

Proposed Revenue Procedure Regarding Home-Care Service Procedures

Notice 2003-70

Purpose

This notice contains a proposed revenue procedure giving updated guidance to state and local government agencies on how they can serve as agents, under section 3504, for disabled individuals and other welfare recipients who employ home-care service providers to assist them in their homes (“service recipients”).

Service recipients who are the common law employers of these home-care service providers may designate an agent under section 3504 to meet certain Federal employment tax responsibilities on behalf of the employer, such as withholding and reporting. The general procedures for designating an agent and reporting and filing as an agent are set forth in Rev. Proc. 70-6, 1970-1 C.B. 420. A state or local government agency can be authorized to serve as a section 3504 agent for service recipients (a “state agent”) enrolled in a program it administers. Special procedures for designating a state agent and for reporting and filing as a state agent are set forth in Rev. Proc. 80-4, 1980-1 C.B. 581.

The proposed revenue procedure would modify the existing guidance to make clear that the special procedures of Rev. Proc. 80-4 apply not only when a state or local government agency furnishes the home-care service providers but also when the service recipients hire their own home-care service providers directly. The proposed revenue procedure also provides guidance on withholding and reporting procedures when a state or local agency that is designated as a state agent in accordance with Rev. Proc. 80-4 engages a subagent or reporting agent to perform payroll and employment tax functions for the service recipients in the program.

Purpose and Contents of Proposed Revenue Procedure

By its terms, Rev. Proc. 80-4 applies when a state or local health and welfare agency wishes to become a section 3504

agent “for welfare recipients who become the employers of individuals furnished by the agencies to provide in-home domestic service for the welfare recipients.” See Rev. Proc. 80-4, sec. 1. Since Rev. Proc. 80-4 was issued, the home-care service industry has changed. Now, although the state and local agencies still provide some or all of the funds to pay the home-care service providers, service recipients frequently recruit, hire, and train their home-care service providers. The proposed revenue procedure modifies Rev. Proc. 80-4 to establish that its provisions also apply to state and local agencies that do not furnish the individuals to provide in-home domestic services. Therefore, a state may be authorized to serve as a section 3504 agent for a service recipient and may report and file in accordance with the specialized procedures of Rev. Proc. 80-4 even though the state does not furnish the individual or individuals that provide the home-care services to the service recipient.

The proposed revenue procedure also reviews, through a series of questions and answers, the operation of the specialized procedures, and incorporates aspects of the procedures that were added by Notice 95-18, 1995-1 C.B. 300, which provided guidance generally about reporting and withholding of employment taxes for household employees. Specifically, the proposed revenue procedure makes clear that the state is not required to submit a Form 2678 with the application package it submits to the Service requesting authorization to act as agent. Additionally, the proposed revenue procedure allows the state to obtain a special EIN (as originally authorized by Notice 95-18) for purposes of withholding, reporting and paying on behalf of service recipients; file an aggregate Form 940 to report FUTA on behalf of the service recipients; and remit taxes with a timely filed return rather than making deposits according to the schedule that would otherwise be applicable under section 31.6302-1 of the Employment Tax Regulations.

The proposed revenue procedure also makes clear that the service recipient can designate the state as agent without having to obtain an EIN as he or she would otherwise be required to do in order to execute a Form 2678.

The proposed revenue procedure also addresses questions that have arisen in light of another evolving aspect of the home-care service industry. States now often engage third parties to participate in various aspects of their home-care service programs, including processing federal grants and administering payroll for home-care service providers. In the home-care service industry, these third parties are sometimes referred to as fiscal intermediaries. For Federal employment tax purposes, the proposed revenue procedure provides guidance on withholding and reporting rules for the third parties when acting either as a subagent of the state agent or as a reporting agent of the state. The Service recognizes that there are a variety of third parties involved in these arrangements, some for-profit, some nonprofit, and some public, and that the terms of the agreements between the states and the third parties also vary. The Service specifically requests comments on the guidance provided in the proposed revenue procedure with respect to use of third party arrangements and suggestions for any additional guidance that may be appropriate or helpful.

