



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

OFFICE OF
CHIEF COUNSEL

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CONEX-158327-02
CC:TEGE:EOEG:ET2



Dear [REDACTED]:

I apologize for the delay in responding to your inquiry concerning businesses that operate as licensed nurse registries dated September 23, 2002. You believe that the nurse registries misclassify their workers as independent contractors instead of employees. You also provided us a copy of Congressman [REDACTED] letter of May 9, 2002, to the IRS on the same matter. We responded to Congressman [REDACTED] inquiry on July 15, 2002, and provided him a similar response.

Your letter said you are the owner of a home health agency, and you are concerned with the nurse registries treating their workers as independent contractors. You believe that nurse registries' treatment of their workers as independent contractors affects competition between home health agencies and nurse registries, and exposes clients to personal injury lawsuits and wage claims made by nurse registry caregivers.

Employment taxes (Federal Insurance Contributions Act (FICA) taxes, Federal Unemployment Tax Act (FUTA) taxes, and income tax withholding) are imposed on wages an employer pays to an employee. 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.

The Employment Tax Regulations have guides for determining the status of an employer-employee relationship [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. In this connection, 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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I understand that previous communications with the IRS have left you without an answer. Unfortunately, based on the information provided, the IRS cannot comment on whether the nurse registries referred to operate in a manner that allows them to treat their workers as independent contractors instead of employees for federal employment tax purposes. The IRS can make a determination only after we examine the particular facts of each business.

The IRS 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 letter. If a taxpayer submits a Form SS-8 for a tax year for which the statute of limitations for assessment 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. Form SS-8 is available at www.irs.gov.

I appreciate the significance of the issue you have brought to our attention. I am sorry I cannot provide a more specific answer. I hope this information is helpful. If we can be of further assistance, please contact [REDACTED]

Sincerely,

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