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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 31

[TD 9662]

RIN 1545-BJ31

Designation of Payor to Perform Acts Required of an Employer

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final Regulations.

SUMMARY: This document contains final regulations under section 3504 of the Internal Revenue Code (Code) providing circumstances under which a person (payor) is designated to perform the acts required of an employer and is liable for employment taxes with respect to wages or compensation paid by the payor to individuals performing services for the payor's client pursuant to a service agreement between the payor and the client.

DATES: Effective date: These final regulations are effective on **[INSERT DATE OF**

PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER].

Applicability date: For dates of applicability, see §31.3504-2(f) of these regulations.

FOR FURTHER INFORMATION CONTACT: Jeanne Royal Singley at (202) 317-6798 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments to 26 CFR part 31 under section 3504 of the Code. On January 29, 2013, Treasury and the IRS published a notice of proposed rulemaking (REG-102966-10, 78 FR 6056) (the proposed regulations) in the **Federal Register** under section 3504 of the Code. Treasury and the IRS received written and electronic comments responding to the proposed regulations. All comments were considered and are available for public inspection at <http://www.regulations.gov> or upon request. After consideration of all the public comments, the proposed regulations are adopted as amended by this Treasury decision. The public comments and revisions are discussed in this preamble.

Explanation of Provisions

Under section 3504, if a payor pays wages or compensation to employees who are employed by one or more employers, the Secretary is authorized, in accordance with regulations prescribed by the Secretary, to designate such payor to perform acts required of employers under the Code. Section 3504 further provides that, except as otherwise prescribed by the Secretary, all provisions of law (including penalties) applicable with respect to an employer are applicable to the payor so designated, but the employer for whom the payor acts remains subject to the provisions of law (including penalties) applicable with respect to employers. Accordingly, both an employer and the payor designated in accordance with regulations under section 3504 are liable for the employment taxes on wages or compensation paid by the payor.

The IRS has established administrative procedures under which a payor may request authorization on Form 2678, Employer/Payer Appointment of Agent, to file employment tax returns and perform other acts for the employer. The proposed

regulations provide rules regarding the employment tax obligations under certain three-party arrangements in which a payor enters into an agreement with the employer (client) to perform the employment tax obligations of the client with regard to wages or compensation paid by the payor to individuals performing services for the client, but the payor does not use the established IRS administrative procedures to request authorization to file employment tax returns and performs other acts for the client.

Under the proposed regulations, a payor is designated under section 3504 to perform the acts of an employer in any case in which the payor enters into a service agreement with a client. For this purpose, the term service agreement means a written or oral agreement pursuant to which the payor (1) asserts it is the employer (or “co-employer”) of individuals performing services for the client, (2) pays wages or compensation to the individuals for services the individuals perform for the client, and (3) assumes responsibility to collect, report, and pay, or assumes liability for, any employment taxes with respect to the wages or compensation paid by the payor to the individuals who perform services for the client.

The proposed regulations also provide exceptions to when a payor is designated under section 3504 to perform the acts of an employer even if the payor has entered into an agreement that includes all of the components of a service agreement. The proposed regulations also include numerous examples to illustrate the rules regarding designation.

Summary of Comments and Explanation of Revisions

The IRS received comments in response to the proposed regulations. The majority of the comments expressed support for the regulations and had no suggested

changes. Other comments were outside the scope of section 3504 and these regulations.

One commenter suggested deleting the term “agent” when describing the third party payor that is designated to perform the acts of an employer. The commenter indicated that many three-party arrangements are not structured as common law agency relationships and that designating the payor as an agent for purposes of these regulations may raise implications for other unrelated issues. While the proposed regulations state that the designation of a payor under the proposed regulations has no impact in determining the payor’s status for other purposes of the Code, Treasury and the IRS agree that describing the payor designated to perform the acts of an employer as an “agent” may be unnecessary, given that section 3504 grants the Secretary authority to designate a “fiduciary, agent, or other person” to perform such acts. Accordingly, the final regulations adopt this change.

Another commenter asked for clarification of the application of section 3504 to payors of group disability income benefits under an administrative service contract (commonly referred to as an administrative service only agreement or an “ASO agreement”) with an employer. The comment was in response to a specific request in the notice of proposed rule-making asking whether the proposed definition of service agreement inappropriately designates or fails to designate a payor to perform acts of an employer. The commenter explained that under an ASO agreement, an insurer that administers employee disability claims may agree to withhold employment taxes on the taxable disability payments and report and pay the employment taxes to the IRS under the insurer’s employer identification number. The commenter stated that in recent

years, some insurance companies have required that the employer designate the insurer as an agent on Form 2678 when entering into new ASO agreements. The commenter asked whether performing services under an ASO agreement makes the insurer an agent under section 3504 that is required to file Form 2678. The commenter also asked for an example to be included in these final regulations to clarify whether filing Form 2678 is required to perform employment tax obligations under an ASO agreement.