Effective Date

Once issued in final form, the proposed revenue procedure will be effective no earlier than January 1, 2005. Until a final version of the proposed revenue procedure is issued, the Service will not challenge the way a state meets the employment tax obligations with respect to home-care service providers employed in its in-home domestic services program if the employment taxes are being timely withheld, reported and paid and the procedures for reporting and paying the taxes are based on a reasonable, good faith interpretation of existing guidance, including Rev. Procs. 70-6 and 80-4 and Notice 95-18. Whether a state has made a reasonable, good faith interpretation of existing guidance will be based on all of the relevant facts and circumstances. Reliance on the positions set forth in the proposed revenue procedure before the effective date will be considered a reasonable, good faith interpretation of existing guidance.

Request for Comments

Comments are requested on the proposed revenue procedure. Comments may be submitted on or before January 26, 2004, to Internal Revenue Service, PO Box 7604, Washington, DC 20044, Attn: CC:PA:LPD:PR (Notice 2003-70), Room 5203. Submissions may also be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to the Courier's Desk at 1111 Constitution Avenue, NW, Washington, DC 20224, Attn: CC:PA:LPD:PR (Notice 2003-70), Room 5203. Submissions may also be sent electronically via the internet to the following email address: *Notice.comments@irscounsel.treas.gov*. Include the notice number (Notice 2003-70) in the subject line.

Drafting Information

The principal author of this notice is Paul J. Carlino of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the Service and Treasury Department participated in the development of this notice. For further information regarding this notice, contact Mr. Carlino at (202) 622-6040 (not a toll-free call).

Proposed Revenue Procedure

I. PURPOSE

This revenue procedure gives updated guidance to state and local government agencies on how they can be designated as agents, under section 3504 of the Internal Revenue Code (the Code), for disabled individuals and other welfare recipients who employ home-care service providers to assist them in their homes ("service recipients"). Specifically, the revenue procedure makes clear that the special procedures for designating an agent set forth in Rev. Proc. 80-4, 1980-1 C.B. 581, apply not only when the state or local government agency furnishes the home-care service providers but also when the service recipients hire their own home-care service providers directly. The proposed revenue procedure also reviews the procedures for withholding, reporting and payment of employment taxes when a state or

local agency is designated as an agent under section 3504 of the Code for service recipients (a "state agent") in accordance with Rev. Proc. 80-4, and provides guidance on withholding, reporting and payment of employment taxes when a state agent in turn engages a subagent or reporting agent to perform payroll and employment tax functions for service recipients in the program.

II. BACKGROUND

A. *Employment Tax Treatment of Household Employees*

For 2003, a household employer is not required to withhold or pay Federal Insurance Contributions Act (FICA) taxes with respect to cash wages of less than \$1,400 paid to an employee performing services of a household nature in the employer's home (a "household employee"). When the cash wages paid to such a household employee equal \$1,400 or more, all of the cash wages (including the first \$1,400) paid to that employee by the household employer are subject to FICA taxes. The dollar threshold applies to each household employee individually, and the amount is revised annually. A household employee whose wages from a household employer do not meet or exceed the dollar threshold may not elect to pay FICA taxes.

An employer of a household employee is not required to withhold federal income taxes from wages paid to the household employee unless the employee asks the employer to withhold and the employer agrees.

An employer of a household employee will be liable for Federal Unemployment Tax Act (FUTA) taxes if the employer paid aggregate cash wages of \$1,000 or more (for all household employees) in any calendar quarter in 2002 or 2003. If an employer is subject to FUTA taxes on wages paid to household employees, the tax applies only to the first \$7,000 paid to each employee as wages during the year. The amount of wages on which FUTA taxes must be paid is not revised annually. Credits may apply to reduce the Federal tax. See Publication 926, *Household Employer's Tax Guide*, and Publication 15, *Circular E, Employer's Tax Guide*, for more information. Details about requirements for contributions to a state unemployment fund

must be obtained from that state's unemployment tax office.

