

Office of Chief Counsel
Internal Revenue Service
memorandum

CC:EBEO:Br2LACamillo
WTA-N-105118-97

date AUG 12 1998

to Returns Operations Office B T:ETA:O:P
Attn: Beatrice Howell and Kevin Hand

from Office of Associate Chief Counsel CC:EBEO
(Employee Benefits and Exempt Organizations)

subject Clarification of Common Paymaster and Agent Rules

This responds to your request for clarification of the rules regarding common paymasters and agents. We apologize for the delay in responding to the request. In particular, the materials you provided to us are concerned with whether, in common paymaster situations, FICA limits and FUTA taxable wages should be calculated in the aggregate across multiple federal employer identification numbers (FEIN's), and whether separate Forms 940 and Forms 941 must be filed for each FEIN. Additionally, you asked for clarification of the term "concurrent employment", as it is used in I.R.C. § 3121(s) and Emp. Tax. Reg. § 31.3121(s)-1.

It appears that there may be some confusion about what is a common paymaster under sections 3121(s) and 3306(p) of the Code and what is an agent under section 3504 of the Code. The materials you provided to us refer to "common paymaster" and "agent," without clearly stating in each case which entity is being discussed. To avoid confusion, this memorandum will refer to the common paymaster under sections 3121(s) and 3306(p) of the Code as the "common paymaster." It will refer to the agent under section 3504 of the Code as the "agent." References to Form 940 include the Form 940-EZ.

Common Paymaster

The common paymaster provisions of sections 3121(s) and 3306(p) of the Code provide for certain related companies to use a single wage base for Federal Insurance Contributions Act (FICA) and FUTA purposes for individuals employed by both companies. These provisions apply only where two or more related companies employ the same person and where only one of the companies pays the person. In this case, the company that pays the employee is referred to as the common paymaster. The common paymaster is responsible for filing information and tax returns and issuing Forms W-2 with respect to wages it is considered to have paid. Employment Tax Regulations § 31.3121(s)-1(a). The definitions and other rules under the section 3121(s) regulations apply for purposes of section 3306(p) (FUTA) as well. There is no issue

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whether a common paymaster is permitted to file Form 940 for the companies for which it is the common paymaster, because the regulations provide that the common paymaster is responsible for employment tax filings.

Agent

Section 3504 provides that where a fiduciary, agent, or other person (referred to collectively as "agent") pays the wages of an employee or group of employees employed by one or more employers, the Secretary, under regulations, may designate the agent to perform such other acts as are required of employers under title 26 of the United States Code.

The regulations under section 3504 provide for the district director or director of a service center to authorize an agent to perform such acts as are required of employers under chapters 21, 22, and 24 of the Code. These chapters relate to the Federal Insurance Contributions Act (FICA), the Railroad Retirement Tax Act (RRTA), and Collection of Income Tax at Source on Wages or income tax withholding (ITW), respectively. The regulations do not mention chapter 23, which corresponds to FUTA. Employment Tax Regulations § 31.3504-1(a).

The regulations provide for the use of an application to be filed with the district director or director of a service center. Form 2678, Employer Appointment of Agent (Rev. October 1993), is the application used to request authority. At the bottom of the form, the applicant is to check boxes to request authorization under chapter 21 (FICA), chapter 22 (RRTA), and chapter 24 (ITW). (There is also a box for chapter 25, regarding general provisions relating to employment taxes, a chapter not relevant here.) There is no box for chapter 23, the FUTA.

The instructions to Form 2678 refer the applicant to Rev. Proc. 70-6, 1970-1 C.B. 420, reprinted in Publication 1271 (5-85). Rev. Proc. 70-6 also refers to chapters 21, 22, and 24, without mentioning chapter 23, the FUTA. Neither the Form 2678 nor the revenue procedure contemplate the agent's filing Form 940 (FUTA) on behalf of an employer.

Rev. Proc. 80-4, 1980-1 C.B. 581, amplifies Rev. Proc. 70-6, with respect to state and local health and welfare agencies acting as agents under section 3504 for welfare recipients who become the employers of individuals furnished by the agencies to provide in-home domestic service for the welfare recipients. Rev. Proc. 80-4, section 3.04, provides that when a welfare recipient/employer is liable for the FUTA tax, the Service will interpose no objection if the state or local agency acting as an agent under section 3504 for FICA tax and income tax withholding also acts as an agent for the reporting and paying of the FUTA

tax. A similar statement appears in Rev. Proc. 68-21, 1968-1 C.B. 817, with respect to a vacation trust fund distributing vacation allowances to employees and authorized to report and pay FICA tax under section 3504. Thus, in two narrow situations, that of a state or local health and welfare agency and that of a vacation trust fund, the Service has permitted an agent that is authorized to report and pay FICA and ITW taxes to also act as an agent for the reporting and paying of the FUTA tax.

Generally, however, it would not be practical for an agent authorized to report and pay FICA and ITW taxes to also act as an agent for the reporting and paying of the FUTA tax. This reporting and paying of the FUTA tax would be particularly problematic where an agent is authorized to report and pay FICA and ITW taxes on behalf of more than one employer.

