

Internal Revenue Service

Department of the Treasury

Number: **INFO 2001-0293**

Release Date: 12/31/2001

UIL Number: 6109.00-00

[REDACTED]

Washington, DC 20224

Person to Contact:

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Telephone Number:

[REDACTED]

Refer Reply To:

COR-141455-01

Date:

November 5, 2001

Dear [REDACTED]

This is in response to your letter dated July 29, 2001, in which you ask what procedure an employer might follow in hiring an individual who does not have, or will not use, a social security number (SSN).

As discussed below in more detail, if an employee fails to furnish his or her SSN to the employer, the employer may be subject to penalties because the employee's Form W-2 will necessarily lack required information, namely, the employee's SSN. The employer may be assessed a \$50 penalty for filing an incorrect Form W-2, and another \$50 penalty for furnishing a copy of the incorrect Form W-2 to the employee. The penalties may be waived only if the employer has made proper requests for the SSN ("solicitations") in the manner prescribed by the regulations under section 6724 of the Internal Revenue Code. In seeking such a waiver, the employer must submit a written statement to the Internal Revenue Service, signed under penalties of perjury, setting forth the facts and law on which the employer relies.

Although your question concerns the employer's tax treatment, we wish to point out certain tax consequences to the employee from failing to supply the SSN to the employer. First, the employee will generally be subject to a \$50 penalty under section 6723 of the Code for failure to supply the SSN to the employer. Second, because the SSN was not supplied, the employee will be subject to income tax withholding under section 3402 as a single person claiming no withholding exemptions.

Circular E, Employer's Tax Guide, summarizes the employer's obligation with respect to

obtaining the employee's SSN (see page 7). For your convenience, we are enclosing Circular E.

Penalties

Section 6041 of the Internal Revenue Code requires that employers file Forms W-2 to report compensation paid to employees. Section 6051 requires that employers furnish a statement of compensation to employees. That statement is the employee's copy of the Form W-2.

Because Form W-2 is a "return, statement, or other document" with respect to an employee, section 6109 of the Code applies. Section 6109(a)(2) requires that the employee furnish his or her identifying number (SSN) to the employer. Also, section 6109(a)(3) requires that the employer request the SSN from the employee and include the SSN on the employee's Form W-2.

An employee may be subject to a \$50 penalty under section 6723 for failure to furnish his or her SSN to the employer.

The employer may be subject to a penalty under section 6721 for filing a Form W-2 which does not include the employee's SSN. In general, the employer's penalty is \$50 for each Form W-2 that lacks an SSN. The employer may also be subject to a penalty under section 6722 for furnishing a copy of Form W-2 to the employee which does not include the employee's SSN. In general, that penalty is also \$50 for each statement furnished which lacks an SSN.

The penalties imposed on an employer may be waived under section 6724(a) of the Code if the failure is due to reasonable cause and not to willful neglect. The regulations under section 6724 define what is meant by "reasonable cause." The employer may satisfy the reasonable cause requirement by establishing that (1) the failure arose from events beyond the employer's control and (2) the employer acted in a responsible manner. See section 301.6724-1 of the regulations.

Section 301.6724-1(c)(6)(i) of the regulations provides that the failure of an employee to provide his or her SSN to the employer is an event beyond the employer's control. As a result, the employer's penalty under section 6721 may be waived if the employer establishes that the employer acted "in a responsible manner."

The regulations provide special rules for acting in a responsible manner when an employee fails to provide the SSN to the employer. The employer must make initial and annual solicitations for the SSN as set forth in section 301.6724-1(e) of the regulations. A solicitation means a request (in writing or by telephone) that the employee furnish his or her correct SSN. The employer must make an initial solicitation at the time the employee is hired. If the employee does not furnish the SSN, the

employer must make the first annual solicitation, generally by December 31 of the year the employee is hired. A second annual solicitation must be made, if necessary, in the year following the year in which the employee was hired. The regulations contain more instructions regarding the required solicitations. In particular, the employer must inform the employee that he or she is subject to a \$50 penalty under section 6723 if he or she fails to furnish to the SSN.

The employer may seek a waiver of the penalties by following the procedures set forth in section 301.6724-1(m) of the regulations. The employer must submit a written statement to the Internal Revenue Service, stating the specific provision of the regulations under which the waiver is requested, the facts alleged as the basis for reasonable cause, and containing the signature, under penalties of perjury of the person required to file the Form W-2.

Employee Treated as a Single Individual Claiming No Withholding Exemptions

Section 3402 of the Code provides that, except as otherwise specifically provided, every employer making payment of wages shall withhold federal income tax required to be deducted and withheld.

Section 31.3402(f)(2)-1(a) of the Employment Tax Regulations 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 the 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, is the form prescribed for the withholding exemption certificate required to be furnished to the employer under section 3402(f)(2). A withholding exemption certificate shall be prepared in accordance with the instruction and regulations applicable thereto, and shall set forth fully and clearly the data called for therein. A withholding allowance certificate that does not set forth fully and clearly the data called for therein is an invalid withholding exemption certificate under section 31.3402(f)(2)-1(e). By refusing to provide an SSN 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.

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 on 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 Raymond Bailey at (202) 622-4910.

Sincerely,

Pamela W. Fuller
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Administrative Provisions and Judicial Practice