A.



For each Form W-2 showing an amount in box 3 or box 7, make certain that box 5 equals or exceeds the sum of boxes 3 and 7.

**Void.** Check this box when an error is made on Form W-2 and you are voiding it because you are going to complete a new Form W-2. Do not include any amounts shown on "Void" forms in the totals you enter on Form W-3. See *Corrections*.

**Box a—Employee's social security number.** Enter the number shown on the employee's social security card.

If the employee does not have a card, he or she should apply for one by completing Form SS-5, Application for a Social Security Card. The SSA lets you verify employee names and SSNs online. For information about these free services, visit the Employer W-2 Filing Instructions & Information website at [www.socialsecurity.gov/employer](http://www.socialsecurity.gov/employer). If you have questions about using these services, call 1-800-772-6270 (toll free) to speak with an employer reporting technician at the SSA.

If the employee has applied for a card but the number is not received in time for filing, enter "Applied For" in box a on paper Forms W-2 filed with the SSA. If e-filing, enter zeros (000-00-0000 if creating forms online or 000000000 if uploading a file).

Ask the employee to inform you of the number and name as they are shown on the social security card when it is received. Then correct your previous report by filing Form W-2c showing the employee's SSN. If the employee needs to change his or her name from that shown on the card, the employee should call the SSA at 1-800-772-1213.

If you do not provide the correct employee name and SSN on Form W-2, you may owe a penalty unless you have reasonable cause. For more information, see Pub. 1586, Reasonable Cause Regulations & Requirements for Missing and Incorrect Name/TINs.

**ITINs for aliens.** Do not accept an ITIN in place of an SSN for employee identification or for work. An ITIN is

only available to resident and nonresident aliens who are not eligible for U.S. employment and need identification for other tax purposes. You can identify an ITIN because it is a 9-digit number formatted like an SSN beginning with the number "9" and with a number in one of the following ranges in the fourth and fifth digit: 70-88, 90-92, or 94-99 (for example, 9NN-70-NNNN). An individual with an ITIN who later becomes eligible to work in the United States must obtain an SSN.



*Do not auto-populate an ITIN into box a.*

**Box b—Employer identification number (EIN).** Show the EIN assigned to you by the IRS (00-0000000). This should be the same number that you used on your federal employment tax returns (Forms 941, 941-SS, 943, 944, CT-1, or Schedule H (Form 1040)). Do not use a prior owner's EIN. If you do not have an EIN when filing Forms W-2, enter "Applied For" in box b; do not use your SSN. You can get an EIN by applying online at IRS.gov, or by filing Form SS-4, Application for Employer Identification Number. Also see *Agent reporting*.

**Box c—Employer's name, address, and ZIP code.** This entry should be the same as shown on your Forms 941, 941-SS, 943, 944, CT-1, or Schedule H (Form 1040). The U.S. Postal Service recommends that no commas or periods be used in return addresses. Also see *Agent reporting*.

**Box d—Control number.** You may use this box to identify individual Forms W-2. You do not have to use this box.

**Boxes e and f—Employee's name and address.** Enter the name as shown on your employee's social security card (first name, middle initial, last name). If the name does not fit in the space allowed on the form, you may show the first and middle name initials and the full last name. It is especially important to report the exact last name of the employee. If you are unable to determine the correct last name, use of the SSA's Social Security Number Verification System may be helpful. Separate parts of a compound name with either a hyphen or a blank. Do not join them into a single word. Include all parts of a compound name in the appropriate name field. For example, for the name "John R Smith-Jones," enter "Smith-Jones" or "Smith Jones" in the last name field. If the name has changed, the employee must get a corrected social security card from any SSA office. Use the name on the original card until you see the corrected card. Do not show titles or academic degrees, such as "Dr.," "RN," or "Esq.," at the beginning or end of the employee's name. Generally, do not enter "Jr.," "Sr.," or other suffix in the "Suff." box on Copy A unless the suffix appears on the card. However, the SSA still prefers that you do not enter the suffix on Copy A.

Include in the address the number, street, and apartment or suite number (or P.O. box number if mail is not delivered to a street address). The U.S. Postal Service recommends that no commas or periods be used in delivery addresses. For a foreign address, give the information in the following order: city, province or state,

and country. Follow the country's practice for entering the postal code. Do not abbreviate the country name.

**Box 1—Wages, tips, other compensation.** Show the total taxable wages, tips, and other compensation that you paid to your employee during the year. However, do not include elective deferrals (such as employee contributions to a section 401(k) or 403(b) plan) except section 501(c)(18) contributions. Include the following.

1. Total wages, bonuses (including signing bonuses), prizes, and awards paid to employees during the year. See *Calendar year basis*.

2. Total noncash payments, including certain fringe benefits. See *Fringe benefits*.

3. Total tips reported by the employee to the employer (not allocated tips).

4. Certain employee business expense reimbursements. See *Employee business expense reimbursements*.

5. The cost of accident and health insurance premiums for 2%-or-more shareholder-employees paid by an S corporation.

6. Taxable benefits from a section 125 (cafeteria) plan if the employee chooses cash.

7. Employee contributions to an Archer MSA.

8. Employer contributions to an Archer MSA if includible in the income of the employee. See *Archer MSA*.

9. Employer contributions for qualified long-term care services to the extent that such coverage is provided through a flexible spending or similar arrangement.

10. Taxable cost of group-term life insurance in excess of \$50,000. See *Group-term life insurance*.

11. Unless excludable under *Educational assistance programs*, payments for non-job-related education expenses or for payments under a nonaccountable plan. See Pub. 970.

12. The amount includible as wages because you paid your employee's share of social security and Medicare taxes (or railroad retirement taxes, if applicable). See *Employee's social security and Medicare taxes (or railroad retirement taxes, if applicable) paid by employer*. If you also paid your employee's income tax withholding, treat the grossed-up amount of that withholding as supplemental wages and report those wages in boxes 1, 3, 5, and 7. (Use box 14 if railroad retirement taxes apply.) No exceptions to this treatment apply to household or agricultural wages.

13. Designated Roth contributions made under a section 401(k) plan, a section 403(b) salary reduction agreement, or a governmental section 457(b) plan. See *Designated Roth contributions*.