To understand the problem that can arise with an agent's filing Form 940 on behalf of more than one employer, it is necessary to consider the nature of the FUTA tax and the credit against the tax for contributions paid into state unemployment funds. While the rate of the FUTA tax imposed under section 3301 of the Code is 6.2 percent of wages up to \$7,000 (as defined in section 3306(b)(1)), section 3302 provides for a credit for contributions paid to state unemployment funds of up to 5.4 percent of wages, effectively reducing the rate of the FUTA tax in most cases to 0.8 percent.

The regulations under section 3302 require a certificate of the proper officer of each state showing, for the employer:

(1) the total amount of contributions required to be paid for the year and actually paid on or before the date the federal return is required to be filed and

(2) the amounts and dates of the required payments actually paid after the date the federal return is required to be filed.

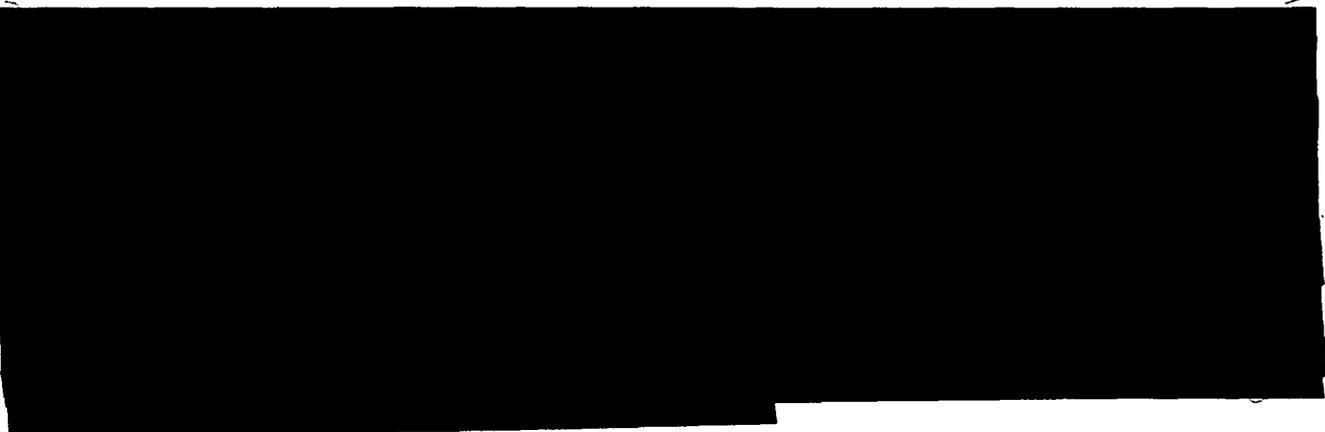
The certificate must be submitted to the district director in order for an employer to be allowed credit against the FUTA tax. Employment Tax Regulations § 31.3302(a)-3. The certificate requirement is not incorporated into the Form 940 instructions; however, the form requires the employer to provide the state reporting number as shown on the state contribution return.

We understand that agents are currently filing Form 940 for the employers for which they are agents in two ways:

(1) the agent files a separate Form 940 for each employer; and

(2) the agent files a single Form 940 for all the employers for which it is an agent.

We do not see a problem with an authorized agent's filing a separate Form 940 for each of the employers for which it is an agent under section 3504 and providing each employer's state reporting number (or numbers, if the employer makes contributions to more than one state unemployment fund) on the form that pertains to that employer.



Concurrent Employment

As noted above, the common paymaster provisions of sections 3121(s) and 3306(p) of the Code provide for certain related companies to use a single wage base for FICA and FUTA purposes for individuals "concurrently employed" by both companies. You have requested clarification with respect to the meaning of the phrase "concurrent employment." In particular, you have inquired whether concurrent employment means that the employee is actually performing services for the common paymaster corporation and any other related corporation(s) that are compensating the employee through the common paymaster. Alternatively, you have asked whether an employee can be classified as "concurrently employed" by Corporations A and B where such employee performs services only for Corporation A, which is owned by Corporation B, even though the employee performs no services for Corporation B.

The Employment Tax Regulations make it clear that concurrent employment refers to situations in which the employee performs services for each corporation compensating the employee through the common paymaster. In this regard, section 31.3121(s)-1(b)(3) provides, in pertinent part, as follows:

...the term "concurrent employment" means the contemporaneous existence of an employment relationship (within the meaning of section 3121(b)) between an individual and two or more corporations. Such a

relationship contemplates the performance of service by the employee for the benefit of the employing corporation (not merely for the benefit of the group of corporations), in exchange for remuneration which, if deductible for purposes of Federal income tax, would be deductible by the employing corporation. The contemporaneous existence of an employment relationship with each corporation is the decisive factor; if it exists, the fact that a particular employee is on leave or otherwise temporarily inactive is immaterial. However, employment is not concurrent with respect to one of the related corporation if the employee's employment relationship with that corporation is completely nonexistent during periods when the employee is not performing services for that corporation... (Emphasis added).

The regulations at section 31.3121(s)-1(b)(3) are very helpful in that they contain specific examples (too voluminous to set forth in this memorandum) of situations in which employees are or are not considered to be concurrently employed.

We hope this information is helpful to you. If there are questions, please call Lynne Camillo of this office at (202) 622-6040.

Jerry E. Holmes 

Jerry E. Holmes
Chief, Branch 2