

Advanced Compensation and Benefits Issues

The University of Texas School of Law | Philanthropy Southwest
Nonprofit Organizations Institute

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Employment tax and Compensation stress points

- Who is the employer? Are there multiple employers?
 - Common law standard generally applies for tax purposes – looks to behavioral control, financial control, relationship of the parties.
 - Corporate officers are deemed by statute to be employees of the corporation. IRC secs. See IRC §§ 3401(c); 3121(d)(1), 3306(i).
- Maintaining an accountable plan
- Capturing taxable fringe benefits on a timely basis

Who is the employer? And are there multiple employers?

As long as worker was treated as an employee and employment taxes were paid, may not have focused on these questions. New reasons to focus:

- Employment tax, including FUTA – If worker is employed by both a 501(c)(3) and a 501(c)(4), need to pay FUTA with respect to 501(c)(4) wages. IRS systems not set up to expect FUTA from 501(c)(3) organization.
- Section 4960 excise tax liability – remuneration includes remuneration “paid with respect to employment ... by any related person....” 4960(c)(4)(A).
- California AB5 – Can a worker be an employee for state law purposes and not for federal purposes? Will state law treatment nullify section 530 relief?

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Common paymaster v. Reporting agent

- Common paymaster – IRC § 3121(s)
 - “[I]f two or more related corporations concurrently employ the same individual and compensate such individual through a common paymaster which is one of such corporations . . .”
 - Purpose is to create a single wage base for FICA purposes.
- Reporting agent – Rev. Proc. 2012-32
 - Use Form 8655 to authorize agent to sign and file Form 941 (quarterly ITW and FICA) and 940 (FUTA) on behalf of employer.
- Section 3504 agent – IRC § 3504
 - Use Form 2678 to authorize agent to file under file Form 941 under its EIN

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Section 3401(d)(1) Employer and Payroll Service Provider

- Section 3401(d)(1) employer – controls the payment of wages. More than serving as payor who issues check and getting advance or reimbursement from employer. This is party determining amount to be paid or controlling the fund from which the wages are paid. E.g., administering a settlement fund.
- Payroll service provider – prepares employment tax returns for employer but is not authorized to sign. May help file. May make tax deposits for employer.

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Types of Third Party Arrangements

	Payroll Service Provider	Reporting Agent	Section 3504 Agent	Section 3401(d)(1) employer	Common Paymaster (disburses all compensation)
Form 941	Employer's Name and EIN	Employer's Name and EIN	Agent's Name and EIN + Schedule R	3401(d)(1) employer's name and EIN	Common Paymaster's Name and EIN
Form W-2	Employer's name and EIN	Employer's name and EIN	Agent's name and EIN	3401(d)(1) employer's name and EIN	Common paymaster's name and EIN
Liability for Unpaid Taxes	Employer	Employer	3504 agent and employer jointly and severally liable	3401(d)(1) employer	Common paymaster and concurrent employer jointly and severally liable

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