B. *Agency Under Section 3504*

An employer may designate an agent under section 3504 of the Code to withhold, report and pay Federal employment taxes required under chapters 21 (FICA), 24 (Collection of Income Tax at Source), and 25 (General Provisions of Employment Taxes and Collection of Income Taxes at Source) of Subtitle C of the Code. Under section 3504, all provisions of law (including penalties) applicable in respect of employers are applicable to the agent and remain applicable to the employer. A party seeking to be authorized to serve as an employer's agent by the IRS must follow the procedures set forth in Rev. Proc. 70-6, 1970-1 C.B. 420. The application for authorization must be submitted to the IRS in writing, and, among other things, it must include a completed Form 2678: *Employer Appointment of Agent Under Section 3504 of the Internal Revenue Code*, executed by each service recipient for whom the agent is to act. An agent authorized under Rev. Proc. 70-6 cannot perform the acts required of an employer under chapter 23 (FUTA).

Once the application is approved, the agent must file only one return for each tax return period using the agent's own employer identification number (EIN) regardless of the number of employers for whom the agent acts. Written on each return should be the statement "This return is filed under authorization granted in accordance with Section 3504 of the Internal Revenue Code". The agent must maintain records that will disclose the full wages paid to each home-care service provider on behalf of, and identified by, each service recipient employer for whom it acts.

C. *Special Procedures for State and Local Agencies Serving as Section 3504 Agents for Domestic Service Recipients*

Under Rev. Proc. 80-4, a state or local health and welfare agency is relieved of some of the procedural requirements that apply under Rev. Proc. 70-6 when it requests authorization to act as agent on behalf of participants enrolled in a state program that provides in-home domestic services and is partially funded with federal grants under Titles XIX and XX of the Social Security Act, as amended by 42 U.S.C. §§ 1396 and 1397 (1976). Rev. Proc.

80-4 provides that a state or local government agency wishing to act as a section 3504 agent for service recipients (a "state agent") may omit Form 2678 from its application package and instead, may reference in its application package a separate document the service recipient filed (or will file) with the state appointing the state to act as agent. Rev. Proc. 80-4 also provides that a state can act as agent on behalf of a service recipient for FUTA taxes, if applicable. Rev. Proc. 80-4 applies to states that furnish the home-care service providers to the service recipients.

As discussed above, household employees are subject to specific rules with respect to FICA and income tax withholding. The deposit rules for accumulated FICA taxes are established in section 31.6302-1 of the Employment Tax Regulations. As determined by an employer's lookback period defined in section 31.6302-1(b)(4), an employer may be either a monthly or semi-weekly depositor depending on whether the taxpayer exceeded \$50,000 in employment taxes reported for the lookback period. An employer may also be subject to a One-Day deposit rule when amounts are accumulated in excess of \$100,000. A taxpayer that exceeds a \$200,000 deposit threshold is required to deposit funds electronically as provided by section 31.6302-1(h).

Section 3510 of the Code provides that employers of household employees who are not liable for employment taxes with respect to other employees should report and pay FICA, FUTA and any income tax withholding with respect to their household employees on an annual basis. Immediately after section 3510 was enacted in 1994, the Service published Notice 95-18, 1995-1 C.B. 300, to provide additional guidance to taxpayers who employ household employees. According to Q & A 5 in that notice, state agents authorized to act as agents in accordance with the procedures set forth in Rev. Proc. 80-4 are to report employment taxes for household employees quarterly on Form 941, *Employer's Quarterly Federal Tax Return*. Thus, the service recipients who employ the home-care service providers and who designate state agents do not also need to file Schedule H with their individual Form 1040 to report and pay employment taxes with respect to their home-care service providers.

Q & A 5 of Notice 95-18 also directs state agents authorized as agents in accordance with Rev. Proc. 80-4 to obtain a separate EIN (distinct from the one the state agent uses in reporting employment taxes for its own employees) for use in withholding, reporting and payment of employment taxes on behalf of all the service recipients for whom it acts as agent.

Notice 95-18 provides that state agents authorized under Rev. Proc. 80-4 should report employment taxes on behalf of the service recipients they represent quarterly on Form 941. Instead of following the deposit schedule set forth in the regulations, state agents authorized under Rev. Proc. 80-4 were permitted to remit the employment taxes with a timely filed Form 941 in 1995.