These regulations address the designation of a payor to perform the acts of an employer when the formal IRS administrative procedures to designate an agent (i.e., filing Form 2678) are not followed. Accordingly, it is beyond the scope of these regulations to address whether a Form 2678 must be filed in order to report and pay employment taxes in any particular situation.

However, §32.1 of the Employment Tax Regulations provides specific rules for reporting employment taxes with respect to payments made by a third party on account of sickness or accident disability (often called “sick pay”). While those rules are unaffected by section 3504 or these regulations, Treasury and the IRS agree a clarification of the interaction of those rules and these regulations would be helpful.

Specifically, under §32.1, a third-party payor of sick pay may be treated as an employer or as an agent of the employer with regard to the employment tax obligations, depending on the circumstances of the arrangement. The proposed regulations contain an exception at §31.3504-2(d)(3) that a payor is not designated to perform the acts required of an employer for any wages or compensation paid by the payor to the individual(s) performing services for a client if the payor is the employer. However, the

proposed regulations are not clear whether the §31.3504-2(d)(3) exception for payors that are employers applies if the third-party payor of the sick pay is *treated* as an employer under §32.1. To clarify that a third-party payor of sick pay that is treated as an employer under §32.1 will not be designated under these regulations to perform the acts of an employer with regard to the sick pay, these final regulations add an additional exception at §31.3504-2(d)(4) for payors treated as employers under section 3121(a)(2)(A).

No changes were needed, however, to address situations where the third-party payor of the sick pay is the agent of the employer under §32.1. Under those circumstances, these regulations do not apply because the payments are not made pursuant to a service agreement within the meaning of these regulations. The first component of a service agreement is that the payor asserts that it is the employer of the individuals performing services for its client, such as by filing employment tax returns using its own EIN that include wages paid to the individuals performing services for the client. A third-party payor of sick pay that is treated as an agent of the employer under §32.1 does not file employment tax returns under its own EIN to report and pay the taxes on the sick pay or otherwise assert that it is the employer. Thus, the arrangement under which the payor pays the sick pay as an agent would not be a service agreement and these regulations would not apply to designate the payor to perform the acts of the employer.

Finally, although no comments were received with regard to the exception at §31.3504-2(d)(3) for employers, these final regulations revise that provision to clarify that the exception includes a section 3401(d)(1) employer, also commonly referred to as

a statutory employer, as discussed in the preamble to the proposed regulations. Section 3401(d)(1) provides that for purposes of federal income tax withholding, the term employer means the person for whom an individual performs or performed any service, of whatever nature, as an employee of such person, except that, if the person for whom the individual performs or performed the services does not have control of the payment of wages for such services, the term employer means the person having control of the payment of such wages. For purposes of section 3401(d)(1), the term control means legal control. See §31.3401(d)-1(f). Thus, when one person is the common law employer of an individual because it controls the day-to-day performance of services by the individual, another person may be the employer liable to collect, report, and pay employment taxes because it is the entity solely in control of the payment of wages to the individual. See *Winstead v. United States*, 109 F.3d 989 (4th Cir. 1997). An example is added to these regulations at §31.3504-2(e)(8) to demonstrate the application of the exception to a section 3401(d)(1) employer.

Special Analyses

It has been determined that this final rule is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to this regulation, and because the regulation does not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, this regulation has been submitted to the Chief Counsel for Advocacy of the Small Business Administration

for comment on its impact on small business, and no comments were received.

Drafting Information

The principal author of these regulations is Jeanne Royal Singley, Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, personnel from other offices of the IRS and Treasury participated in their development.

List of Subjects in 26 CFR Part 31

Employment taxes, Income taxes, Penalties, Pensions, Railroad retirement, Reporting and recordkeeping requirements, Social security, Unemployment compensation.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 31 is amended as follows:

PART 31--EMPLOYMENT TAXES AND COLLECTION OF INCOME TAX AT SOURCE

Paragraph 1. The authority citation for part 31 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 31.3504-2 is added to read as follows:

§31.3504-2 Designation of payor to perform acts of an employer.

(a) **In general.** A person (as defined in section 7701(a)(1)) that pays wages or compensation (“payor”) to the individual(s) performing services for any client pursuant to a service agreement, except as provided in paragraph (d) of this section, is designated to perform the acts required of an employer with respect to the wages or compensation paid. For purposes of this section the term **wages** has the same meaning as the term

wages has for purposes of chapters 21, 23, and 24, and the term compensation has the same meaning as the term compensation has for purposes of chapter 22. This section is not applicable if the payor has been authorized as an agent of the employer under § 31.3504-1.

