



Department of the Treasury
Internal Revenue Service

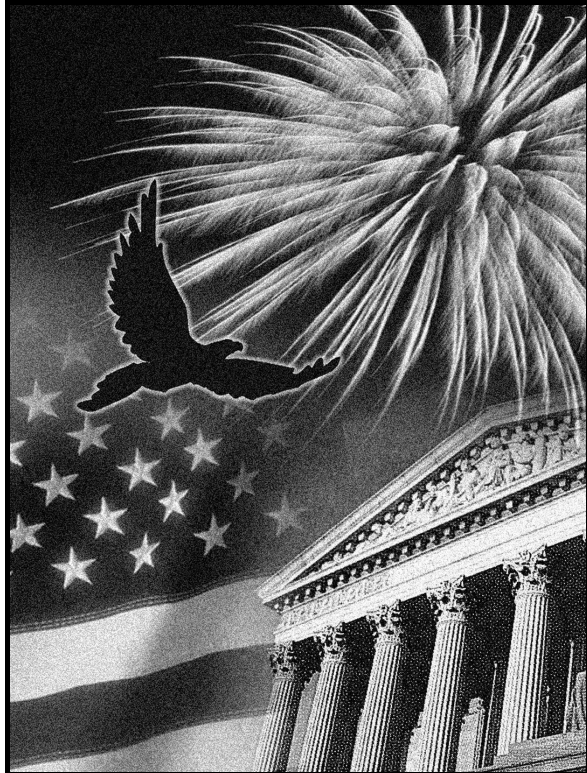
Publication 15-A

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Employer's Supplemental Tax Guide

**(Supplement to
Publication 15
(Circular E),
Employer's Tax Guide)**

For use in **2009**



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What's New

This publication reflects changes included in the recently enacted American Recovery and Reinvestment Act of 2009 (ARRA).

New tables for alternative methods for figuring withholding. New tables for alternative methods for figuring withholding have been developed due to changes made to the tax law by ARRA.

Alternative Methods for Figuring Withholding and the associated tables have been removed from this revision of the publication and can now be found on pages 36–69 in [Publication 15-T, New Wage Withholding and Advance Earned Income Credit Payment Tables \(For Wages Paid Through December 2009\)](#).

The Publication 15-T also includes the new tables for wage withholding and advance earned income credit (EIC) payments as found in Publication 15 (Circular E), Employer's Tax Guide, and Publication 51 (Circular A), Agricultural Employer's Tax Guide.

The new withholding tables in Publication 15-T also apply for figuring income tax withholding on pension payments.

Employers should begin using these tables as soon as possible after February 17, 2009, but no later than April 1, 2009.

New employment tax adjustment process in 2009. If you discover an error on a previously filed employment tax return after December 31, 2008, make the correction by

filing the form that corresponds to the return being corrected. For example, on March 1, 2009, you discover an error on your 2007 fourth quarter Form 941, Employer's QUARTERLY Federal Tax Return. You would file Form 941-X, Adjusted Employer's QUARTERLY Federal Tax Return or Claim for Refund, to correct the error. Do **not** use Form 941c, Supporting Statement to Correct Information. For more information about the new employment tax adjustment process, see Publication 15 (Circular E), Employer's Tax Guide, get the Instructions for Form 941-X, or visit the IRS website at www.irs.gov.

Reminders

Additional employment tax information. Visit the IRS website at www.irs.gov/businesses and click on the *Employment Taxes* link.

Telephone help. You can call the IRS Business and Specialty Tax Line with your employment tax questions at 1-800-829-4933.

Help for people with disabilities. Telephone help is available using TTY/TDD equipment. You can call 1-800-829-4059 with your tax question or to order forms and publications. You may also use this number for problem resolution assistance.

Annual employment tax filing for small employers. Certain small employers must file Form 944, Employer's ANNUAL Federal Tax Return, rather than Form 941, Employer's QUARTERLY Federal Tax Return, to report their employment taxes. For more information, see the Instructions for Form 944.

Furnishing Form W-2 to employees electronically. You may set up a system to furnish Forms W-2 electronically to employees who choose to receive them in that format. Each employee participating must consent electronically (or receive confirmation of any consent made using a paper document), and you must notify the employees of all hardware and software requirements to receive the forms. You may not send a Form W-2 electronically to any employee who does not consent or who has revoked consent previously provided.

To furnish Forms W-2 electronically, you must meet the following **disclosure requirements** and provide a clear and conspicuous statement of each of them to your employees.

- The employee must be informed that he or she may receive a paper Form W-2 if consent is not given to receive it electronically.
- The employee must be informed of the scope and duration of the consent.
- The employee must be informed of any procedure for obtaining a paper copy of any Form W-2 (and whether or not the request for a paper statement is

treated as a withdrawal of his or her consent) after giving consent.

- The employee must be notified about how to withdraw a consent and the effective date and manner by which the employer will confirm the withdrawn consent. The employee must also be notified that the withdrawn consent does not apply to the previously issued Forms W-2.
- The employee must be informed about any conditions under which electronic Forms W-2 will no longer be furnished (for example, termination of employment).
- The employee must be informed of any procedures for updating his or her contact information that enables the employer to provide electronic Forms W-2.
- The employer must notify the employee of any changes to the employer's contact information.

You must furnish electronic Forms W-2 by the same due date as the paper Forms W-2. For more information on furnishing Form W-2 to employees electronically, see Regulations section 31.6051-1(j).

Electronic filing and payment. Now, more than ever before, businesses can enjoy the benefits of filing and paying their federal taxes electronically. Whether you rely on a tax professional or handle your own taxes, the IRS offers you convenient programs to make filing and payment easier.

Spend less time and worry on taxes and more time running your business. Use *e-file* and the Electronic Federal Tax Payment System (EFTPS) to your benefit.

- For *e-file*, visit www.irs.gov for additional information.
- For EFTPS, visit www.eftps.gov or call EFTPS Customer Service at 1-800-555-4477.

Electronic submission of Forms W-4, W-4P, W-4S, W-4V, and W-5. You may set up a system to electronically receive any or all of the following forms (and their Spanish versions, if available) from an employee or payee.

- Form W-4, Employee's Withholding Allowance Certificate.
- Form W-4P, Withholding Certificate for Pension or Annuity Payments.
- Form W-4S, Request for Federal Income Tax Withholding From Sick Pay.
- Form W-4V, Voluntary Withholding Request.
- Form W-5, Earned Income Credit Advance Payment Certificate.

If you establish an electronic system to receive any of these forms, you do not need to process that form in a paper version.

For each form that you establish an electronic submission system for, you must meet each of the following five requirements.

1. The electronic system must ensure that the information received by the payer is the information sent by the payee. The system must document all occasions of user access that result in a submission. In addition, the design and operation of the electronic system, including access procedures, must make it reasonably certain that the person accessing the system and submitting the form is the person identified on the form.
2. The electronic system must provide exactly the same information as the paper form.
3. The electronic submission must be signed with an electronic signature by the payee whose name is on the form. The electronic signature must be the final entry in the submission.
4. Upon request, you must furnish a hard copy of any completed electronic form to the IRS and a statement that, to the best of the payer's knowledge, the electronic form was submitted by the named payee. The hard copy of the electronic form must provide exactly the same information as, but need not be a facsimile of, the paper form. For Forms W-4 and W-5, the signature must be under penalty of perjury, and must contain the same language that appears on the paper version of the form. The electronic system must inform the employee that he or she must make a declaration contained in the perjury statement and that the declaration is made by signing the Form W-4 or W-5.
5. You must also meet all recordkeeping requirements that apply to the paper forms.

For more information, see:

- Form W-4—Regulations sections 31.3402(f)(5)-1 and Treasury Decision 9196. See Treasury Decision 9196, 2005-19 I.R.B. 1000, available at www.irs.gov/irb/2005-19_IRB/ar11.html.
- Form W-5—Announcement 99-3. You can find Announcement 99-3 on page 15 of Internal Revenue Bulletin 1999-3 at www.irs.gov/pub/irs-irbs/irb99-03.pdf.
- Forms W-4P, W-4S, and W-4V—Announcement 99-6. You can find Announcement 99-6 on page 24 of Internal Revenue Bulletin 1999-4 at www.irs.gov/pub/irs-irbs/irb99-04.pdf.

Photographs of missing children. The Internal Revenue Service is a proud partner with the National Center for Missing and Exploited Children. Photographs of missing children selected by the Center may appear in this publication on pages that would otherwise be blank. You can help bring these children home by looking at the photographs and calling 1-800-THE-LOST (1-800-843-5678) if you recognize a child.

Introduction

This publication supplements Publication 15 (Circular E), Employer's Tax Guide. It contains specialized and detailed employment tax information supplementing the basic information provided in Publication 15 (Circular E). This publication also contains tables for withholding on distributions of Indian gaming profits to tribal members. Publication 15-B, Employer's Tax Guide to Fringe Benefits, contains information about the employment tax treatment of various types of noncash compensation.

Ordering publications and forms. See page 26 for information on how to obtain forms and publications.

Useful Items

You may want to see:

Publication

- ❑ **51** (Circular A), Agricultural Employer's Tax Guide
- ❑ **505** Tax Withholding and Estimated Tax
- ❑ **509** Tax Calendars for 2009
- ❑ **225** Farmer's Tax Guide
- ❑ **515** Withholding of Tax on Nonresident Aliens and Foreign Entities
- ❑ **535** Business Expenses
- ❑ **553** Highlights of 2008 Tax Changes
- ❑ **583** Starting a Business and Keeping Records
- ❑ **1635** Understanding Your EIN

Comments and suggestions. We welcome your comments about this publication and your suggestions for future editions.

You can write to us at the following address:

Internal Revenue Service
Tax Products Coordinating Committee
SE:W:CAR:MP:T:B:P
1111 Constitution Ave. NW, IR-6526
Washington, DC 20224

We respond to many letters by telephone. Therefore, it would be helpful if you would include your daytime phone number, including the area code, in your correspondence.

You can email us at *taxforms@irs.gov. (The asterisk must be included in the address.) Please put "Publications Comment" on the subject line. Although we cannot respond individually to each email, we do appreciate your feedback and will consider your comments as we revise our tax products.

1. Who Are Employees?

Before you can know how to treat payments that you make to workers for services, you must first know the business relationship that exists between you and the person performing the services. The person performing the services may be:

- An independent contractor,
- A common-law employee,
- A statutory employee, or
- A statutory nonemployee.

This discussion explains these four categories. A later discussion, [Employee or Independent Contractor?](#) (section 2), points out the differences between an independent contractor and an employee and gives examples from various types of occupations.

If an individual who works for you is not an employee under the common-law rules (see [section 2](#)), you generally do not have to withhold federal income tax from that individual's pay. However, in some cases you may be required to withhold under the backup withholding requirements on these payments. See Publication 15 (Circular E) for information on backup withholding.

Independent Contractors

People such as lawyers, contractors, subcontractors, and auctioneers who follow an independent trade, business, or profession in which they offer their services to the public, are generally not employees. However, whether such people are employees or independent contractors depends on the facts in each case. The general rule is that an individual is an independent contractor if you, the person 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.

Common-Law Employees

Under common-law rules, anyone who performs services for you is your employee if you have the right to control what will be done and how it will be done. This is so even when you give the employee freedom of action. What matters is that you have the right to control the details of how the services are performed. For a discussion of facts that indicate whether an individual providing services is an independent contractor or employee, see [section 2](#).

If you have an employer-employee relationship, it makes no difference how it is labeled. The substance of the relationship, not the label, governs the worker's status. It does not matter whether the individual is employed full time or part time.

