



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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OFFICE OF THE CHIEF COUNSEL

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The Honorable Richard G. Lugar
United States Senate
Washington, DC 20510

Attention:

Dear Senator Lugar:

In a letter dated May 5, 2010, our office responded to your inquiry on behalf of your constituent, . This letter responds to a follow-up inquiry dated May 25, 2010, on behalf of .

He believes that we have imposed a new tax burden on veterans and widows who receive home health care services. I assure you the proposed regulations that we issued earlier this year do not change the definition of employer or the thresholds for employment taxes applicable to household employment, and they do not add new employment tax obligations for employers. They merely permit an agent that acts on behalf of employers who are home care service recipients to perform the employer's federal unemployment tax (FUTA tax) obligations, in addition to performing the employer's obligations with respect to FICA tax (i.e., social security and Medicare tax) and any applicable income tax withholding. If the worker is not an employee of the individual, these rules do not apply. Without more specific information, I cannot determine the reasons for confusion over the new regulations. I can, however, provide the following information on employment tax law, which I hope is helpful.

Generally if an individual hires someone to do household work, the worker may be a household employee and the law may require that individual to withhold and pay federal employment taxes. See Publication 926, *Household Employer's Tax Guide*, available on www.irs.gov. Employment taxes include FICA tax, FUTA tax, and federal income tax withholding. Household work is work done in or around a home, such as by caretakers, health aides, nannies, private nurses, and yard workers. The law treats a worker as an

employee if the individual has the right to direct and control what work is done and how it is done. The employer does not have to actually direct or control the manner in which the worker performs the services, but must have the right to do so. [See Treasury Regulation sections 31.3121(d)-1, 31.3306(i)-1, 31.3401(c)-1.]

If an employment relationship exists, the employer and the household employee are each subject to a 7.65 percent FICA tax (6.2 percent for social security tax and 1.45 percent for Medicare tax) of the employee's wages if the wages paid to the household employee exceed a threshold amount. For 2010, the amount is \$1,700. However, the employer and employee will not owe FICA tax if the household employee is:

- The employer's spouse
- The employer's child under the age 21
- The employer's parent, with certain exceptions
- A person under the age of 18 if not the person's principal occupation

If an employment relationship exists, the household employer is also liable for FUTA taxes of 6.2 percent of the employee's wages up to \$7,000 if the employer paid aggregate wages of \$1,000 or more for all household employees in any calendar quarter in the current or prior year. The amount of FUTA tax is subject to offsetting credits related to state unemployment contributions. However, the employer will not owe FUTA if the household employee is:

- The employer's spouse
- The employer's child under the age of 21
- The employer's parent

The law does not require employers to withhold federal income tax from wages paid to household employees. However, if the employee requests withholding, and the employer agrees, the employer must withhold income tax from wages. The employee must complete Form W-4, *Employee's Withholding Allowance Certificate*.

Employers use Schedule H (Form 1040), *Household Employment Taxes* to report employment taxes for household employees. The employer must also file Form W-2, *Wage and Tax Statement*, and furnish copies to the employee.

Various federal, state, and local government programs seek to help elderly or disabled individuals maintain their independence by funding home health care and other personal services in or around the home. These programs authorize the use of certain intermediaries to serve as agents to disburse payments to service providers on the service recipients' behalf. As employers of household workers, the service recipients

may designate an agent to assist them with employment tax compliance and to report, file, and pay employment taxes on their behalf. (Section 3504 of the Internal Revenue Code). When employers receive payments from a government agency, they often designate the intermediary disbursing the payments as their agent for employment tax purposes.

Under the proposed regulations issued earlier this year, a home care service recipient (as defined in the regulations) may now designate an agent to report, file, and pay *all* employment taxes, including FUTA taxes. Other employers may only designate agents for FICA tax and income tax withholding purposes. Under procedures applicable to agents, the agent for the home care service recipient may file an aggregate Form 940, *Employer's Annual Federal Unemployment (FUTA) Tax Return*, and an aggregate Form 941, *Employer's QUARTERLY Tax Return*, on behalf of multiple home care service recipients. Taxpayers may rely on the proposed regulations for guidance pending issuance of the final regulations. For a full text of the proposed regulation, please see *Section 3504 Agent Employment Tax Liability*, REG-137036-08, 2010-6 I.R.B. 398, available at http://www.irs.gov/irb/2010-06_IRB/ar11.html.

Again, I hope this information is helpful in responding to . If you have questions, please contact me or of my staff at .

Sincerely,

Janine Cook
Branch Chief, Employment Tax Branch 1
(Exempt Organizations/Employment
Tax/Government Entities)
(Tax Exempt & Government Entities)