

**Office of Chief Counsel
Internal Revenue Service
memorandum**

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(Office of Associate Chief Counsel (Employee Benefits, Exempt Organizations, and
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subject: Information Returns for Mid-Year Change to Treas. Reg. § 31.3504-1 Agent

This memorandum responds to your request for non-taxpayer specific legal advice regarding the information return obligations of a common law employer after entering into an agency relationship pursuant to section 31.3504-1 of the Treasury Regulations. This advice may not be used or cited as precedent.

ISSUE

Which entity, the common law employer (“employer”) or the 31.3504-1 agent (“agent”), is responsible for issuing Forms W-2 when a Treas. Reg. § 31.3504-1 agency relationship begins mid-year?

CONCLUSION

Each entity that paid wages during the calendar year should issue Forms W-2 reflecting the wages it paid.

LAW AND ANALYSIS

Section 3504 authorizes the Secretary to promulgate regulations to designate an agent to “perform such acts as are required of employers” when the “agent, or other person has the control, receipt, custody, or disposal of, or pays the wages of an employee or group of employees.” Section 31.3504-1(a) of the Treasury Regulations provides,

In the event wages as defined in chapter 21 or 24 of the Internal Revenue Code (Code), or compensation as defined in chapter 22 of the Code, of an employee or group of employees, employed by one or more employers, is paid by a fiduciary, agent, or other person (“agent”), or if that agent has the control, receipt, custody, or disposal of (collectively “pays”) wages or compensation, the Internal Revenue Service may, subject to the terms and conditions as it deems proper, authorize that agent to perform the acts required of the employer or employers under those provisions of the Code and the regulations that apply, for purposes of the taxes imposed by the chapter or chapters, with respect to wages or compensation paid by the agent. If the agent is authorized by the Internal Revenue Service to perform such acts, all provisions of law (including penalties) and of the regulations applicable to an employer with respect to such acts shall be applicable to the agent. However, each employer for whom the agent acts shall remain subject to all provisions of law (including penalties) and of the regulations applicable to an employer with respect to such acts. Any application to authorize an agent to perform such acts, signed by the agent and the employer, shall be made on the form prescribed by the Internal Revenue Service and shall be filed with the Internal Revenue Service as prescribed in the instructions to the form and other applicable guidance.

This regulatory language clarifies that any acts required of the employer that are performed by the agent must relate to wages paid by the agent. Revenue Procedure 2013-39 provides additional guidance on proper procedures for designating an agent under § 31.3504-1. It provides that an employer uses Form 2678 to authorize an agent under § 31.3504-1 to perform acts required of an employer. Section 4.05 of Rev. Proc. 2013-39 provides that, “Generally, the agent furnishes and files one Form W-2, Wage and Tax Statement, for each employee. The agent’s EIN is entered in the spaces provided for the employer. The name of the agent, followed by “Agent for (name of employer),” is entered in the space provided for the employer.” Consistent with this instruction, the General Instructions for the Forms W-2 and W-3 provide that an agent who has an approved Form 2678, should enter its name, EIN, and “agent for (employer)” on the Form W-2 it files, and clarify that for information return matching purposes, Forms W-2 with the agent’s information should only be issued with respect to wages for which the agent’s EIN was reported on the corresponding Form(s) 941 (or other relevant information return(s)).

Accordingly, in situations in which both the employer and the 31.3504-1 agent paid wages to employees of the employer during the calendar year, each entity should issue a Form W-2 to each employee, reporting the wages it paid to that employee.

Example

To illustrate, assume an employer pays wages to its employees, pays employment taxes, and files Forms 941, Employer’s Quarterly Federal Tax Returns, for the first three quarters of a calendar year. For the fourth quarter, the employer executes and properly

files a Form 2678, Employer/Payer Appointment of Agent, authorizing a representative to act as an agent under § 3504 of the Internal Revenue Code and § 31.3504-1 of the Treasury Regulations and appointing the agent to file Forms 941 for all employees. The employer's appointed agent ("agent") then files an aggregate Form 941 for the final quarter of the year, along with an attached Schedule R, Allocation Schedule for Aggregate Form 941 Filers, properly reporting the employer's EIN and all other required information.

Under section 3504 and Treas. Reg. § 31.3504-1, the employer in this scenario should issue Forms W-2 with respect to the wages it paid during the first three quarters of the year, with the employer's EIN and other identifying information in the relevant boxes, and the 31.3504-1 agent should issue Forms W-2 with respect to the wages it paid in the final quarter of the year, with the agent's name, EIN, and "agent for [the employer]" included in the relevant boxes.

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call (202) 317-6798 if you have any further questions.