

Information Guide for Employers Filing Form 941 or Form 944

*Frequently Asked Questions
about the Reclassification of
Workers as Employees*



Contents

Part 1. General information for employers	4
Part 2. Voluntary correction before a determination has been issued	8
Part 3. What should you do now about your misclassification of workers?	9
a) Current year	9
b) Prior years.....	9
Part 4. Do you qualify for IRC section 3509 rates?	10
Part 5. What rates are used to compute tax liability under IRC section 3509?	11
Part 6. How do you correct tax returns and information returns when workers are reclassified as employees?	12
a) Correcting the current year	12
b) Correcting a prior year using IRC section 3509 rates	14
c) Correcting a prior year when IRC section 3509 rates do not apply	15
Part 7. How do you correct tax returns and information returns to correct the treatment of additional wage payments that do not relate to reclassification of workers?	17
a) Correcting the current year	17
b) Correcting a prior year	18
Part 8. Do you need to correct any unemployment tax returns?	20
Part 9. What do you do with the employment tax forms?	20
Part 10. Can you get help in filing all the corrected employment tax forms?	21
Checklist.....	21
Social Security Wage Base for recent years	24

1. General information for employers.

- Under Rev. Proc. 2010-1, I.R.B.1, the Internal Revenue Service may issue a determination letter to an employer or a worker regarding the worker's status for employment tax purposes when Form SS-8, *Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding*, is filed with the IRS. Where the IRS determines that a worker is an employee, the employer is instructed to file corrected employment tax returns and information returns showing that the worker and any other worker performing services under the same circumstances are treated as employees.
- The IRS does not calculate your balance due and send you a bill after it issues a determination or information letter. You are responsible for satisfying the resulting employment tax reporting and payment obligations, such as filing employment tax returns or correcting previously filed employment tax returns.
- The information in this guide is intended to assist employers that have received a determination letter reclassifying the employer's worker(s) as employee(s). This guide will also help the employer complete and file the correct employment tax returns and issue the correct information returns to the reclassified worker(s).
- The information in this guide may also be used by an employer who currently has an SS-8 determination letter request pending for processing with the IRS, and who decides to voluntarily reclassify its worker(s) as employee(s) instead of continuing to participate in the SS-8 determination letter process. In the case of an employer who voluntarily decides to reclassify its worker(s) as employee(s), a photocopy of the corrected information return(s) (such as Form 1099 MISC, Form W-2, or Form W-2c) must be submitted to the office that was processing the SS-8 determination letter request.
- Some payments not treated as wages by an employer may appear to involve a worker reclassification situation; but since the employer has already treated the person who received these payments as an employee, this is an issue of additional wages. This information guide may also be used by employers that have additional wage payment issues. (See Part 7 of the guide.) The additional wage payments at issue may be bonuses, commissions, overtime pay, accumulated sick leave, severance pay, awards, prizes, back pay and retroactive pay increases for employees, payment of nondeductible moving expenses, taxable fringe benefits, expense allowances paid under a non-accountable plan, or any other compensation for services not initially treated as wages.
- This guide is **not** applicable if an employer is entitled to relief from treating this class of workers as employees under section 530 of the 1978 Revenue Act. Section 530 established a safe haven from an employer's liability for employment taxes arising from an employment relationship. This relief may be available to employers who have misclassified workers if they meet certain criteria. It is important to note that the IRS SS-8 Employment Tax

Determination Program does not have the authority to grant section 530 relief in relation to a determination it issues. Section 530 relief is officially considered and possibly granted by an auditor at the commencement of the examination process should the IRS select your return(s) for audit. The SS-8 determination process is not related to an examination of your returns. You must first consider your eligibility for section 530 relief to determine whether you should correct your returns as a result of an IRS determination.

- If you are not eligible for section 530 relief, and the failure to pay the correct amount of employment tax was due to the misclassification of a worker's status, you must correct your tax returns and may be required to use the rates outlined in Part 4 below. You may wish to contact a tax professional if you need assistance with this matter.
- This guide is only intended to assist you in correcting your tax returns and information returns due to the reclassification of your worker(s) or because you made additional wage payments that you did not treat as wages. It is not intended to provide a complete analysis of all relevant law or to replace Publications 15, (*Circular E*) *Employer's Tax Guide*, or 15-A, *Employer's Supplemental Tax Guide*. You should refer to the appropriate legal authorities and publications for further information and employer responsibilities.
- Before correcting your tax returns and information returns, you need to consider whether the period of limitations for the assessment of taxes has expired. If that is the case, it will not be necessary for you to adjust your return(s). IRC section 6501(a) provides that the period of limitations for assessment generally expires three years from the due date of the return, or three years after the date the return was actually filed, whichever is later. Under a special rule in IRC section 6501(b)(2) for employment tax returns, the three years generally begins April 15th of the following year for which the return was due.
- **You must secure an employer identification number (EIN) if one has not already been assigned to you.** You can apply for and receive an EIN the same day by calling 1 (800) 829-4933 or by completing an online application (Form SS-4) at our website www.irs.gov. To locate this online application form, enter "**Online EIN**" in the search box. To be sure you have access to all the information you will need, you may find it helpful to print and complete a hardcopy of Form SS-4 before calling the 800 number or completing the online form. You may also mail or fax the Form SS-4 as directed in the instructions.
- Starting with calendar year 2006, certain employers were required to file Form 944, *Employer's ANNUAL Federal Tax Return*, instead of Form 941, *Employer's QUARTERLY Federal Tax Return*, if they were notified by the IRS to do so. (This form is for employers that expect to have an employment tax liability of \$1,000.00 or less. Generally, if an employer expects to pay \$4,000.00 or less in wages for the calendar year, the employer is likely to pay

\$1,000 or less in employment taxes.) Beginning January 1, 2010, the filing of Form 944 is voluntary. Employers may opt in or opt out of filing Form 944 by calling the IRS by April 1st of the current tax year, or writing the IRS. Employers who write the IRS to request to opt in or out must have their correspondence postmarked on or before March 15th of the current tax year. The IRS will send you a written notice that your filing requirement has been changed. If you do not receive this notice, then you must file the tax return you were previously assigned to file. The phone numbers and addresses to opt in or out of using Form 944, as well as additional information regarding the use of this Form, are specified in the Instructions for Form 944.