III. DEFINITIONS

Service recipient — An individual participating in an in-home domestic services program administered by a state or local agency and all or part of the services received are paid for with funds supplied by the Federal, state or local government.

Home-care service provider — A worker that provides domestic services to a service recipient under a state or local government agency in-home domestic services program funded in whole or in part with Federal, state or local funds.

State agent — A state or local agency administering an in-home domestic services program and designated as agent for the service recipient in accordance with Rev. Proc. 70-6 as modified by Rev. Proc. 80-4 and this revenue procedure.

Employment taxes — The taxes imposed on employees and employers by the Federal Insurance Contributions Act (FICA), sections 3101 and 3111 of the Code; the tax imposed on employers by the Federal Unemployment Tax Act (FUTA), section 3301 of the Code; and income tax withholding, section 3402 of the Code.

Reporting agent — an accounting service, franchiser, bank, service bureau or other entity authorized to perform one or more acts on behalf of an employer, including sign and file Forms 940 and 941 and make Federal tax deposits for the taxes reported on those forms.

Subagent — an individual or entity designated as an agent by a state agent in accordance with Rev. Proc. 70-6 and this revenue procedure.

IV. QUESTIONS AND ANSWERS

A. LIST OF QUESTIONS

Q-1. *What are the employment tax obligations of a common law employer?*

Q-2. *Can a common law employer authorize another party to perform the employment tax obligations on his or her behalf?*

Q-3. *What is the procedure to request authorization to act as agent?*

Q-4. *What can an agent authorized under section 3504 do for the employer?*

Q-5. *Who is the common law employer of the home-care service provider?*

Q-6. *Is the procedure for authorizing an agent different if a service recipient participating in an in-home domestic services program administered by a state or local government agency wants to authorize the state or local agency to serve as agent?*

Q-7. *What can a state agent authorized under section 3504 do for the service recipient?*

Q-8. *How is an authorization to act as agent terminated?*

Q-9. *What is an employer identification number (EIN)?*

Q-10. *What are the EIN requirements for a service recipient who becomes the employer of a home-care service provider?*

Q-11. *What are the EIN requirements that apply to a state agent?*

Q-12. *How should a state agent report the income tax and FICA taxes withheld and paid on the wages of home-care service providers?*

Q-13. *What are the Federal Unemployment Tax Act (FUTA) reporting requirements of a state agent acting on behalf of a service recipient?*

Q-14. *What are the deposit requirements for a state agent?*

Q-15. *What are the Form W-2, Wage and Tax Statement, rules applicable to a state agent?*

Q-16. *If a home-care service provider performed services for more than one service recipient during the year, but each service recipient has designated the same state agent, must separate W-2's be issued?*

Q-17. *May a state agent furnish a Form W-2 to a home-care service provider who earned less than the FICA threshold?*

Q-18. *Can a state agent engage a third party to perform the acts the state would be required to perform as agent?*

Q-19. *If a state agent uses a reporting agent, is the state agent relieved of liability for the employment tax?*

Q-20. *If the state agent hires a reporting agent, should the reporting agent use the special EIN obtained by the state agent to report and pay employment taxes in accordance with the instructions given in Notice 95-18?*

Q-21. *How should a reporting agent acting on behalf of a state agent report the income and FICA taxes withheld and paid on the wages of home-care service providers?*

Q-22. *How should a reporting agent acting on behalf of a state agent report FUTA tax obligations of service recipients?*

Q-23. *May a reporting agent acting on behalf of a state agent remit employment taxes with a timely filed employment tax return?*

Q-24. *What are the rules for completing Form W-2, Wage and Tax Statement, when a reporting agent prepares returns on behalf of a state agent?*

Q-25. *How can a state agent designate a subagent to perform the acts the state is required to perform as agent?*

Q-26. *Who is liable for employment taxes when a state agent uses a subagent to carry out the duties the state agent is required to fulfill as agent?*

Q-27. *When filing employment tax returns, should the subagent acting on behalf of a state agent use the special EIN the state agent obtained for use in reporting taxes of the service recipients?*

Q-28. *How should a subagent acting on behalf of a state agent report the income tax and FICA taxes withheld and paid on the wages of home-care service providers?*

Q-29. *What are the Federal Unemployment Tax Act (FUTA) reporting requirements of a subagent acting on behalf of a state agent?*

Q-30. *Is a subagent acting on behalf of a state agent eligible to remit the taxes with a timely filed return?*

Q-31. *What are the rules for completing Form W-2, Wage and Tax Statement,*

when a subagent acting on behalf of a state agent completes the return?

