



ITG News

Keeping First Nations Informed



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Message From The Director

As the office of Indian Tribal Governments moves into its fifth year of existence, I want to reiterate my commitment to maintaining open communications with our customer base, America's First Nations. While tax issues are often complex and sometimes contentious, we are committed to ensuring that we do everything possible to assist in resolving federal tax concerns. The key is communication.

We continue to seek opportunities to dialogue with tribes and tribal associations. We have found these opportunities to be invaluable, not only for the ability it provides us to share current tax information, but also for the opportunity to listen to questions and concerns on the part of tribes. We welcome all invitations to meet with individual tribes, regional tribal groups, tribal tax associations, and tribal leadership councils.

We have continued to enhance our web site as a communication tool by adding new products, such as Publication 4268 – Employment Tax Guide for Tribes, to existing products such as Frequently Asked Questions and Publication 3908 - gaming tax guide. Because many tribes have told us that they have minimal Internet access, we have also created and distributed publications, along with common tax forms, via a CD-Rom. If you would like a copy of the CD-Rom, please feel free to contact your ITG Specialist

As many of you may be aware, several years ago the Tax Exempt Government Entities Division formed an outside stakeholder group to assist in identifying areas where the Service needed to improve communications with customers and better meet customer needs. The Advisory Committee to the TEGE Commissioner (ACT) has 20 total members who each serve a multi-year term. I am pleased to announce that Robert Gips and Lenor Scheffler were recently appointed to fill vacancies on ACT and will be representing tribal interests. Both have extensive experience with tribal issues, and we look forward to their invaluable contributions.

Finally, I want to ensure that all of you feel free to contact me at any time with any concerns you may have that cannot be resolved by our field staff. I can be contacted at (202) 283-9800 or via e-mail at christie.jacobs@irs.gov.



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Christie Jacobs



An Incentive to Join EFTPS

The Internal Revenue Service has announced an incentive to encourage enrollment in and use of the Electronic Federal Tax Payment System (EFTPS). Approximately one million employers could qualify for a refund of a previously paid federal tax deposit (FTD) penalty.

The EFTPS-FTD penalty refund offer allows business taxpayers an opportunity to receive an automatic one-time penalty refund if they have been assessed a deposit penalty on a Form 941, Employer's Quarterly Federal Tax Return. The offer is available to employers who are not mandated to use EFTPS. To qualify for the offer, the employer must:

- use EFTPS for one year (four consecutive quarters),
- make all Form 941 payments on time and,
- have previously fully paid the penalty.

Using the electronic payment system is much more accurate and much less burdensome for taxpayers. At the same time, the government saves money because there are fewer errors, fewer notices and fewer problems.

Using EFTPS eliminates the vast majority of the errors found on paper submissions. Errors on paper coupons result in late or misapplied payments and an FTD penalty. Paying taxes using EFTPS means almost 20 times greater accuracy. Greater accuracy means fewer penalties. Beginning in 2005, the IRS will automatically determine which employers have achieved the four quarters of EFTPS compliance and reverse the most recent full-paid FTD penalty minus any outstanding taxes. No other action by the employer is necessary.

The IRS will look back up to four quarters prior to the four-quarter compliance period for a full paid FTD penalty to abate. Penalties paid earlier than one year prior to the four-quarter compliance period are not eligible for the automatic offer.

EFTPS is a free service provided by two bureaus of the U.S. Department of the Treasury — IRS and the Financial Management Service (FMS). EFTPS gives employers the ability to make federal tax payments electronically online, by phone, or with batch provider software for professionals.

Employers can enroll in EFTPS by visiting www.eftps.gov or by calling EFTPS Customer Service at **1-800-555-4477** to receive an enrollment form by mail.