14. Distributions to an employee or former employee from an NQDC plan (including a rabbi trust) or a nongovernmental section 457(b) plan.

15. Amounts includible in income under section 457(f) because the amounts are no longer subject to a substantial risk of forfeiture.

16. Payments to statutory employees who are subject to social security and Medicare taxes but not subject to

federal income tax withholding must be shown in box 1 as other compensation. See *Statutory employee*.

17. Cost of current insurance protection under a compensatory split-dollar life insurance arrangement.

18. Employee contributions to a health savings account (HSA).

19. Employer contributions to an HSA if includible in the income of the employee. See *Health savings account (HSA)*.

20. Amounts includible in income under an NQDC plan because of section 409A. See *Nonqualified deferred compensation plans under Special Reporting Situations for Form W-2*.

21. Payments made to former employees while they are on active duty in the Armed Forces or other uniformed services.

22. All other compensation, including certain scholarship and fellowship grants. See *Scholarship and fellowship grants*. Other compensation includes taxable amounts that you paid to your employee from which federal income tax was not withheld. You may show other compensation on a separate Form W-2. See *Multiple forms*.

**Box 2—Federal income tax withheld.** Show the total federal income tax withheld from the employee's wages for the year. Include the 20% excise tax withheld on excess parachute payments. See *Golden parachute payments*.

For Forms W-2AS, W-2CM, W-2GU, or W-2VI, show the total American Samoa, CNMI, Guam, or U.S. Virgin Islands income tax withheld.

**Box 3—Social security wages.** Show the total wages paid (before payroll deductions) subject to employee social security tax but not including social security tips and allocated tips. If reporting these amounts in a subsequent year (due to lapse of risk of forfeiture), the amount must be adjusted by any gain or loss. See *Box 7—Social security tips* and *Box 8—Allocated tips*. Generally, noncash payments are considered to be wages. Include employee business expense reimbursements reported in box 1. If you paid the employee's share of social security and Medicare taxes rather than deducting them from wages, see *Employee's social security and Medicare taxes (or railroad retirement taxes, if applicable) paid by employer*. The total of boxes 3 and 7 cannot exceed \$118,500 (2016 maximum social security wage base).

Report in box 3 elective deferrals to certain qualified cash or deferred compensation arrangements and to retirement plans described in box 12 (codes D, E, F, G, and S) even though the deferrals are not includible in box 1. Also report in box 3 designated Roth contributions made under a section 401(k) plan, under a section 403(b) salary reduction agreement, or under a governmental section 457(b) plan described in box 12 (codes AA, BB, and EE).

Amounts deferred (plus earnings or less losses) under a section 457(f) or nonqualified plan or nongovernmental section 457(b) plan must be included in boxes 3 and/or 5 as social security and/or Medicare wages as of the later of when the services giving rise to the deferral are performed

or when there is no substantial forfeiture risk of the rights to the deferred amount. Include both elective and nonelective deferrals for purposes of nongovernmental section 457(b) plans.

Wages reported in box 3 also include:

- Signing bonuses an employer pays for signing or ratifying an employment contract. See Rev. Rul. 2004-109, 2004-50 I.R.B. 958 available at [www.irs.gov/irb/2004-50\\_IRB/ar07.html](http://www.irs.gov/irb/2004-50_IRB/ar07.html).
- Taxable cost of group-term life insurance over \$50,000 included in box 1. See Group-term life insurance.
- Cost of accident and health insurance premiums for 2%-or-more shareholder-employees paid by an S corporation, but only if not excludable under section 3121(a)(2)(B).
- Employee and nonexcludable employer contributions to an MSA or HSA. However, do not include employee contributions to an HSA that were made through a cafeteria plan. See Archer MSA and Health savings account (HSA).
- Employee contributions to a SIMPLE retirement account. See SIMPLE retirement account.
- Adoption benefits. See Adoption benefits.

**Box 4—Social security tax withheld.** Show the total employee social security tax (not your share) withheld, including social security tax on tips. For 2016, the amount should not exceed \$7,347 (\$118,500 × 6.2%). Include only taxes withheld (or paid by you for the employee) for 2016 wages and tips. If you paid your employee's share, see *Employee's social security and Medicare taxes (or railroad retirement taxes, if applicable) paid by employer*.

**Box 5—Medicare wages and tips.** The wages and tips subject to Medicare tax are the same as those subject to social security tax (boxes 3 and 7) except that there is no wage base limit for Medicare tax. Enter the total Medicare wages and tips in box 5. Be sure to enter tips that the employee reported even if you did not have enough employee funds to collect the Medicare tax for those tips. See *Box 3—Social security wages*, for payments to report in this box. If you paid your employee's share of taxes, see *Employee's social security and Medicare taxes (or railroad retirement taxes, if applicable) paid by employer*.

If you are a federal, state, or local governmental agency with employees paying only Medicare tax, enter the Medicare wages in this box. See *Government employers*.

**Example of how to report social security and Medicare wages.** You paid your employee \$140,000 in wages. Enter in box 3 (social security wages) 118500.00 but enter in box 5 (Medicare wages and tips) 140000.00. There is no limit on the amount reported in box 5. If the amount of wages paid was \$118,500 or less, the amounts entered in boxes 3 and 5 will be the same.

**Box 6—Medicare tax withheld.** Enter the total employee Medicare tax (including any Additional Medicare Tax) withheld. Do not include your share. Include only tax withheld for 2016 wages and tips. If you paid your employee's share of the taxes, see *Employee's social security and Medicare taxes (or railroad retirement taxes, if applicable) paid by employer*.

For more information on Additional Medicare Tax, go to [IRS.gov](http://IRS.gov) and enter "Additional Medicare Tax" in the search box.

**Box 7—Social security tips.** Show the tips that the employee reported to you even if you did not have enough employee funds to collect the social security tax for the tips. The total of boxes 3 and 7 should not be more than \$118,500 (the maximum social security wage base for 2016). Report all tips in box 1 along with wages and other compensation. Include any tips reported in box 7 in box 5 also.

