



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

June 21, 2001

Number: **INFO 2001-0094**

Release Date: 6/29/2001

CC:TEGE:EOEG:ET1:MAOWens
COR-116805-01
UIL: 3402.12-00



This is in response to your letter dated March 3, 2001, in which you requested information concerning federal income tax withholding. This letter provides general information on mandatory withholding on wages and voluntary withholding on certain other payments.

Mandatory Withholding

Section 3402 of the Internal Revenue Code (Code) provides that, except as otherwise specifically provided in § 3402, every employer making payment of wages shall withhold federal income tax as determined in accordance with prescribed tables or computational procedures. Section 3401(a) provides that the term "wages" means all remuneration for services performed by an employee for his employer unless a specific exemption under § 3401(a) applies. For example, remuneration for services performed by a domestic worker in a private home is specifically excluded from the definition of wages by § 3401(a) (3).

Under § 3402(f)(2)(A) of the Code and § 31.3402(f)(2)-1(a) of the Employment Tax Regulations, on or before the date on which an individual commences employment with an employer, the individual must furnish the employer with a signed withholding exemption certificate relating to the employee's marital status and the number of withholding exemptions which the employee claims. The employer is required to request a withholding exemption certificate from each employee, but if an employee fails to furnish such certificate, the employer must withhold federal income tax from the employee as if the employee were a single person with no withholding exemptions.

Section 31.3402(f)(5)-1 of the Employment Tax Regulations provides that Form W-4, Employee's Withholding Allowance Certificate, is the form prescribed for the withholding exemption certificate required to be furnished to the employer under § 3402(f)(2) of the Code. A copy of Form W-4 is enclosed. A Form W-4 must be

COR-116805-01

prepared in accordance with the instructions and regulations applicable thereto, and must set forth fully and clearly the data therein called for. A withholding allowance certificate that does not set forth fully and clearly the data therein called for is an invalid withholding exemption certificate under § 31.3402(f)(2)-1(e). In addition, any alteration of or unauthorized addition to a withholding exemption certificate shall cause such certificate to be invalid.

Section 31.3402(f)(2)-1(e) of the Employment Tax Regulations provides that if an employer receives an invalid withholding certificate, the employer shall consider it a nullity for purposes of computing withholding. Since an altered certificate is an invalid withholding exemption certificate, it can not authorize an employer to cease withholding tax.

Section 31.3402(f)(2)-1(e) of the Employment Tax Regulations further provides that if an employer receives an invalid withholding certificate, the employer shall inform the employee who submitted the certificate that it is invalid and shall request another withholding exemption certificate from the employee. If the employee who submitted the invalid certificate fails to comply with the employer's request, the employer must withhold federal income tax from the employee as if the employee were a single person with no withholding exemptions. However, if a valid prior certificate is on file it remains controlling.

A discussion of constitutional issues associated with the requirement to furnish Form W-4 can be found in United States v. Drefke, 707 F.2d 978 (8th Cir. 1983), cert. denied, Jameson v. United States, 464 U.S. 942 (1983). Drefke furnished Forms W-4 in which he claimed exemption from federal income taxes and certified that he had not incurred a liability for federal income taxes in the preceding year. He was convicted under § 7205 of the Code of filing false withholding exemption certificates.¹ He argued that § 7205 giving rise to his conviction constituted punishment for failure to give self-incriminating information. The Eighth Circuit stated that the Fifth Amendment right against self-incrimination does not authorize individuals to refuse to disclose information concerning their income.

¹ An individual may be prosecuted under § 7205 for filing a false withholding exemption certificate or for willfully failing to supply information. Section 7205 provides:

Any individual required to supply information to his employer under § 3402 who willfully supplies false or fraudulent information or who willfully fails to supply information thereunder which would require an increase in the tax to be withheld under § 3402, shall, in addition to any other penalty provided by law, upon conviction thereof, be fined not more than \$1,000, or imprisoned not more than one year, or both.

COR-116805-01

Also, you may be interested in a recent nontax case involving a claim of discrimination based on national origin. The District Court in El Bey v. Dialysis Clinic, Inc., 2001 U.S. Dist. Lexis 2319; 80 Empl. Prac. Dec. (CCH) ¶ 40,445 (S.D.N.Y. 2001) ruled that employees have an obligation to furnish Forms W-4, and an individual's claim that a prospective employer would not allow the individual to begin working without filling out a Form W-4 does not raise an inference of discrimination. The District Court further held, that there was no legal basis to conclude that the individual's status as a Moorish-American granted him the right under the Ninth Amendment -- or any other provision in the United States Constitution -- not to fill out a Form W-4.

In summary, an employee who refuses to provide an employer with a valid certificate will be subject to income tax withholding as a single person with no withholding exemptions.

Voluntary Withholding

The employer and employee can also agree that the employer will withhold federal income taxes from payments for services that do not constitute "wages," such as domestic service. See § 3402 (p)(3) of the Code. Form W-4 is used to request and change voluntary withholding from these payments. An individual may request the employer to discontinue voluntary withholding from these payments by giving the employer notice in writing.

In addition, if an individual receives certain government payments, the individual may have federal income tax withheld. At the payee's request, federal income tax is withheld from unemployment compensation, social security benefits, and certain other federal payments, as if the payments were wages. See § 3402(p)(1) and (2) of the Code. Form W-4V, Voluntary Withholding Request, is used to request, change, or discontinue voluntary withholding from these payments. A copy of Form W-4V is enclosed.

The regulations set forth in § 31.3402(p)-1 provide the procedures for making voluntary withholding agreements on certain nonwage payments. The rules concerning voluntary withholding and the termination of such withholding do not apply to withholding on wages. Thus, reliance on § 31.3402(p)-1 as a basis of terminating withholding on wages is inappropriate.

This letter provides general information only. It describes well-established interpretations or principles of tax law without applying them to a specific set of facts. It is advisory only and has no binding effect with the Internal Revenue Service. This letter is intended only to provide you with general guidance for determining how to comply with applicable law.

COR-116805-01

We hope this information is useful to you. If you have any further questions, please contact Margaret Owens (Employee ID #50-05478) at (202) 622-6040.

Sincerely,

MICHAEL A. SWIM
Chief, Employment Tax Branch 1
Office of the Assistant Chief Counsel
(Exempt Organizations, Employment Tax
& Government Entities)

Enclosures (2)
Form W-4
Form W-4V