B. Q & As RELATED TO AGENTS AND STATE AGENTS

Q-1. *What are the employment tax obligations of a common law employer?*

A-1. A common law employer generally must withhold, report, and pay Federal employment taxes with respect to wage payments made to an employee. An employer of an employee who provides domestic services in the employer's home is not required to withhold income tax with respect to the household employee's wages unless the employee has requested such treatment, and the employer has consented. Thus, service recipients are required to withhold income tax from home-care service providers only if the home-care service provider has requested withholding, and the service recipient has consented to withhold. An employer must withhold and pay FICA taxes and pay FUTA taxes, if applicable, regardless of whether income taxes are withheld.

Q-2. *Can a common law employer authorize another party to perform the employment tax obligations on his or her behalf?*

A-2. Under section 3504 of the Code, an employer may authorize an agent to perform such acts as are required of employers under the Code. In accordance with section 3504, both the designated agent and the employer who uses a designated agent are subject to the provisions of Federal tax law (including penalties) applicable to the employer with respect to employment taxes. Thus, the employer and the agent designated to fulfill the employer's duties to withhold, report, and/or pay employment taxes are both independently liable for the employment taxes.

Q-3. *What is the procedure to request authorization to act as agent?*

A-3. An agent seeking authorization should generally follow the procedure set forth in Rev. Proc. 70-6. But see Q&A 6 for state agents. The agent should forward to the Internal Revenue Service Center Director indicated on the Form 2678: (1) a written request for authority to act as agent for one or more service recipients; and (2) a completed Form 2678: *Employer Appointment of Agent Under Section 3504 of the Internal Revenue Code*, executed by

each service recipient for whom the agent is to act.

Q-4. *What can an agent authorized under section 3504 do for the employer?*

A-4. An agent authorized under section 3504 can withhold, report and pay FICA taxes and income tax withholding with respect to the employer's employees. The agent may also furnish Forms W-2 to the employees.

Q-5. *Who is the common law employer of the home-care service provider?*

A-5. Generally, the service recipient is the employer of the home-care service provider if the service recipient has the right to direct and control the performance of the services. This control refers not only to the result to be accomplished by the work but also the means and details by which that result is accomplished.

Q-6. *Is the procedure for authorizing an agent different if a service recipient participating in an in-home domestic services program administered by a state or local government agency wants to authorize the state or local agency to serve as agent?*

A-6. Yes. The state or local agency needs to file a written application with the Internal Revenue Service Center Director as indicated on the Form 2678. However, state or local agencies filing applications to be designated as agents on behalf of service recipients enrolled in an in-home domestic services program administered by the agency do not need to submit a copy of Form 2678 for each service recipient. In lieu of Form 2678, the state or local agency may solicit authorization to act as agent from each service recipient in the forms the service recipient must complete in order to become enrolled in the agency's program. The state or local agency may then make reference to these forms in its application to the IRS. Details with respect to the language that must be included in the forms should be worked out between the state and the Director with whom the employment tax returns are filed. In cases in which the domestic services are provided under a state-wide uniform program, the state agency that administers the program may file one application to act as agent for all service recipients. In cases in which the programs vary by local jurisdiction, each state or local government agency that wishes to act as agent for employment tax purposes should file an application.

The Director will send a letter to each state or local government agency whose application is approved. The letter of authorization will be effective when mailed.

Q-7. *What can a state agent authorized under section 3504 do for the service recipient?*

A-7. A state agent can withhold, report and pay FICA taxes, income tax withholding (if the service recipient agrees to withhold at the request of the home-care service provider) and FUTA taxes (if applicable). The state agent may also furnish Forms W-2 to the home-care service provider.