**Box 8—Allocated tips (not applicable to Forms W-2AS, W-2CM, W-2GU, or W-2VI).** If you operate a large food or beverage establishment, show the tips allocated to the employee. See the Instructions for Form 8027, Employer's Annual Information Return of Tip Income and Allocated Tips. Do not include this amount in boxes 1, 3, 5, or 7.

**Box 9.** Do not enter an amount in box 9.

**Box 10—Dependent care benefits (not applicable to Forms W-2AS, W-2CM, W-2GU, or W-2VI).** Show the total dependent care benefits under a dependent care assistance program (section 129) paid or incurred by you for your employee. Include the fair market value (FMV) of care in a daycare facility provided or sponsored by you for your employee and amounts paid or incurred for dependent care assistance in a section 125 (cafeteria) plan. Report all amounts paid or incurred (regardless of any employee forfeitures), including those in excess of the \$5,000 exclusion. This may include (a) the FMV of benefits provided in kind by the employer, (b) an amount paid directly to a daycare facility by the employer or reimbursed to the employee to subsidize the benefit, or (c) benefits from the pre-tax contributions made by the employee under a section 125 dependent care flexible spending account. Include any amounts over \$5,000 in boxes 1, 3, and 5. For more information, see Pub. 15-B.

 **TIP** *An employer that amends its cafeteria plan to provide a grace period for dependent care assistance may continue to rely on Notice 89-111 by reporting in box 10 the salary reduction amount elected by the employee for the year for dependent care assistance (plus any employer matching contributions attributable to dependent care). Also see Notice 2005-42, 2005-23 I.R.B. 1204, available at [www.irs.gov/irb/2005-23\\_IRB/ar11.html](http://www.irs.gov/irb/2005-23_IRB/ar11.html).*

**Box 11—Nonqualified plans.** The purpose of box 11 is for the SSA to determine if any part of the amount reported in box 1 or boxes 3 and/or 5 was earned in a prior year. The SSA uses this information to verify that they have properly applied the social security earnings test and paid the correct amount of benefits.

Report distributions to an employee from a nonqualified plan or nongovernmental section 457(b) plan in box 11. Also report these distributions in box 1. Make only one entry in this box. Distributions from governmental section 457(b) plans must be reported on Form 1099-R, not in box 1 of Form W-2.

Under nonqualified plans or nongovernmental 457(b) plans, deferred amounts that are no longer subject to a

substantial risk of forfeiture are taxable even if not distributed. Report these amounts in boxes 3 (up to the social security wage base) and 5. Do not report in box 11 deferrals included in boxes 3 and/or 5 and deferrals for current year services (such as those with no risk of forfeiture).



**CAUTION** *If you made distributions and also are reporting any deferrals in boxes 3 and/or 5, do not complete box 11. See Pub. 957, Reporting Back Pay and Special Wage Payments to the Social Security Administration, and Form SSA-131, Employer Report of Special Wage Payments, for instructions on reporting these and other kinds of compensation earned in prior years. However, do not file Form SSA-131 if this situation applies and the employee was not 61 years old or more during the tax year for which you are filing Form W-2.*

Unlike qualified plans, NQDC plans do not meet the qualification requirements for tax-favored status for this purpose. NQDC plans include those arrangements traditionally viewed as deferring the receipt of current compensation. Accordingly, welfare benefit plans, stock option plans, and plans providing dismissal pay, termination pay, or early retirement pay are not generally NQDC plans.

Report distributions from NQDC or section 457 plans to beneficiaries of deceased employees on Form 1099-MISC, not on Form W-2.

Military employers must report military retirement payments on Form 1099-R.



**TIP** *Do not report special wage payments, such as accumulated sick pay or vacation pay, in box 11. For more information on reporting special wage payments, see Pub. 957.*

**Box 12—Codes.** Complete and code this box for all items described below. Note that the codes do not relate to where they should be entered in boxes 12a through 12d on Form W-2. For example, if you are only required to report code D in box 12, you can enter code D and the amount in box 12a of Form W-2. Report in box 12 any items that are listed as codes A through EE. Do not report in box 12 section 414(h)(2) contributions (relating to certain state or local government plans). Instead, use box 14 for these items and any other information that you wish to give to your employee. For example, union dues and uniform payments may be reported in box 14.



**TIP** *On Copy A (Form W-2), do not enter more than four items in box 12. If more than four items need to be reported in box 12, use a separate Form W-2 to report the additional items (but enter no more than four items on each Copy A (Form W-2)). On all other copies of Form W-2 (Copies B, C, etc.), you may enter more than four items in box 12 when using an approved substitute Form W-2. See Multiple forms.*

Use the IRS code designated below for the item you are entering, followed by the dollar amount for that item. Even if only one item is entered, you must use the IRS code designated for that item. Enter the code using a

capital letter(s). Use decimal points but not dollar signs or commas. For example, if you are reporting \$5,300.00 in elective deferrals under a section 401(k) plan, the entry would be D 5300.00 (not A 5300.00 even though it is the first or only entry in this box). Report the IRS code to the left of the vertical line in boxes 12a through 12d and the money amount to the right of the vertical line.

See the *Form W-2 Reference Guide for Box 12 Codes*. See also the detailed instructions next for each code.

**Code A—Uncollected social security or RRTA tax on tips.** Show the employee social security or Railroad Retirement Tax Act (RRTA) tax on all of the employee's tips that you could not collect because the employee did not have enough funds from which to deduct it. Do not include this amount in box 4.

**Code B—Uncollected Medicare tax on tips.** Show the employee Medicare tax or RRTA Medicare tax on tips that you could not collect because the employee did not have enough funds from which to deduct it. Do not show any uncollected Additional Medicare Tax. Do not include this amount in box 6.

**Code C—Taxable cost of group-term life insurance over \$50,000.** Show the taxable cost of group-term life insurance coverage over \$50,000 provided to your employee (including a former employee). See *Group-term life insurance*. Also include this amount in boxes 1, 3 (up to the social security wage base), and 5. Include the amount in box 14 if you are a railroad employer.

