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From: [REDACTED]

Sent: Monday, June 29, 2020 3:11:23 PM

To: [REDACTED]

Cc: [REDACTED]

Bcc:

Subject: FW: Third party summons notice under reprisal scenario

Hi :

Section 7602(c) lays out the notice requirements for all third-party contacts. A third-party summons is treated as a third-party contact. Therefore, in general, before issuing a third-party summons, the IRS must ensure that the required advance notice has been provided and should not issue the third-party summons until the 46th day following the date that advance notice of third-party contact was provided as required by 7602(c). IRM 25.5.4.6(2).

This is complicated by the reprisal scenario. Under 7602(c)(3), if the IRS determines that notifying the taxpayer of contact with the former employee “may involve reprisal against” the former employee (or any person), the third-party contact notice requirements do not apply. A statement by the former employee that harm may occur against any person is sufficient to constitute good cause for the IRS to believe that reprisal may occur. 26 CFR § 301.7602-2(f)(3)(i). Therefore, the IRS may *contact* the former employee without notifying the taxpayer. But if the IRS wants to *summon* the former employee, the notice requirements of 7609(a) would still apply unless a court has authorized service without notice under 7609(g).

Section 7609(g) contains a different and more specific test than 7602(c)(3). In order to prevail under 7609(g), the IRS must establish reasonable cause that notifying the taxpayer of the third-party summons may lead him to attempt to “prevent the communication of information from [the former employee] through intimidation, bribery, or collusion[.]” This language addresses what the taxpayer may do to *prevent* the former employee from providing information, which is different than what the taxpayer may do in retaliation *after* the information has been provided. Based only on the limited facts here – that the former employee “fears reprisal” – I do not think the IRS has established reasonable cause under 7609(g). Unless the IRS can allege sufficient facts and circumstances to persuade a court, Exam cannot issue a summons to the former employee without providing notice to the taxpayer under 7609(a).

I hope that is helpful. Please let me know if you’d like to set up a call to discuss further.