Q-8. *How is an authorization to act as agent terminated?*

A-8. If an authorized agent wants to stop performing the agent functions for an employer, a letter to this effect should be sent to the Service Center Director that approved the application. This termination is effective when received by the Director. The Director will notify the agent by letter that the termination letter has been received. Terminations commenced by the Director are effective when mailed by the Director.

Q-9. *What is an employer identification number (EIN)?*

A-9. An EIN is a nine-digit number used by the Internal Revenue Service to identify employers. To obtain an EIN by telephone, fax, or mail, see the Instructions for Form SS-4, *Application for Employer Identification Number*. Generally, an employer should have only one EIN.

Q-10. *What are the EIN requirements for a service recipient who becomes the employer of a home-care service provider?*

A-10. As a general rule, service recipients who are employers must obtain an EIN to be used either in reporting and paying employment taxes or in completing Form 2678 to appoint another party as agent for employment tax purposes. However, service recipients who designate a state agent as agent for employment tax purposes do not report and file their own employment taxes and do not need to execute a Form 2678. Therefore, they do not need to obtain an EIN solely for the purpose of designating an agent and reporting and paying Federal employment taxes. However, the service recipient might need an EIN to satisfy the procedures for making contributions to a state unemployment fund.

Q-11. *What are the EIN requirements that apply to a state agent?*

A-11. As directed by Notice 95-18, Q & A 5, a state agent should obtain a separate EIN (in addition to the one obtained for use in reporting taxes of its own employees) for use in reporting taxes on behalf of all the service recipients for whom it acts as agent.

Q-12. *How should a state agent report the income tax and FICA taxes withheld and paid on the wages of home-care service providers?*

A-12. The state agent must file only one return for each tax return period regardless of the number of service recipients for whom it is acting as agent. Form 941 should be used to report the aggregate FICA taxes and withheld income taxes. The state agent's name and EIN are to be entered as provided by the instructions for the return. Attached to each return shall be the statement, "This return is filed under authorization granted in accordance with Section 3504 of the Internal Revenue Code." The state agent must maintain records that will show the full wages paid to each home-care service provider on behalf of, and identified by, each service recipient for whom it acts.

Q-13. *What are the Federal Unemployment Tax Act (FUTA) reporting requirements of a state agent acting on behalf of a service recipient?*

A-13. Under sections 3306(a)(3) and 3306(c)(2) of the Code, a service recipient is subject to FUTA tax only if the service recipient paid cash wages of \$1,000 or more (for all household employees) in any calendar quarter of the calendar year or the preceding calendar year. The tax applies to the first \$7,000 paid as wages to each employee during the year. The amount of wages on which FUTA taxes must be paid is not revised annually. Credits against FUTA tax generally are available for amounts paid into state unemployment funds. In the instances where a service recipient is liable for the FUTA tax, the agent should report and pay those taxes in addition to the FICA and withheld income tax liabilities which arise. FUTA taxes should be reported on Form 940, *Employer's Annual Federal Unemployment (FUTA) Tax Return*.

Using its special EIN, a state agent may file one FUTA return on behalf of all service recipients for whom it acts as agent.

Attached to each return shall be the statement, "This return is filed under authorization granted in accordance with Section 3504 of the Internal Revenue Code."

Q-14. *What are the deposit requirements for a state agent?*

A-14. A state agent that withholds, reports and pays employment taxes on behalf of service recipients who employ home-care service providers is permitted to remit taxes with a timely filed return. The state agent should note its status as a state or local government agency authorized to act as a section 3504 agent for service recipients on the return, citing this revenue procedure. The note will indicate to the Service Center that any penalties for failure to deposit timely should not be assessed.

Q-15. *What are the Form W-2, Wage and Tax Statement, rules applicable to a state agent?*

A-15. A state agent must file a Form W-2 on behalf of each service recipient for (a) each home-care service provider who received an amount in cash wages equal to or greater than the dollar threshold for FICA for the year and (b) each home-care service provider who had Federal income taxes withheld. A state agent should enter its own EIN and name itself as the employer on the Form W-2. One Form W-3, *Transmittal of Wage and Tax Statement*, must be filed with all Forms W-2 filed by the agent on behalf of the service recipients. See *Instructions for Forms W-2 and W-3*, for more information.