For employment tax purposes, no distinction is made between classes of employees. Superintendents, managers, and other supervisory personnel are all employees. An **officer of a corporation** is generally an employee; however, an officer who performs no services or only minor

services, and neither receives nor is entitled to receive any pay, is not considered an employee. A **director of a corporation** is not an employee with respect to services performed as a director.

You generally have to withhold and pay income, social security, and Medicare taxes on wages that you pay to common-law employees. However, the wages of certain employees may be exempt from one or more of these taxes. See [Employees of Exempt Organizations](#) (section 3) and [Religious Exemptions](#) (section 4).

Leased employees. Under certain circumstances, a corporation furnishing workers to various professional people and firms is the employer of those workers for employment tax purposes. For example, a professional service corporation may provide the services of secretaries, nurses, and other similarly trained workers to its subscribers.

The service corporation enters into contracts with the subscribers under which the subscribers specify the services to be provided and a fee is paid to the service corporation for each individual furnished. The service corporation has the right to control and direct the worker's services for the subscriber, including the right to discharge or reassign the worker. The service corporation hires the workers, controls the payment of their wages, provides them with unemployment insurance and other benefits, and is the employer for employment tax purposes. For information on employee leasing as it relates to pension plan qualification requirements, see *Leased employee* in Publication 560, Retirement Plans for Small Business (SEP, SIMPLE, and Qualified Plans).

Additional information. For more information about the treatment of special types of employment, the treatment of special types of payments, and similar subjects, refer to Publication 15 (Circular E) or Publication 51 (Circular A).

Statutory Employees

If workers are independent contractors under the common law rules, such workers may nevertheless be treated as employees by statute, "statutory employees," for certain employment tax purposes. This would happen if they fall within any one of the following four categories and meet the three conditions described under [Social security and Medicare taxes](#), later.

1. A driver who distributes beverages (other than milk) or meat, vegetable, fruit, or bakery products; or who picks up and delivers laundry or dry cleaning, if the driver is your agent or is paid on commission.
2. A full-time life insurance sales agent whose principal business activity is selling life insurance or annuity contracts, or both, primarily for one life insurance company.
3. An individual who works at home on materials or goods that you supply and that must be returned to you or to a person you name, if you also furnish specifications for the work to be done.

4. A full-time traveling or city salesperson who works on your behalf and turns in orders to you from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments. The goods sold must be merchandise for resale or supplies for use in the buyer's business operation. The work performed for you must be the salesperson's principal business activity. See [Salesperson](#) in section 2.

Social security and Medicare taxes. Withhold social security and Medicare taxes from the wages of statutory employees if all three of the following conditions apply.

- The service contract states or implies that substantially all the services are to be performed personally by them.
- They do not have a substantial investment in the equipment and property used to perform the services (other than an investment in transportation facilities).
- The services are performed on a continuing basis for the same payer.

Federal unemployment (FUTA) tax. For FUTA tax, the term "employee" means the same as it does for social security and Medicare taxes, except that it does not include statutory employees in *categories 2 and 3* earlier. Thus, any individual who is an employee under *category 1 or 4* is also an employee for FUTA tax purposes and subject to FUTA tax.

Income tax. Do not withhold federal income tax from the wages of statutory employees.

Reporting payments to statutory employees. Furnish Form W-2 to a statutory employee, and check "Statutory employee" in box 13. Show your payments to the employee as "other compensation" in box 1. Also, show social security wages in box 3, social security tax withheld in box 4, Medicare wages in box 5, and Medicare tax withheld in box 6. The statutory employee can deduct his or her trade or business expenses from the payments shown on Form W-2. He or she reports earnings as a statutory employee on line 1 of Schedule C or C-EZ (Form 1040). A statutory employee's business expenses are deductible on Schedule C or C-EZ (Form 1040) and are not subject to the reduction by 2% of his or her adjusted gross income that applies to common-law employees.

Statutory Nonemployees

There are three categories of statutory nonemployees: direct sellers, licensed real estate agents, and certain companion sitters. Direct sellers and licensed real estate agents are treated as self-employed for all federal tax purposes, including income and employment taxes, if:

- Substantially all payments for their services as direct sellers or real estate agents are directly related to sales or other output, rather than to the number of hours worked and

- Their services are performed under a written contract providing that they will not be treated as employees for federal tax purposes.

Direct sellers. Direct sellers include persons falling within any of the following three groups.

1. Persons engaged in selling (or soliciting the sale of) consumer products in the home or place of business other than in a permanent retail establishment.
2. Persons engaged in selling (or soliciting the sale of) consumer products to any buyer on a buy-sell basis, a deposit-commission basis, or any similar basis prescribed by regulations, for resale in the home or at a place of business other than in a permanent retail establishment.
3. Persons engaged in the trade or business of delivering or distributing newspapers or shopping news (including any services directly related to such delivery or distribution).

Direct selling includes activities of individuals who attempt to increase direct sales activities of their direct sellers and who earn income based on the productivity of their direct sellers. Such activities include providing motivation and encouragement; imparting skills, knowledge, or experience; and recruiting.

Licensed real estate agents. This category includes individuals engaged in appraisal activities for real estate sales if they earn income based on sales or other output.

Companion sitters. Companion sitters are individuals who furnish personal attendance, companionship, or household care services to children or to individuals who are elderly or disabled. A person engaged in the trade or business of putting the sitters in touch with individuals who wish to employ them (that is, a companion sitting placement service) will not be treated as the employer of the sitters if that person does not receive or pay the salary or wages of the sitters and is compensated by the sitters or the persons who employ them on a fee basis. Companion sitters who are not employees of a companion sitting placement service are generally treated as self-employed for all federal tax purposes.

Misclassification of Employees

Consequences of treating an employee as an independent contractor. 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 (the relief provisions, discussed below, will not apply). See section 2 in Publication 15 (Circular E) for more information.

Relief provisions. If you have a reasonable basis for not treating a worker as an employee, you may be relieved from having to pay employment taxes for that worker. To get this relief, you must file all required federal information returns on a basis consistent with your treatment of the

worker. You (or your predecessor) must not have treated any worker holding a substantially similar position as an employee for any periods beginning after 1977.

Technical service specialists. This relief provision does not apply for a technical services specialist you provide to another business under an arrangement between you and the other business. A technical service specialist is an engineer, designer, drafter, computer programmer, systems analyst, or other similarly skilled worker engaged in a similar line of work.

This limit on the application of the rule does not affect the determination of whether such workers are employees under the common-law rules. The common-law rules control whether the specialist is treated as an employee or an independent contractor. However, if you directly contract with a technical service specialist to provide services for your business and not for another business, you may still be entitled to the relief provision.

Test proctors and room supervisors. The consistent treatment requirement does not apply to services performed after December 31, 2006, by an individual as a test proctor or room supervisor assisting in the administration of college entrance or placement examinations if the individual:

- Is performing the services for a section 501(c) or organization exempt from tax under section 501(a) of the code, and
- Is not otherwise treated as an employee of the organization for employment taxes.

2. Employee or Independent Contractor?

An employer must generally withhold federal income taxes, withhold and pay social security and Medicare taxes, and pay unemployment tax on wages paid to an employee. An employer does not generally have to withhold or pay any taxes on payments to independent contractors.

Common-Law Rules

To determine whether an individual is an employee or an independent contractor under the common law, the relationship of the worker and the business must be examined. In any employee-independent contractor determination, all information that provides evidence of the degree of control and the degree of independence must be considered.

Facts that provide evidence of the degree of control and independence fall into three categories: behavioral control, financial control, and the type of relationship of the parties. These facts are discussed below.

Behavioral control. Facts that show whether the business has a right to direct and control how the worker does the task for which the worker is hired include the type and degree of:

Instructions that the business gives to the worker.

An employee is generally subject to the business' instructions about when, where, and how to work. All of the following are examples of types of instructions about how to do work.

- When and where to do the work.
- What tools or equipment to use.
- What workers to hire or to assist with the work.
- Where to purchase supplies and services.
- What work must be performed by a specified individual.
- What order or sequence to follow.

The amount of instruction needed varies among different jobs. Even if no instructions are given, sufficient behavioral control may exist if the employer has the right to control how the work results are achieved. A business may lack the knowledge to instruct some highly specialized professionals; in other cases, the task may require little or no instruction. The key consideration is whether the business has retained the right to control the details of a worker's performance or instead has given up that right.

Training that the business gives to the worker. An employee may be trained to perform services in a particular manner. Independent contractors ordinarily use their own methods.

Financial control. Facts that show whether the business has a right to control the business aspects of the worker's job include:

The extent to which the worker has unreimbursed business expenses. Independent contractors are more likely to have unreimbursed expenses than are employees. Fixed ongoing costs that are incurred regardless of whether work is currently being performed are especially important. However, employees may also incur unreimbursed expenses in connection with the services that they perform for their business.

The extent of the worker's investment. An independent contractor often has a significant investment in the facilities he or she uses in performing services for someone else. However, a significant investment is not necessary for independent contractor status.

The extent to which the worker makes his or her services available to the relevant market. An independent contractor is generally free to seek out business opportunities. Independent contractors often advertise, maintain a visible business location, and are available to work in the relevant market.

How the business pays the worker. An employee is generally guaranteed a regular wage amount for an hourly, weekly, or other period of time. This usually indicates that a worker is an employee, even when the wage or salary is supplemented by a commission. An independent contractor is usually paid by a flat fee for the job. However, it is

common in some professions, such as law, to pay independent contractors hourly.

The extent to which the worker can realize a profit or loss. An independent contractor can make a profit or loss.

Type of relationship. Facts that show the parties' type of relationship include:

- **Written contracts describing the relationship the parties intended to create.**
- **Whether or not the business provides the worker with employee-type benefits, such as insurance, a pension plan, vacation pay, or sick pay.**
- **The permanency of the relationship.** If you engage a worker with the expectation that the relationship will continue indefinitely, rather than for a specific project or period, this is generally considered evidence that your intent was to create an employer-employee relationship.
- **The extent to which services performed by the worker are a key aspect of the regular business of the company.** If a worker provides services that are a key aspect of your regular business activity, it is more likely that you will have the right to direct and control his or her activities. For example, if a law firm hires an attorney, it is likely that it will present the attorney's work as its own and would have the right to control or direct that work. This would indicate an employer-employee relationship.

IRS help. If you want the IRS to determine whether or not a worker is an employee, file Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding, with the IRS.

Industry Examples

The following examples may help you properly classify your workers:

Building and Construction Industry

Example 1. Jerry Jones has an agreement with Wilma White to supervise the remodeling of her house. She did not advance funds to help him carry on the work. She makes direct payments to the suppliers for all necessary materials. She carries liability and workers' compensation insurance covering Jerry and others that he engaged to assist him. She pays them an hourly rate and exercises almost constant supervision over the work. Jerry is not free to transfer his assistants to other jobs. He may not work on other jobs while working for Wilma. He assumes no responsibility to complete the work and will incur no contractual liability if he fails to do so. He and his assistants perform personal services for hourly wages. Jerry Jones and his assistants are employees of Wilma White.

Example 2. Milton Manning, an experienced tile setter, orally agreed with a corporation to perform full-time services at construction sites. He uses his own tools and performs services in the order designated by the corporation and according to its specifications. The corporation supplies all materials, makes frequent inspections of his work, pays him on a piecework basis, and carries workers' compensation insurance on him. He does not have a place of business or hold himself out to perform similar services for others. Either party can end the services at any time. Milton Manning is an employee of the corporation.

Example 3. Wallace Black agreed with the Sawdust Co. to supply the construction labor for a group of houses. The company agreed to pay all construction costs. However, he supplies all the tools and equipment. He performs personal services as a carpenter and mechanic for an hourly wage. He also acts as superintendent and foreman and engages other individuals to assist him. The company has the right to select, approve, or discharge any helper. A company representative makes frequent inspections of the construction site. When a house is finished, Wallace is paid a certain percentage of its costs. He is not responsible for faults, defects of construction, or wasteful operation. At the end of each week, he presents the company with a statement of the amount that he has spent, including the payroll. The company gives him a check for that amount from which he pays the assistants, although he is not personally liable for their wages. Wallace Black and his assistants are employees of the Sawdust Co.

