

Internal Revenue Service

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CC:EBEO:2 – COR-105016-00

Date: May 1, 2000

Dear 

This is in response to your letter dated February 10, 2000, in which you requested information concerning a situation in which a newly hired employee failed to furnish the employee's social security number. In particular you asked whether employee social security tax is to be withheld, whether employer social security tax is to be paid, and whether other federal taxes are to be withheld. In addition, you asked how tax reporting is to be done without a social security number.

Social Security Taxes

Federal Insurance Contributions Act (FICA) taxes consist of the Old-Age, Survivors, and Disability Insurance (social security) and the Hospital Insurance (medicare) taxes. Sections 3101 and 3111 of the Internal Revenue Code impose matching FICA taxes on employees and employers, respectively.

Section 3101 imposes on an employee a tax equal to a percentage of wages received with respect to employment (the employee's share of FICA tax). Section 3111 imposes on the employer an excise tax equal to a percentage of wages paid by the employer with respect to employment (the employer's share of FICA tax). Section 3121 defines the term "wages," for FICA purposes, as all remuneration for employment, with certain limited exceptions not relevant here. There is no exception made for wages paid to an employee who has failed to furnish the employee's social security number.

Section 3102 imposes on an employer the duty to collect the employee's share of FICA tax under § 3101, by withholding the amount of the tax from the wages paid. Whether or not it is collected from the employee, § 31.3102-1(c) of the Employment Tax Regulations provides that the employer is liable for the employee share of the tax (in addition to the employer share) with respect to all wages paid by the employer.

Thus, an employer must withhold the employee's share of FICA tax on wages paid and must pay the employer's share of FICA tax on such wages, regardless of whether the employee furnished a social security number.

COR-105924-99

Federal Income Tax Withholding

Section 3402 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 31.3402(f)(2)-1(a) provides that on or before the date on which an individual commences employment with an employer, the individual shall 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, such employee shall be considered as a single person claiming no withholding exemptions.

Section 31.3402(f)(5)-1 provides that Form W-4, Employee's Withholding Allowance Certificate (or an acceptable substitute form), is the form prescribed for the withholding exemption certificate required to be furnished to the employer under § 3402(f)(2). A copy of Form W-4 is enclosed. A Form W-4 shall be prepared in accordance with the instructions and regulations applicable thereto, and shall 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). By refusing to provide a social security number on Form W-4, an employee will have failed to provide the information required on the Form W-4 and will be submitting an invalid withholding exemption certificate.

Section 31.3402(f)(2)-1(e) provides that if an employer receives an invalid withholding certificate, the employer shall consider it a nullity for purposes of computing withholding; 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 shall withhold federal income tax from the employee as from a single person claiming no withholding exemptions.

In summary, an employee who refuses to provide an employer with the employee's social security number when completing Form W-4 will have submitted an invalid certificate and will be subject to income tax withholding as a single person claiming no withholding exemptions.

COR-105924-99

Information Reporting

Every employee is required to furnish the employee's social security number to his or her employer. The employer must include the social security number on the employee's Form W-2, Wage and Tax Statement, filed with the Social Security Administration (SSA). See §§ 6109(a)(2) and 6051.

Section 301.6109-1(d)(1) of the Regulations on Procedure and Administration provides that individuals who are ineligible for or do not wish to participate in the benefits of the social security program shall nevertheless obtain a social security number if they are required to furnish such a number pursuant to paragraph (b) of that section. Paragraph (b) provides that a U.S. person whose number must be included on a document filed by another person (in this case, Form W-2) must give the taxpayer identifying number so required (in this case, the employee's social security number) to the other person on request.

If the employee does not have a social security number, the employer must inform the employee of the employee's duty to apply for a social security number. See § 31.6011(b)-2(c)(2)(i) of the Employment Tax Regulations. An individual needing a social security number may apply for one by filing a signed Form SS-5, "Application for A Social Security Number Card," at any social security office and submitting the required evidence. Upon request, the social security office may distribute a quantity of Form SS-5 applications to employers. See 20 C.F.R. 422.103 (1999).

If an employer reports an employee's wages on Form W-2 to SSA without the employee's social security number, SSA will write to the employee at the address shown on the Form W-2 and request the missing information. If the Form W-2 does not show the employee's address or shows an incomplete address, SSA will write to the employer and request the missing employee information. SSA notifies the Internal Revenue Service of all wage reports filed without employee social security numbers so that the Service can decide whether to assess penalties, pursuant to § 6721. See 20 C.F.R. 422.120 (1999).

Penalties may be imposed on both the employee and the employer if the employee fails to furnish the social security number and the Form W-2 is missing the number. See §§ 6721-6723. The employer's penalties may be waived if the failure to include the employee's social security number on the Form W-2 is due to the employee's failure to furnish the number. See § 6724 and the regulations thereunder. The employer penalty may be waived only if the employer follows specific procedures, set forth in the regulations, for soliciting the employee's social security number multiple times. Furthermore, the employer will typically receive penalty notices and must affirmatively request the waiver of the penalty in writing. An employer may receive a penalty notice

COR-105924-99

each year a Form W-2 is filed with a missing social security number and, thus, would have to affirmatively request the waiver of the penalty in writing each year.

In addition, if the Form W-2 is missing the social security number, the wages cannot be identified and credited to the proper individual's earnings records by SSA. In such cases, the information is maintained in a suspense file of uncredited earnings. See 20 C.F.R. 422.120 (1999).

We have enclosed Circular E, Employer's Tax Guide. That publication summarizes the employer's obligation with respect to obtaining the employee's social security number, and outlines the procedures for requesting the number.

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.

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

Sincerely,

Patricia McDermott

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Enclosures (2)
Form W-4
Circular E