**Codes D through H, S, Y, AA, BB, and EE.** Use these codes to show elective deferrals and designated Roth contributions made to the plans listed. Do not report amounts for other types of plans. See the example for reporting elective deferrals under a section 401(k) plan, later.

The amount reported as elective deferrals and designated Roth contributions is only the part of the employee's salary (or other compensation) that he or she did not receive because of the deferrals or designated Roth contributions. Only elective deferrals and designated Roth contributions should be reported in box 12 for all coded plans; except, when using code G for section 457(b) plans, include both elective and nonelective deferrals.

For employees who were 50 years of age or older at any time during the year and made elective deferral and/or designated Roth "catch-up" contributions, report the elective deferrals and the elective deferral "catch-up" contributions as a single sum in box 12 using the appropriate code, and the designated Roth contributions and designated Roth "catch-up" contributions as a single sum in box 12 using the appropriate code.



**TIP** If any elective deferrals, salary reduction amounts, or nonelective contributions under a section 457(b) plan during the year are makeup amounts under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) for a prior year, you must enter the prior year contributions separately. Beginning with the earliest year, enter the code, the year, and the amount. For example, elective deferrals of \$2,250 for 2014 and \$1,250 for 2015 under

USERRA under a section 401(k) plan are reported in box 12 as follows:

*D 14 2250.00, D 15 1250.00. A 2016 contribution of \$7,000 does not require a year designation; enter it as D 7000.00. Report the code (and year for prior year USERRA contributions) to the left of the vertical line in boxes 12a through 12d.*

The following are not elective deferrals and may be reported in box 14, but not in box 12.

- Nonelective employer contributions made on behalf of an employee.
- After-tax contributions that are not designated Roth contributions, such as voluntary contributions to a pension plan that are deducted from an employee's pay. See *Box 12—Codes* for Code AA, Code BB, and Code EE for reporting designated Roth contributions.
- Required employee contributions.
- Employer matching contributions.

**Code D—Elective deferrals under a section 401(k) cash or deferred arrangement (plan).** Also show deferrals under a SIMPLE retirement account that is part of a section 401(k) arrangement.

**Example of reporting excess elective deferrals and designated Roth contributions under a section 401(k) plan.** For 2016, Employee A (age 45) elected to defer \$18,300 under a section 401(k) plan. The employee also made a designated Roth contribution to the plan of \$1,000, and made a voluntary (non-Roth) after-tax contribution of \$600. In addition, the employer, on A's behalf, made a qualified nonelective contribution of \$2,000 to the plan and a nonelective profit-sharing employer contribution of \$3,000.

Even though the 2016 limit for elective deferrals and designated Roth contributions is \$18,000, the employee's total elective deferral amount of \$18,300 is reported in box 12 with code D (D 18300.00). The designated Roth contribution is reported in box 12 with code AA (AA 1000.00). The employer must separately report the actual amounts of \$18,300 and \$1,000 in box 12 with the appropriate codes. The amount deferred in excess of the limit is not reported in box 1. The return of excess salary deferrals and excess designated contributions, including earnings on both, is reported on Form 1099-R.

The \$600 voluntary after-tax contribution may be reported in box 14 (this is optional) but not in box 12. The \$2,000 nonelective contribution and the \$3,000 nonelective profit-sharing employer contribution are not required to be reported on Form W-2, but may be reported in box 14.

Check the "Retirement plan" box in box 13.

**Code E—Elective deferrals under a section 403(b) salary reduction agreement.**

**Code F—Elective deferrals under a section 408(k)(6) salary reduction SEP.**

**Code G—Elective deferrals and employer contributions (including nonelective deferrals) to any governmental or nongovernmental section 457(b) deferred compensation plan.** Do not report either section 457(b) or section 457(f) amounts that are subject to a substantial risk of forfeiture.

**Code H—Elective deferrals under section 501(c)(18)(D) tax-exempt organization plan.** Be sure to include this amount in box 1 as wages. The employee will deduct the amount on his or her Form 1040.

**Code J—Nontaxable sick pay.** Show any sick pay that was paid by a third-party and was not includible in income (and not shown in boxes 1, 3, and 5) because the employee contributed to the sick pay plan. Do not include nontaxable disability payments made directly by a state.

**Code K—20% excise tax on excess golden parachute payments (not applicable to Forms W-2AS, W-2CM, W-2GU, or W-2VI).** If you made excess golden parachute payments to certain key corporate employees, report the 20% excise tax on these payments. If the excess payments are considered to be wages, report the 20% excise tax withheld as income tax withheld in box 2.

**Code L—Substantiated employee business expense reimbursements.** Use this code only if you reimbursed your employee for employee business expenses using a per diem or mileage allowance and the amount that you reimbursed exceeds the amount treated as substantiated under IRS rules. See *Employee business expense reimbursements*.

Report in box 12 only the amount treated as substantiated (such as the nontaxable part). Include in boxes 1, 3 (up to the social security wage base), and 5 the part of the reimbursement that is more than the amount treated as substantiated. Report the unsubstantiated amounts in box 14 if you are a railroad employer.

**Code M—Uncollected social security or RRTA tax on taxable cost of group-term life insurance over \$50,000 (for former employees).** If you provided your former employees (including retirees) more than \$50,000 of group-term life insurance coverage for periods during which an employment relationship no longer exists, enter the amount of uncollected social security or RRTA tax on the coverage in box 12. Do not include this amount in box 4. Also see *Group-term life insurance*.

**Code N—Uncollected Medicare tax on taxable cost of group-term life insurance over \$50,000 (for former employees).** If you provided your former employees (including retirees) more than \$50,000 of group-term life insurance coverage for periods during which an employment relationship no longer exists, enter the amount of uncollected Medicare tax or RRTA Medicare tax on the coverage in box 12. Do not show any uncollected Additional Medicare Tax. Do not include this amount in box 6. Also see *Group-term life insurance*.

**Code P—Excludable moving expense reimbursements paid directly to employee.** Show the total moving expense reimbursements that you paid directly to your employee for qualified (deductible) moving expenses. See *Moving expenses*.