Example 4. Bill Plum contracted with Elm Corporation to complete the roofing on a housing complex. A signed contract established a flat amount for the services rendered by Bill Plum. Bill is a licensed roofer and carries workers' compensation and liability insurance under the business name, Plum Roofing. He hires his own roofers who are treated as employees for federal employment tax purposes. If there is a problem with the roofing work, Plum Roofing is responsible for paying for any repairs. Bill Plum, doing business as Plum Roofing, is an independent contractor.

Example 5. Vera Elm, an electrician, submitted a job estimate to a housing complex for electrical work at \$16 per hour for 400 hours. She is to receive \$1,280 every 2 weeks for the next 10 weeks. This is not considered payment by the hour. Even if she works more or less than 400 hours to complete the work, Vera Elm will receive \$6,400. She also performs additional electrical installations under contracts with other companies, that she obtained through advertisements. Vera is an independent contractor.

Trucking Industry

Example. Rose Trucking contracts to deliver material for Forest, Inc., at \$140 per ton. Rose Trucking is not paid for any articles that are not delivered. At times, Jan Rose, who operates as Rose Trucking, may also lease another truck and engage a driver to complete the contract. All

operating expenses, including insurance coverage, are paid by Jan Rose. All equipment is owned or rented by Jan and she is responsible for all maintenance. None of the drivers are provided by Forest, Inc. Jan Rose, operating as Rose Trucking, is an independent contractor.

Computer Industry

Example. Steve Smith, a computer programmer, is laid off when Megabyte, Inc., downsizes. Megabyte agrees to pay Steve a flat amount to complete a one-time project to create a certain product. It is not clear how long that it will take to complete the project, and Steve is not guaranteed any minimum payment for the hours spent on the program. Megabyte provides Steve with no instructions beyond the specifications for the product itself. Steve and Megabyte have a written contract, which provides that Steve is considered to be an independent contractor, is required to pay federal and state taxes, and receives no benefits from Megabyte. Megabyte will file Form 1099-MISC, Miscellaneous Income, to report the amount paid to Steve. Steve works at home and is not expected or allowed to attend meetings of the software development group. Steve is an independent contractor.

Automobile Industry

Example 1. Donna Lee is a salesperson employed on a full-time basis by Bob Blue, an auto dealer. She works six days a week and is on duty in Bob's showroom on certain assigned days and times. She appraises trade-ins, but her appraisals are subject to the sales manager's approval. Lists of prospective customers belong to the dealer. She is required to develop leads and report results to the sales manager. Because of her experience, she requires only minimal assistance in closing and financing sales and in other phases of her work. She is paid a commission and is eligible for prizes and bonuses offered by Bob. Bob also pays the cost of health insurance and group-term life insurance for Donna. Donna is an employee of Bob Blue.

Example 2. Sam Sparks performs auto repair services in the repair department of an auto sales company. He works regular hours and is paid on a percentage basis. He has no investment in the repair department. The sales company supplies all facilities, repair parts, and supplies; issues instructions on the amounts to be charged, parts to be used, and the time for completion of each job; and checks all estimates and repair orders. Sam is an employee of the sales company.

Example 3. An auto sales agency furnishes space for Helen Bach to perform auto repair services. She provides her own tools, equipment, and supplies. She seeks out business from insurance adjusters and other individuals and does all of the body and paint work that comes to the agency. She hires and discharges her own helpers, determines her own and her helpers' working hours, quotes prices for repair work, makes all necessary adjustments,

assumes all losses from uncollectible accounts, and receives, as compensation for her services, a large percentage of the gross collections from the auto repair shop. Helen is an independent contractor and the helpers are her employees.

Attorney

Example. Donna Yuma is a sole practitioner who rents office space and pays for the following items: telephone, computer, on-line legal research linkup, fax machine, and photocopier. Donna buys office supplies and pays bar dues and membership dues for three other professional organizations. Donna has a part-time receptionist who also does the bookkeeping. She pays the receptionist, withholds and pays federal and state employment taxes, and files a Form W-2 each year. For the past 2 years, Donna has had only three clients, corporations with which there have been long-standing relationships. Donna charges the corporations an hourly rate for her services, sending monthly bills detailing the work performed for the prior month. The bills include charges for long distance calls, on-line research time, fax charges, photocopies, postage, and travel, costs for which the corporations have agreed to reimburse her. Donna is an independent contractor.

Taxicab Driver

Example. Tom Spruce rents a cab from Taft Cab Co. for \$150 per day. He pays the costs of maintaining and operating the cab. Tom Spruce keeps all fares that he receives from customers. Although he receives the benefit of Taft's two-way radio communication equipment, dispatcher, and advertising, these items benefit both Taft and Tom Spruce. Tom Spruce is an independent contractor.

Salesperson

To determine whether salespersons are employees under the usual **common-law** rules, you must evaluate each individual case. If a salesperson who works for you does not meet the tests for a common-law employee, discussed earlier, you do not have to withhold federal income tax from his or her pay (see [Statutory Employees](#) in section 1). However, even if a salesperson is not an employee under the usual common-law rules, his or her pay may still be subject to social security, Medicare, and FUTA taxes.

To determine whether a salesperson is an employee for social security, Medicare, and FUTA tax purposes, the salesperson must meet **all eight** elements of the statutory employee test. A salesperson is a statutory employee for social security, Medicare, and FUTA tax purposes if he or she:

1. Works full time for one person or company except, possibly, for sideline sales activities on behalf of some other person,
2. Sells on behalf of, and turns his or her orders over to, the person or company for which he or she works,

3. Sells to wholesalers, retailers, contractors, or operators of hotels, restaurants, or similar establishments,
4. Sells merchandise for resale, or supplies for use in the customer's business,
5. Agrees to do substantially all of this work personally,
6. Has no substantial investment in the facilities used to do the work, other than in facilities for transportation,
7. Maintains a continuing relationship with the person or company for which he or she works, and
8. Is **not** an employee under common-law rules.

3. Employees of Exempt Organizations

Many nonprofit organizations are exempt from federal income tax. Although they do not have to pay federal income tax themselves, they must still withhold federal income tax from the pay of their employees. However, there are special social security, Medicare, and federal unemployment (FUTA) tax rules that apply to the wages that they pay their employees.

Section 501(c)(3) organizations. Nonprofit organizations that are exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code include any community chest, fund, or foundation organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes, fostering national or international amateur sports competition, or for the prevention of cruelty to children or animals. These organizations are usually corporations and are exempt from federal income tax under section 501(a).

Social security and Medicare taxes. Wages paid to employees of section 501(c)(3) organizations are subject to social security and Medicare taxes unless one of the following situations applies.

- The organization pays an employee less than \$100 in a calendar year.
- The organization is a church or church-controlled organization opposed for religious reasons to the payment of social security and Medicare taxes and has filed Form 8274, Certification by Churches and Qualified Church-Controlled Organizations Electing Exemption From Employer Social Security and Medicare Taxes, to elect exemption from social security and Medicare taxes. The organization must have filed for exemption before the first date on which a quarterly employment tax return (Form 941) or annual employment tax return (Form 944) would otherwise be due.

An employee of a church or church-controlled organization that is exempt from social security and Medicare taxes must pay self-employment tax if the employee is paid \$108.28 or more in a year. However, an employee who is a

member of a qualified religious sect can apply for an exemption from the self-employment tax by filing Form 4029, Application for Exemption From Social Security and Medicare Taxes and Waiver of Benefits. See *Members of recognized religious sects opposed to insurance* in section 4.

Federal unemployment tax. An organization that is exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code is also exempt from FUTA tax. This exemption cannot be waived.

Note. An organization wholly owned by a state or its political subdivision should contact the appropriate state official for information about reporting and getting social security and Medicare coverage for its employees.

Other than section 501(c)(3) organizations. Nonprofit organizations that are not section 501(c)(3) organizations may also be exempt from federal income tax under section 501(a) or section 521. However, these organizations are not exempt from withholding federal income, social security, or Medicare tax from their employees' pay, or from paying FUTA tax. Two special rules for social security, Medicare, and FUTA taxes apply.

1. If an employee is paid less than \$100 during a calendar year, his or her wages are not subject to social security and Medicare taxes.
2. If an employee is paid less than \$50 in a calendar quarter, his or her wages are not subject to FUTA tax for the quarter.

The above rules do not apply to employees who work for pension plans and other similar organizations described in section 401(a).

4. Religious Exemptions

Special rules apply to the treatment of ministers for social security purposes. An exemption from social security is available for ministers and certain other religious workers and members of certain recognized religious sects. For more information on getting an exemption, see Publication 517, Social Security and Other Information for Members of the Clergy and Religious Workers.

Ministers. Ministers are individuals who are duly ordained, commissioned, or licensed by a religious body constituting a church or church denomination. They are given the authority to conduct religious worship, perform sacerdotal functions, and administer ordinances and sacraments according to the prescribed tenets and practices of that religious organization.

A minister who performs services for you subject to your will and control is your employee. The common-law rules discussed in *sections 1 and 2* should be applied to determine whether a minister is your employee or is self-employed. The earnings of a minister are not subject to federal income, social security, and Medicare tax withholding. However, the earnings as reported on the minister's Form 1040 are subject to self-employment tax and

federal income tax. You do not withhold these taxes from wages earned by a minister, but you may agree with the minister to voluntarily withhold tax to cover the minister's liability for self-employment tax and federal income tax.

Form W-2. If your employee is an ordained minister, report all taxable compensation as wages in box 1 on Form W-2. Include in this amount expense allowances or reimbursements paid under a nonaccountable plan, discussed in section 5 of Publication 15 (Circular E). Do not include a parsonage allowance (excludable housing allowance) in this amount. You may report a parsonage or rental allowance (housing allowance), utilities allowance, and the rental value of housing provided in a separate statement or in box 14 on Form W-2. Do not show on Form W-2, Form 941, or Form 944 any amount as social security or Medicare wages, or any withholding for social security or Medicare taxes. If you withheld federal income tax from the minister under a voluntary agreement, this amount should be shown in box 2 on Form W-2 as federal income tax withheld. For more information on ministers, see Publication 517.

Exemptions for ministers and others. Certain ordained ministers, Christian Science practitioners, and members of religious orders who have not taken a vow of poverty, who are subject to self-employment tax, may apply to exempt their earnings from the tax on religious grounds. The application must be based on conscientious opposition to public insurance because of personal religious considerations. The exemption applies only to qualified services performed for the religious organization. See Revenue Procedure 91-20, 1991-1 C.B. 524, for guidelines to determine whether an organization is a religious order or whether an individual is a member of a religious order.

To apply for the exemption, the employee should file Form 4361, Application for Exemption From Self-Employment Tax for Use by Ministers, Members of Religious Orders and Christian Science Practitioners. See Publication 517 for more information about claiming an exemption from self-employment tax using Form 4361.

Members of recognized religious sects opposed to insurance. If you belong to a recognized religious sect or to a division of such sect that is opposed to insurance, you may qualify for an exemption from the self-employment tax. To qualify, you must be conscientiously opposed to accepting the benefits of any public or private insurance that makes payments because of death, disability, old age, or retirement, or makes payments toward the cost of, or provides services for, medical care (including social security and Medicare benefits). If you buy a retirement annuity from an insurance company, you will not be eligible for this exemption. Religious opposition based on the teachings of the sect is the only legal basis for the exemption. In addition, your religious sect (or division) must have existed since December 31, 1950.