- Starting with calendar year 2009, you must use Form 941-X, *Adjusted Employer's QUARTERLY Federal Tax Return or Claim for Refund*, to make corrections to a previously filed Form 941, and Form 944-X, *Adjusted Employer's ANNUAL Federal Tax Return or Claim for Refund*, to make corrections to a *previously filed* Form 944. Forms 941-X and 944-X are stand-alone forms, meaning employers can file them when an error is discovered, rather than waiting to file an adjustment with the next Form 941/944 due. A separate Form 941-X/944-X must be filed for each Form 941/944 you are correcting. These forms should **not** be attached to Forms 941/944 unless you did not file a Form 941/944 for the period at issue because you did not treat any workers as employees and you are now correcting the worker's classification (see Part 3(b) below for additional clarification).
- You may be able to adjust and pay the additional federal income tax withholding and FICA taxes due for prior quarters or the FICA taxes for prior years without incurring any interest charges. To do this, you must correct your employment taxes by reporting and paying the additional taxes by the due date of the Form 944 or Form 941, depending on which return you are correcting, for the period in which the error was discovered. In most cases, the date the error was discovered will be the date of our determination letter. **See the example below for more clarification.** This interest-free adjustment does not apply to FUTA taxes.

Example: Jill performed services for you in tax year 2006 and you issued her a Form 1099-MISC for these services. In 2008, Jill filed a Form SS-8 and she was found to be an employee. The date of the determination letter was January 15, 2009. You had other employees and previously filed an employment tax return for 2006.

Correcting a previously filed Form 944:

If you file Form 944 and are correcting a previously filed Form 944, you must report the additional tax on Form 944-X by the due date of the yearly return for the year in which the determination letter was issued to get an interest-free adjustment. For this example, the additional tax should be reported and paid by the due date of the annual return for calendar year 2009, the year in which the error was discovered. Therefore, Form 944-X would have to be filed by January 31, 2010. The amount due must be paid by the time Form 944-X is filed, or, interest will accrue on the balance due.

Correcting a previously filed Form 941:

If you file Form 941 and are correcting a previously filed Form 941, you must report the additional tax on Form 941-X by the due date of the quarterly return for the quarter in which the determination letter was issued. For this example, the additional tax should be reported and paid by the due date of the return for the first quarter of 2009, which includes January, 2009, the month in which the error was discovered. Therefore, Form 941-X would have to be filed April 30, 2009. The amount due must be paid by the time Form 941-X is filed or interest will begin to accrue.

Correcting a previously filed return when there has been a change to your filing requirement:

If you were previously required to file a Form 941, but now file a Form 944, and you are correcting a previously filed Form 941, you must report the additional tax on Form 941-X. The additional tax must be reported by the due date of the quarterly return for the quarter in which the determination letter was issued. For this example, the additional tax should be reported and paid by the due date of the return for the first quarter of 2009, which includes January, 2009, the month in which the error was discovered. Therefore, Form 941-X would have to be filed April 30, 2009. The amount due must be paid by the time Form 941-X is filed or interest will begin to accrue.

If you were previously required to file a Form 944 but now file a Form 941, and you are correcting a previously filed Form 944, you must report the additional tax on Form 944-X. The additional tax must be reported by the due date of the yearly return for the year in which the determination letter was issued to get an interest-free adjustment. For this example, the additional tax should be reported and paid by the due date of the annual return for calendar year **2009**, the year in which the error was discovered. Therefore, Form 944-X would have to be filed by January 31, 2010. The amount due must be paid by the time Form 944-X is filed or interest will begin to accrue.

The following table will help you determine the date that your adjustment and tax payment is due if you are filing Form 941-X.

If the error was discovered between:	The adjustment and tax is due by:
January 1st and March 31st (First Quarter)	April 30th
April 1st and June 30th (Second Quarter)	July 31st
July 1st and September 30th (Third Quarter)	October 31st
October 1st and December 31st (Fourth Quarter)	January 31st

- In order to receive an interest-free adjustment, the failure to pay the employment taxes must be due to an error. Thus, an interest-free adjustment is not available if:
 - ◆ Your returns for prior years were audited and additional tax found to be due with respect to the same issue was involved;
 - ◆ You had been informed of your tax status as an employer with respect to the same class of workers; or,
 - ◆ You otherwise knowingly underreported your employment tax liability in subsequent years.

- An interest-free adjustment is not available after receipt of a notice and demand for payment, based on an assessment or receipt of a Notice of Determination of Worker Classification under section 7436.

- Generally, your correction of an underreported amount will not be subject to penalty or interest if you file on time (by the due date of the year you discover the error), pay the amount shown on line 17 of Form 941-X/944-X, enter the date you discovered the error and explain in detail the grounds and facts relied on to support the correction. If you are charged a penalty on this adjustment, you may request an abatement of the penalty by filing a Form 843, *Claim For Refund and Request for Abatement*. This request may or may not be approved.

- You must file appropriate information returns in accordance with reclassifying the workers as employees. See Parts 6 and 7 for more information.

- You must notify most employees who have no income tax withheld that they may be able to claim a tax refund because of the earned income credit (EIC). Refer to Publication 15 for more information on this requirement and exceptions. Look for the section labeled **Required Notice to Employees** in Publication 15. You will meet the notification requirement if you give the employee one of the following:
 - ◆ Form W-2, with the EIC information on the back of the copy B;
 - ◆ Substitute Form W-2 with the same EIC information on the back of the employee's copy;
 - ◆ Notice 797, "*Possible Federal Tax Refund Due to the Earned Income Credit (EIC)*;" or,
 - ◆ A written statement with the same wording as Notice 797.