(b) Definitions--(1) Client. The term client means an individual or entity that enters into a service agreement with the payor.

(2) Service agreement. (i) The term service agreement means an agreement pursuant to which the payor --

(A) Asserts it is the employer (or “co-employer”) of the individual(s) performing services for the client;

(B) Pays wages or compensation to the individual(s) for services the individual(s) perform for the client; and

(C) Assumes responsibility to collect, report, and pay, or assumes liability for, any taxes applicable under subtitle C of the Code with respect to the wages or compensation paid by the payor to the individual(s) performing services for the client.

(ii) For purposes of paragraph (b)(2)(i)(A) of this section, the payor may implicitly or explicitly assert it is the employer (or “co-employer”) of the individual(s) performing services for the client, including by agreeing to--

(A) Recruit and hire employees for the client or assign employees as permanent or temporary members of the client’s work force, or participate with the client in these actions;

(B) Hire the client’s employees as its own and then provide them back to the client to perform services for the client; or

(C) File employment tax returns using its own employer identification number that include wages or compensation paid to the individual(s) performing services for the client.

(c) Effects of designation. If a payor is designated to perform the acts required of an employer under this section then the following rules apply--

(1) A payor must perform the acts required of an employer under each applicable chapter of the Code and the relevant regulations with respect to the wages or compensation paid by such payor. All provisions of law (including penalties) and the regulations applicable to the employer are applicable to the payor so designated with respect to the wages or compensation paid by the payor; and

(2) Each employer for whom the payor is designated remains subject to all provisions of law (including penalties) and of the regulations applicable to an employer.

(d) Exceptions. A payor is not designated to perform the acts required of an employer under this section for any wages or compensation paid by the payor to the individual(s) performing services for a client if--

(1) The wages or compensation are reported on a return filed under the client's employer identification number (as defined in section 6109 and the applicable regulations);

(2) The payor is a common paymaster under sections 3121(s) or 3231(i);

(3) The payor is the employer of the individual(s) (including an employer within the meaning of section 3401(d)(1)); or

(4) The payor is treated as an employer under section 3121(a)(2)(A).

(e) Examples. The following examples illustrate the application of this section:

(1) Example 1. Corporation P enters into an agreement with Employer, effective January 1, 2015. Under the agreement, Corporation P hires the Employer's employees as its own employees and provides them back to Employer to perform services for Employer. Corporation P also assumes responsibility to make payment of the individuals' wages and for the collection, reporting, and payment of applicable taxes. For all pay periods in 2015, Employer provides Corporation P with an amount equal to the gross payroll (that is, wage and tax amounts) of the individuals, and Corporation P pays wages (less the applicable withholding) to the individuals performing services for Employer. Corporation P also reports the wage and tax amounts on Form 941, Employer's QUARTERLY Federal Tax Return, filed for each quarter of 2015 under Corporation P's employer identification number. Corporation P is not a common paymaster, the employer of the individuals (including an employer within the meaning of section 3401(d)(1)), or treated as the employer of the individual under section 3121(a)(2)(A). Corporation P is designated to perform the acts of an employer with respect to all of the wages Corporation P paid to the individuals performing services for Employer for all quarters of 2015. Employer and Corporation P are each subject to all provisions of law (including penalties) applicable in respect of employers for all quarters of 2015 with respect to such wages.

(2) Example 2. Same facts as Example 1, except that Corporation P only reports the wage and tax amounts on Form 941, Employer's QUARTERLY Federal Tax Return, filed for the 1st and 2nd quarters of 2015. Neither Corporation P nor Employer files returns for the 3rd and 4th quarters of 2015. Corporation P is designated to perform the acts of an employer with respect to all of the wages Corporation P paid to the individuals performing services for Employer for all quarters of 2015. Employer and Corporation P are each subject to all provisions of law (including penalties) applicable in respect of employers for all quarters of 2015 with respect to such wages.

(3) Example 3. Same facts as Example 1, except that neither Corporation P nor Employer reports the wage and tax amounts on Form 941, Employer's QUARTERLY Federal Tax Return, for any quarter of 2015. Corporation P is designated to perform the acts of an employer with respect to all of the wages Corporation P paid to the individuals performing services for Employer for all quarters of 2015. Employer and Corporation P are each subject to all provisions of law (including penalties) applicable in respect of employers for all quarters of 2015 with respect to such wages.

(4) Example 4. Same facts as Example 1, except that Employer provides only net payroll (that is, wages less tax amounts) to Corporation P for each pay period. Corporation P is designated to perform the acts of an employer with respect to all of the wages Corporation P paid to the individuals performing services for Employer for all quarters of 2015. Employer and Corporation P are each subject to all provisions of law (including penalties) applicable in respect of employers for all quarters of 2015 with respect to such wages.

