



Employers: 2020 deadlines approach to furnish incentive stock option and employee stock purchase plan information statements and returns

Employee Benefits Alert

14 January 2020

By: William H. Hoffman | Cisco Palao-Ricketts | Patrick Burri

Section 6039 of the Internal Revenue Code (Code) requires a corporation to furnish a written statement to any employee or former employee who either (i) exercised an incentive stock option within the meaning of Section 422 of the Code (ISO) during 2019 or (ii) during 2019 first transferred legal title to shares acquired under the corporation's employee stock purchase plan within the meaning of Section 423 of the Code (ESPP). This requirement applies to both privately held and publicly traded corporations. **The corporation must furnish these statements on Forms 3921 and 3922 no later than January 31, 2020.**

IRS return filing requirement for 2019 transactions

In addition to the employee information statements, corporations must file returns with the Internal Revenue Service on Forms 3921 and 3922 no later than February 28, 2020, if filed on paper, or March 31, 2020, if filed electronically.

Form 3921, for ISO exercises, and Form 3922, for initial ESPP share transfers, must be filed electronically by any corporation required to file 250 or more of the particular form; corporations filing fewer than 250 of a particular type of information return may file that type of return either electronically or in paper form.

ISO exercises

Form 3921 provides the following information to the IRS and an employee or former employee who during 2019 exercised an ISO:

1. The name, address and employer identification number of the corporation transferring the shares
2. The name, address and employer identification number of the corporation whose stock is subject to the option (if other than the corporation transferring the shares)
3. The name, address and identifying number of the person to whom the shares were transferred pursuant to the exercise of the option
4. The date when the option was granted
5. The exercise price per share
6. The date when the option was exercised
7. The fair market value of a share on the date when the option was exercised
8. The number of shares transferred pursuant to the exercise of the option

ESPP share transfers

Form 3922 provides the following information to the IRS and an employee or former employee for whom the corporation records in 2019 the first transfer of legal title to shares of stock acquired by the individual pursuant to an option granted under an ESPP where the exercise price was less than 100 percent of the fair market value of the shares on the date of grant or was not fixed and determinable on the date of grant (e.g., because the exercise price is 85 percent of the lesser of the grant date or exercise date fair market value per share):

1. The name, address and employer identification number of the corporation whose stock was transferred
2. The name, address and identifying number of the transferor (*ie*, the employee who acquired the shares under the ESPP)
3. The date when the option was granted to the transferor
4. The fair market value of a share of stock on the date the option was granted
5. The date when the option was exercised
6. The fair market value of a share of stock on the date the option was exercised
7. The actual exercise price paid per share
8. The exercise price per share determined as if the option was exercised on the date the option was granted (to be provided only if the exercise price per share is not fixed and determinable on the date of grant)
9. The date when the legal title to the shares was transferred by the transferor
10. The number of shares to which title was transferred by the transferor

The final Section 6039 regulations clarify that the “first transfer of legal title” that triggers the ESPP share transfer reporting requirements includes an immediate deposit of the shares acquired under the plan into a brokerage account established on behalf of the employee. For many employers, this means that their ESPP participants’ “first transfer of legal title” will occur on the ESPP purchase date. For employers that do not utilize a captive broker arrangement but instead issue shares acquired under the ESPP in certificate or book-entry form, the “first transfer of legal title” will occur when the employee subsequently sells the shares or transfers them to a brokerage account. The return and information statement requirements do not depend on whether the transfer of legal title to shares acquired under an ESPP is a qualifying or disqualifying disposition.

Nonresident aliens

Corporations do not have reporting obligations under Section 6039 for employees who are nonresident aliens and for whom the corporation (or related employer) is not required to provide a Form W-2 for any calendar year during the period beginning with the first day of the calendar year in which the option was granted and ending with the last day of the calendar year in which the option was exercised (or legal title to ESPP shares was first transferred).

Forms and instructions

Both the returns filed with the IRS and employee information statements must be provided using either Forms 3921/3922 obtained from the IRS or substitute forms that satisfy IRS guidelines. Sample Forms 3921 and 3922 are available on the IRS website for informational purposes only. However, downloaded copies are not scannable by the IRS and cannot be used for filing. **Only the official printed versions of these forms obtained from the IRS may be used for scannable paper filings.** To order the official forms, call 1-800-TAX-FORM (1-800-829-3676), or order them online, available here.

The specific instructions for Forms 3921 and 3922 are available on the IRS website here, and General Instructions for Certain Information Returns, including Forms 3921 and 3922 are available here. The requirements for using substitute information statements are contained in Publication 1179, available here.

Deadlines

Employee information statements, either Copy B of Forms 3921/3922 or an acceptable substitute, for 2019 transactions must be furnished no later than January 31, 2020. Information statements may be furnished to employees electronically in accordance with requirements set forth in the General Instructions for Certain Information Returns.

Paper filings of Form 3921 and 3922 for 2019 transactions must be submitted to the IRS with transmittal Form

1096 for each type of return and are due no later than February 28, 2020. However, corporations required to file 250 or more of either type of form must file that form electronically following the procedures contained in Publication 1220, available here. Electronic filings of Forms 3921 and 3922 for 2019 transactions are due no later than March 31, 2020.

An automatic 30-day extension for filing Form 3921/3922 returns with the IRS may be obtained by completing and filing by the due date Form 8809, Application for Extension of Time to File Information Returns, available here.

Timely filing and furnishing of forms 3921/3922 is important

A sliding scale of penalties under Section 6721 of the Code, ranging from \$50 to \$270 per information return (and from \$194,500 to \$3,339,000 per calendar year in the aggregate) is imposed for a corporation's failure to file a correct information return by the due date, unless excused by a showing of reasonable cause. For intentional disregard of the reporting requirement, the penalty is at least \$550 per failure with no maximum. Section 6722 of the Code imposes similar but separate penalties for each failure to furnish a correct employee information statement.

For more information, please contact any of the members of our Employee Benefits and Executive Compensation group.

AUTHORS



William H. Hoffman

Senior Counsel
Silicon Valley | T: +1 650 833 2000
william.hoffman@dlapiper.com



Cisco Palao-Ricketts

Partner
Silicon Valley | T: +1 650 833 2000
cisco.palao-ricketts@dlapiper.com



Patrick Burri

Associate
Silicon Valley | T: +1 650 833 2000
patrick.burri@dlapiper.com