2. Voluntary correction before a determination has been issued.

If, during the processing of the SS-8 determination letter request, you decide to voluntarily reclassify your worker(s) as employees instead of continuing to participate in the SS-8 determination letter process, you must submit copies of the corrected information returns (preferably by fax) to the office that is processing the SS-8 request. (The **original** corrected information

returns should be filed according to the instructions for the corrected information returns.) Be sure to refer to Part 4 to see if you qualify for reduced rates under IRC section 3509. Part 8 provides you with information on amending your Form 940/940-EZ, *Employer's Annual Federal Unemployment (FUTA) Tax Return*, if applicable.

a) Current year:

If the services by the reclassified worker(s) were performed during the current year, you need to make an adjustment to the federal income tax withholding and FICA tax so that the amount withheld and paid is correct by the end of the calendar year. See Part 6 for more information. You must also pay FUTA tax on wages paid to employees unless you are exempt from FUTA or unless you have already computed the maximum FUTA tax this year on other wages you paid to the employee(s). You are responsible for providing the appropriate information returns to the worker(s) and for filing employment tax returns.

For most employers that includes filing:

- Form 940 (Form 940-EZ is no longer available for 2006 and thereafter)
- Form 941/944, if none was filed
- Form 941-X/944-X, if Form 941 or Form 944 were previously filed
- Form W-2

b) Prior years:

Before you can report the additional employment tax on your Form 941-X/944-X, you need to know if you qualify for the reduced rates available under IRC section 3509 to employers that have misclassified an employee as an independent contractor or non-employee, or if you need to use full rates.

If you qualify, IRC section 3509 provides reduced rates for the **employee's** share of FICA taxes and for the federal income tax that should have been withheld, for which you are liable. You are still responsible for the **full** amount of the **employer's** share of FICA taxes. See Parts 4 and 5 for more information. IRC section 3509 does not provide a reduced rate for FUTA tax. FUTA taxes are computed in the normal manner. See Part 8 for information on unemployment tax returns.

If the services by the reclassified worker(s) were performed during prior years, you need to:

- File the necessary forms (such as Form W-2 or Form W-2c) with the Social Security Administration (SSA) or the IRS, as appropriate, and issue corrected information returns to the worker(s).

3. What should you do now about your misclassification of workers?

- Report the additional employment tax due on Form 941-X/944-X, or both Form 941/944 and 941-X/944-X if you did not previously file a Form 941/944 because you did not treat any workers as employees, and now you are correcting the misclassification (See Part 6 for more information).
- You may also have to file a Form 940 or an amended Form 940/940-EZ for the years at issue. See Part 8 for more information.

4. Do you qualify for IRC section 3509 rates?

IRC section 3509 rates provide a one-time opportunity to correct the tax treatment of your misclassified employees. You are eligible for the reduced tax rates under IRC section 3509, unless one of the circumstances listed below applies to you. If these rates apply, you must use these rates in figuring your employment tax liability. If section 3509 rates apply, **you cannot elect to use the full rates and you cannot recover any tax you pay under this provision from your employees.**

Circumstances where IRC section 3509 rates **do not** apply are:

- In cases where you intentionally disregarded the requirements to deduct and withhold income and FICA taxes. Note: There are specific penalties that may be imposed on any responsible person for willful failure to withhold income and FICA taxes, or for willful failure to file correct Forms W-2 or to furnish correct Forms W-2 to employees.

Below are two **Examples**:

- ◆ If you have previously been audited and this class of worker was found to be employees, but you continued to treat the workers as non-employees.
 - ◆ You were previously issued a determination letter notifying you of the determination of employee status of a worker and the applicability of the letter to other workers you engage under substantially similar circumstances, but you continued to treat the workers in such circumstances as non-employees.
- In cases where the worker was an employee and his/her regular compensation was treated as wages (either for withholding purposes or as reported on an employment tax return for one or more periods during the calendar year, or on a Form W-2), but other income paid to him/her (e.g., bonuses, probationary pay, severance pay, commissions, overtime pay, accumulated sick leave, awards, prizes, back pay and retroactive pay increases) was not treated as wages.
 - In cases where a worker was treated as an employee and you stopped withholding taxes without a significant change in the work done by the worker or your right to control the worker.

- In cases where you withheld federal income taxes, but not FICA taxes.
- For wages paid in the current calendar year.
- In cases where the worker was found to be one of the following statutory employees:
 - ◆ An agent-driver or commission-driver;
 - ◆ A full-time life insurance salesman;
 - ◆ A home worker; or,
 - ◆ A traveling or city salesman.

IRC section 3509(a) rates

The rates under IRC section 3509(a) are 10.68% of the employee's wages that total an amount less than or equal to the Social Security wage base for such year, and 3.24% of the wages paid to an employee in excess of the Social Security wage base, and consist of the following:

- Income Tax Withholding - Your liability for federal income tax withholding is 1.5 percent of the wages you paid to your employee.
- FICA Taxes - Your liability for the **employee's** share of the social security and Medicare taxes is 20 percent of the full rate (20% of 6.20%=1.24% of wages that total an amount less than or equal to the Social Security wage base; 20% of 1.45%=.29% of the total wages, including wages in excess of the Social Security wage base).
- FICA Taxes- Your liability for the **employer's** share of the social security and Medicare taxes is 100 percent of the full rate (6.20% of wages that total an amount less than or equal to the to the Social Security wage base; 1.45% of the total wages, including wages in excess of the Social Security wage base).

For section 3509(a) & (b) rates for FICA taxes, please refer to the Social Security Wage Base Chart found in this Publication.)