(5) Example 5. Same facts as Example 1, except that after Corporation P reports the wage and tax amounts on Form 941, Employer's QUARTERLY Federal Tax

Return, filed for each quarter of 2015 under Corporation P's employer identification number, Corporation P files a claim for refund of the employment taxes it paid for each quarter of 2015 that are related to wages Corporation P paid to the individuals performing services for Employer. The basis for Corporation P's refund claim is that Corporation P is not the employer of the individuals that performed services for Employer. Corporation P is designated to perform the acts of an employer with respect to all of the wages Corporation P paid to the individuals performing services for Employer for all quarters of 2015. Accordingly, Corporation P is not entitled to a refund. Employer and Corporation P are each subject to all provisions of law (including penalties) applicable in respect of employers for all quarters of 2015 with respect to such wages.

(6) Example 6. Corporation S enters into an agreement with Employer, effective January 1, 2015. Under the agreement, Corporation S provides payroll services, including payment of wages to individuals performing services for Employer, and assumes responsibility for the collection, reporting, and payment of applicable taxes. For all pay periods in 2015, Employer provides Corporation S with an amount equal to the gross payroll (that is, wage and tax amounts) of the individuals, and Corporation S pays wages (less the applicable withholding) to the individuals performing services for Employer. Corporation S also reports the wage and tax amounts on Form 941, Employer's QUARTERLY Federal Tax Return, filed for each quarter of 2015 under Employer's employer identification number. Corporation S is not designated to perform the acts of an employer with respect to all of the wages Corporation S paid to the individuals performing services for Employer for all quarters of 2015. Corporation S did not assert it was the employer and filed Forms 941 using Employer's employer identification number. Accordingly, Corporation S is not liable for the applicable employment taxes under this section. Employer remains subject to all provisions of law (including penalties) applicable in respect of employers for all quarters of 2015 with respect to such wages.

(7) Example 7. Corporation T enters into a consulting agreement with Manufacturer effective January 1, 2015, to provide consulting services to Manufacturer. Corporation T is responsible to pay wages to the individuals providing the consulting services to Manufacturer and to collect, report, and pay the applicable taxes. Corporation T has the right to direct and control the individuals as to when and how to perform the consulting services and, thus, is the common law employer of the individuals providing the consulting services. Corporation T is not designated to perform the acts of an employer with respect to all of the wages Corporation T pays to individuals providing consulting services to Manufacturer. However, as the common law employer of the individuals, Corporation T is subject to all provisions of law (including penalties) applicable in respect of employers with respect to such wages.

(8) Example 8. On January 1, 2015, Corporation U enters into an agreement with Employer for Employer to farm Corporation U's property. Under the agreement, Corporation U and Employer agree to split the proceeds of the sale of the products grown on the property. Employer hires workers to assist it with the farming. Employer

has the right to direct and control the workers as to when and how to perform the services and, thus, is the common law employer of the workers. However, Employer is unable to pay the workers until after the products are sold. Therefore, Corporation U pays wages to the workers and deducts this amount from Employer's share of the profits. Corporation U controls the payment of wages within the meaning of section 3401(d)(1). Corporation U is not designated to perform the acts of an employer with respect to all of the wages Corporation U paid to workers providing services for Employer. However, as the section 3401(d)(1) employer of the workers performing services for Employer, Corporation U is subject to all provisions of law (including penalties) applicable in respect of employers with respect to such wages.

(9) Example 9. Corporation V and Employer execute and submit a Form 2678, Employer/Payer Appointment of Agent, to the Service, requesting approval to authorize Corporation U to report, deposit, and pay taxes with respect to wages it pays, as agent of Employer for purposes of Form 941, Employer's QUARTERLY Federal Tax Return. The Form 2678 is approved by the Service and effective for all quarters of 2015. Accordingly, Corporation V reports the wages it pays to individuals performing services for Employer and related tax amounts on Form 941 and Schedule R (Form 941), Allocation Schedule for Aggregate Form 941 Filers, filed for each quarter of 2015 under

Corporation V's employer identification number. Corporation V is not designated under this section to perform the acts of an employer with respect to all of the wages Corporation V paid to the individuals performing services for Employer for all quarters of 2015. However, as an agent authorized under §31.3504-1(a), Corporation V is subject to all provisions of law (including penalties) applicable in respect of employers for all quarters of 2015 with respect to such wages. Employer also remains subject to all provisions of law (including penalties) applicable in respect of employers for all quarters of 2015 with respect to such wages.

(f) Effective/applicability date. These final regulations are effective for wages or compensation paid by a payor in quarters beginning on or after **[INSERT DATE OF PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER]**.

John Dalrymple

Deputy Commissioner for Services and Enforcement.

Approved: March 20, 2014

Mark J. Mazur

Assistant Secretary of the Treasury (Tax Policy).

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