EFTPS was introduced in 1996. Since that time, more than 4.6 million employers have enrolled in the system to make their federal tax payments electronically. In fiscal year 2003, EFTPS processed more than 68.5 million transactions totaling more than \$1.5 trillion. Employers can make payments through a secure web site or by phone 24 hours a day, seven days a week from home or office; schedule payments up to 120 days in advance (for businesses) or 365 days in advance (for individuals); and review the last 16 months of tax payment history online or by calling Customer Service. In addition, for easy record keeping and as proof of the transaction, taxpayers receive an immediate acknowledgement number for every EFTPS transaction.

Web Links:

- Electronic Federal Tax Payment System -- <http://www.eftps.gov/>
- Financial Management Service -- <http://www.fms.treas.gov/>

If you are not already enrolled and need assistance, please contact your ITG Specialist.



Section 501(c)(4) Entities and FUTA

Although the Consolidated Appropriations Act of 2000 allowed tribes the opportunity to be exempted from Federal Unemployment Tax, that provision did not automatically extend to entities that a tribe structured under Section 501(c)(4) of the Internal Revenue Code. As a result, advice was requested to clarify FUTA requirements for these entities. The opinion received can best be summarized through the following Questions and Answers:

Question: A Tribal government is a federally recognized tribe with its own EIN. They have a separate entity with a different EIN and an exemption under 501(c)(4). One or more of the tribal council members sit on the board, but the exempt organization makes its own decisions. The tribal government does not control it. Is the entity subject to FUTA?

Answer: Yes. The entity must file Form 940 and pay FUTA. The facts suggest this entity is wholly independent from the tribe. Although the tribal council may have some representation on the entity's board, the entity is structured so to be able to operate wholly independent of the tribe.

Question: If a Tribal government has only one entity for the tribe and has structured it under Section 501(c)(4), and the tribal council controls the exempt organization, is the entity liable for paying FUTA and filing Form 940?

Answer: No. The entity has no liability for FUTA. The facts suggest the entity could be seen as either operated directly by the tribe or wholly owned by the tribe.

Question: A Tribal government is a federally recognized tribe with its own EIN. They have a separate entity with a different EIN that is exempt from income tax under Section 501(c)(4). The board's members consist of the entire tribal council, and they control the entity. Is the 501(c)(4) entity subject to FUTA?

Answer: No. The entity has no liability for FUTA. Although there are two separate EINs, the facts suggest the entity is either operated directly by the tribe or wholly owned by the tribe, since the entire tribal council constitutes the Board of the entity.

In summary, a 501(c)(4) entity that is 100% controlled by the tribe and has no autonomy, yet does not exercise government authority on its own, will probably qualify for relief from FUTA. Other 501(c)(4) entities will normally be subject to FUTA.

Consultation Policy Update

We continue to progress in the development of an IRS/Tribal Consultation Policy, following the outline provided by the Advisory Committee on Tax Exempt and Government Entities (ACT). The Office of Indian Tribal Governments held a series of 12 regional meetings and met with tribal representatives to listen to their input on the development of an IRS/Tribal Consultation Policy. A summary was compiled and posted to the ITG web site, and interested parties were offered an opportunity to comment on the input before April 30, 2004.

A joint IRS/Tribal group has now begun the process of developing an initial Consultation Policy draft, with further opportunities to review and comment as we proceed. We expect to have the initial draft posted to our web site by the fall of 2004.

We would like to thank everyone who has participated in the process to date, and we look forward to the continuing evolution of a Consultation Policy that will best meet the needs of all parties.



Annual Reporting Requirements under TRDA and GITCA

Many tribes have entered into Tip Reporting agreements such as the Tip Rate Determination Agreement (TRDA) and the Gaming Industry Tip Compliance Agreement (GITCA). While these agreements assist both the tribe and the IRS in improving compliance, both also contain an annual reporting mechanism to assist in addressing noncompliance by non-participating employees. Section II(b) of the TRDA, and section 5(f) of the GITCA outline these requirements.

Many tribes have inquired about the process to be used to meet the reporting obligation. In order to assist, we will be contacting each entity with an existing agreement in order to determine the reporting process that will work best for both parties. In the interim, any questions concerning the annual reporting process can be directed to Julie Reese at (303) 231-5250, ext. 236.