IRC section 3509(b) rates

If you did **not** file required information returns (e.g., Form 1099-MISC) consistent with treating the worker as a non-employee, you must use the rates under IRC section 3509(b). The rates under IRC section 3509(b) are 13.71% of the employee's wages that total an amount less than or equal to the Social Security wage base for such year, and 5.03% of the wages paid in excess of the Social Security wage base, and consist of the following:

5. What rates are used to compute tax liability under IRC section 3509?

- **Income Tax Withholding** - Your liability for federal income tax withholding is 3 percent of the wages you paid to your employee.
- **FICA Taxes** - Your liability for the **employee's** share of the social security and Medicare taxes is 40 percent of the full rate (40% of 6.20%=2.48% of wages up to the Social Security wage base; 40% of 1.45%=.58% of the total wages, including wages in excess of the Social Security wage base).
- **FICA Taxes** - Your liability for the **employer's** share of the social security and Medicare taxes is 100 percent of the full rate (6.20% of wages up to the Social Security wage base; 1.45% of the total wages, including wages in excess of the Social Security wage base).

NOTE: If your failure to file information returns is due to reasonable cause and not willful neglect, or because no information return was required (e.g. wages under \$600.00) you should use IRC section 3509(a) rates. (Reasonable cause for not filing an information return is a limited exception, requiring that the failure be due to an event beyond your control or due to significant mitigating factors.)

(For section 3509(a) & (b) rates for FICA taxes, please refer to the Social Security Wage Base Chart found in this Publication.)

6. How do you correct tax returns and information returns when workers are reclassified as employees?

a) Correcting the current year:

If your worker has been reclassified as an employee, you as the employer are now responsible for withholding and paying the applicable federal employment taxes for this employee and any other worker that performs similar services for you under similar circumstances. In addition, you must also file with the Social Security Administration (SSA) and furnish to the worker(s) a Form W-2 to report the compensation paid to them. Send a copy of all Forms W-2 with Form W-3 to the SSA at the appropriate address provided on the form. You may file Forms W-2 and W-3 electronically. Visit the SSA's website at www.socialsecurity.gov/employer for more information. If you are required to file 250 or more Forms W-2, you must file them electronically unless the IRS granted you a waiver. The 250 or more requirement applies separately for each type of return (e.g., Form W-2) and separately to each type of corrected return (e.g., Form W-2c). Even though employers may submit up to 249 information returns on paper, employers are encouraged to file those information returns electronically. See the Instructions for Forms W-2 and W-3 and Publication 1220, *Specifications for Filing Form 1098, 1099, 5498, and W2-G Electronically*, for more information on electronic filing requirements and waivers.

You should **not** issue the worker(s) a Form 1099-MISC and a Form W-2 for compensation paid for the same services. The Form W-2 must include all taxable compensation paid to the worker(s) for the entire year.

You must adjust the taxes of the employee(s) withheld for the current year so that the proper amount of taxes is withheld from wages by the end of the calendar year. IRC section 3509 rates cannot be used for determining the taxes due on current year wages. If you withheld no income tax or FICA tax during the calendar year or less than the right amount from an employee's wages, you must deduct the taxes from later wages you pay to that employee if the employee still works for you, but the underwithheld income tax must be deducted from the employee on or before the last day of the calendar year. If you do not deduct the taxes from your employee's wages or the employee no longer works for you, reimbursement is a matter for settlement between you and the employee. However, you are liable for the underpayment of taxes whether or not they are withheld or otherwise recovered from the employee. If the correction is for a fringe benefit, you should refer to Publication 15-B, *Employer's Tax Guide for Fringe Benefits*, for further information. There are special rules for taxes on fringe benefits.

Your liability for federal income tax withholding is based on the employee's filing status and withholding allowances. The employee provides this information on Form W-4. If the employee has not given you a Form W-4, you should withhold tax as if he or she is single with no withholding allowances unless this was "supplemental wages." Refer to Publication 15 for information on how to compute the federal income tax withholding on supplemental wages.

If you choose to pay the employee's federal income tax and/or FICA tax rather than withholding them from the employee's wages, or otherwise recover them from the employee, in addition to making the adjustment as directed below, you must include the amount of the taxes in the employee's wages **this** year for income tax withholding, FICA tax and FUTA tax purposes. This increase in the employee's wages is also subject to employment taxes, which again increases the amount of tax you need to pay. To compute the employee's increased wages and the appropriate tax, refer to the formula in Publication 15-A. Part 7 of Publication 15-A addresses the employer's payment of the employee's FICA taxes under the heading "**Employee's Portion of Taxes Paid by Employer**," including an exception for household or agricultural employees. You will need to modify the computation in Publication 15-A if you pay income tax withholding and employee FICA tax without withholding this tax from the employee.

Whether or not such taxes are actually withheld from the employee, you must report the additional taxes on a Form 941-X/944-X. In order for the adjustment for prior quarters in the current tax year to be interest-free, the adjustment must be reported on Form 941-X/944-X, lines 7, 8, and 10, and be filed on or before the due date for the return period during which the misclassification was discovered. (See example in Part 1 for clarification.) The additional taxes must be paid by the time Form 941-X/944-X is filed. If the taxes are not paid by then, interest will begin to accrue. This interest-free adjustment is not applicable to FUTA tax. In order to show that you paid the additional taxes timely, you must pay the tax in full by the time you file Form 941-X/944-X. **Do not** attach Forms 941-X/944-X to Forms 941/944.

According to the Instructions for Form 941-X/944-X, file Forms 941-X/944-X separately. File Forms 941-X/944-X **with** Forms 941/944 **only if** you did not previously file Form 941/944 because you did not treat any workers as employees and you are correcting the misclassification now.

You must also pay FUTA tax on each reclassified worker's wages that total less than or are equal to the FUTA wage base, unless you are exempt from FUTA. See Part 8.

b) Correcting a prior year using IRC section 3509 rates:

To correct the failure to withhold tax and to pay income tax and FICA tax on wages paid in prior years using section 3509 rates as applicable, you must:

1. Complete a Form 941-X/944-X to compute the tax, and file it separately from the Form 941/944 if you previously filed a return.
2. If you did not previously file a return, file Form 941/944 and attach Form 941-X/944-X to the Form 941/944, according to the Instructions for Form 941-X or the Instructions for Form 944-X.
3. Write "Misclassified Employees" in dark, bold letters across the top margin of page 1 on all forms.
4. Complete the remainder of the Form 941/944 and/or Form 941-X/944-X according to the instructions for the form(s).

