



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

OFFICE OF THE CHIEF COUNSEL

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The Honorable Mike Thompson
Member, U.S. House of Representatives
Fort Bragg District Office
P.O. Box 2208
Fort Bragg, California 95437

Attention:

Dear Congressman Thompson:

I am responding to your correspondence dated March 5, 2010, on behalf of your constituent, asked about the employment status and federal tax withholding and information reporting requirements for 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.

Generally, requests regarding employment status (employer/employee) from taxpayers must be submitted to the appropriate Internal Revenue Service (IRS) office listed on the current Form SS-8, *Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding*. The SS-8 Determination Unit will apply the rules described below to the facts and other information submitted to make a determination of the workers status as an employee or independent contractor. If the service recipient (the firm) requests the letter ruling, the firm will receive any issued letter ruling. A copy will also be sent to any identified workers. If the worker requests the letter ruling, both the worker and the firm will receive any issued letter ruling. The letter ruling will apply to any individuals engaged by the firm under substantially similar circumstances. The SS-8 Determination Unit will generally reconsider a ruling if the worker or the firm provides new facts, information, or materials that may alter a previous determination.

The Internal Revenue Service appreciates the critical role volunteers at our nation's fire departments play in maintaining public safety. We appreciate that the potentially

differing definitions of “employee” under the federal tax law and under the Fair Labor Standards Act the Department of Labor administers may create confusion for firefighting organizations. For this reason, the IRS, through its Federal, State and Local Government Division, has worked to educate firefighting organizations about their tax obligations through various outreach programs. The IRS remains committed to partnering with firefighting organizations 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, 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 that 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 (the 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 employer can exclude from the gross income of the employee under Code section 139B (section 3121(a)(23) of the Code). The Mortgage Forgiveness Debt Relief Act of 2007 enacted 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 can not exceed \$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 have 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.

As mentioned earlier, the Federal, State, and Local Government Division (FSLG) has worked diligently to assist firefighter organizations around the country in their efforts to understand and comply with the requirements of the tax law. They have conducted numerous meetings and outreach events with volunteer firefighter organizations. The FSLG Division has written articles on the tax treatment of compensation paid to firefighters, and has made the information available on the IRS website. In 2007, the FSLG Division wrote an article for the International Association of Fire Chiefs (IAFC) to use in its newsletter. The IRS is committed to continuing to work with firefighter organizations to help them understand and apply the federal tax laws.

I am enclosing IRS Publication 1779, *Independent Contractor or Employee*, the article that appeared in the IAFC newsletter, and the firefighter fact sheet that appears on our website. I hope these items are of assistance in your response to Chief Wilson.

I appreciate and share your interest in this subject and in the well-being of firefighting organizations. The IRS is committed to continue to help firefighting organizations understand and apply the longstanding federal tax policy on the proper classification of workers.

If you have further questions, please call me at _____, or _____ at _____.

Sincerely,

Nancy J. Marks
Division Counsel/Associate Chief Counsel
(Tax Exempt & Government Entities)

Enclosures (3)