Private Letter Ruling Clarifies Reporting Requirements for Pow-Wow Prizes

IRS Counsel has issued Private Letter Ruling (PLR) 200420028 in response to questions regarding the taxability of pow-wow prizes. While the PLR was issued in response to a specific tribe's question, this information is an indication of the position the IRS would take in similar cases.

The question presented was whether the tribe is required to issue a Form 1099 to a pow-wow contest winner who receives \$600 or more as a cash prize. The tribe requesting the PLR raised three arguments – 1) they are not subject to tax and by extension not subject to information reporting, 2) they are not a “person” under the meaning of Section 7701, and 3) a pow-wow is not a trade or business for the tribe thus further exempting them from reporting the prizes.

The PLR indicated that Form 1099 was required and provided the following responses to each of the three positions raised by the tribe:

1. Although federally recognized tribes are not subject to income tax, they are subject to employment taxes and information reporting requirements in the same manner as all other governmental entities. Thus, the “not subject to tax” position was not applicable as there is no nexus to information reporting requirements.
2. In *Chickasaw Nation v. United States*, 208 F.3d 871, 879 (10th Cir. 2000), the court concluded that an Indian tribe is a “person” within the meaning of section 7701(a)(1). It explained that "Congress unambiguously intended for the word 'person,' as used in section 7701(a)(1), to encompass all legal entities, including Indian tribes and tribal organizations, that are the subject of rights and duties." In Revenue Ruling 85-194, 1985-2 C.B. 301, the Service ruled that section 6041 applies to an Indian tribe.
3. The regulations state that "all persons engaged in a trade or business" includes not only those so engaged for gain or profit, but also organizations the activities of which are not for the purpose of gain or profit. As a result, the information reporting requirements of section 6041 are not limited to organizations that are engaged in activities for gain or profit.

Thus, the PLR ruled that Forms 1099 are required to be issued for pow-wow prizes of \$600 or more.

Employee or Independent Contractor



A person who works for you may be classified as a common law employee, a statutory employee or an independent contractor. Generally, an employer/employee relationship exists when the tribe for whom services are performed has the right to control and direct 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 means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer.

In determining whether a worker is an employee or an independent contractor under the common law rules, three main categories must be considered:

- 1) behavioral control,
- 2) financial control, and
- 3) relationship of the parties.

1. Behavioral control—A worker is an employee when the tribe has the right to direct and control the worker.

Facts to consider include:

- Instruction the tribe gives to the worker, such as:
 - ___ How, when, or where to do the work
 - ___ What tools or equipment to use
 - ___ What assistants to hire to help with the work
 - ___ Where to purchase supplies and services
 - ___ What work must be performed by a specified individual
 - ___ What order or sequence to follow
- Training the tribe gives the worker

2. Financial control—Facts that show whether there is a right to direct or control the business part of the work include:


- Significant investment—the extent of the worker's investment
- Expenses—the extent to which the worker has unreimbursed business expenses
- Opportunity for profit or loss—the extent to which the worker can realize a profit or loss
- The extent to which the worker makes services available to others
- How the business pays the worker

3. Relationship of the parties—Facts that illustrate how the tribe and worker perceive their relationship include:

- Employee benefits—whether the tribe provides the worker with employee-type benefits
- Written contracts describing the relationship
- The permanency of the relationship
- The extent to which services performed by the worker are a key aspect of the tribal business

Even after evaluating the above factors, there will be times when it is difficult to make the determination as to whether an individual is a **common law employee** or an independent contractor. Many individuals who have personal service contracts with tribal governments may be employees rather than independent contractors. The mere existence of a contract does not mean the individual is not an employee.

It is important to the worker that the employment status be determined as quickly as possible so that the



earnings can be properly reported. To request a determination from the IRS as to whether or not a worker is an employee, file a Form SS-8, *Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding*. See Chapter 3, page 17 of Publication 4268, *Employment Tax Desk Guide*, for further information.