If the income tax withholding and FICA tax adjustments using section 3509 rates are reported and paid with Form 941-X/944-X and it is filed on or before the due date of the return for the return period in which the error is discovered, the adjustment is interest-free (see example in Part 1 for clarification). This interest-free adjustment is not applicable to FUTA tax. You must pay the tax in full by the time you file Form 941-X/944-X. When using section 3509 rates, you are not permitted to recover any portion of the taxes from the employee.

You must complete item 20 of Form 941-X/944-X to provide an explanation of the adjustment and to notate that you are using IRC section 3509 rates for the adjustment. Be sure to fill out the box titled "Enter the Date You Discovered Errors." This is the date you had enough information to correct the error. You can use the date of your determination letter, if one was issued. If you determine you should reclassify the worker(s) as employee(s) while the determination letter is pending, use the date that you notified the processing office that you are reclassifying the worker(s) as employee(s).

On lines 12, 13, and 14 of Form 941-X/944-X, enter **only** corrections to wages resulting from reclassifying the workers listed in item 20 as employees or as otherwise directed by IRS personnel. In column 1 only, enter the corrected wages related to worker reclassification, **not** the amount paid to ALL employees. Enter previously reported reclassification amounts (if any) in column 2. To get the amount for column 4, use the applicable tax rates outlined in Part 5, above, when multiplying the amount in column 3.

You must file a Form W-2 for the prior years to report the income earned by the worker. If you originally issued the worker a Form 1099-MISC, you must file a Form W-2 for the prior years to correctly report the wages and a corrected Form 1099-MISC showing “zero” in the box in which the income was originally reported (usually this is box 7 or box 3) and check the “Corrected” box on the Form 1099-MISC. More specifically, include in boxes 1, 3 and 5 of the Form W-2 the amount originally reported on Form 1099-MISC. There will be no taxes reported in the three withholding boxes (2, 4 and 6) when using IRC section 3509 rates as the worker will not receive credit for the taxes you pay using IRC section 3509 rates. Show “zero” in these boxes.

c) Correcting a prior year when IRC section 3509 rates do not apply:

If you did not withhold income tax or FICA tax on wages paid in prior year(s) and IRC section 3509 rates do **not** apply, you must deduct the FICA tax from later wages you pay to that employee if the employee still works for you, but you may not recover underwithheld income tax from the employee for a prior year. If you do not deduct the FICA tax from your employee’s wages or the employee no longer works for you, reimbursement of the FICA tax is a matter for settlement between you and the employee. However, you are liable for the underpayment of FICA tax whether or not it is withheld or otherwise recovered from the employee. If the correction is for a fringe benefit, you should refer to Publication 15-B for further information. There are special rules for taxes on fringe benefits.

If you choose to pay the employee’s FICA tax rather than withholding it from the employee’s wages, or otherwise recover it from the employee, in addition to making the adjustment as directed below, you must include the amount of the tax in the employee’s wages **this** year for income tax withholding, FICA tax, and FUTA tax purposes. This increase in the employee’s wages is also subject to employment taxes, which again increases the amount of tax you need to pay. To compute the employee’s increased wages and the appropriate tax, refer to the formula in Publication 15-A. Part 7 of Publication 15-A addresses the employer’s payment of the employee’s FICA tax under the heading “**Employee’s Portion of Taxes Paid by Employer,**” including an exception for household or agricultural employees. You will need to modify the computation in Publication 15-A if you pay the employee’s share of FICA tax without withholding it from the employee’s wages.

To correct the failure to withhold and pay FICA tax on wages paid in prior years using full rates, you must complete Form 941-X/944-X to compute the tax if you previously filed Form 941/944. Do not file Form 941/944.

If you did not previously file a return, file Form 941/944 for each affected quarter and attach Form 941-X/944-X according to the Instructions for Form 941-X/944-X. Write “Misclassified Employees” in red ink across the top margin of page 1 of each Form 941/944.

If the FICA tax adjustment is reported and paid on or before the due date of the return for the return period in which the error is discovered (or before the due date of Form 941/944, if you did not previously file), the adjustment is interest-free (see example in Part 1 for clarification). This interest-free adjustment is not applicable to FUTA tax. You must pay the FUTA tax in full by the time you file Form 941-X/944-X.

Note that the failure to withhold and pay federal income tax cannot be adjusted for prior years because, for prior years, you can no longer withhold income tax for which the employee will get credit. However, you may be held liable under examination for the underwithheld income tax, including applicable interest and penalties, if the employee did not pay the income tax due in connection with his or her Form 1040/1040A/1040EZ.

Complete item 20 of Form 941-X/944-X to provide an explanation of the FICA tax adjustment. Be sure to fill out the box titled “Enter the Date You Discovered Errors.” This is the date when you had enough information to correct the error. You can use the date of your determination letter, if one was issued. If you determine you should reclassify the worker(s) as employee(s) while the determination letter is pending, use the date that you notified the processing office that you are reclassifying the worker(s) as employee(s).

In columns 1 and 2 of lines 6 through 10, show amounts for **all** of your employees, not just for those employees whose amounts you are correcting. Enter previous adjustments to Form 941/944 (if any) in column 2.

