

2023 Year-End Executive Compensation Matters: Reminder of Annual Reporting of ISO Exercises and ESPP Purchases

Insights

January 19, 2024

This Alert briefly highlights certain reporting requirements applicable to equity-based compensation as we begin 2024.

Employers must file information returns with the Internal Revenue Service and provide employees with information statements related to incentive stock option exercises that occurred during calendar year 2023. Similarly, employers (typically relevant only for public companies) must file information returns with the IRS and provide employees with information statements related to initial transfers of legal title during 2023 of stock acquired under an employee stock purchase plan that complies with Internal Revenue Code Section 423.

The information returns to be filed with the IRS are Form 3921 (for incentive stock option exercises) and Form 3922 (for initial transfers of legal title of shares acquired under an employee stock purchase plan). Employers may satisfy the requirement to provide employees with an information statement by delivering to each employee “Copy B” of the applicable Form 3921 or 3922, or they may use substitute forms for the employee information statements, provided that the substitute forms meet published IRS guidance as to form and content.

The delivery and filing deadlines are as follows:

- January 31, 2024 – Deadline to furnish an information statement (“Copy B”) to employees;

- February 28, 2024 – Deadline to file return on appropriate form with IRS, if filing a paper copy; and
- April 1, 2024^[1] – Deadline to file return on appropriate form with IRS, if filing electronically.

Beginning with information returns for the 2023 tax year^[2], companies filing 10 or more information returns in a year are required to file electronically. Note that each option exercise or stock transfer will result in a separate information return so a single individual could trigger multiple filings. Also, when calculating whether a company is required to file 10 or more information returns, most forms of information return (such as Form W-2, Form 1099 and Forms 3921 and 3922) must be aggregated. As a result, we anticipate that the majority of companies will now be required to file each Form 3921 and Form 3922 electronically.

The penalties for late and incorrect filings range from \$60 to \$310 per form, with a maximum penalty of \$3,783,000 (\$1,261,000 for “small businesses”). The increased penalty for intentional disregard of these requirements is \$630 per form, with no maximum. The IRS will grant an automatic 30-day extension for the return filing deadline upon filing a Form 8809, which must be filed electronically or by paper by the applicable deadline. Companies may request an additional 30-day extension due to a claimed hardship, but such extension will not be automatically granted by the IRS and does not extend the due date for delivering “Copy B” of the applicable form to the employee.

Forms 3921 and 3922 are available through the IRS website. Instructions for completing and filing Form 3921 can be obtained through this link:

<https://www.irs.gov/forms-pubs/about-form-3921>, and instructions for completing and filing Form 3922 can be obtained through this link: <https://www.irs.gov/forms-pubs/about-form-3922>. Third-party vendors are available to assist companies with preparing and filing Forms 3921 and 3922. For a list of vendors, please contact the attorney with whom you regularly work at Gunderson Dettmer.

^[1] Note this deadline is generally March 31 of each year, but in 2024, March 31 falls on a Sunday.

^[2] Prior to 2023, the e-file trigger was 250 or more information returns.

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