



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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OFFICE OF
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INTERNAL REVENUE SERVICE NATIONAL OFFICE CHIEF COUNSEL ADVICE

MEMORANDUM FOR PHOEBE L. NEARING
DISTRICT COUNSEL, MICHIGAN CC:NER:MIC

FROM: David L. Fish
Chief, Branch 4 (Disclosure Litigation) CC:EL:D

SUBJECT: Disclosure of Return Information to Private Insurer

This is in response to your memorandum dated September 21, 1999. This document is not to be cited as precedent.

ISSUES:

1. Does an employee of the Internal Revenue Service (Service), who is being sued by a taxpayer for actions committed within the scope of his/her employment, commit a violation of I.R.C. § 6103 by providing a copy of the civil complaint to his/her private insurer, whom he/she obtained to provide coverage in this type of situation?
2. The insurance policy obtained by the employee provides the following when the employee is sued for actions committed within the scope of his employment: liability coverage, an attorney if the government does not represent the employee, the possibility of an attorney to oversee a defense provided by the government, and the delegation of limited power to the insurer to settle civil claims. If providing the complaint to the private insurer is not a violation of section 6103, would a discussion with the insurer or personal attorney involving return information underlying but not contained within the complaint or other public documents constitute a disclosure violation?

CONCLUSIONS:

Issue 1:

A Service employee, who is being sued in his/her individual capacity, by a taxpayer

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for actions committed within the scope of his/her employment does not commit a violation of section 6103 by providing a copy of the civil complaint that is served on him/her personally to his/her private insurer because the copy of the complaint that is served on the employee is not return information as defined by section 6103(b)(2).

Issue 2:

Any discussion of the underlying tax issues with private insurer or personal attorney in connection with the complaint would be a disclosure of confidential return information. Such a disclosure would be permitted only if an express exception exists in the Internal Revenue Code (Code) authorizing the disclosure.

The only exception to the nondisclosure rule that might be relevant here is section 6103(l)(4)(A), which authorizes the disclosure of return information to Treasury Department employees (or their duly authorized legal representatives) in personnel related matters. However, in most instances, a federal employee who has been sued by a taxpayer in his/her individual capacity is represented by the Department of Justice (DOJ). If DOJ represents the employee, then the private insurer does not meet the requirements for disclosure in section 6103(l)(4)(A). That is because DOJ, not the private insurer, is the employee's legal representative, and thus DOJ, not the private insurer, has the responsibility for preparing the employee's defense and using the information in the proceeding.

FACTS:

In the aftermath of the Restructuring and Reform Act of 1998, several Michigan District Service employees obtained personal liability insurance in case they were sued for actions committed during the scope of their employment.

One such policy, which we assume is typical, provides for liability coverage, an attorney if the government does not represent the employee, the possibility of an attorney to oversee a defense provided by the government, and the delegation of limited power to the insurer to settle civil claims.

Pursuant to the "CONDITIONS" subsection of the policy, the employee has the right to bring suit against the insurer to recover monies due to a judgment or agreement with the plaintiff resulting in liability, provided that the employee complies with the terms of the policy. Pursuant to this same subsection, the employee has the duty upon receipt of a complaint, to cooperate with the insurance company to the fullest extent of the law and to immediately provide the insurer with "written notice containing particulars sufficient to identify the Insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses."

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In regard to the employee's duties as well as the other provisions of this policy, it should be noted that the policy also states that the "[t]erms of this [policy] which are in conflict with Federal law and regulations . . . are hereby amended to conform to such statutes."

As a result of levies or other collection activity, taxpayers frequently file suit against the United States and/or employees individually. When taxpayers name individual employees as defendants, there is the potential that the employees will be civilly liable for damages, which is the purpose of obtaining insurance. See Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971)(the case authority for federal court jurisdiction over allegations against federal officials of violations of a plaintiff's constitutional rights).

LAW AND ANALYSIS:

A. Disclosure of Complaint to Private Insurer

The Federal Rules of Civil Procedure (FRCP) requires service of process upon a defendant. If a federal employee is named individually as a defendant in a lawsuit, he/she is served in his/her individual capacity pursuant to Rule 4(e) of the FRCP. The copy of the complaint served upon the employee in his/her individual capacity is not return information under section 6103 because that copy has not been received or collected by the Secretary. See I.R.C. § 6103(b)(2). Thus, an employee who has been sued by a taxpayer in his/her individual capacity may provide to his/her private insurer a copy of the complaint without contravening the disclosure rules.

B. Disclosure of Return Information Underlying Complaint to Private Insurer

Any discussion of the underlying tax issues with the private insurer or personal attorney in connection with the complaint would be a disclosure of confidential return information. Such a disclosure would be permitted only if an express exception exists in the Code authorizing the disclosure.

The only exception to the nondisclosure rule that might be relevant here is section 6103(l)(4)(A). Under section 6103(l)(4)(A), a Service employee or his/her duly authorized legal representative may obtain access to return information to prepare for, and to use in, a personnel related action or proceeding. In particular, section 6103(l)(4)(A) authorizes the disclosure of returns and return information "upon written request" to a Treasury Department employee or former employee (or his or her duly authorized legal representative):

who is or may be a party to any administrative action or proceeding affecting the personnel rights of such employee or former employee . . .

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solely for use in the action or proceeding, or in preparation for the action or proceeding, but only to the extent that the Secretary determines that such returns or return information is or may be relevant and material to the action or proceeding[.]

A federal employee, pursuant to 28 C.F.R. § 50.15(a), generally will be provided representation by the DOJ in civil, criminal, and Congressional proceedings where the employee has been sued, subpoenaed, or charged in his/her individual capacity; provided that the employee's actions reasonably appear to have been performed within the scope of his/her employment and the Attorney General or his/her delegate

In most instances, a federal employee who has been sued by a taxpayer in his/her individual capacity meets the criteria outlined in the above regulation and is represented by DOJ. If DOJ represents the employee, then the private insurer does not meet the requirements for disclosure in section 6103(l)(4)(A). As explained above, section 6103(l)(4)(A) provides that a Treasury Department employee (or his or her duly authorized legal representative) may obtain access to returns and return information to prepare for, and to use in, any action or proceeding affecting the personnel rights of the employee. DOJ, not the private insurer, is the employee's legal representative. Furthermore, when DOJ represents the employee, the private insurer does not have the responsibility for preparing the employee's defense and using the information in the proceeding.¹

We do not deal here with the rare situation where DOJ declines to represent an employee, or the employee declines DOJ representation, and seeks a private attorney.

If you have any further questions, please call (202) 622-4570.

¹ In such a proceeding involving underlying tax matters, DOJ obtains return information to prepare for the proceeding under sections 6103(h)(2) and (3), and discloses information in the proceeding under section 6103(h)(4).