You must file a Form W-2 for the prior years to report the income earned by the worker. If you originally issued the worker a Form 1099-MISC, you must file a Form W-2 for the prior years to correctly report the wages and a corrected Form 1099-MISC showing “zero” in the box in which the income was originally reported. Usually this is box 7 or box 3. Check the “Corrected” box on the Form 1099-MISC. More specifically, in boxes 1, 3 and 5 of the Form W-2, include the amount originally reported on Form 1099-MISC. Include the employee’s FICA tax (that you have now paid) in boxes 4 and 6. If you are paying these taxes without recovering them from the worker, the worker receives credit for these taxes. However, these credited taxes are taxable income to the worker **this** year (the year in which you actually pay the additional tax). Accordingly, a Form W-2 must be issued for **this** tax year reflecting this tax as wages. The Form W-2 should also include as wages any other taxable compensation you paid to the employee during this tax year. Since these taxes are also subject to employment taxes, there is a formula to use to compute the employee’s increased wages and the appropriate tax. See Part 7 of Publication 15-A.

a) Correcting the current year:

If your employee has received an additional wage payment, as the employer you are responsible for withholding and paying the applicable federal employment taxes for this employee.

You must adjust the taxes of the employee(s) for the current year so that the proper amount of taxes is withheld from wages by the end of the calendar year. If you did not withhold income tax or FICA tax during the calendar year or you withheld less than the right amount from an employee's wages, you must deduct the taxes from later compensation you pay to that employee, if the employee still works for you. However, the underwithheld income tax must be deducted from the employee's compensation on or before the last day of the calendar year. If you do not deduct the taxes from your employee's compensation, or the employee no longer works for you, reimbursement is a matter for settlement between you and the employee. However, you are liable for the underpayment of taxes whether or not they are withheld or otherwise recovered from the employee. If the correction is for a fringe benefit, you should refer to Publication 15-B for further information. There are special rules for taxes on fringe benefits.

Your liability for federal income tax withholding is based on the employee's filing status and withholding allowances. The employee provides this information on Form W-4. If the employee has not given you a Form W-4, you should withhold tax as if he or she is single with no withholding allowances unless this was "supplemental wages." Refer to the formula in Publication 15 to compute the federal income tax withholding on supplemental wages.

If you choose to pay the employee's federal income tax and/or FICA tax, rather than withholding them from the employee's wages, or otherwise recover them from the employee, in addition to making the adjustment as directed below, you must include the amount of the taxes in the employee's wages **this year** for federal income tax withholding, FICA tax, and FUTA tax purposes. This increase in the employee's wages is also subject to employment taxes, which again increases the amount of tax you need to pay. To compute the employee's increased wages and the appropriate tax, refer to the formula in Publication 15-A. Part 7 of Publication 15-A addresses the employer's payment of the employee's FICA tax under the heading "**Employee's Portion of Taxes Paid by Employer**," including an exception for household or agricultural employees. You will need to modify the computation in Publication 15-A if you pay federal income tax withholding and employee FICA tax without withholding them from the employee.

Whether or not such taxes are withheld from the employee, you must report the additional taxes on Form 941-X/944-X, if you previously filed a Form 941/944. Do not file a second Form 941/944.

In order to be interest-free, the adjustment for prior quarters in the current year must be reported on Form 941-X/944-X, lines 7, 8, and 10, and be filed

7. How do you correct tax returns and information returns to correct the treatment of additional wage payments that do not relate to reclassification of workers?

on or before the due date of the return for the return period during which the misclassification was discovered. (See example in Part 1 for clarification.) The additional taxes must be paid by the time Form 941-X/944-X is filed. If the taxes are not then paid by then, interest will accrue. This interest-free adjustment is not applicable to FUTA tax. You must pay the FUTA tax in full by the time you file the 941-X/944-X.

You must also pay FUTA tax on the additional wages if other wages paid to the employee have not exceeded the FUTA wage base, unless you are exempt from FUTA.

Note: If you did not previously file Form 941/944, file Form 941/944 for each affected quarter according to the Instructions in Form 941/944. Do **not** file Form 941-X/944-X, because the failure to file the return was not due to worker misclassification. Interest-free adjustments are not applicable to late-filed Forms 941/944.

b) Correcting a prior year:

If no federal income tax or FICA tax was withheld from an employee's additional wage payment during prior year(s), you must deduct the FICA tax from later compensation you pay to that employee if the employee still works for you. However, you may **not** recover underwithheld income tax from the employee for a prior year. If you do not deduct FICA tax from your employee's compensation or the employee no longer works for you, reimbursement of the FICA tax is a matter for settlement between you and the employee. However, you are liable for the underpayment of FICA tax whether or not it is withheld or otherwise recovered from the employee. If the correction is for a fringe benefit, you should refer to Publication 15-B for further information. There are special rules for taxes on fringe benefits.

If you choose to pay the employee's FICA tax rather than withholding it from the employee's compensation, or otherwise recovering it from the employee, in addition to making the adjustment as directed below, you must include the amount of the tax in the employee's wages this year for income tax withholding, FICA tax, and FUTA tax purposes. This increase in the employee's wages is also subject to employment taxes, which again increases the amount of tax you need to pay. Refer to the formula in Publication 15-A to compute the employee's increased wages and the appropriate tax. Part 7 of Publication 15-A addresses the employer's payment of the employee's FICA tax under the heading "**Employee's Portion of Taxes Paid by Employer,**" including an exception for household or agricultural employees. You will need to modify the computation in Publication 15-A if you pay the employee's share of FICA tax without withholding it from the employee's wages.

To correct the failure to withhold and pay FICA tax on the additional wages paid in prior years, you must complete Form 941-X/944X to compute the tax if you previously filed Form 941/944. Do not file Form 941/944.

If the FICA tax adjustment is reported and paid on or before the due date of the return for the return period in which the error is discovered, the adjustment is interest-free. You must pay the tax in full by the time you file Form 941-X/944-X. (See example in Part 1 for clarification.) This interest-free adjustment is not applicable to FUTA tax.

Note: If you did not previously file Form 941/944, file Form 941/944 for each affected quarter according to the Instructions for Form 941/944. Do not file Form 941-X/944-X, because the failure to file the return was not due to worker misclassification. Interest-free adjustments are not applicable to late-filed Forms 941/944.

Note that the failure to withhold and pay federal income tax cannot be adjusted for prior years because, for prior years, you can no longer withhold income tax for which the employee will get credit. However, you may be held liable under examination for the underwithheld income tax, including applicable interest and penalties, if the employee did not pay the income tax due in connection with his or her Form 1040/1040A/1040EZ.