Self-employed. If you are self-employed and a member of a recognized religious sect opposed to insurance, you can apply for exemption by filing Form 4029, Application for Exemption From Social Security and Medicare

Taxes and Waiver of Benefits, and waive all social security benefits.

Employees. The social security and Medicare tax exemption available to the self-employed who are members of a recognized religious sect opposed to insurance is also available to their employees who are members of such a sect. This applies to partnerships only if each partner is a member of the sect. This exemption for employees applies only if both the employee and the employer are members of such a sect, and the employer has an exemption. To get the exemption, the employee must file Form 4029.

An employee of a church or church-controlled organization that is exempt from social security and Medicare taxes can also apply for an exemption on Form 4029.

5. Wages and Other Compensation

Publication 15 (Circular E) provides a general discussion of taxable wages. Publication 15-B discusses fringe benefits. The following topics supplement those discussions.

Relocating for Temporary Work Assignments

If an employee is given a temporary work assignment away from his or her regular place of work, certain travel expenses reimbursed or paid directly by the employer in accordance with an accountable plan (see section 5 in Publication 15 (Circular E)) may be excludable from the employee's wages. Generally, a temporary work assignment in a single location is one that is realistically expected to last (and does in fact last) for 1 year or less. If the employee's new work assignment is indefinite, any living expenses reimbursed or paid by the employer (other than qualified moving expenses) must be included in the employee's wages as compensation. For the travel expenses to be excludable:

- The new work location must be outside of the city or general area of the employee's regular work place or post of duty,
- The travel expenses must otherwise qualify as deductible by the employee, and
- The expenses must be for the period during which the employee is at the temporary work location.

If you reimburse or pay any personal expenses of an employee during his or her temporary work assignment, such as expenses for home leave for family members or for vacations, these amounts must be included in the employee's wages. See chapter 1 of Publication 463, Travel, Entertainment, Gift, and Car Expenses, and section 5 of Publication 15 (Circular E), for more information. These rules generally apply to temporary work assignments both inside and outside the U.S.

Employee Achievement Awards

Do not withhold federal income, social security, or Medicare taxes on the fair market value of an employee achievement award if it is excludable from your employee's gross income. To be excludable from your employee's gross income, the award must be tangible personal property (not cash, gift certificates, or securities) given to an employee for length of service or safety achievement, awarded as part of a meaningful presentation, and awarded under circumstances that do not indicate that the payment is disguised compensation. Excludable employee achievement awards also are not subject to FUTA tax.

Limits. The most that you can exclude for the cost of all employee achievement awards to the same employee for the year is \$400. A higher limit of \$1,600 applies to qualified plan awards. Qualified plan awards are employee achievement awards under a written plan that does not discriminate in favor of highly compensated employees. An award cannot be treated as a qualified plan award if the average cost per recipient of all awards under all of your qualified plans is more than \$400.

If during the year an employee receives awards not made under a qualified plan and also receives awards under a qualified plan, the exclusion for the total cost of all awards to that employee cannot be more than \$1,600. The \$400 and \$1,600 limits cannot be added together to exclude more than \$1,600 for the cost of awards to any one employee during the year.

Scholarship and Fellowship Payments

Only amounts that you pay as a qualified scholarship to a candidate for a degree may be excluded from the recipient's gross income. A qualified scholarship is any amount granted as a scholarship or fellowship that is used for:

- Tuition and fees required to enroll in, or to attend, an educational institution or
- Fees, books, supplies, and equipment that are required for courses at the educational institution.

The exclusion from income does not apply to the portion of any amount received that represents payment for teaching, research, or other services required as a condition of receiving the scholarship or tuition reduction. These amounts are reportable on Form W-2. However, the exclusion will still apply for any amount received under two specific programs—the National Health Service Corps Scholarship Program and the Armed Forces Health Professions Scholarship and Financial Assistance Program—despite any service condition attached to those amounts.

Any amounts that you pay for room and board are not excludable from the recipient's gross income. A qualified scholarship is not subject to social security, Medicare, and FUTA taxes, or federal income tax withholding. For more information, see Publication 970, Tax Benefits for Education.

Outplacement Services

If you provide outplacement services to your employees to help them find new employment (such as career counseling, resume assistance, or skills assessment), the value of these benefits may be income to them and subject to all withholding taxes. However, the value of these services will not be subject to any employment taxes if:

- You derive a substantial business benefit from providing the services (such as improved employee morale or business image) separate from the benefit that you would receive from the mere payment of additional compensation and
- The employee would be able to deduct the cost of the services as employee business expenses if he or she had paid for them.

However, if you receive no additional benefit from providing the services, or if the services are not provided on the basis of employee need, then the value of the services is treated as wages and is subject to federal income tax withholding and social security and Medicare taxes. Similarly, if an employee receives the outplacement services in exchange for reduced severance pay (or other taxable compensation), then the amount the severance pay is reduced is treated as wages for employment tax purposes.

Withholding for Idle Time

Payments made under a voluntary guarantee to employees for idle time (any time during which an employee performs no services) are wages for the purposes of social security, Medicare, FUTA taxes, and federal income tax withholding.

Back Pay

Treat back pay as wages in the year paid and withhold and pay employment taxes as required. If back pay was awarded by a court or government agency to enforce a federal or state statute protecting an employee's right to employment or wages, special rules apply for reporting those wages to the Social Security Administration. These rules also apply to litigation actions, and settlement agreements or agency directives that are resolved out of court and not under a court decree or order. Examples of pertinent statutes include, but are not limited to, the National Labor Relations Act, Fair Labor Standards Act, Equal Pay Act, and Age Discrimination in Employment Act. See Publication 957, Reporting Back Pay and Special Wage Payments to the Social Security Administration, and Form SSA-131, Employer Report of Special Wage Payments, for details.

Supplemental Unemployment Benefits

If you pay, under a plan, supplemental unemployment benefits to a former employee, all or part of the payments

may be taxable and subject to federal income tax withholding, depending on how the plan is funded. Amounts that represent a return to the employee of amounts previously subject to tax are not taxable and are not subject to withholding. You should withhold federal income tax on the taxable part of the payments made, under a plan, to an employee who is involuntarily separated because of a reduction in force, discontinuance of a plant or operation, or other similar condition. It does not matter whether the separation is temporary or permanent.

There are special rules that apply in determining whether benefits qualify as supplemental unemployment benefits that are excluded from wages for social security, Medicare, and FUTA purposes. To qualify as supplemental unemployment benefits for these purposes, the benefits must meet the following requirements.

- Benefits are paid only to unemployed former employees who are laid off by the employer.
- Eligibility for benefits depends on meeting prescribed conditions after termination.
- The amount of weekly benefits payable is based upon state unemployment benefits, other compensation allowable under state law, and the amount of regular weekly pay.
- The right to benefits does not accrue until a prescribed period after termination.
- Benefits are not attributable to the performance of particular services.
- No employee has any right to the benefits until qualified and eligible to receive benefits.
- Benefits may not be paid in a lump sum.

Withholding on taxable supplemental unemployment benefits must be based on the withholding certificate (Form W-4) that the employee gave to you.

Golden Parachute Payments

A golden parachute payment, in general, is a payment made under a contract entered into by a corporation and key personnel. Under the agreement, the corporation agrees to pay certain amounts to its key personnel in the event of a change in ownership or control of the corporation. Payments to employees under golden parachute contracts are subject to social security, Medicare, FUTA taxes, and federal income tax withholding.

No deduction is allowed to the corporation for any excess parachute payment. To determine the amount of the excess parachute payment, you must first determine if there is a parachute payment for purposes of section 280G. A parachute payment for purposes of section 280G is any payment that meets all of the following.

1. The payment is in the nature of compensation.
2. The payment is to, or for the benefit of, a disqualified individual (defined below).

3. The payment is contingent on a change in ownership of the corporation, the effective control of the corporation, or the ownership of a substantial portion of the assets of the corporation.
4. The payment has an aggregate present value of at least three times the individual's base amount. The base amount is the average annual compensation for service includible in the individual's gross income over the most recent 5 taxable years.

A disqualified individual is anyone who at any time during the 12-month period prior to and ending on the date of the change in ownership or control of the corporation (the disqualified individual determination period) was an employee or independent contractor and was, in regard to that corporation, a shareholder, an officer, or highly compensated individual.

An excess parachute payment amount is the excess of any parachute payment over the base amount. For more information, see Regulations section 1.280G-1. The recipient of an excess parachute payment is subject to a 20% nondeductible excise tax. If the recipient is an employee, the 20% excise tax is to be withheld by the corporation.

Example. An officer of a corporation receives a golden parachute payment of \$400,000. This is more than three times greater than his or her average compensation of \$100,000 over the previous 5-year period. The excess parachute payment is \$300,000 (\$400,000 minus \$100,000). The corporation cannot deduct the \$300,000 and must withhold the excise tax of \$60,000 (20% of \$300,000).

Reporting golden parachute payments. Golden parachute payments to employees must be reported on Form W-2. See the Instructions for Forms W-2 and W-3 for details. For nonemployee reporting of these payments, see Box 7 in the Instructions for Form 1099-MISC.

Exempt payments. Most small business corporations are exempt from the golden parachute rules. See Regulations section 1.280G-1 for more information.

Interest-Free and Below-Market-Interest-Rate Loans

In general, if an employer lends an employee more than \$10,000 at an interest rate less than the current applicable federal rate (AFR), the difference between the interest paid and the interest that would be paid under the AFR is considered additional compensation to the employee. This rule applies to a loan of \$10,000 or less if one of its principal purposes is the avoidance of federal tax.

This additional compensation to the employee is subject to social security, Medicare, and FUTA taxes, but not to federal income tax withholding. Include it in compensation on Form W-2 (or Form 1099-MISC for an independent contractor). The AFR is established monthly and published by the IRS each month in the Internal Revenue Bulletin. You can get these rates by calling 1-800-829-4933 or by visiting the IRS website at www.irs.gov. For more information, see section 7872 and its related regulations.

Leave Sharing Plans

If you establish a leave sharing plan for your employees that allows them to transfer leave to other employees for medical emergencies, the amounts paid to the recipients of the leave are considered wages. These amounts are includible in the gross income of the recipients and are subject to social security, Medicare, and FUTA taxes, and federal income tax withholding. Do not include these amounts in the income of the transferors. These rules apply only to leave sharing plans that permit employees to transfer leave to other employees for medical emergencies.

Nonqualified Deferred Compensation Plans

Income Tax and Reporting

Section 409A provides that all amounts deferred under a nonqualified deferred compensation (NQDC) plan for all tax years are currently includible in gross income (to the extent not subject to a substantial risk of forfeiture and not previously included in gross income) and subject to additional taxes, unless certain requirements are met pertaining to, among other things, elections to defer compensation and distributions under a NQDC plan. Section 409A also includes rules that apply to certain trusts or similar arrangements associated with NQDC plans if the trusts or arrangements are located outside of the United States, are restricted to the provision of benefits in connection with a decline in the financial health of the plan sponsor, or contributions are made to the trust during certain periods such as when a qualified plan of the service recipient is underfunded. Employers must withhold federal income tax (but not the additional Section 409A taxes) on any amount includible in gross income under section 409A. Other changes to the Internal Revenue Code provide that the deferrals under a NQDC plan must be reported separately on Form W-2 or Form 1099-MISC, whichever applies. Specific rules for reporting are provided in the instructions to the forms. The provisions do not affect the application or reporting of social security, Medicare, or FUTA taxes.