**Code Q—Nontaxable combat pay.** If you are a military employer, report any nontaxable combat pay in box 12.

**Code R—Employer contributions to an Archer MSA.** Show any employer contributions to an Archer MSA. See *Archer MSA*.

**Code S—Employee salary reduction contributions under a section 408(p) SIMPLE plan.** Show deferrals

under a section 408(p) salary reduction SIMPLE retirement account. However, if the SIMPLE plan is part of a section 401(k) arrangement, use code D. If you are reporting prior year contributions under USERRA, see the *TIP* above Code D in *Box 12—Codes*.

**Code T—Adoption benefits.** Show the total that you paid or reimbursed for qualified adoption expenses furnished to your employee under an adoption assistance program. Also include adoption benefits paid or reimbursed from the pre-tax contributions made by the employee under a section 125 (cafeteria) plan. However, do not include adoption benefits forfeited from a section 125 (cafeteria) plan. Report all amounts including those in excess of the \$13,460 exclusion. For more information, see *Adoption benefits*.

**Code V—Income from the exercise of nonstatutory stock option(s).** Show the spread (that is, the fair market value of stock over the exercise price of option(s) granted to your employee with respect to that stock) from your employee's (or former employee's) exercise of nonstatutory stock option(s). Include this amount in boxes 1, 3 (up to the social security wage base), and 5. Include this amount in box 14 if you are a railroad employer.

This reporting requirement does not apply to the exercise of a statutory stock option, or the sale or disposition of stock acquired pursuant to the exercise of a statutory stock option. For more information about the taxability of employee stock options, see Pub. 15-B.

**Code W—Employer contributions to a health savings account (HSA).** Show any employer contributions (including amounts the employee elected to contribute using a section 125 (cafeteria) plan) to an HSA. See *Health savings account (HSA)*.

**Code Y—Deferrals under a section 409A nonqualified deferred compensation plan.** It is not necessary to show deferrals in box 12 with code Y. For more information, see Notice 2008-115. However, if you report these deferrals, show current year deferrals, including earnings during the year on current year and prior year deferrals. See *Nonqualified deferred compensation plans under Special Reporting Situations for Form W-2*.

**Code Z—Income under a nonqualified deferred compensation plan that fails to satisfy section 409A.** Enter all amounts deferred (including earnings on amounts deferred) that are includible in income under section 409A because the NQDC plan fails to satisfy the requirements of section 409A. Do not include amounts properly reported on a Form 1099-MISC, corrected Form 1099-MISC, Form W-2, or Form W-2c for a prior year. Also, do not include amounts that are considered to be subject to a substantial risk of forfeiture for purposes of section 409A. For more information, see Regulations sections 1.409A-1, -2, -3, and -6; and Notice 2008-115.

The amount reported in box 12 using code Z is also reported in box 1 and is subject to an additional tax reported on the employee's Form 1040. See *Nonqualified deferred compensation plans under Special Reporting Situations for Form W-2*.

For information regarding correcting section 409A errors and related reporting, see Notice 2008-113, Notice 2010-6, and Notice 2010-80.

**Code AA—Designated Roth contributions under a section 401(k) plan.** Use this code to report designated Roth contributions under a section 401(k) plan. Do not use this code to report elective deferrals under code D. See *Designated Roth contributions*.

**Code BB—Designated Roth contributions under a section 403(b) plan.** Use this code to report designated Roth contributions under a section 403(b) plan. Do not use this code to report elective deferrals under code E. See *Designated Roth contributions*.

**Code DD—Cost of employer-sponsored health coverage.** Use this code to report the cost of employer-sponsored health coverage. **The amount reported with code DD is not taxable.** Additional reporting guidance, including information about the transitional reporting rules that apply, is available on the Affordable Care Act Tax Provisions page of IRS.gov.

**Code EE—Designated Roth contributions under a governmental section 457(b) plan.** Use this code to report designated Roth contributions under a governmental section 457(b) plan. Do not use this code to report elective deferrals under code G. See *Designated Roth contributions*.

**Box 13—Checkboxes.** Check all boxes that apply.

**Statutory employee.** Check this box for statutory employees whose earnings are subject to social security and Medicare taxes but not subject to federal income tax withholding. Do not check this box for common-law employees. There are workers who are independent contractors under the common-law rules but are treated by statute as employees. They are called statutory employees.

1. A driver who distributes beverages (other than milk) or meat, vegetable, fruit, or bakery products; or who picks up and delivers laundry or dry cleaning, if the driver is your agent or is paid on commission.

2. A full-time life insurance sales agent whose principal business activity is selling life insurance or annuity contracts, or both, primarily for one life insurance company.

3. An individual who works at home on materials or goods that you supply and that must be returned to you or to a person you name, if you also furnish specifications for the work to be done.

4. A full-time traveling or city salesperson who works on your behalf and turns in orders to you from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments. The goods sold must be merchandise for resale or supplies for use in the buyer's business operation. The work performed for you must be the salesperson's principal business activity.

For details on statutory employees and common-law employees, see section 1 in Pub. 15-A.

**Retirement plan.** Check this box if the employee was an "active participant" (for any part of the year) in any of the following.

1. A qualified pension, profit-sharing, or stock-bonus plan described in section 401(a) (including a 401(k) plan).

2. An annuity plan described in section 403(a).

3. An annuity contract or custodial account described in section 403(b).

4. A simplified employee pension (SEP) plan described in section 408(k).

5. A SIMPLE retirement account described in section 408(p).

6. A trust described in section 501(c)(18).

7. A plan for federal, state, or local government employees or by an agency or instrumentality thereof (other than a section 457(b) plan).

Generally, an employee is an active participant if covered by (a) a defined benefit plan for any tax year that he or she is eligible to participate in or (b) a defined contribution plan (for example, a section 401(k) plan) for any tax year that employer or employee contributions (or forfeitures) are added to his or her account. For additional information on employees who are eligible to participate in a plan, contact your plan administrator. For details on the active participant rules, see Notice 87-16, 1987-1 C.B. 446; Notice 98-49, 1998-2 C.B. 365; section 219(g)(5); and Pub. 590-A, Contributions to Individual Retirement Arrangements (IRAs). You can find Notice 98-49 on page 5 of Internal Revenue Bulletin 1998-38 at [www.irs.gov/pub/irs-irbs/irb98-38.pdf](http://www.irs.gov/pub/irs-irbs/irb98-38.pdf). Also see Notice 2000-30, which is on page 1266 of Internal Revenue Bulletin 2000-25 at [www.irs.gov/pub/irs-irbs/irb00-25.pdf](http://www.irs.gov/pub/irs-irbs/irb00-25.pdf).



