UT LAW CLE THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

37th Annual Nonprofit Organizations Institute

January 23-24, 2020
Austin, TX

Shared Employment, Reporting of Compensation and Its Implications for Exempt Organizations

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January 25, 2020

Shared employment involves two or more employers agreeing to each direct and control a worker's services concurrently. If an exempt organization is sharing an employee with another organization or business, it will need to pay attention to how the shared employment could affect compliance with requirements for exemption, particularly if the exempt organization is paying any part of the wages for the shared employee. If an exempt organization is sharing an employee with another entity, the exempt organization will also want to understand how employment taxes are being reported and paid with respect to the employee's wages and how that approach to reporting reconciles with having two employers. The first part of the outline discusses tax compliance issues for exempt organizations that are sharing employees with one or more other entities. The second part of the outline describes the types of arrangements under which a third party, who may or may not be an employer sharing the employee, may be involved in reporting wages and paying employment taxes. Understanding these arrangements is important background for the third part of the outline, which reviews how compensation and benefits are reported on Form W-2 and Form 990 where there is shared employment and how that reporting could interact with analysis and compliance with employment tax responsibilities generally and the new section 4960 excise tax specifically.

I. Shared Employment

Shared employment occurs when two organizations – which may or may not be related -- have agreed they will each employ the same employee concurrently and either one of the employers will cover the cost of the employee's wages and benefits for the services performed for both employers or the two employers will share the cost. The employee may be performing services on a joint project sponsored by the two organizations or may be providing separate services for each employer. Shared employment for purposes of this outline is distinct from secondment, which occurs when an employer who has an established relationship with an employee lends the employee to another organization (related or unrelated) for a specified period of time. Shared employment also does not refer to a circumstance where an employee simultaneously holds two jobs with two employers who have no agreement with each other about the employee's services and who each pay the employee separately for her services.

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A. Employment

For purposes of reporting on Form 990 and for employment tax purposes, whether an individual is an employee – rather than an independent contractor – is determined by applying the common law standard. Instructions for Form 990, page 59; Treas. Reg. §§ 31.3121(d)-1(c)(1) (FICA); 31.3306(i)-1(a) (FUTA); and 31.3401(c)-1(a) (income tax withholding). The same common law standard appears to apply for the new excise tax on executive compensation under section 4960. The tax applies with respect to remuneration. Remuneration is defined in section 4960(c)(3)(A) as wages under section 3401(a), and wages under section 3401(a) are defined as all remuneration for services performed by an employee for his employer.

As explained in the employment tax regulations, "Generally [a common law employment] relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer . . . are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services." Treas. Reg. § 31.3121(d)-1(c)(2). See also, Treas. Reg. §§ 31.3306(i)-1(b) and 31.3401(c)-1(b).

The IRS has developed a three-category test analyzing various factors to determine whether a common law employment relationship exists between workers and a particular entity. See, "Independent Contractor or Employee?" Department of the Treasury, Internal Revenue Service, Training 3320-102 (Rev. 10-96). The categories are behavioral control, financial control, and relationship of the parties. Each category contains facts that illustrate the right to direct and control - or its absence. There is no magic number of relevant evidentiary facts that is dispositive of the issue. Instead, all the facts must be weighed in evaluating the extent of the right to direct and control. See CCA 200415008 (April 9, 2004).

It is important to clarify whether the worker has two separate employment relationships or whether the worker is employed by one organization, and the second organization is purchasing services from the employing organization. All of the facts and circumstances will be relevant. If there are two employment relationships, the documentation of the arrangement between the two organizations would be expected to say either that each organization pays compensation and benefits separately or that one organization will reimburse the other organization for the compensation and benefits attributable to the time spent working for the second organization. If the worker is presented to the public as having a specific position at each organization, e.g. Director of Community Relations at one organization and Executive Director at the other organization, that suggests two employment relationships. Employment tax reporting and payment should be consistent with one employer or two on matters such as the FICA wage base, and number of W-2s issued. See section II of the outline for discussion of the legal framework when two employers share an employee and only one employer pays the employee on behalf of both employers.

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First appeared as part of the conference materials for the
37th Annual Nonprofit Organizations Institute session
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