



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

OFFICE OF THE CHIEF COUNSEL

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Dear \_\_\_\_\_ :

This letter responds to your memo, dated May 23, 2013, which you forwarded to Janine Cook, Deputy Division Counsel/Deputy Associate Chief Counsel (EOEG), by email. Your memo requested information regarding employment tax responsibilities under sections 3401(d)(1) and 3504 of the Internal Revenue Code ("Code").

The Code requires employers to report, deposit, and pay federal employment taxes. Federal employment taxes generally refer to Federal Insurance Contributions Act (FICA) tax, Federal Unemployment Tax Act (FUTA) tax, and federal income tax withholding. Whether a person is an employer for employment tax purposes is determined under the common law rules. Guidelines for determining whether an employer-employee relationship exist are found in three substantially similar sections of the Employment Tax Regulations - sections 31.3121(d)-1, 31.3306(i)-1 and 31.3401(c)-1, relating to FICA tax, FUTA tax, and income tax withholding, respectively. Generally, the relationship of employer-employee exists when the person for whom the services are being performed has the right to direct and control the individual who performs the services, not only as to the result to be accomplished by the work, but also as to the details and the means by which the result is accomplished.

Under section 3401(d)(1) of the Code, if a person who is not the common law employer has control of the payment of wages, that person is considered the employer for income tax withholding purposes. The person with control of the payment of wages is sometimes called a statutory employer or "section 3401(d)(1) employer." Neither the FICA nor the FUTA contains a definition of employer similar to the definition contained in section 3401(d)(1). However, Otte v. U.S., 419 U.S. 43 (1974), holds that a person who is an employer under section 3401(d)(1), relating to income tax withholding, is also an employer for purposes of FICA withholding. The Otte decision has been interpreted

to provide that the person having control of the payment of wages is also an employer for purposes of the employer FICA tax and FUTA tax. Thus, a person that is determined to be a section 3401(d)(1) employer is now required to report, deposit, and pay income tax withholding, FICA tax, and FUTA tax.

When determining whether a person has control of the payment of wages, the focus is on the “legal control” of the payment of wages. Section 31.3401(d)-1(f) of the Employment Tax Regulations. The IRS considers the facts and circumstances of a particular situation to determine whether a person has legal control of the payment of wages. See, e.g., Winstead v. U.S., 109 F.3d 989 (4<sup>th</sup> Cir. 1997); Hi-Q Personnel, Inc. v. Commissioner, 132 T.C. 279 (2009). Thus, whether a person who is not the common law employer is liable for employment taxes as a section 3401(d)(1) employer depends entirely on the facts and circumstances. There are no procedures to follow to become a section 3401(d)(1) employer because it is not a status that a person can elect.

Section 3504 of the Code authorizes the Service to designate an agent to perform such acts as are required of employers under the Code. All provisions of law applicable with respect to an employer, including penalties and liability for employment taxes, are applicable to the section 3504 agent. The employer for whom the agent acts remains liable for the employment taxes as well. In contrast to section 3401(d)(1), there are procedures that must be followed by a person who wishes to become authorized as the section 3504 agent on behalf of an employer.

The general procedures for requesting authorization to act as a section 3504 agent are found in Revenue Procedure 70-6, 1970-1 C.B. 420. Generally, a request is made by filing Form 2678, Employer/Payer Appointment of Agent, executed by the employer and the person the employer wishes to appoint as its section 3504 agent. Simplified procedures apply with respect to government agencies wishing to act as section 3504 agent on behalf of participants enrolled in a federal, state, or local government program that provides funding for the provision of certain care services. See Rev. Proc. 80-4, 1980-1 C.B. 581, as modified and amplified by Notice 2003-70, 2003-2 C.B. 916.

This letter has called your attention to certain general principles of the law. It is intended for informational purposes only and does not constitute a ruling. See Rev. Proc. 2013-1, §2.04, 2013-1 IRB 7 (Jan. 2, 2013). If you have any additional questions, please contact \_\_\_\_\_ at \_\_\_\_\_.

Sincerely,

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