**Do not check this box for contributions made to a nonqualified or section 457(b) plan.**

See the *Form W-2 Box 13 Retirement Plan Checkbox Decision Chart*.

**Third-party sick pay.** Check this box only if you are a third-party sick pay payer filing a Form W-2 for an insured's employee or as an employer reporting sick pay payments made by a third party. See section 6 of Pub. 15-A.

**Box 14—Other.** If you included 100% of a vehicle's annual lease value in the employee's income, it also must be reported here or on a separate statement to your employee. You also may use this box for any other information that you want to give to your employee. Label each item. Examples include state disability insurance taxes withheld, union dues, uniform payments, health insurance premiums deducted, nontaxable income, educational assistance payments, or a minister's parsonage allowance and utilities. In addition, you may enter the following contributions to a pension plan: (a) nonelective employer contributions made on behalf of an employee, (b) voluntary after-tax contributions (but not designated Roth contributions) that are deducted from an employee's pay, (c) required employee contributions, and (d) employer matching contributions.

If you are reporting prior year contributions under USERRA (see the *TIP* above Code D in *Box 12—Codes and Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) makeup amounts to a pension plan*), you may report in box 14 makeup amounts for nonelective employer contributions, voluntary after-tax contributions, required employee contributions, and

employer matching contributions. Report such amounts separately for each year.

Railroad employers, see *Railroad employers* for amounts reportable in box 14.

**Boxes 15 through 20—State and local income tax information (not applicable to Forms W-2AS, W-2CM, W-2GU, or W-2VI).** Use these boxes to report state and local income tax information. Enter the two-letter abbreviation for the name of the state. The employer's state ID numbers are assigned by the individual states. The state and local information boxes can be used to report wages and taxes for two states and two localities. Keep each state's and locality's information separated by the broken line. If you need to report information for more than two states or localities, prepare a second Form W-2. See *Multiple forms*. Contact your state or locality for specific reporting information.

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## Specific Instructions for Form W-3

**How to complete Form W-3.** The instructions under *How to complete Form W-2* generally apply to Form W-3. Use black ink for all entries. Scanners cannot read entries if the type is too light. Be sure to send the entire page of the Form W-3.



*Amounts reported on related employment tax forms (for example, Forms W-2, 941, 941-SS, 943, or 944) should agree with the amounts reported on Form W-3. If there are differences, you may be contacted by the IRS and SSA. Retain your reconciliation information for future reference. See Reconciling Forms W-2, W-3, 941, 941-SS, 943, 944, CT-1, and Schedule H (Form 1040).*

**Box a—Control number.** This is an optional box that you may use for numbering the whole transmittal.

**Box b—Kind of Payer.** Check the box that applies to you. Check only one box. If you have more than one type of Form W-2, send each type with a separate Form W-3. **Note.** The "Third-party sick pay" indicator box does not designate a separate kind of payer.

**941 or 941-SS.** Check this box if you file Forms 941 or 941-SS and no other category applies. A church or church organization should check this box even if it is not required to file Forms 941, 941-SS, or 944. If you are a railroad employer sending Forms W-2 for employees covered under the Railroad Retirement Tax Act (RRTA), check the "CT-1" box.

**Military.** Check this box if you are a military employer sending Forms W-2 for members of the uniformed services.

**943.** Check this box if you are an agricultural employer and file Form 943 and you are sending Forms W-2 for agricultural employees. For nonagricultural employees, send their Forms W-2 with a separate Form W-3, checking the appropriate box.

**944.** Check this box if you file Form 944 (or Formulario 944(SP), its Spanish-language version), and no other category applies.

**CT-1.** Check this box if you are a railroad employer sending Forms W-2 for employees covered under the

Railroad Retirement Tax Act (RRTA). Do not show employee RRTA tax in boxes 3 through 7. These boxes are only for social security and Medicare information. If you also have employees who are subject to social security and Medicare taxes, send that group's Forms W-2 with a separate Form W-3 and check the "941" checkbox on that Form W-3.

**Hshld. emp.** Check this box if you are a household employer sending Forms W-2 for household employees and you did not include the household employee's taxes on Forms 941, 941-SS, 943, or 944.

**Medicare govt. emp.** Check this box if you are a U.S., state, or local agency filing Forms W-2 for employees subject only to Medicare tax. See *Government employers*.

**Box b—Kind of Employer.** Check the box that applies to you. Check only one box unless the second checked box is "Third-party sick pay." See Pub. 557, *Tax-Exempt Status for Your Organization*, for information about 501(c)(3) tax-exempt organizations.

**None apply.** Check this box if none of the checkboxes discussed next apply to you.

**501c non-govt.** Check this box if you are a non-governmental tax-exempt section 501(c) organization. Types of 501(c) non-governmental organizations include private foundations, public charities, social and recreation clubs, and veterans organizations. For additional examples of 501(c) non-governmental organizations, see chapters 3 and 4 of Pub. 557.

**State/local non-501c.** Check this box if you are a state or local government or instrumentality. This includes cities, townships, counties, special-purpose districts, public schools districts, or other publicly-owned entities with governmental authority.

**State/local 501c.** Check this box if you are a state or local government or instrumentality, and you have received a determination letter from the IRS indicating that you are also a tax-exempt organization under section 501(c)(3).

**Federal govt.** Check this box if you are a Federal government entity or instrumentality.

**Box b—Third-party sick pay.** Check this box if you are a third-party sick pay payer (or are reporting sick pay payments made by a third party) filing Forms W-2 with the "Third-party sick pay" checkbox in box 13 checked. File a single Form W-3 for the regular and "Third-party sick pay" Forms W-2. See *941 or 941-SS*.

**Box c—Total number of Forms W-2.** Show the number of completed individual Forms W-2 that you are transmitting with this Form W-3. Do not count "Void" Forms W-2.

