



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

OFFICE OF THE CHIEF COUNSEL

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Person to Contact:

Telephone Number:

Refer Reply To:

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August 18, 2011

Dear _____ :

This responds to your correspondence dated June 27, 2011 in which you request general information about the Internal Revenue Code (the Code) and the regulations relating to reporting and withholding of income taxes. The letter you sent to us asked the following three questions for which we have provided summary answers:

1. Which tax regulation imposes a penalty against an employer for not obtaining a signed Form W-4 from new employees?

Answer. There is no specific penalty imposed on an employer for not obtaining a signed Form W-4 from new employees.

2. Which tax regulation imposes a penalty against an employer for not withholding from an employee?

Answer. Penalties under section 6651 of the Code may be imposed on an employer for failure to timely pay employee withholding taxes.

3. Which tax regulation penalizes an employer for not obtaining disclosure of an individual's social security number as a condition of employment?

Answer. There is no specific penalty for an employer's failure to obtain disclosure of individual's social security number as a condition of employment.

Section 3402(a) of the Code provides that, except as otherwise specifically provided in section 3402, every employer shall withhold federal income tax from the wages it pays to its employees. The amount of tax to be withheld and paid over for each employee is determined with regard to a withholding exemption certificate (Form W-4) relating to the employee's marital status and the number of withholding exemptions which the employee claims.

Section 3402(f)(2)(A) provides that the employee shall furnish the employer with a signed Form W-4 on or before the date of commencement of employment. The employer is required to request Form W-4 from the employee, but if the employee fails to furnish a signed Form W-4, the employer should withhold the tax as if the employee was single with no withholding exemptions. Section 31.3402(f)(2)-1(a) of the Employment Tax Regulations. An employer is relieved of liability to any other person for the amount of tax withheld and paid to the Internal Revenue Service. Section 31.3403-1 of the Employment Tax Regulations.

Thus, under the provisions of the Code and regulations discussed above, an employer is required to withhold income taxes even with respect to wages paid to employees who fail to provide Forms W-4. Additionally, under section 3403, every employer required to withhold federal income tax under section 3402 is liable for the payment of such tax whether or not it is collected from the employee. Moreover, pursuant to section 3402(d), if an employer fails to withhold income tax on wages paid to an employee, and the tax is subsequently paid by the employee, the employer is not absolved of any penalties or additions to tax relating to the failure to withhold which may be assessed.

In addition to the liability imposed by section 3403, the penalties and additions to tax which may be assessed on the employer for failing to withhold tax from wages paid to an employee include the failure to pay penalty of section 6651.

Section 6721 of the Code imposes a penalty for failure to file correct and complete information returns. For instance, employers filing a Form W-2, Wage and Tax Statement with an incorrect or missing employee Social Security Number (SSN) may be subject to this penalty. Section 6722 imposes a penalty for failure to furnish correct and complete payee statements.

Under section 6724(a) of the Code, the Service may waive the penalties under sections 6721 and 6722 if the employer shows that the failure is due to reasonable cause and not to willful neglect. The penalty may be waived for reasonable cause only if the employer establishes: (1) that there are significant mitigating factors with respect to the failure; or (2) that the failure arose from events beyond the employer's control. Section 301.6724-1(a)(2) of the Regulations on Procedure and Administration. The regulations also require that the employer establish that it acted in a responsible manner before and after the failure occurred.

Sections 301.6724-1(e) and (f) of the regulations provide special payee Taxpayer Identification Number (TIN) soliciting rules for missing and incorrect payee TINs, such as SSNs, to establish that the filer acted in a responsible manner. See 301.6724-1(e)(1)(vi)(B) and 301.6724-1(f)(5)(ii) of the regulations. Accordingly, an employer may request a waiver of the section 6721 penalty or section 6722 penalty for reasonable cause under section 6724 of the Code and the regulations thereunder.

This letter provides general information only. It describes well-established interpretations or principles of tax law without applying them to a specific set of facts. It is advisory only and has no binding effect on the Internal Revenue Service. This letter is intended only to provide you with general guidance for determining how to comply with applicable law.

I hope this information is helpful to you. If you have any further questions, please contact _____ of this office at () _____.

Sincerely,

Paul J. Carlino
Branch Chief, Employment Tax Branch 1 (Exempt
Organizations/Employment Tax/Government
Entities)
(Tax Exempt & Government Entities)