



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

CHIEF COUNSEL

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Dear _____ :

Your letter dated May 29, 2009 to IRS Commissioner Douglas H. Shulman was forwarded to me for response. You expressed concern with our position on the information reporting requirements for payments made to volunteer firefighters.

As explained in detail below, the law has historically provided, and continues to provide, that the information reporting requirements for payments to a volunteer firefighter differ depending on the individual firefighter's status as an employee or an independent contractor. Our interpretation of these provisions is well established and has remained constant over many years.

We appreciate the critical role volunteers at our nation's fire departments play in maintaining the public safety. For this reason, we have worked to educate firefighting organizations about their tax obligations through various outreach programs. We remain committed to partnering with them to help them correctly understand and apply the tax and reporting requirements.

The tax laws generally apply to volunteer firefighters in the same way they do to other workers. In most cases, the information reporting requirements for payments made or benefits provided to a worker depend on the worker's status as either a common law employee or an independent contractor (non-employee). The fact that a firefighter may be called a "volunteer" does not determine his or her status as an employee or an independent contractor. Neither does it determine the nature of required federal information reporting.

The regulations that provide the criteria for determining a worker's status as an employee or an independent contractor for the Federal Insurance Contributions Act (FICA) tax and for federal income tax withholding purposes are found in sections

31.3121(d)-1 and 31.3401(c)-1 of the Employment Tax Regulations. These regulations provide rules, frequently referred to as the common law rules, that state, in general, that if the worker provides services under the direction and control of the service recipient, the worker is considered an employee for employment tax and related information reporting purposes. The rules reflect common law principles, developed and affirmed over decades by the courts, which govern IRS policy in this area.

Whether a worker is an employee or an independent contractor for federal tax and related information reporting purposes is determined under the Internal Revenue Code and the Employment Tax Regulations. The Fair Labor Standards Act does not affect whether an individual is an employee for federal tax purposes. Thus, a worker may be an employee for federal tax purposes and not an employee for Fair Labor Standards Act purposes.

The term “wages” for purposes of FICA is all remuneration for employment, with certain exceptions. (section 3121(a) of the Code). The law provides a similar definition of wages for purposes of federal income tax withholding. (section 3401(a) of the Code). An employer who pays wages to an employee must furnish the employee with a Form W-2 showing the amount of wages paid. (section 6051 of the Code). Wages paid to workers who are independent contractors generally must be reported on a Form 1099-MISC. (section 6041 of the Code).

The law excepts from the definition of wages for FICA tax purposes any benefit or payment that an employee can exclude from gross income under Code section 139B. (section 3121(a)(23) of the Code). The Mortgage Forgiveness Debt Relief Act of 2007 adopted section 139B of the Code to provide members of qualified volunteer emergency response organizations (including firefighters) an exclusion from gross income for certain state or local tax benefits or payments. These benefits or payments may be in the form of reimbursement or otherwise, but the exclusion is limited to \$30 a month. The law provides a similar exception from wages for income tax withholding purposes. (section 3401(a)(23) of the Code).

In short, employers do not need to report on Form W-2 or Form 1099-MISC any payments made or benefits provided to volunteer firefighters that are excluded from income under section 139B. However, employers must report on Form W-2 or Form 1099-MISC amounts that are not excludable under section 139B, or any other Code provision, depending on the status of the volunteer firefighter as an employee or independent contractor.

I appreciate and share your interest in this subject and in the well-being of firefighting organizations. If you have further questions, please call me or _____ at _____

Sincerely,

Lynne Camillo
Branch Chief, Employment Tax Branch 2
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