

Internal Revenue Service

Department of the Treasury

UIL No.: 6109.04-00

Washington, DC 20224



Number: **INFO 2000-0394**
Release Date: 12/29/2000

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CC:PA:APJP:1-COR-116234-00
Date: November 20, 2000

Dear Mr. :

This is in response to your letter of August 3, 2000, addressed to the Office of the Assistant Chief Counsel (Employee Benefits & Exempt Organizations), to the attention of Margaret Owens. Your letter contains follow-up questions to earlier correspondence with that office. Because your new questions relate to issues within the jurisdiction of this office, the matter was transferred to this office.

Your inquiries relate to a situation in which a newly hired employee fails to furnish his social security number to his employer. You asked about the penalty to the employer for filing returns that do not include the employee's social security number.

As outlined in previous correspondence, an employer must file a Form W-2 to report wages paid to employees, and must include the employee's social security number on that form. The employer has a duty to solicit the social security number from the employee, and the employee has a duty to furnish the number to the employer. See § 6109 of the Internal Revenue Code, and the regulations thereunder.

Also as outlined in the previous correspondence, penalties may be imposed pursuant to §§ 6721-6723 of the Code. Section 6721 provides for a penalty with respect to an employer who fails to file a correct Form W-2, including failure to include the social security number of the employee. That penalty is \$50 for each return with respect to which a failure occurs. If the failure is due to intentional disregard of filing requirements, the penalty is \$100 or, if greater, 10 percent of the items to be reported correctly. The employer may also be subject to a penalty under § 6722 for failure to furnish a correct payee statement to the employee. That penalty is also \$50 for each return with respect to which a failure occurs. In the case of intentional disregard, the penalty is \$100 or, if greater, 10 percent of the items to be reported correctly. Section 6723 provides for a penalty with respect to an employee who fails to furnish his social security number to his employer. That penalty is \$50.

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These penalties may be waived if the employer shows that it had reasonable cause for the failures, pursuant to § 6724 of the Code. Section 301.6724-1 of the Regulations on Procedure and Administration provides for a waiver if there are mitigating circumstances or if the failure to file a correct return is due to events beyond the filer's control. In addition, the filer must have acted in a responsible manner, both before and after the failure occurred.

Section 301.6724-1(c) of the regulations defines "events beyond the filer's control" to include actions of the payee, including a failure by the payee to provide information necessary for the filer to comply with information reporting requirements.

Section 301.6724-1(e) of the regulations sets forth specific rules with respect to the requirement to act in a responsible manner when the penalty is imposed because returns were filed that are missing the employee's social security number. The employer must have made an initial solicitation of the social security number when the employee was hired, and another solicitation before the end of the year, if necessary. Those two solicitations will satisfy the requirements for a failure to include the social security number on the W-2 for the first year. The employer must make another solicitation the following year, which would relate to the failure for the return filed for that year and for succeeding years. See § 301.6724-1(e) of the regulations.

There is no pre-printed form to request a waiver of penalties. Section 301.6724-1(m) states that the filer must submit a written statement to the Internal Revenue Service Center or district director where the returns are filed, signed under penalties of perjury, which sets forth the specific provision under which the waiver is requested, and the relevant facts. The employer will have to request a waiver each year in which penalty notices are received.

With respect to your concerns about privacy matters, there may be private civil remedies where an employer makes unlawful use or unauthorized disclosure of an employee's social security number; however, such violations would not be actionable against the Internal Revenue Service under either section 6103 of the Code or The Privacy Act, 5 U.S.C. § 552a.

You raised additional concerns regarding the collateral consequences of information return penalties, including audit consequences. This office expresses no opinion regarding hypothetical situations or the potential application of penalties. See, generally, Rev. Proc. 2000-1, 2000-1 I.R.B. 4; Rev. Proc. 2000-7, 2000-1 I.R.B. 227.

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We hope this is helpful. If you have any further questions, please call Nancy Rose at (202) 622-4910.

Sincerely,

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