



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

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CONEX-139131-02
CC:TEGE:EOEG:ET2



Dear Senator [REDACTED]:

I apologize for the delay in responding to your inquiry dated June 27, 2002, on behalf of your constituent [REDACTED]. [REDACTED] requests your assistance in determining whether the nurse registry business model is acceptable to the Federal government.

[REDACTED] owns and operates a home health agency (HHA). His letter states HHAs and licensed nurse registries (NRs) provide nursing and home health aide care in homes, and the main distinguishing feature between the models is NRs are allowed to treat their workers as independent contractors. Thus, [REDACTED] points out, NRs are not required to pay employment taxes on their field staff and the workers of the NR models are not eligible for certain benefits that these and other taxes provide. [REDACTED] has asked you to request the IRS to rule on whether the NRs are properly treating their workers as not employees.

Employment tax obligations (comprised of Federal Insurance Contributions Act (FICA) taxes, Federal Unemployment Tax Act (FUTA) taxes, and income tax withholding) are generally taxed on wages paid to the employee by his or her employer. An individual is an employee for Federal employment tax purposes if he or she has the status of an employee under the usual common law rules applicable in determining the employer-employee relationship.

Guides for determining the status of an employer-employee relationship are found in the Employment Tax Regulations sections 31.3121(d)-1(c); 31.3306(i)-1; and 31.3401(c)-1.

These sections generally provide that the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. It is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to do so.

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Based on the information you provided, I cannot comment on whether the NRs operate in a manner that allows them to treat their workers as independent contractors instead of employees for Federal employment tax purposes. We can make a determination only after we examine the particular facts of each business.

We can determine the status of a worker if the worker or the business to whom the worker provides services submits a Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding. A Form SS-8 determination is requested only to resolve Federal tax matters. The taxpayer requesting a determination must file an income tax return for the years under consideration before we can issue a determination. If Form SS-8 is submitted for a tax year for which the statute of limitations on the tax return has expired, we will not issue a determination letter. The statute of limitations expires three years from the due date of the tax return or the date filed, whichever is later. We do not issue a determination letter for proposed transactions or on hypothetical situations. We may, however, issue an information letter when appropriate. Form SS-8 is available at www.irs.gov.

I appreciate the significance of the issue you have brought to our attention and regret that the very factual nature of the analysis does not permit us to provide a more specific answer. I hope the information I have provided is helpful. If we can be of further assistance, please contact me at (202) 622-3777 or
) at (202) 622-3184.

Sincerely,
LYNNE CAMILLO
Chief, Employment Tax Branch 2
Division Counsel/Associate Chief Counsel
(Tax Exempt and Government Entities)