The provisions do not prevent the inclusion of amounts in income or wages under other provisions of the Internal Revenue Code or common law principles, such as when amounts are actually or constructively received or irrevocably contributed to a separate fund. For more information about nonqualified deferred compensation plans, see Regulations sections 1.409A-1 through 1.409A-6. Notice 2008-115 provides rules for reporting deferrals and reporting income includable under section 409A for 2008 and for income tax withholding for amounts includable in gross income under section 409A for 2008. See Notice 2008-115, 2008-52 I.R.B. 1367, available at www.irs.gov/irb/2008-52_IRB/ar10.html. Notice 2008-113 provides guidance on the correction of certain operation

failures of a NQDC plan. See Notice 2008-113, 2008-51 I.R.B. 1305, available at www.irs.gov/irb/2008-51_IRB/ar12.html.

Social security, Medicare, and FUTA taxes. Employer contributions to nonqualified deferred compensation (NQDC) plans, as defined in the applicable regulations, are treated as social security, Medicare, and FUTA wages when the services are performed or the employee no longer has a substantial risk of forfeiting the right to the deferred compensation, whichever is later.

Amounts deferred are subject to social security, Medicare, and FUTA taxes at that time unless the amount that is deferred cannot be reasonably ascertained; for example, if benefits are based on final pay. If the value of the future benefit is based on any factors that are not yet reasonably ascertainable, you may choose to estimate the value of the future benefit and withhold and pay social security, Medicare, and FUTA taxes on that amount. You will have to determine later, when the amount is reasonably ascertainable, whether any additional taxes are required. If taxes are not paid before the amounts become reasonably ascertainable, when the amounts become reasonably ascertainable they are subject to social security, Medicare, and FUTA taxes on the amounts deferred plus the income attributable to those amounts deferred. For more information, see Regulations sections 31.3121(v)(2)-1 and 31.3306(r)(2)-1.

Tax-Sheltered Annuities

Employer payments made by an educational institution or a tax-exempt organization to purchase a tax-sheltered annuity for an employee (annual deferrals) are included in the employee's social security and Medicare wages if the payments are made because of a salary reduction agreement. However, they are not included in box 1 on Form W-2 in the year the deferrals are made and are not subject to federal income tax withholding. See Regulations section 31.3121(a)(5)-2 for the definition of a salary reduction agreement.

Contributions to a Simplified Employee Pension (SEP)

An employer's SEP contributions to an employee's individual retirement arrangement (IRA) are excluded from the employee's gross income. These excluded amounts are not subject to social security, Medicare, FUTA taxes, or federal income tax withholding. However, any SEP contributions paid under a salary reduction agreement (SARSEP) are included in wages for purposes of social security and Medicare taxes and for FUTA. See Publication 560 for more information about SEPs.

Salary reduction simplified employee pensions (SARSEP) repealed. You may not establish a SARSEP after 1996. However, SARSEPs established before January 1, 1997, may continue to receive contributions.

SIMPLE Retirement Plans

Employer and employee contributions to a savings incentive match plan for employees (SIMPLE) retirement account (subject to limitations) are excludable from the employee's income and are exempt from federal income tax withholding. An employer's nonelective (2%) or matching contributions are exempt from social security, Medicare, and FUTA taxes. However, an employee's salary reduction contributions to a SIMPLE are subject to social security, Medicare, and FUTA taxes. For more information about SIMPLE retirement plans, see Publication 560.

6. Sick Pay Reporting

Special rules apply to the reporting of sick pay payments to employees. How these payments are reported depends on whether the payments are made by the employer or a third party, such as an insurance company.

Sick pay is usually subject to social security, Medicare, and FUTA taxes. For exceptions, see [Social Security, Medicare, and FUTA Taxes on Sick Pay](#) later. Sick pay may also be subject to either mandatory or voluntary federal income tax withholding, depending on who pays it.

Sick Pay

Sick pay generally means any amount paid under a plan because of an employee's temporary absence from work due to injury, sickness, or disability. It may be paid by either the employer or a third party, such as an insurance company. Sick pay includes both short- and long-term benefits. It is often expressed as a percentage of the employee's regular wages.

Payments That Are Not Sick Pay

Sick pay does not include the following payments.

1. **Disability retirement payments.** Disability retirement payments are not sick pay and are not discussed in this section. Those payments are subject to the rules for federal income tax withholding from pensions and annuities. See [section 8](#).
2. **Workers' compensation.** Payments because of a work-related injury or sickness that are made under a workers' compensation law are not sick pay and are not subject to employment taxes. But see *Payments in the nature of workers' compensation—public employees* next.
3. **Payments in the nature of workers' compensation—public employees.** State and local government employees, such as police officers and firefighters, sometimes receive payments due to an injury in the line of duty under a statute that is not the general workers' compensation law of a state. If the statute limits benefits to work-related injuries or sickness and does not base payments on the employee's age, length of service, or prior contributions,

the statute is "in the nature of" a workers' compensation law. Payments under a statute in the nature of a workers' compensation law are not sick pay and are not subject to employment taxes. For more information, get Treasury Decision 9233. See Treasury Decision 9233, 2006-3 I.R.B. 303, available at www.irs.gov/irb/2006-03_IRB/ar10.html.

4. **Medical expense payments.** Payments under a definite plan or system for medical and hospitalization expenses, or for insurance covering these expenses, are not sick pay and are not subject to employment taxes.
5. **Payments unrelated to absence from work.** Accident or health insurance payments unrelated to absence from work are not sick pay and are not subject to employment taxes. These include payments for:
 - a. Permanent loss of a member or function of the body,
 - b. Permanent loss of the use of a member or function of the body, or
 - c. Permanent disfigurement of the body.

Example. Donald was injured in a car accident and lost an eye. Under a policy paid for by Donald's employer, Delta Insurance Co. paid Donald \$5,000 as compensation for the loss of his eye. Because the payment was determined by the type of injury and was unrelated to Donald's absence from work, it is not sick pay and is not subject to federal employment taxes.

Sick Pay Plan

A sick pay plan is a plan or system established by an employer under which sick pay is available to employees generally or to a class or classes of employees. This does not include a situation in which benefits are provided on a discretionary or occasional basis with merely an intention to aid particular employees in time of need.

You have a sick pay plan or system if the plan is in writing or is otherwise made known to employees, such as by a bulletin board notice or your long and established practice. Some indications that you have a sick pay plan or system include references to the plan or system in the contract of employment, employer contributions to a plan, or segregated accounts for the payment of benefits.

Definition of employer. The employer for whom the employee normally works, a term used in the following discussion, is either the employer for whom the employee was working at the time that the employee became sick or disabled or the last employer for whom the employee worked before becoming sick or disabled, if that employer made contributions to the sick pay plan on behalf of the sick or disabled employee.

Note. Contributions to a sick pay plan through a cafeteria plan (by direct employer contributions or salary reduction) are employer contributions unless they are after-tax

employee contributions (that is, included in taxable wages).

Third-Party Payers of Sick Pay

Employer's agent. An employer's agent is a third party that bears no insurance risk and is reimbursed on a cost-plus-fee basis for payment of sick pay and similar amounts. A third party may be your agent even if the third party is responsible for determining which employees are eligible to receive payments. For example, if a third party provides administrative services only, the third party is your agent. If the third party is paid an insurance premium and is not reimbursed on a cost-plus-fee basis, the third party is not your agent. Whether an insurance company or other third party is your agent depends on the terms of their agreement with you.

A third party that makes payments of sick pay as your agent is not considered the employer and generally has no responsibility for employment taxes. This responsibility remains with you. However, under an exception to this rule, the parties may enter into an agreement that makes the third-party agent responsible for employment taxes. In this situation, the third-party agent should use its own name and EIN (rather than your name and EIN) for the responsibilities that it has assumed.

Third party not employer's agent. A third party that makes payments of sick pay other than as an agent of the employer is liable for federal income tax withholding (if requested by the employee) and the employer part of the social security and Medicare taxes.

The third party is also liable for the employer part of the social security and Medicare taxes and the FUTA tax, unless the third party transfers this liability to the employer for whom the employee normally works. This liability is transferred if the third party takes the following steps:

1. Withholds the **employee** social security and Medicare taxes from the sick pay payments,
2. Makes timely deposits of the **employee** social security and Medicare taxes, and
3. Notifies the employer for whom the employee normally works of the payments on which employee taxes were withheld and deposited. The third party must notify the employer within the time required for the third party's deposit of the employee part of the social security and Medicare taxes. For instance, if the third party is a monthly schedule depositor, it must notify the employer by the 15th day of the month following the month in which the sick pay payment is made because that is the day by which the deposit is required to be made. The third party should notify the employer as soon as information on payments is available so that an employer required to make electronic deposits can make them timely. For multi-employer plans, see the special rule discussed next.

Multi-employer plan timing rule. A special rule applies to sick pay payments made to employees by a third-party insurer under an insurance contract with a multi-employer plan established under a collectively bargained agreement. If the third-party insurer making the payments complies with steps 1 and 2 above and gives the plan (rather than the employer) the required timely notice described in step 3 above, then the plan (not the third-party insurer) must pay the employer part of the social security and Medicare taxes and the FUTA tax. Similarly, if within six business days of the plan's receipt of notification, the plan gives notice to the employer for whom the employee normally works, the employer (not the plan) must pay the employer part of the social security and Medicare taxes and the FUTA tax.

Reliance on information supplied by the employer. A third party that pays sick pay should request information from the employer to determine amounts that are not subject to employment taxes. Unless the third party has reason not to believe the information, it may rely on that information for the following items.

- The total wages paid to the employee during the calendar year.
- The last month in which the employee worked for the employer.
- The employee contributions to the sick pay plan made with after-tax dollars.

The third party should not rely on statements regarding these items made by the employee.

Social Security, Medicare, and FUTA Taxes on Sick Pay

Employer. If you pay sick pay to your employee, you must generally withhold employee social security and Medicare taxes from the sick pay. You must timely deposit employee and employer social security and Medicare taxes and FUTA tax. There are no special deposit rules for sick pay. See section 11 of Publication 15 (Circular E) for more information on the deposit rules.

Amounts not subject to social security, Medicare, or FUTA taxes. The following payments, whether made by the employer or a third party, are not subject to social security, Medicare, or FUTA taxes (different rules apply to federal income tax withholding).

- **Payments after an employee's death or disability retirement.** Social security, Medicare, and FUTA taxes do not apply to amounts paid under a definite plan or system, as defined under [Sick Pay Plan](#) earlier, on or after the termination of the employment relationship because of death or disability retirement. However, even if there is a definite plan or system, amounts paid to a former employee are subject to social security, Medicare, and FUTA taxes if they

would have been paid even if the employment relationship had not terminated because of death or disability retirement. For example, a payment to a disabled former employee for unused vacation time would have been made whether or not the employee retired on disability. Therefore, the payment is wages and is subject to social security, Medicare, and FUTA taxes.

- **Payments after calendar year of employee's death.** Sick pay paid to the employee's estate or survivor after the calendar year of the employee's death is **not** subject to social security, Medicare, or FUTA taxes. Also, see [Amounts not subject to income tax withholding](#) under [Income Tax Withholding on Sick Pay](#) later.

Example. Sandra became entitled to sick pay on November 24, 2008, and died on December 31, 2008. On January 12, 2009, Sandra's sick pay for the period from December 24 through December 31, 2008, was paid to her survivor. The payment is not subject to social security, Medicare, or FUTA taxes.

- **Payments to an employee entitled to disability insurance benefits.** Payments to an employee when the employee is entitled to disability insurance benefits under section 223(a) of the Social Security Act are not subject to social security and Medicare taxes. This rule applies only if the employee became entitled to the Social Security Act benefits before the calendar year in which the payments are made, and the employee performs no services for the employer during the period for which the payments are made. However, these payments **are** subject to FUTA tax.
- **Payments that exceed the applicable wage base.** Social security and FUTA taxes do not apply to payments of sick pay that, when combined with the regular wages and sick pay previously paid to the employee during the year, exceed the applicable wage base. Because there is no Medicare tax wage base, this exception does not apply to Medicare tax. The social security tax wage base for 2009 is \$106,800. The FUTA tax wage base is \$7,000.