Complete item 20 of Form 941-X/944-X to provide an explanation of the FICA tax adjustment. Be sure to fill in the box titled “Enter the Date You Discovered Errors.” This is the date when you had enough information to correct the error. You can use the date of your information letter, if one was issued. If you determine you should make this correction before an information letter is issued, use the date that you notified the processing office that you will be correcting your Form 941/944.

In columns 1 and 2 of lines 6 through 10, show amounts for **all** of your employees, not just for those employees whose amounts you are correcting. Enter any previous adjustments to Form 941/944 in column 2.

You must file Form W-2c for the prior years to report the additional wages paid to the worker. If you originally issued the worker a Form 1099-MISC for the additional payment, you must file Form W-2c for the prior year to correctly report the total wages and a corrected Form 1099-MISC showing “zero” in the box in which the income was originally reported. (Usually this is box 7 or box 3). Check the “Corrected” box on the Form 1099-MISC. More specifically, in boxes 1, 3 and 5 of the Form W-2c, include the amount originally reported on the Form W-2 and the amount originally reported on the Form 1099-MISC. Include the employee’s FICA taxes (that you have now paid) in boxes 4 and 6. If you are paying these taxes without recovering them from the worker, the worker receives credit for these taxes but they are taxable income to the worker **this** year (the year that you actually pay the additional tax). Accordingly, Form W-2 must be issued for **this** tax year reflecting this tax as wages. The Form W-2 should also include as wages any other taxable compensation you paid to the employee this year. Since these taxes are also subject to employment taxes, there is a formula to use to compute the employee’s increased wages and the appropriate tax. See Part 7 of

Publication 15-A. You will need to modify the computation formula shown in Publication 15A if you pay the income tax withholding and employee FICA tax for the current year.

8. Do you need to correct any unemployment tax returns?

Yes, you may be liable for unemployment tax on your employee's wages. You may also need to contact your state tax agency in order to make any necessary state income or unemployment tax corrections.

Refer to Publication 15 for information on your liability for this tax. Use Form 940 (or Form 940-EZ for years prior to 2006) to make corrections for unemployment tax. Check off the amended return box, if applicable. If you make contributions to a state unemployment fund by the due date for the applicable year, you receive a credit toward your FUTA tax liability for these contributions. If you are making payments to the state unemployment fund after the due date, your credit against your FUTA tax obligation is limited to 90 percent of the state unemployment tax you paid late. Refer to the Instructions for Form 940 for further information on this credit. Interest-free adjustments are not applicable to FUTA tax.

9. What do you do with the employment tax forms?

Forms 940, 940EZ, 941, 941-X, 944, 944-X, 1096, 1099-MISC, W-2 and W-3, or W-2c and W-3c must be sent to the addresses where you would usually file these. The worker must be given a copy of the information returns for use in filing or correcting individual tax returns.

The address for Forms 940/940-EZ, 941/944, and 941-X/944-X can be found in the instructions for these forms. The address is determined by the location of your business and also depends on whether or not you are submitting a payment with your return. These forms should not be mailed to the office that issued your determination letter (or considered your determination letter request).

Form 1099-MISC needs to be filed with Form 1096. Form 1096 serves as a summary of the Forms 1099-MISC that you are filing. These documents are submitted to the IRS.

The address for submitting these documents is located on the back of Form 1096 and is determined by the location of your business. ***If you are amending the information returns issued to your worker(s) in response to a Form SS-8 determination letter request before receiving a formal determination, you must send a copy of the corrected Form 1099-MISC to the office processing the SS-8 request so that the case can be closed.***

Form W-2 needs to be filed with Form W-3. Form W-2c needs to be filed with Form W-3c. The Form W-3 and Form W-3c serve as a summary of the Form W-2 or Form W-2c, respectively, that you are filing. These documents are submitted to the SSA. The address for submitting these docu-

ments is located on the front of Form W-3 and on the back of the first page of Form W-3c. ***If you are amending the information returns issued to your worker(s) in response to a Form SS-8 request before receiving a formal determination, you must send a copy of Form W-2 or W-2c to the office processing the SS-8 request so that the case can be closed.***

Yes, you may wish to request assistance by calling one of the toll-free telephone numbers listed below. You may also seek assistance from your local IRS Taxpayer Service or a professional tax advisor in order to make the above-mentioned employment tax adjustments. To find the location of the IRS office nearest you, visit us online at www.irs.gov and click on the link **Contact IRS**.

For questions on Forms 940, 941, 941-X, 944, or 944-X, call **1 (800) 829-4933**.
For questions on information returns, call **1 (866) 455-7438**.
For general tax questions call **1 (800) 829-1040**.

By taking the initiative to correct your account, you may be able to reduce or avoid any otherwise applicable interest or penalty charges.

Checklist

Did you read this Information Guide and determine whether IRC section 3509 rates apply?

If the reduced rates under IRC section 3509 apply, did you calculate the additional employment taxes due using Form 941-X/944-X?

- Did you calculate the tax using lines 12, 13, and 14 and the rates listed in Part 5 of this publication?
- Did you enter only corrections to wages resulting from reclassifying the workers in column 1?
- Did you state in item 20 that the adjustment is due to the reclassification of a worker (or workers) and reduced rates under IRC section 3509 apply?
- Did you write the date that you discovered the error (i.e., the date of your determination letter, or the date that you notified the IRS that you were reclassifying the workers as employees) in the “Enter the Date You Discovered Errors” box?
- If you did not previously file a Form 941/944, did you also complete the Form 941/944 to be submitted with Form 941-X/944-X?
- Did you write “Misclassified Employees” in dark, bold letters across the top margin of the Form 941/944 and Form 941-X/944-X?

10. Can you get help in filing all the corrected employment tax forms?

If IRC section 3509 rates do **not** apply, did you report the wages, FICA taxes for current and prior years, and income tax withholding for the current year only on Form 941-X/944-X?