Even though some workers may seem to be independent contractors under the common law rules just discussed, they may be considered **statutory employees** if they fall into any one of four categories and they meet three additional conditions. The law defines certain workers as employees by statute. These categories include: 1) drivers who distribute certain food products or deliver laundry or dry cleaning, 2) full-time life insurance sales agents, 3) individuals who work at home on materials and goods you supply and must be returned to you, and 4) full-time traveling or city salespersons who turn in orders to you from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments. Refer to Publication 15-A, Section 1, *Who are Employees?* for further information.

The general rule is that an individual is an **independent contractor** if you, the tribe for whom the services are performed, have the right to control or direct only the result of the work and not the means and methods of accomplishing the result. Workers who offer their services to the public are generally not employees. Form 1099-MISC, *Miscellaneous Income*, should be furnished to independent contractors and filed with IRS.

Misclassification of Employees. If you classify an employee as an independent contractor and you have no reasonable basis for doing so, you may be held liable for employment taxes for that worker (IRC §3509). In some instances, you may have reasonable basis for not treating a worker as an employee and may be entitled to relief under Section 530 of the Revenue Act of 1978.

Examples of Employees

1) The tribal business pays Mr. Tom, an individual, \$500 per week to clean the tribal office complex. Mr. Tom only works for the tribe. He does not have the right to hire or fire any assistants, and he is required to personally do the work. The tribe provides the supplies and tools. Based on these facts, Mr. Tom is considered an employee and the tribe should withhold income taxes and employment taxes. Mr. Tom will be issued a Form W-2.

2) Mr. Bills works as a deputy for the tribal police department. When Mr. Bills is off-duty, he has been repairing the roof of the tribal hospital. The tribe has determined when the work is to be done, has provided the supplies needed, and has determined how Mr. Bills will be paid. Based on these facts, Mr. Bills is considered an employee for the tribe for both jobs and should be issued a Form W-2 showing the withheld income taxes and employment taxes.

3) Ms. Fran is a tribal member but **not** a council member. Ms. Fran is on the Beautification Committee. She is required to attend the Ms. Indian Pageant Committee meeting and is paid \$50. Ms. Fran is considered an employee and is subject to withholding of federal income taxes, FICA, and Medicare tax. Ms. Fran will also be issued a Form W-2.

Example of an Independent Contractor

The tribe pays Mr. Paul \$600 per week to clean the bingo hall. Mr. Paul operates his own janitorial service that performs work for numerous entities. He has the right to hire and fire his own employees and provides his own supplies. The tribe does not have the right to control Mr. Paul. Therefore, Mr. Paul is not an employee of the tribe and would be issued a Form 1099-MISC.

If you have a question about the treatment of any of your workers, please contact your ITG Specialist.

During May 2004, a CD-Rom containing Publication 4268 Employment Tax Desk Guide and other common forms was sent to all the Alaskan Tribal Offices.

Receiving a Notice From IRS

Tribal governments or other tribal entities occasionally receive notices from the Internal Revenue Service. These notices arise from various situations such as failure to deposit payroll taxes timely and late filing or non-filing of various returns. The two most important things to do are:

- Determine, through a review of your records, if the notice is correct, AND
- Respond to the notice on or before the date required.

Failure to respond timely can lead to the assessment of unnecessary penalties and interest. Failure to review records to ensure the correctness of the notice can lead to payment of unnecessary penalties. If the notice is determined to be correct and additional tax, penalties and interest are due; payment should be made within the time frame shown in the notice.

Indian Tribal Government Specialists (see list below) and other IRS personnel are ready to assist you in understanding the notices and determining the correctness of the notices. Our Customer Account Services staff can be contacted toll-free at **1-877-829-5500**. This call center is open 8:00 am to 6:30 pm eastern time.

ITG specialists are also available to assist when a timely response to an incorrect notice does not achieve a resolution to the situation. The specialist can review your response and help you file the proper forms to resolve the issue or ensure the case is routed to the proper office for resolution.