Example. If an employee receives \$99,000 in wages from an employer in 2009 and then receives \$15,000 of sick pay, only the first \$7,800 of the sick pay is subject to social security tax. All of the sick pay is subject to Medicare tax. None of the sick pay is subject to FUTA tax. See [Example of Figuring and Reporting Sick Pay](#) later.

- **Payments after 6 months absence from work.** Social security, Medicare, and FUTA taxes do not apply to sick pay paid more than 6 calendar months after the last calendar month in which the employee worked.

Example 1. Ralph's last day of work before he became entitled to receive sick pay was December 13, 2008. He was paid sick pay for 9 months before his return to work on September 12, 2009. Sick pay paid to Ralph after June 30, 2009, is not subject to social security, Medicare, or FUTA taxes.

Example 2. The facts are the same as in Example 1, except that Ralph worked 1 day during the 9-month period, on February 13, 2009. Because the 6-month period begins again in March, only the sick pay paid to Ralph after August 31, 2009, is exempt from social security, Medicare, and FUTA taxes.

- **Payments attributable to employee contributions.** Social security, Medicare, and FUTA taxes do not apply to payments, or parts of payments, attributable to employee contributions to a sick pay plan made with after-tax dollars. Contributions to a sick pay plan made on behalf of employees with employees' pre-tax dollars under a cafeteria plan are **employer** contributions.

Group policy. If both the employer and the employee contributed to the sick pay plan under a group insurance policy, figure the taxable sick pay by multiplying total sick pay by the percentage of the policy's cost that was contributed by the employer for the 3 policy years before the calendar year in which the sick pay is paid. If the policy has been in effect fewer than 3 years, use the cost for the policy years in effect or, if in effect less than 1 year, a reasonable estimate of the cost for the first policy year.

Example. Alan is employed by Edgewood Corporation. Because of an illness, he was absent from work for 3 months during 2009. Key Insurance Company paid Alan \$2,000 sick pay for each month of his absence under a policy paid for by contributions from both Edgewood and its employees. All of the employees' contributions were paid with after-tax dollars. For the 3 policy years before 2009, Edgewood paid 70% of the policy's cost and its employees paid 30%. Because 70% of the sick pay paid under the policy is due to Edgewood's contributions, \$1,400 ($\$2,000 \times 70\%$) of each payment made to Alan is taxable sick pay. The remaining \$600 of each payment that is due to employee contributions is not taxable sick pay and is not subject to employment taxes. Also, see [Example of Figuring and Reporting Sick Pay](#) later.

Income Tax Withholding on Sick Pay

The requirements for federal income tax withholding on sick pay and the methods for figuring it differ depending on whether the sick pay is paid by:

- The employer,
- An agent of the employer (defined earlier), or
- A third party that is not the employer's agent.

Employer or employer's agent. Sick pay paid by you or your agent is subject to **mandatory** federal income tax withholding. An employer or agent paying sick pay generally determines the federal income tax to be withheld based on the employee's Form W-4. The employee cannot choose how much will be withheld by giving you or your agent a Form W-4S. Sick pay paid by an agent is treated

as supplemental wages. If the agent does not pay regular wages to the employee, the agent may choose to withhold federal income tax at a flat 25% rate, rather than at the wage withholding rate. See section 7 in Publication 15 (Circular E) for the flat rate (35%) when supplemental wage payments to an individual exceed \$1,000,000 during the year.

Third party not an agent. Sick pay paid by a third party that is not your agent is **not** subject to mandatory federal income tax withholding. However, an employee may elect to have federal income tax withheld by submitting Form W-4S to the third party.

If Form W-4S has been submitted, the third party should withhold federal income tax on all payments of sick pay made 8 or more days after receiving the form. The third party may, at its option, withhold federal income tax before 8 days have passed.

The employee may request on Form W-4S to have a specific whole dollar amount withheld. However, if the requested withholding would reduce any net payment below \$10, the third party should not withhold any federal income tax from that payment. The minimum amount of withholding that the employee can specify is \$4 per day, \$20 per week, or \$88 per month based on the payroll period.

Withhold from all payments at the same rate. For example, if \$25 is withheld from a regular full payment of \$100, then \$20 (25%) should be withheld from a partial payment of \$80.

Amounts not subject to income tax withholding. The following amounts, whether paid by you or a third party, are not wages subject to federal income tax withholding.

- **Payments after the employee's death.** Sick pay paid to the employee's estate or survivor at any time after the employee's death is not subject to federal income tax withholding, regardless of who pays it.
- **Payments attributable to employee contributions.** Payments, or parts of payments, attributable to employee contributions made to a sick pay plan with after-tax dollars are not subject to federal income tax withholding. For more information, see the corresponding discussion in [Amounts not subject to social security, Medicare, or FUTA taxes](#) earlier.

Depositing and Reporting

This section discusses who is liable for depositing social security, Medicare, FUTA, and withheld federal income taxes on sick pay. These taxes must be deposited under the same rules that apply to deposits of taxes on regular wage payments. See Publication 15 (Circular E) for information on the deposit rules.

This section also explains how sick pay should be reported on Forms W-2, W-3, 940, and 941 (or Form 944).

Sick Pay Paid by Employer or Agent

If you or your agent (defined earlier) make sick pay payments, you deposit taxes and file Forms W-2, W-3, 940, and 941 (or Form 944) under the same rules that apply to regular wage payments.

However, the agreement between the parties may require your agent to carry out responsibilities that would otherwise have been borne by you. In this situation, your agent should use its own name and EIN (rather than yours) for the responsibilities that it has assumed.

Reporting sick pay on Form W-2. You may either combine the sick pay with other wages and prepare a single Form W-2 for each employee, or you may prepare separate Forms W-2 for each employee, one reporting sick pay and the other reporting regular wages. A Form W-2 must be prepared even if all of the sick pay is nontaxable (see Box 12 below in the list of information that must be included on Form W-2). All Forms W-2 must be given to the employees by January 31.

The Form W-2 filed for the sick pay must include the employer's name, address, and EIN; the employee's name, address, and SSN; and the following information.

- Box 1 – Sick pay the employee must include in income.
- Box 2 – Any federal income tax withheld from the sick pay.
- Box 3 – Sick pay subject to employee social security tax.
- Box 4 – Employee social security tax withheld from the sick pay.
- Box 5 – Sick pay subject to employee Medicare tax.
- Box 6 – Employee Medicare tax withheld from the sick pay.
- Box 12 – Any sick pay that was paid by a third party and was **not** subject to federal income tax because the employee contributed to the sick pay plan (enter code J).
- Box 13 – Check the "Third-party sick pay" box **only** if the amounts were paid by a third party.

Sick Pay Paid by Third Party

The rules for a third party that is not your agent depend on whether liability has been transferred as discussed under [Third-Party Payers of Sick Pay](#) earlier.

To figure the due dates and amounts of its deposits of employment taxes, a third party should combine:

- The liability for the wages paid to its own employees and
- The liability for payments it made to all employees of all its clients. This does not include liability transferred to the employer.

Liability not transferred to the employer. If the third party does not satisfy the requirements for transferring liability for FUTA tax and the **employer's part** of the social security and Medicare taxes, the third party reports the sick pay on its own Form 940 and Form 941 or Form 944. In this situation, the employer has no tax responsibilities for sick pay.

The third party must deposit social security, Medicare, FUTA, and withheld federal income taxes using its own name and EIN. The third party must give each employee to whom it paid sick pay a Form W-2 by January 31 of the following year. The Form W-2 must include the third party's name, address, and EIN instead of the employer information. Otherwise, the third party must complete Form W-2 as shown in [Reporting sick pay on Form W-2](#) earlier.

Liability transferred to the employer. Generally, if a third party satisfies the requirements for transferring liability for the **employer part** of the social security and Medicare taxes and for the FUTA tax, the following rules apply.

Deposits. The third party must make deposits of withheld employee social security and Medicare taxes and withheld federal income tax using its own name and EIN. You must make deposits of the **employer part** of the social security and Medicare taxes and the FUTA tax using your name and EIN. In applying the deposit rules, your liability for these taxes begins when you receive the third party's notice of sick pay payments.

Form 941 or Form 944. The third party and you must each file Form 941 or Form 944. This discussion only explains how to report sick pay on Form 941. If you file Form 944, use the lines on that form that correspond to the lines on Form 941 that are discussed here.

Line 7b of each Form 941 must contain a special adjusting entry for social security and Medicare taxes. These entries are required because the total tax liability for social security and Medicare taxes (employee and employer parts) is split between you and the third party.

- **Employer.** You must include third-party sick pay on lines 2, 5a, and 5c of Form 941. There should be no sick pay entry on line 3 because the third party withheld federal income tax, if any. After completing line 6, subtract on line 7b the employee social security and Medicare taxes withheld and deposited by the third party.
- **Third party.** The third party must include on Form 941 or Form 944 the employee part of the social security and Medicare taxes (and federal income tax, if any) withheld. The third party does not include on line 2 any sick pay paid as a third party but does include on line 3 any federal income tax withheld. On line 5a, column 1, the third party enters the total amount it paid subject to social security taxes. This amount includes both wages paid to its own employees and sick pay paid as a third party. The third party completes line 5c, column 1, in a similar manner. On line 7b, the third party subtracts the employer part of the social security and Medicare taxes that you must pay.

Form 940. You, not the third party, must prepare Form 940 for sick pay.

Third-party sick pay recap Forms W-2 and W-3. The third party must prepare a "Third-Party Sick Pay Recap" Form W-2 and a "Third-Party Sick Pay Recap" Form W-3. These forms, previously called "Dummy" forms, do not reflect sick pay paid to individual employees, but instead show the combined amount of sick pay paid to all employees of all clients of the third party. The recap forms provide a means of reconciling the wages shown on the third party's Form 941 or Form 944. However, see [Optional rule for Form W-2](#) below. Do not file the recap Form W-2 and W-3 electronically.

The third party fills out the third-party sick pay recap Form W-2 as follows.

Box b – Third party's EIN.

Box c – Third party's name and address.

Box e – "Third-Party Sick Pay Recap" in place of the employee's name.

Box 1 – Total sick pay paid to all employees.

Box 2 – Any federal income tax withheld from sick pay.

Box 3 – Sick pay subject to employee social security tax.

Box 4 – Employee social security tax withheld from sick pay.

Box 5 – Sick pay subject to employee Medicare tax.

Box 6 – Employee Medicare tax withheld from sick pay.

The third party attaches the third-party sick pay recap Form W-2 to a separate recap Form W-3, on which only boxes b, e, f, g, 1, 2, 3, 4, 5, 6, and 13 are completed. Enter "Third-Party Sick Pay Recap" in box 13. Only the employer makes an entry in box 14 of Form W-3.

Optional rule for Form W-2. You and the third party may choose to enter into a legally binding agreement designating the third party to be your agent for purposes of preparing Forms W-2 reporting sick pay. The agreement must specify what part, if any, of the payments under the sick pay plan is excludable from the employees' gross incomes because it is attributable to their contributions to the plan. If you enter into an agreement, the third party prepares the actual Forms W-2, not the "Third-Party Sick Pay Recap" Form W-2 as discussed earlier, for each employee who receives sick pay from the third party. If the optional rule is used:

- The third party does not provide you with the sick pay statement described later and
- You (not the third party) prepare "Third-Party Sick Pay Recap" Forms W-2 and W-3. These recap forms are needed to reconcile the sick pay shown on your Form 941 or Form 944.

Sick pay statement. The third party must furnish you with a sick pay statement by January 15 of the year following the year in which the sick pay was paid. The statement must show the following information about each employee who was paid sick pay.