**Box d—Establishment number.** You may use this box to identify separate establishments in your business. You may file a separate Form W-3, with Forms W-2, for each establishment even if they all have the same EIN; or you may use a single Form W-3 for all Forms W-2 of the same type.

**Box e—Employer identification number (EIN).** Enter the nine-digit EIN assigned to you by the IRS. The number should be the same as shown on your Forms 941, 941-SS, 943, 944, CT-1, or Schedule H (Form 1040) and

### Form W-2 Reference Guide for Box 12 Codes

<b>A</b>	Uncollected social security or RRTA tax on tips	<b>K</b>	20% excise tax on excess golden parachute payments	<b>V</b>	Income from exercise of nonstatutory stock option(s)
<b>B</b>	Uncollected Medicare tax on tips (but not Additional Medicare Tax)	<b>L</b>	Substantiated employee business expense reimbursements	<b>W</b>	Employer contributions (including employee contributions through a cafeteria plan) to an employee's health savings account (HSA)
<b>C</b>	Taxable cost of group-term life insurance over \$50,000	<b>M</b>	Uncollected social security or RRTA tax on taxable cost of group-term life insurance over \$50,000 (former employees only)	<b>Y</b>	Deferrals under a section 409A nonqualified deferred compensation plan
<b>D</b>	Elective deferrals under a section 401(k) cash or deferred arrangement plan (including a SIMPLE 401(k) arrangement)	<b>N</b>	Uncollected Medicare tax on taxable cost of group-term life insurance over \$50,000 (but not Additional Medicare Tax)(former employees only)	<b>Z</b>	Income under a nonqualified deferred compensation plan that fails to satisfy section 409A
<b>E</b>	Elective deferrals under a section 403(b) salary reduction agreement	<b>P</b>	Excludable moving expense reimbursements paid directly to employee	<b>AA</b>	Designated Roth contributions under a section 401(k) plan
<b>F</b>	Elective deferrals under a section 408(k)(6) salary reduction SEP	<b>Q</b>	Nontaxable combat pay	<b>BB</b>	Designated Roth contributions under a section 403(b) plan
<b>G</b>	Elective deferrals and employer contributions (including nonelective deferrals) to a section 457(b) deferred compensation plan	<b>R</b>	Employer contributions to an Archer MSA	<b>DD</b>	Cost of employer-sponsored health coverage
<b>H</b>	Elective deferrals to a section 501(c)(18)(D) tax-exempt organization plan	<b>S</b>	Employee salary reduction contributions under a section 408(p) SIMPLE plan	<b>EE</b>	Designated Roth contributions under a governmental section 457(b) plan
<b>J</b>	Nontaxable sick pay	<b>T</b>	Adoption benefits		

See *Box 12—Codes*.

### Form W-2 Box 13 Retirement Plan Checkbox Decision Chart

Type of Plan	Conditions	Check Retirement Plan Box?
Defined benefit plan (for example, a traditional pension plan)	Employee qualifies for employer funding into the plan, due to age/years of service – even though the employee may not be vested or ever collect benefits	Yes
Defined contribution plan (for example, a 401(k) or 403(b) plan, a Roth 401(k) or 403(b) account, but not a 457 plan)	Employee is eligible to contribute but does not elect to contribute any money in this tax year	No
Defined contribution plan (for example, a 401(k) or 403(b) plan; a Roth 401(k) or 403(b) account; but not a 457 plan)	Employee is eligible to contribute and elects to contribute money in this tax year	Yes
Defined contribution plan (for example, a 401(k) or 403(b) plan; a Roth 401(k) or 403(b) account; but not a 457 plan)	Employee is eligible to contribute but does not elect to contribute any money in this tax year, but the employer does contribute funds	Yes
Defined contribution plan (for example, a 401(k) or 403(b) plan; a Roth 401(k) or 403(b) account; but not a 457 plan)	Employee contributed in past years but not during the current tax year under report	No (even if the account value grows due to gains in the investments)
Profit sharing plan	Plan includes a grace period after the close of the plan year when profit sharing can be added to the participant's account	Yes

See *Box 13—Checkboxes*.