Q-16. *If a home-care service provider performed services for more than one service recipient during the year, but each service recipient has designated the same state agent, must separate W-2's be issued?*

A-16. Yes. The state agent must furnish a separate Form W-2 for each home-care service provider on behalf of each service recipient for whom that home-care service provider provides services.

Q-17. *May a state agent furnish a Form W-2 to a home-care service provider who earned less than the FICA threshold?*

A-17. Yes. A state agent may, but is not required to, report the wages paid to a home-care service provider on Form W-2 even though no income tax was withheld, and the wages paid are less than the dollar threshold and not subject to FICA taxes. The Form W-2 is properly used to report the wages because it serves as a receipt

for remuneration paid to an employee. No amount should be reported as Social Security or Medicare wages on the Form W-2, but the amount paid should be reported as Wages, tips, or other compensation.

C. Q & As RELATED TO THIRD PARTIES

Q-18. *Can a state agent engage a third party to perform the acts the state would be required to perform as agent?*

A-18. Yes, a state may either hire a reporting agent or designate a subagent to perform the obligations of an employer that accrue to the state as agent.

1. REPORTING AGENTS

Q-19. *If a state agent uses a reporting agent, is the state agent relieved of liability for the employment tax?*

A-19. No. A reporting agent assumes no liability with the Service. The state and the service recipient remain liable for any unfulfilled employment tax obligations (including penalties.)

Q-20. *If the state agent hires a reporting agent, should the reporting agent use the special EIN obtained by the state agent to report and pay employment taxes in accordance with the instructions given in Notice 95-18?*

A-20. Yes, the reporting agent should use the special EIN of the state agent.

Q-21. *How should a reporting agent acting on behalf of a state agent report the income and FICA taxes withheld and paid on the wages of home-care service providers?*

A-21. The reporting agent must file only one return for each tax return period regardless of the number of service recipients for whom the state is acting as agent. Form 941 should be used to report the aggregate FICA taxes and withheld income taxes. The state agent's name and special EIN are to be entered as provided by the instructions for the return. Attached to each return shall be the statement, "This return is filed under authorization granted in accordance with Section 3504 of the Internal Revenue Code." The reporting agent or the state agent must maintain records that will show the full wages paid to each home-care service provider on behalf of, and identified by, each service recipient for whom the state agent acts.

Q-22. *How should a reporting agent acting on behalf of a state agent report FUTA tax obligations of service recipients?*

A-22. A reporting agent should file one FUTA return using the name and special EIN of the state agent. Attached to each return shall be the statement, "This return is filed under authorization granted in accordance with Section 3504 of the Internal Revenue Code."

Q-23. *May a reporting agent acting on behalf of a state agent remit employment taxes with a timely filed employment tax return?*

A-23. Yes. Under standard principles of payroll reporting, the state agent is entitled to use a reporting agent without being subjected to a change in deposit schedules. If the state agent were filing without using a reporting agent, it would be entitled to remit employment taxes at the time of filing, rather than being required to remit taxes on a more accelerated and frequent basis. (See Q&A 14 above). The state agent that uses a reporting agent enjoys the same relief.

Q-24. *What are the rules for completing Form W-2, Wage and Tax Statement, when a reporting agent prepares returns on behalf of a state agent?*

A-24. A reporting agent should prepare Forms W-2 on behalf of home-care service providers as if it were the state agent. See Q&A 15-17 and *Instructions for Forms W-2 and W-3*, for more information.

2. SUBAGENTS

Q-25. *How can a state agent designate a subagent to perform the acts the state is required to perform as agent?*

A-25. The state or local government agency should ask the program participant to appoint the state as agent in accordance with the provisions set forth in Q&A 6 above and also to authorize the agency to appoint a subagent to assist in meeting its responsibilities as agent. The state may elect to include these requests for authorization in the forms the service recipient completes in order to enroll in the in-home domestic services program. The state agent can then designate a subagent using Form 2678. The state agent should execute the Form 2678 and provide it to the third party the state wishes to authorize as subagent. The subagent should submit the

Form 2678 to the Service according to the procedures set forth in Rev. Proc. 70-6, (See Q&A 3) except that the Form should show the state agent's special EIN rather than its standard EIN.