- The employee's name.
- The employee's SSN (if social security, Medicare, or income tax was withheld).
- The sick pay paid to the employee.
- Any federal income tax withheld.
- Any employee social security tax withheld.
- Any employee Medicare tax withheld.

Example of Figuring and Reporting Sick Pay

Dave, an employee of Edgewood Corporation, was seriously injured in a car accident on January 1, 2008. Dave's last day of work was December 31, 2007. The accident was not job related.

Key, an insurance company that was not an agent of the employer, paid Dave \$2,000 each month for 10 months, beginning in January 2008. Dave submitted a Form W-4S to Key, requesting \$210 be withheld from each payment for federal income tax. Dave received no payments from Edgewood, his employer, from January 2008 through October 2008. Dave returned to work in November 2008.

For the policy year in which the car accident occurred, Dave paid a part of the premiums for his coverage, and Edgewood paid the remaining part. The plan was, therefore, a "contributory plan." During the 3 policy years before the calendar year of the accident, Edgewood paid 70% of the total of the net premiums for its employees' insurance coverage, and its employees paid 30%.

Social security and Medicare taxes. For social security and Medicare tax purposes, taxable sick pay was \$8,400 ($\$2,000 \text{ per month} \times 70\% = \$1,400 \text{ taxable portion per payment}$; $\$1,400 \times 6 \text{ months} = \$8,400 \text{ total taxable sick pay}$). Only the six \$2,000 checks received by Dave from January through June are included in the calculation. The check received by Dave in July (the seventh check) was received more than 6 months after the month in which Dave last worked.

Of each \$2,000 payment Dave received, 30% (\$600) is not subject to social security and Medicare taxes because the plan is contributory and Dave's after-tax contribution is considered to be 30% of the premiums during the 3 policy years before the calendar year of the accident.

FUTA tax. Of the \$8,400 taxable sick pay (figured the same as for social security and Medicare taxes), only \$7,000 is subject to the FUTA tax because the FUTA contribution base is \$7,000.

Federal income tax withholding. Of each \$2,000 payment, \$1,400 ($\$2,000 \times 70\%$) is subject to voluntary federal income tax withholding. In accordance with Dave's Form

W-4S, \$210 was withheld from each payment (\$2,100 for the 10 payments made during 2008).

Liability transferred. For the first 6 months following the last month in which Dave worked, Key was liable for social security, Medicare, and FUTA taxes on any payments that constituted taxable wages. However, Key could have shifted the liability for the employer part of the social security and Medicare taxes (and for the FUTA tax) during the first 6 months by withholding Dave's part of the social security and Medicare taxes, timely depositing the taxes, and notifying Edgewood of the payments.

If Key shifted liability for the employer part of the social security and Medicare taxes to Edgewood and provided Edgewood with a sick pay statement, Key would not prepare a Form W-2 for Dave. However, Key would prepare "Third-Party Sick Pay Recap" Forms W-2 and W-3. Key and Edgewood must each prepare Form 941. Edgewood must also report the sick pay and withholding for Dave on Forms W-2, W-3, and 940.

As an alternative, the parties could have followed the optional rule described under [Optional rule for Form W-2](#) earlier. Under this rule, Key would prepare Form W-2 even though liability for the employer part of the social security and Medicare taxes had been shifted to Edgewood. Also, Key would not prepare a sick pay statement, and Edgewood, not Key, would prepare the recap Forms W-2 and W-3 reflecting the sick pay shown on Edgewood's Form 941.

Liability not transferred. If Key did not shift liability for the employer part of the social security and Medicare taxes to Edgewood, Key would prepare Forms W-2 and W-3 as well as Forms 941 and 940. In this situation, Edgewood would not report the sick pay.

Payments received after 6 months. The payments received by Dave in July through October are not subject to social security, Medicare, or FUTA taxes, because they were received more than 6 months after the last month in which Dave worked (December 2007). However, Key must continue to withhold federal income tax from each payment because Dave furnished Key with a Form W-4S. Also, Key must prepare Forms W-2 and W-3, unless it has furnished Edgewood with a sick pay statement. If the sick pay statement was furnished, then Edgewood must prepare Forms W-2 and W-3.

7. Special Rules for Paying Taxes

Common Paymaster

If two or more related corporations employ the same individual at the same time and pay this individual through a common paymaster which is one of the corporations, the corporations are considered to be a single employer. They have to pay, in total, no more in social security and Medicare taxes than a single employer would pay.

Each corporation must pay its own part of the employment taxes and may deduct only its own part of the wages. The deductions will not be allowed unless the corporation reimburses the common paymaster for the wage and tax payments. See Regulations section 31.3121(s)-1 for more information. The common paymaster is responsible for filing information and tax returns and issuing Forms W-2 with respect to wages it is considered to have paid as a common paymaster.

Agents

You must submit an application for authorization to act as an agent to the IRS Service Center where you will be filing returns. Form 2678, Employer/Payer Appointment of Agent, properly completed by each employer or payer, must be submitted with this application. See Revenue Procedure 70-6, 1970-1 C.B. 420, Revenue Procedure 84-33, 1984-1 C.B. 502, and the separate Instructions for Forms W-2 and W-3 for procedures and reporting requirements. Form 2678 does not apply to FUTA taxes reportable on Form 940.

Reporting Agents

Magnetic tape filing of Forms 940, 941, and 944. Reporting agents may not use magnetic tape for filing Forms 940, 941, and 944. Instead, see [Electronic filing of Forms 940, 941, and 944](#) next.

Electronic filing of Forms 940, 941, and 944. Reporting agents may file Forms 940, 941, and 944 electronically. For details, see Publication 3112, IRS e-file Application and Participation. File Form 8633, Application to Participate in the IRS e-file Program, and Form 8655, Reporting Agent Authorization. See Revenue Procedure 2007-40 for information on electronic filing of Forms 940, 941, and 944. Revenue Procedure 2007-40, 2007-26 I.R.B. 1488 is available at www.irs.gov/irb/2007-26_IRB/ar13.html. See Revenue Procedure 2007-38 for the requirements for completing and submitting Form 8655. Revenue Procedure 2007-38, 2007-25 I.R.B. 1442 is available at www.irs.gov/irb/2007-25_IRB/ar15.html. For more information on electronic filing, visit the IRS website at www.irs.gov/efile or call 1-866-255-0654.

Employee's Portion of Taxes Paid by Employer

If you pay your employee's social security and Medicare taxes without deducting them from the employee's pay, you must include the amount of the payments in the employee's wages for federal income tax withholding and social security, Medicare, and FUTA taxes. This increase in the employee's wage payment for your payment of the employee's social security and Medicare taxes is also subject to employee social security and Medicare taxes. This again increases the amount of the additional taxes you must pay.

To figure the employee's increased wages in this situation, divide the stated pay (the amount that you pay without taking into account your payment of employee social security and Medicare taxes) by a factor for that year. This factor is determined by subtracting from 1 the combined employee social security and Medicare tax rate for the year that the wages are paid. For 2009, the factor is .9235 (1 – .0765). If the stated pay is more than \$98,629.80 (2009 wage base \$106,800 × .9235), follow the procedure described under [Stated pay of more than \\$98,629.80 in 2009](#) below.

Stated pay of \$98,629.80 or less in 2009. For an employee with stated pay of \$98,629.80 or less in 2009, figure the correct wages (wages plus employer-paid employee taxes) and withholding to report by dividing the stated pay by .9235. This will give you the wages to report in box 1 and the social security and Medicare wages to report in boxes 3 and 5 of Form W-2.

To figure the correct social security tax to enter in box 4 and Medicare tax to enter in box 6, multiply the amounts in boxes 3 and 5 by the withholding rates (6.2% and 1.45%) for those taxes, and enter the results in boxes 4 and 6.

Example. Donald Devon hires Lydia Lone for only one week during 2009. He pays her \$300 for that week. Donald agrees to pay Lydia's part of the social security and Medicare taxes. To figure her reportable wages, he divides \$300 by .9235. The result, \$324.85, is the amount that he reports as wages in boxes 1, 3, and 5 of Form W-2. To figure the amount to report as social security tax, Donald multiplies \$324.85 by the social security tax rate of 6.2% (.062). The result, \$20.14, is entered in box 4 of Form W-2. To figure the amount to report as Medicare tax, Donald multiplies \$324.85 by the Medicare tax rate of 1.45% (.0145). The result, \$4.71, is entered in box 6 of Form W-2. Although he did not actually withhold the amounts from Lydia, he will report these amounts as taxes withheld on Form 941 or Form 944 and is responsible for matching the amounts with the employer share of these taxes.

For FUTA tax and federal income tax withholding, Lydia's weekly wages are \$324.85.

Stated pay of more than \$98,629.80 in 2009. For an employee with stated pay of more than \$98,629.80 in 2009, the correct social security wage amount is \$98,629.80 (the first \$106,800 of wages × .9235). The stated pay in excess of \$98,629.80 is not subject to social security tax because the tax only applies to the first \$106,800 of wages (stated pay plus employer-paid employee taxes). Enter \$106,800 in box 3 of Form W-2. The social security tax to enter in box 4 is \$6,621.60 (\$106,800 × .062).

To figure the correct Medicare wages to enter in box 5 of Form W-2, subtract \$98,629.80 from the stated pay. Divide the result by .9855 (1 – .0145) and add \$106,800.

For example, if stated pay is \$104,500, the correct Medicare wages are figured as follows.

$$\$104,500 - \$98,629.80 = \$5,870.20$$

$$\$5,870.20 \div .9855 = \$5,956.57$$

$\$5,956.57 + \$106,800 = \$112,756.57$

The Medicare wages are \$112,756.57. Enter this amount in box 5 of Form W-2. The Medicare tax to enter in box 6 is \$1,634.97 ($\$112,756.57 \times .0145$).

Although these employment tax amounts are not actually withheld from the employee's pay, report them as withheld on Form 941, and pay this amount as the employer's share of the social security and Medicare taxes. If the wages for federal income tax withholding purposes in the preceding example are the same as for social security and Medicare purposes, the correct wage amount for federal income tax withholding is \$112,756.57 ($\$104,500 + \$6,621.60 + \$1,634.97$), which is included in box 1 of Form W-2.

Household and agricultural employees. This discussion above does not apply to household and agricultural employers. If you pay a household or agricultural employee's social security and Medicare taxes, these payments must be included in the employee's wages. However, this wage increase due to the tax payments made for the employee is not subject to social security or Medicare taxes as discussed in this section.

Tax deposits and Form 941 or Form 944. If you pay your employee's portion of his or her social security and Medicare taxes rather than deducting them from his or her pay, you are liable for timely depositing or paying the increased taxes associated with the wage increase. Also, report the increased wages on the appropriate lines of Form 941 for the quarter during which the wages were paid or on Form 944 for the year during which the wages were paid.

International Social Security Agreements

The United States has social security agreements with many countries to eliminate dual taxation and coverage under two social security systems. Under these agreements, sometimes known as totalization agreements, employees generally must pay social security taxes only to the country where they work. Employees and employers who are subject only to foreign social security taxes under these agreements are exempt from U.S. social security taxes, including the Medicare portion.

The United States has social security agreements with the following countries: Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Japan, South Korea, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, and the United Kingdom. On March 1, 2009, an international social security agreement between the United States and Poland went into effect. Additional agreements are expected in the future. For more information, visit the SSA website at www.socialsecurity.gov/international, or see Publication 519, U.S. Tax Guide for Aliens.

