

Reminder to Prepare for Annual ISO/ESPP Reporting in January 2012

December 12, 2011 by [Gregory Schick](#) and [Danica Dodds](#)

Summary

As discussed in our December 16, 2010 [blog article](#), the IRS issued final regulations in 2009 under Section 6039 of the Internal Revenue Code (the "Code") that require Employers to annually furnish each employee who exercised incentive stock options ("ISOs") or sold or otherwise transferred shares acquired under an employee stock purchase plan ("ESPP") during a year with a detailed information statement by January 31 of the following year. In addition, Employers must file an information return with the IRS by February 28 of the following year, or by March 15 for Employers filing electronically.

Information Statements to Employees for 2011 ISO/ESPP Transactions

If in 2011 an employee exercised an ISO (i.e. a stock option described in Section 422 of the Code), the Employer must provide the employee with a written information statement by January 31, 2012. [Form 3921](#) should be used, however, a substitute form may also be used so long as it contains the required information.

If in 2011 legal title to stock purchased under an ESPP (i.e. a plan described in Section 423 of the Code) was transferred from the employee to a third party for the first time, the Employer must provide the employee with a written information statement by January 31, 2012. or a substitute form may be used. These reporting requirements do not apply to an Employer that has issued shares directly to an employee until the employee sells its shares or transfers its shares to a brokerage account.

Information Reporting to the IRS [Form 3922](#)

In addition, Employers must file an information return with the IRS by February 28, 2012, or by March 15, 2012 for Employers filing electronically. Companies filing 250 or more information statements in a year must file these forms electronically. The information returns must be filed on [Form 3921](#) for ISO transactions and [Form 3922](#) for ESPP transfers. In other words, unlike for the

employee information statements, no substitute form can be used for the information returns filed with the IRS.

Other Information

The failure to timely furnish the information statements, or timely file the information returns, can result in penalties to the Employer including a fine of \$50 per information statement, up to a maximum of \$100,000 per year, and up to \$50 per information return, up to a maximum of \$250,000 per year (subject to certain exceptions).

Keep in mind that other reporting obligations may arise upon the disposition of stock acquired under an ISO or an ESPP, including that the employee's income from the disposition of stock may need to be reported on Form W-2.

Given that there are now less than three weeks left in 2011, Employers may want to review their administration of any 2011 ISO and ESPP transactions in order to ensure that they will be able to timely prepare and file the requisite reports.

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