Q-26. *Who is liable for employment taxes when a state agent uses a subagent to carry out the duties the state agent is required to fulfill as agent?*

A-26. All parties remain liable. The service recipient is liable by virtue of his or her status as common law employer. Because both the state and the subagent are designated agents acting pursuant to section 3504 of the Code, these parties are also liable.

Q-27. *When filing employment tax returns, should the subagent acting on behalf of a state agent use the special EIN the state agent obtained for use in reporting taxes of the service recipients?*

A-27. Yes. When the state executes and submits a Form 2678 authorizing a subagent to act as agent on its behalf, the state authorizes the subagent to use the special EIN when reporting and depositing taxes for the service recipients and when providing W-2s to the home-care service providers.

Q-28. *How should a subagent acting on behalf of a state agent report the income tax and FICA taxes withheld and paid on the wages of home-care service providers?*

A-28. The subagent must file only one return for each tax return period using the state agent's name and special EIN regardless of the number of employers for whom the subagent acts. Written on the return should be the statement "This return is filed under authorization granted in accordance with Section 3504 of the Internal Revenue Code". The subagent should maintain records that will show the full wages paid to each home-care service provider on behalf of, and identified by, each service recipient for whom it acts.

Q-29. *What are the Federal Unemployment Tax Act (FUTA) reporting requirements of a subagent acting on behalf of a state agent?*

A-29. A subagent should file one Form 940 using the name and special EIN of the state agent on behalf of all service recipients for whom it acts. Written on the return should be the statement "This return is filed under authorization granted in accordance with Section 3504 of the Internal Revenue Code".

Q-30. *Is a subagent acting on behalf of a state agent eligible to remit the taxes with a timely filed return?*

A-30. No. A subagent must follow the deposit schedule in section 31.6302-1 of the Employment Tax Regulations that is otherwise applicable. See Publication 15, *Circular E, Employer's Tax Guide*, for more information.

Q-31. *What are the rules for completing Form W-2, Wage and Tax Statement, when a subagent acting on behalf of a state agent completes the return?*

A-31. A subagent should prepare Forms W-2 for home-care service providers as if it were the state agent. See Q & As 15-17 and *Instructions for Forms W-2 and W-3*, for more information. However, a subagent should use the name and special EIN of the state agent instead of its own EIN.

V. EFFECTIVE DATE

This Revenue Procedure is effective on the date specified in the final version of the Revenue Procedure as published in the Federal Register.

VI. EFFECT ON OTHER PUBLICATIONS

Rev. Proc. 70-6 is modified and superseded, in part. Rev. Proc. 80-4 is modified and amplified. Notice 95-18 is modified.

VII. PAPERWORK REDUCTION ACT

The collection of information contained in this revenue procedure will be submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act (44 U.S.C. 3507(c)).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

The collection of information in this revenue procedure is in section IV, requiring state agents, reporting agents and subagents to maintain such records as will disclose the full wages paid to each home-care service provider on behalf of, and identified by, each service recipient for whom it acts. This information is required for the agent to figure, withhold, report and pay

FICA and FUTA taxes on wages of home-care service providers. This information should be used to determine whether the FICA and FUTA taxes are applicable. The collection of information is required to assure that the correct taxes are withheld, reported and paid. The likely respondents are individuals, state or local agencies and for-profit and nonprofit entities.

The estimated total annual reporting and/or recordkeeping burden is 556 hours.

The estimated annual burden per respondent/recordkeeper varies from 1 to 10 hours, depending on individual circumstances, with an estimated average of 4 hours. The estimated number of respondents and/or recordkeepers is 139.

The estimated annual frequency of responses (used for reporting requirements only) is four times per calendar year.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

VIII. DRAFTING INFORMATION

The principal author of this revenue procedure is Paul J. Carlino of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the Service and Treasury Department participated in the development of this revenue procedure. For further information regarding this revenue procedure, contact Mr. Carlino at (202) 622-6040 (not a toll-free call).