8. Pensions and Annuities

Generally, federal income tax withholding applies to the taxable part of payments made from pension, profit-sharing, stock bonus, annuity, and certain deferred compensation plans; from individual retirement arrangements (IRAs); and from commercial annuities. The method and rate of withholding depends on (a) the kind of payment, (b) whether the payments are delivered outside the United States or its possessions, and (c) whether the payee is a nonresident alien individual, a nonresident alien beneficiary, or a foreign estate. Qualified distributions from Roth IRAs and Roth 401(k)s are nontaxable and, therefore, not subject to withholding. See [Payments to Foreign Persons and Payments Outside the United States](#) later for special withholding rules that apply to payments outside the United States and payments to foreign persons.

The recipient of pension or annuity payments can choose not to have federal income tax withheld from the payments by using line 1 of Form W-4P. For an estate, the election to have no federal income tax withheld can be made by the executor or personal representative of the decedent. The estate's EIN should be entered in the area reserved for "Your social security number" on Form W-4P.

Federal income tax must be withheld from eligible rollover distributions. See [Eligible Rollover Distribution—20% Withholding](#) later.

Federal Income Tax Withholding

Periodic Payments

Withholding from periodic payments of a pension or annuity is figured in the same manner as withholding from wages. Periodic payments are made in installments at regular intervals over a period of more than 1 year. They may be paid annually, quarterly, monthly, etc.

If the recipient wants income tax withheld, he or she must designate the number of withholding allowances on line 2 of Form W-4P and can designate an additional amount to be withheld on line 3. If the recipient does not want any federal income tax withheld from his or her periodic payments, he or she can check the box on line 1 of Form W-4P and submit the form to you. If the recipient does not submit Form W-4P, you must withhold on periodic payments as if the recipient were married claiming three withholding allowances. Generally, this means that tax will be withheld if the pension or annuity is at least \$1,600 a month.

If you receive a Form W-4P that does not contain the recipient's correct taxpayer identification number (TIN), you must withhold as if the recipient were single claiming zero withholding allowances even if the recipient chooses not to have income tax withheld.

There are some kinds of periodic payments for which the recipient cannot use Form W-4P because they are already defined as wages subject to federal income tax withholding. These include retirement pay for service in the

U.S. Armed Forces and payments from certain nonqualified deferred compensation plans and compensation plans of exempt organizations described in section 457.

The recipient's Form W-4P stays in effect until he or she changes or revokes it. You must notify recipients each year of their right to choose not to have federal income tax withheld or to change their previous choice.

Nonperiodic Payments—10% Withholding

You must withhold at a flat 10% rate from nonperiodic payments (but see [Eligible Rollover Distribution—20% Withholding](#) next) unless the recipient chooses not to have income tax withheld. Distributions from an IRA that are payable on demand are treated as nonperiodic payments. A recipient can choose not to have income tax withheld (if permitted) from a nonperiodic payment by submitting Form W-4P (containing his or her correct TIN) and checking the box on line 1. Generally, this choice not to have federal income tax withheld will apply to any later payment from the same plan. A recipient cannot use line 2 for nonperiodic payments. But he or she may use line 3 to specify an additional amount that he or she wants withheld.

If a recipient submits a Form W-4P that does not contain his or her correct TIN, you cannot honor his or her request not to have income tax withheld and you must withhold 10% of the payment for federal income tax.

Eligible Rollover Distribution—20% Withholding

Distributions from qualified pension or annuity plans (for example, 401(k) pension plans, IRAs, and section 457(b) plans maintained by a governmental employer) or tax-sheltered annuities that are eligible to be rolled over tax free to an IRA or qualified plan are subject to a flat 20% withholding rate. The 20% withholding rate is required and a recipient cannot choose to have less federal income tax withheld from eligible rollover distributions. However, you should not withhold federal income tax if the entire distribution is transferred by the plan administrator in a direct rollover to a traditional IRA, qualified pension plan, governmental section 457(b) plan (if allowed by the plan), section 403(b) contract or tax-sheltered annuity.

Exceptions. Distributions that are (a) required by law, (b) one of a specified series of equal payments, or (c) qualifying "hardship" distributions are not "eligible rollover distributions" and are not subject to the mandatory 20% federal

income tax withholding. See Publication 505, Tax Withholding and Estimated Tax, for details. See also [Nonperiodic Payments—10% Withholding](#) earlier.

Payments to Foreign Persons and Payments Outside the United States

Unless the recipient is a nonresident alien, withholding (in the manner described above) is required on any periodic or nonperiodic payments that are delivered outside the United States or its possessions. A recipient cannot choose not to have federal income tax withheld.

In the absence of a treaty exemption, nonresident aliens, nonresident alien beneficiaries, and foreign estates generally are subject to a 30% withholding tax under section 1441 on the taxable portion of a periodic or nonperiodic pension or annuity payment that is from U.S. sources. However, most tax treaties provide that private pensions and annuities are exempt from withholding and tax. Also, payments from certain pension plans are exempt from withholding even if no tax treaty applies. See Publication 515, Withholding of Tax on Nonresident Aliens and Foreign Entities, and Publication 519. A foreign person should submit Form W-8BEN, Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding, to you before receiving any payments. The Form W-8BEN must contain the foreign person's TIN.

Statement of Income Tax Withheld

By January 31 of the next year, you must furnish a statement on Form 1099-R, Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc., showing the total amount of the recipient's pension or annuity payments and the total federal income tax you withheld during the prior year. Report income tax withheld on Form 945, Annual Return of Withheld Federal Income Tax, not on Form 941 or Form 944.

If the recipient is a foreign person who has provided you with Form W-8BEN, you instead must furnish a statement to the recipient on Form 1042-S, Foreign Person's U.S. Source Income Subject to Withholding, by March 15 for the prior year. Report federal income tax withheld on Form 1042, Annual Withholding Tax Return for U.S. Source Income of Foreign Persons.

9. Tables for Withholding on Distributions of Indian Gaming Profits to Tribal Members

If you make certain payments to members of Indian tribes from gaming profits, you must withhold federal income tax. You must withhold if (a) the total payment to a member for the year is over \$9,350 and (b) the payment is from the net revenues of class II or class III gaming activities (classified by the Indian Gaming Regulatory Act) conducted or licensed by the tribes.

A class I gaming activity is not subject to this withholding requirement. Class I activities are social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in as part of tribal ceremonies or celebrations.

Class II. Class II includes (a) bingo and similar games, such as pull tabs, punch boards, tip jars, lotto, and instant bingo, and (b) card games that are authorized by the state or that are not explicitly prohibited by the state and played at a location within the state.

Class III. A class III gaming activity is any gaming that is not class I or class II. Class III includes horse racing, dog racing, jai alai, casino gaming, and slot machines.

Withholding Tables

To figure the amount of tax to withhold each time you make a payment, use the table on page 24 for the period for

which you make payments. For example, if you make payments weekly, use Table 1; if you make payments monthly, use Table 4. If the total payments to an individual for the year are \$9,350 or less, no withholding is required.

Example. A tribal member is paid monthly. The monthly payment is \$5,000. Using Table 4, Monthly Distribution Period, to figure the withholding as follows: Subtract \$3,608 from the \$5,000 payment for a remainder of \$1,392. Multiply this amount by 25% for a total of \$348. Add \$389.55 for a total withholding of \$737.55.

Depositing and reporting withholding. Combine the Indian gaming withholding with all other nonpayroll withholding (for example, backup withholding and withholding on gambling winnings). Generally, you must deposit the amounts withheld using EFTPS or at an authorized financial institution using Form 8109, Federal Tax Deposit Coupon. See Publication 15 (Circular E) for a detailed discussion of the deposit requirements.

Report Indian gaming withholding on Form 945, Annual Return of Withheld Federal Income Tax. For more information, see Form 945 and the Instructions for Form 945. Also, report the payments and withholding to tribal members and to the IRS on Form 1099-MISC, Miscellaneous Income (see the Instructions for Forms 1099-MISC).

Tables for Withholding on Distributions of Indian Gaming Profits to Tribal Members

Tables for All Individuals

(For Payments Made in 2009)

Table 1—WEEKLY DISTRIBUTION PERIOD

If the amount of the payment is:		The amount of income tax to withhold is:		
Not over	\$180			\$0
Over—	But not over—		of excess over—	
\$180	\$340		10%	\$180
\$340	\$833	\$16.00 plus 15%	. . . . .	\$340
\$833	\$1,762	\$89.95 plus 25%	. . . . .	\$833
\$1,762	-----	\$322.20 plus 28%	. . . . .	\$1,762

Table 2—BIWEEKLY DISTRIBUTION PERIOD

If the amount of the payment is:		The amount of income tax to withhold is:		
Not over	\$360			\$0
Over—	But not over—		of excess over—	
\$360	\$681		10%	\$360
\$681	\$1,665	\$32.10 plus 15%	. . . . .	\$681
\$1,665	\$3,523	\$179.70 plus 25%	. . . . .	\$1,665
\$3,523	-----	\$644.20 plus 28%	. . . . .	\$3,523

Table 3—SEMIMONTHLY DISTRIBUTION PERIOD

If the amount of the payment is:		The amount of income tax to withhold is:		
Not over	\$390			\$0
Over—	But not over—		of excess over—	
\$390	\$738		10%	\$390
\$738	\$1,804	\$34.80 plus 15%	. . . . .	\$738
\$1,804	\$3,817	\$194.70 plus 25%	. . . . .	\$1,804
\$3,817	-----	\$697.95 plus 28%	. . . . .	\$3,817

Table 4—MONTHLY DISTRIBUTION PERIOD

If the amount of the payment is:		The amount of income tax to withhold is:		
Not over	\$779			\$0
Over—	But not over—		of excess over—	
\$779	\$1,475		10%	\$779
\$1,475	\$3,608	\$69.60 plus 15%	. . . . .	\$1,475
\$3,608	\$7,633	\$389.55 plus 25%	. . . . .	\$3,608
\$7,633	-----	\$1,395.80 plus 28%	. . . . .	\$7,633

Table 5—QUARTERLY DISTRIBUTION PERIOD

If the amount of the payment is:		The amount of income tax to withhold is:		
Not over	\$2,338			\$0
Over—	But not over—		of excess over—	
\$2,338	\$4,425		10%	\$2,338
\$4,425	\$10,825	\$208.70 plus 15%	. . . . .	\$4,425
\$10,825	\$22,900	\$1,168.70 plus 25%	. . . . .	\$10,825
\$22,900	-----	\$4,187.45 plus 28%	. . . . .	\$22,900

Table 6—SEMIANNUAL DISTRIBUTION PERIOD

If the amount of the payment is:		The amount of income tax to withhold is:		
Not over	\$4,675			\$0
Over—	But not over—		of excess over—	
\$4,675	\$8,850		10%	\$4,675
\$8,850	\$21,650	\$417.50 plus 15%	. . . . .	\$8,850
\$21,650	\$45,800	\$2,337.50 plus 25%	. . . . .	\$21,650
\$45,800	-----	\$8,375.00 plus 28%	. . . . .	\$45,800

Table 7—ANNUAL DISTRIBUTION PERIOD

If the amount of the payment is:		The amount of income tax to withhold is:		
Not over	\$9,350			\$0
Over—	But not over—		of excess over—	
\$9,350	\$17,700		10%	\$9,350
\$17,700	\$43,300	\$835.00 plus 15%	. . . . .	\$17,700
\$43,300	\$91,600	\$4,675.00 plus 25%	. . . . .	\$43,300
\$91,600	-----	\$16,750.00 plus 28%	. . . . .	\$91,600

Table 8—DAILY or MISCELLANEOUS DISTRIBUTION PERIOD

If the amount of the payment is:		The amount of income tax to withhold is:		
Not over	\$36.00			\$0
Over—	But not over—		of excess over—	
\$36.00	\$68.10		10%	\$36.00
\$68.10	\$166.50	\$3.21 plus 15%	\$68.10
\$166.50	\$352.30	\$17.97 plus 25%	\$166.50
\$352.30	-----	\$64.42 plus 28%	\$352.30

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