- Did you calculate the tax using lines 7, 8, and 10 and enter the total corrected amount for ALL employees in column 1?
- In item 20, did you explain that the adjustment is due to the reclassification of a worker (or workers) by the IRS or due to the correction of the treatment of a wage payment unrelated to the classification of a worker's status?
- Did you write the date that you discovered the error (i.e., the date of your determination or information letter or the date that you notified the IRS that you were reclassifying the workers as employees or correcting an error) in the "Enter the Date You Discovered Errors" box?
- If you had not previously filed a return, did you file Form 941/944 along with Form 941-X/944-X?

Did you complete and file a Form W-2 for each reclassified worker for each affected year and furnish the worker(s) copies of the Forms W-2?

- Did you send Copy A of all Forms W-2 with Form W-3, to the Social Security Administration (SSA)?
- Did you complete boxes 1, 3 and 5 of Form W-2 with the appropriate wage amount and enter zero in boxes 2, 4 and 6 if reduced rates under IRC section 3509 apply?
- Did you complete boxes 1, 3 and 5 of Form W-2 with the appropriate wage amount and enter the employee tax you paid in box 2 (for the current year W-2 only) and in boxes 4 and 6 if full rates apply?
- If you paid the employee's FICA tax (and the income tax withholding for the current year) without withholding it from the employee's compensation or otherwise recovering it from the employee, did you include the amount of tax (increased for any additional taxes you paid) in the employee's wages for this year?

If you paid additional wages that you did not originally treat as wages, did you complete and file a Form W-2c for the employee for each affected year and furnish the employee(s) their copies of the Forms W-2c?

- Did you send Copy A of all Forms W-2c with Form W-3c to the Social Security Administration (SSA)?

- Did you correct boxes 1, 3 and 5 of Form W-2 on W-2c to reflect the appropriate wage amount and enter the FICA tax you paid on the worker's behalf in the corrected boxes 4 and 6 of Form W-2c?
- If you paid the employee's FICA tax (and the income tax withholding for the current year) without withholding it from the employee's compensation or otherwise recovering it from the employee, did you include the amount of tax (increased for any additional taxes you paid) in the employee's wages for this year?

Did you correct and file Form 1099-MISC with zero in box 7 (or 3 if applicable), check the "Corrected" box, and furnish copy B of Form 1099-MISC to the worker(s)?

- The corrected copy should be identical to the original regarding employer and employee information.
- Did you use Form 1096 to submit the corrected Form(s) 1099 to the IRS?

Did you complete Form 940/940-EZ to make the necessary unemployment tax corrections?

- Did you check off the box indicating that this is an amended return?
- Did you contact your state tax agency to find out about your state tax liability? A percentage of the unemployment tax paid to the state is allowable as a credit against your FUTA tax obligation.

Did you include your check for payment made payable to the **United States Treasury** with the tax period in question and your employer identification number annotated on the memo line of the check or money order (or did you deposit such amount if you are required to do so)? For other forms of payment,

consult the applicable form instructions or visit our website at www.irs.gov.

Social Security Wage Base for recent years

The following chart shows the tax rates and wage bases for the years 1999 through 2009. If you need information for a year not listed below, please see

Social Security Tax			Medicare Tax	
Year	Rate	Wage Base	Rate	Wages
1999	6.2%	\$ 72,600	1.45%	No limitation
2000	6.2%	\$ 76,200	1.45%	No limitation
2001	6.2%	\$ 80,400	1.45%	No limitation
2002	6.2%	\$ 84,900	1.45%	No limitation
2003	6.2%	\$ 87,000	1.45%	No limitation
2004	6.2%	\$ 87,900	1.45%	No limitation
2005	6.2%	\$ 90,000	1.45%	No limitation
2006	6.2%	\$ 94,200	1.45%	No limitation
2007	6.2%	\$ 97,500	1.45%	No limitation
2008	6.2%	\$102,000	1.45%	No limitation
2009	6.2%	\$106,800	1.45%	No limitation
2010	6.2%	\$106,800	1.45%	No limitation

Publication 15 for the applicable year.

Terms and acronyms:

Employment tax: includes federal withheld income tax, FICA tax and FUTA tax

FICA: Federal Insurance Contributions Act

Full Rates: 100% of the employer's and the employee's share of FICA tax, and, where relevant, the full amount of the federal income tax that should have been withheld

FUTA: Federal Unemployment Tax Act

IRC: Internal Revenue Code

Information returns: Forms 1099-MISC, W-2 or W-2c

Publications:

15 (Circular E) *Employer's Tax Guide*

15-A *Employer's Supplemental Tax Guide*

15-B *Employer's Tax Guide to Fringe Benefits*

Forms and schedules:

940, *Employer's Annual Federal Unemployment (FUTA) Tax Return*

941, *Employer's QUARTERLY Federal Tax Return*

941-SS, *Employer's QUARTERLY Federal Tax Return*

941-X, *Adjusted Employer's QUARTERLY Federal Tax Return or Claim for Refund*

944, *Employer's ANNUAL Federal Tax Return*

944-SS, *Employer's ANNUAL Federal Tax Return*

944-X, *Adjusted Employer's ANNUAL Federal Tax Return or Claim for Refund*

1096, *Annual Summary and Transmittal of U. S. Information Returns*

1099-MISC, *Miscellaneous Income*

SS-4, *Application for Employer Identification Number*

W-2, *Wage and Tax Statement (Also W-2AS, W-2CM, W-2GU, W-2VI)*

W-2c, *Corrected Wage and Tax Statement*

W-3, *Transmittal of Wage and Tax Statements*

W-3c, *Transmittal of Corrected Wage and Tax Statements*

W-3SS, *Transmittal of Wage and Tax Statements*

W-4, *Employee's Withholding Allowance Certificate*

**Terms, acronyms,
publications, forms,
and schedules
referred to in
this guide**