## Nonqualified Deferred Compensation Reporting Example Chart

Example	How to report on Form W-2
<p>Example 1—Deferral, immediately vested (no risk of forfeiture).                      Regular wages: \$200                      Defer, vested: \$20                      Employer match, vested: \$10</p>	<p>Box 1 = \$180 (\$200 – \$20)                      Boxes 3 and 5 = \$210 (\$200 + \$10)                      Box 11 = \$0</p>
<p>Example 2—Deferral, delayed vesting (risk of forfeiture) of employee and employer portions.                      Regular wages: \$200                      Defer, not vested: \$20                      Employer match, not vested: \$10</p>	<p>Box 1 = \$180 (\$200 – \$20)                      Boxes 3 and 5 = \$180 (\$200 – \$20)                      Box 11 = \$0</p>
<p>Example 3—Deferral, immediately vested. Prior year deferrals and employer matches are now vesting.                      Regular wages: \$200                      Defer, vested: \$20                      Vesting of prior-year deferrals and employer matches: \$100 + \$15 (earnings on \$100)</p>	<p>Box 1 = \$180 (\$200 – \$20)                      Boxes 3 and 5 = \$315 (\$200 + \$100 + \$15)                      Box 11 = \$115 (\$100 + \$15)</p>
<p>Example 4—No deferrals, but there are distributions. No vesting of prior year deferrals.                      Regular wages: \$100                      Distribution: \$50</p>	<p>Box 1 = \$150 (\$100 + \$50)                      Boxes 3 and 5 = \$100                      Box 11 = \$50</p>
<p>Special Rule for W-2 Box 11: Distributions and Deferrals in the Same Year – Form SSA-131</p>	<p>If, in the same year, there are NQDC distributions and deferrals that are reportable in boxes 3 and/or 5 (current or prior year deferrals), do not complete box 11. Instead, report on Form SSA-131 the total amount the employee earned during the year. Generally, the amount earned by the employee during the tax year for purposes of item 6 of Form SSA-131 is the amount reported in box 1 of Form W-2 plus current year deferrals that are vested (employee and employer portions) less distributions. Do not consider prior-year deferrals that are vesting in the current year. If there was a plan failure, the box 1 amount in this calculation should be as if there were no plan failure. Submit the SSA-131 to the nearest SSA office or give it to the employee.</p>
<p>Example 5—Deferral, immediately vested, and distributions. No vesting of prior year deferrals.                      Regular wages: \$200                      Defer, vested: \$20                      Employer match, vested: \$10                      Distribution: \$50</p>	<p>Box 1 = \$230 (\$200 – \$20 + \$50)                      Boxes 3 and 5 = \$210 (\$200 + \$10)                      Box 11 = \$0                       Form SSA-131 = \$210 (\$230 (box 1) – \$50 (distribution) + \$30 (vested employee and employer deferrals))</p>
<p>Example 6—Deferral, delayed vesting, and distributions. No vesting of prior year deferrals.                      Regular wages: \$200                      Defer, not vested: \$20                      Distribution: \$50</p>	<p>Box 1 = \$230 (\$200 – \$20 + \$50)                      Boxes 3 and 5 = \$180 (\$200 – \$20)                      Box 11 = \$50</p>
<p>Example 7—Deferral, immediately vested, and distributions. Prior-year deferrals and employer matches are now vesting.                      Regular wages: \$200                      Defer, vested: \$20                      Distribution: \$50                      Vesting of prior-year deferrals and employer matches: \$100 + \$15 (earnings on the \$100)</p>	<p>Box 1 = \$230 (\$200 – \$20 + \$50)                      Boxes 3 and 5 = \$315 (\$200 + \$100 + \$15)                      Box 11 = \$0                       Form SSA-131 = \$200 (\$230 (box 1) – \$50 (distribution) + \$20 (vested deferral))</p>
<p>Example 8—Deferral, delayed vesting, and distributions. Prior-year deferrals and employer matches are now vesting.                      Regular wages: \$200                      Defer, not vested: \$20                      Distribution: \$50                      Vesting of prior-year deferrals and employer matches: \$100 + \$15 (earnings on the \$100)</p>	<p>Box 1 = \$230 (\$200 – \$20 + \$50)                      Boxes 3 and 5 = \$295 (\$200 – \$20 + \$100 + \$15)                      Box 11 = \$0                       Form SSA-131 = \$180 (\$230 (box 1) – \$50 (distribution))</p>

See *Nonqualified deferred compensation plans*.

## Nonqualified Deferred Compensation Reporting Example Chart—(Continued)

Example	How to report on Form W-2
<p><b>Special Rule for Payment of Social Security, Medicare, and Unemployment Taxes</b></p> <p>If the amount cannot be reasonably ascertained (the employer is unable to calculate an amount for a year by December 31), the employer has two methods it can use. For example, immediately-vested employer contributions to NQDC made late in the year would have no effect on W-2 box 1, but they would affect FICA and FUTA taxes.</p>	<p><i>Estimated Method</i></p> <p>Under the estimated method, an employer may treat a reasonably estimated amount as wages paid on the last day of the calendar year (the "first year"). If the employer underestimates the amount deferred and, thereby, underdeposits social security, Medicare, or FUTA taxes, it can choose to treat the shortfall as wages either in the first year or the first quarter of the next year. The shortfall does not include income credited to the amount deferred after the first year. Conversely, if the amount deferred is overestimated, the employer can claim a refund or credit. If the employer chooses to treat the shortfall as wages in the first year, the employer must issue a Form W-2c. Also, the employer must correct the information on the Form 941 for the last quarter of the first year. In such a case, the shortfall will not be treated as a late deposit subject to penalty if it is deposited by the employer's first regular deposit date following the first quarter of the next year.</p> <p><i>Lag Method</i></p> <p>Under the lag method, an employer may calculate the end-of-the-year amount on any date in the first quarter of the next calendar year. The amount deferred will be treated as wages on that date, and the amount deferred that would otherwise have been taken into account on the last day of the first year must be increased by income earned on that amount through the date on which the amount is taken into account.</p>
<p><b>Section 409A NQDC Plan Failure</b>  <b>Example 9—Deferral, immediately vested. No distributions. Plan failure.</b>                      Plan balance on January 1, 2010: \$325, vested.                      Regular wages: \$100                      Defer, vested: \$50                      Employer match, vested: \$25                      Plan failure in 2010.</p>	<p>Box 12, Code Z = \$400</p> <ul style="list-style-type: none"> <li>• Amount in the plan account on December 31, 2010, not subject to risk of forfeiture and not included in prior-year income: \$400 (\$325 + \$50 + \$25)</li> <li>• Current-year distributions: \$0</li> <li>• \$400 (\$0 + \$400)</li> </ul> <p>Box 1 = \$450 (\$100 – \$50 + \$400)                      Boxes 3 and 5 = \$125 (\$100 + \$25)                      Box 11 = \$0</p> <p>SSA-131 = not required</p>
<p><b>Section 409A NQDC Plan Failure</b>  <b>Example 10—Deferral, some delayed vesting, and distributions. Plan failure.</b>                      Plan balance on January 1, 2010: \$250 vested; \$75 not vested.                      Regular wages: \$100                      Defer, vested: \$50                      Employer match, not vested: \$25                      Distribution: \$200                      Plan failure in 2010.                      Vesting of prior-year deferrals and employer matches: \$0</p>	<p>Box 12, Code Z = \$300</p> <ul style="list-style-type: none"> <li>• Amount in the plan account on December 31, 2010, not subject to risk of forfeiture and not included in prior-year income: \$100 (\$250 + \$50 – \$200)</li> <li>• Current-year distributions: \$200</li> <li>• \$100 + \$200 = \$300</li> </ul> <p>Box 1 = \$350 (\$100 – \$50 + \$300 (code Z amount, which already includes the distribution))                      Boxes 3 and 5 = \$100                      Box 11 = \$0</p> <p>SSA-131 = \$100 (\$250 (what box 1 would have been without plan failure) – \$200 (distributions) + \$50 (vested deferral))</p>

See *Nonqualified deferred compensation plans*.