

Internal Revenue Service

Department of the Treasury

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Person to Contact:

Telephone Number:

Refer Reply To:

CC:TEGE:EOEG:ET1-PLR-106373-03

Date:

June 05 2003

DO:

Legend:

Firm =
Worker =

X =
Y =

Dear Firm:

This is in reply to your letter of January 16, 2003, requesting a ruling that the Firm's use of a new agreement, described below, with respect to Workers, will not terminate the Firm's relief from the imposition of federal employment taxes under section 530 of the Revenue Act of 1978.¹

In 1999, the Service audited the Firm's Forms 941, Employer's Quarterly Federal Tax Return, for the periods ending in 1997. At the end of the audit, the District Director sent a letter to the Firm stating that the Service made no changes to the tax reported on the Firm's Forms 941.

A significant percentage of the Firm's activities and conduct is regulated by two federal agencies, X and Y. X and Y have promulgated regulations and X has issued requirements for Workers in an X handbook and letters. Recently, X asked for certain

¹ Pub. L. No. 95-600, 92 Stat. 2763 (1978), as amended by Pub. L. No. 96-167, Pub. L. No. 96-541, Pub. L. No. 97-248, Pub. L. No. 99-514, and Pub. L. No. 104-188. The statutory language of section 530 of the Revenue Act of 1978, as amended, although not codified in the Internal Revenue Code of 1986, can usually be found in the publisher's notes following Code § 3401(a).

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revisions to be made to the Firm's Worker agreement to satisfy X's requirement that the Worker functions be performed by persons classified as common law employees.

X's regulations, handbook, and letters:

- (1) do not require Workers to be treated as common law employees for federal employment tax purposes;
- (2) do not require the Firm to withhold income tax or FICA tax from a Worker or pay the employer's share of FICA tax or the FUTA tax on behalf of a Worker; and
- (3) do not require the Firm to file Form W-2, Form 940, or Form 941 with respect to the Workers.

In response to X's request for revisions to the agreement, the Firm has revised the agreement to add provisions--

- (1) that the Firm will exercise control and responsible management supervision over the Worker's conduct and activity in Y-related activity, including regular and ongoing reviews of the Worker's performance.
- (2) that the Firm will pay the Worker's operating expenses incurred with respect to Y-related activity, including furniture, office rent, overhead charges, and office supplies.
- (3) that the Worker will personally perform all customary Worker functions with respect to Y-related activity and the Worker agrees not to contract with a third party for any of these functions.

The Firm will use the new agreement for those individuals performing Worker services for new X/Y-related activity. The Firm will continue to treat all its Workers as independent contractors for federal employment tax purposes. The Firm will continue to prepare and file Form 1099 for each Worker performing services for the Firm.

Section 530 of the Revenue Act of 1978 relieves a taxpayer of employment tax liability in certain circumstances. If the requirements are met, section 530 terminates a taxpayer's liability for federal employment taxes under subtitle C of the Code, including the Federal Insurance Contributions Act (FICA) tax, the Federal Unemployment Tax Act (FUTA) tax, and federal income tax withholding.

Section 530(a)(1) provides that if a taxpayer did not treat an individual as an employee for any period for purposes of employment taxes imposed under subtitle C of the Code, then the individual will be deemed not to be an employee for that period unless the taxpayer had no reasonable basis for not treating the individual as an employee. For a taxpayer to obtain relief under the Act for any period after December 31, 1978,

- (1) the taxpayer must have timely filed all required federal tax returns (including information returns) with respect to an individual for the period on a basis consistent with the taxpayer's treatment of the individual and

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those holding substantially similar positions as not being employees, and

(2) the treatment of individuals holding substantially similar positions must have been consistent with the treatment for periods beginning after December 31, 1977.

Section 3.02 of Rev. Proc. 85-18, 1985-1 C.B. 518, provides that for any period after December 31, 1978, the relief under section 530(a)(1) will not apply, even if the taxpayer has met the "safe haven" rules, if the appropriate Form 1099 has not been timely filed with respect to the workers involved.

Section 3.03 of Rev. Proc. 85-18 provides that in determining whether a taxpayer did not "treat" an individual as an employee for any period within the meaning of section 530(a)(1), the following guidelines should be followed:

(A) The withholding of income tax or FICA tax from an individual's wages is "treatment" of the individual as an employee, whether or not the tax is paid over to the Government.

(B) Except as otherwise provided in Rev. Proc. 85-18, the filing of an employment tax return (including Forms 940 (Employer's Annual Federal Unemployment Tax Return), 941 (Employer's Quarterly Federal Tax Return), and W-2 (Wage and Tax Statement)) for a period with respect to an individual, whether or not tax was withheld from the individual, is "treatment" of the individual as an employee for that period.

Section 3.08 of Rev. Proc. 85-18 provides that section 530 does not change in any way the status, liabilities, and rights of the worker whose status is at issue. Section 530(a)(1) terminates the liability of the employer for employment taxes but has no effect on the workers. It does not convert individuals from the status of employee to the status of self-employed.

We conclude that the use of the new agreement will not be considered treatment of the Workers as employees within the meaning of section 530(a)(1), as long as--

- (1) the Firm continues to timely file all the required federal tax returns (including information returns) consistent with the Firm's treatment of Workers as not being employees;
- (2) the Firm continues to treat individuals holding substantially similar positions as not being employees;
- 3) the Firm does not withhold income tax or FICA tax from a Worker or pay the employer's share of FICA tax or the FUTA tax on behalf of a Worker; and
- (4) federal Forms W-2, 940, and 941 are not filed with respect to the Workers.

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This ruling is directed only to the Firm which requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

Pursuant to the power of attorney on file with this office, we are sending a copy of this letter to your authorized representative.

Sincerely Yours,

Will E. McLeod
Chief, Employment Tax Branch 1
Office of Division Counsel/
Associate Chief Counsel
(Tax Exempt and Government Entities)

Enclosures:
Copy of letter
Copy for section 6110 purposes