ITG Specialists for the Pacific Northwest

Judy Pearson	Anchorage, AK	907-271-6949	Judy.M.Pearson@irs.gov
Carol Czolowski	Ogden, UT	801-620-5048	Carol.A.Czolowski@irs.gov
Connie Perkins	Salem, OR	503-399-5623 ext. 251	Connie.K.Perkins@irs.gov
John Mandeville	Spokane, WA	509-353-0807	John.M.Mandeville@irs.gov
Bill Barker	Spokane, WA	509-353-0825	William.J.Barker@irs.gov
Michael Fehrenbacher	Vancouver, WA	360-696-7643 ext. 227	Michael.Fehrenbacher@irs.gov
Debra Thompson, Mgr	Las Vegas, NV	702-455-1379	Debra.W.Thompson@irs.gov

A New Method to Contact Us

In response to your feedback, we want to make it easier for you to contact us.

You can contact **Judy Pearson**, our Indian Tribal Governments Specialist in **Alaska**, by calling her **toll-free pager** at **1-888-733-6502** and leaving a callback telephone number. Judy will return your call as soon as possible.

Federal Tax Calendar for Third Quarter 2004

July 2004

SUN	MON	TUE	WED	THU	FRI	SAT
				1	2 * Payroll date 6/26-6/29	3
4	5	6	7	8 * Payroll date 6/30-7/2	9 * Payroll date 7/3-7/6	10
11	12 Employees report tips from June	13	14 * Payroll date 7/7-7/9	15 ** Monthly Deposit for June	16 * Payroll date 7/10-7/13	17
18	19	20	21 * Payroll date 7/14-7/16	22	23 * Payroll date 7/17-7/20	24
25	26	27	28 * Payroll date 7/21-7/23	29	30 * Payroll date 7/24-7/27	31

August 2004

SUN	MON	TUE	WED	THU	FRI	SAT
1	2	3	4 * Payroll date 7/28-7/30	5	6 * Payroll date 7/31-8/3	7
8	9	10 Employees report tips from July	11 * Payroll date 8/4-8/6	12	13 * Payroll date 8/7-8/10	14
15	16 ** Monthly Deposit for July	17	18 * Payroll date 8/11-8/13	19	20 * Payroll date 8/14-8/17	21
22	23	24	25 * Payroll date 8/18-8/20	26	27 * Payroll date 8/21-8/24	28
29	30	31				

* = Make a Payroll Deposit if you are under the semi-weekly deposit rule.

** = Make a Monthly Deposit if you qualify under that rule.

NOTE: Deposits made through EFTPS are due one day prior to the dates listed.

September 2004

SUN	MON	TUE	WED	THU	FRI	SAT
			1 * Payroll date 8/25-8/27	2	3 * Payroll date 8/28-8/31	4
5	6	7	8	9 * Payroll date 9/1-9/3	10 * Payroll date 9/4-9/7 Employees report tips from August	11
12	13	14	15 * Payroll date 9/8-9/10 ** Monthly Deposit for August	16	17 * Payroll date 9/11-9/14	18
19	20	21	22 * Payroll date 9/15-9/17	23	24 * Payroll date 9/18-9/21	25
26	27	28	29 * Payroll date 9/22-9/24	30		

*= Make a Payroll Deposit if you are under the semi-weekly deposit rule.

**= Make a Monthly Deposit if you qualify under that rule.

NOTE: Deposits made through EFTPS are due one day prior to the dates listed.

Return Filing Dates

July 1st

File Form 11-C to register and pay the annual Occupational tax if you are in the business of taking wagers

August 2nd

File Form 941 for the quarter ended June 30, 2004. If the tax was deposited in full and on time, file by August 10th.

File Form 730 and pay the tax on applicable wagers accepted during June

August 31st

File Form 730 and pay the tax on applicable wagers accepted during July

September 30th

File Form 730 and pay the tax on applicable wagers accepted during August