



Proposed Regulation: Section 3504-2
Summary for FMS Membership
Compiled by the National Resource Center for Participant-Directed Services

Purpose: The IRS wants to ensure that it can hold liable a payor who enters into an agreement with an employer and tells the employer that it will be an employer or co-employer and pay all employment taxes, but then does not file form 2678 to become an agent under section 3504 and does not meet the test to be a common law employer. Under the proposed rule, such a payor would be an agent under 3504-2 who is jointly liable with the employer for any employment taxes and penalties.

Proposal: This regulation proposes to add a part 2 to section 3504. In summary, section 3504-2 states that a person who enters into a certain kind of "service agreement" to pay wages or compensation on behalf of an employer is considered to be designated as an agent of that employer, and has the obligation to "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."

A "service agreement" must state the following in order to trigger liability under this section:

1. The payor asserts that it is the employer or co-employer of the workers (or implies through its actions that it is an employer or co-employer);
2. The payor agrees to pay wages or compensation to the workers; and
3. The payor assumes responsibility to pay taxes with respect to those wages.

The service agreement can be either oral or written. A payor can assert that it is an employer of workers either explicitly, or implicitly by performing functions such as: recruiting and hiring employees or assigning employees "as permanent or temporary members of the client's workforce", hiring the workers as its own and then providing them back to perform services for the client, or filing employment tax returns for the workers under its own EIN.

Exceptions: The section will **not** apply to any agents who have been authorized under the current section 3504. It applies only to an entity that:

1. Pays wages on behalf of an employer, but has not been authorized to act as an agent through an approved Form 2678, and
2. Is not a common law employer of workers, but nevertheless told an employer (incorrectly) that it is an employer or "co-employer" and will take on the responsibility of paying wages and filing taxes on those wages.



A payor is **not** considered an agent under the proposed regulation if the wages are reported on a return filed under the employer's EIN, not the payor's EIN. The IRS provides the following example: a provider of payroll services that does not assert that it is the employer, and files forms 941 using the employer's EIN and not its own EIN, would not be jointly liable under 3504-2.

The proposed rule does **not** apply if the payor of wages is determined to be the common law employer of the workers, because in such a case the payor would be liable as an employer and section 3504 would not come into play. (The IRS explained that it does not give up its right to argue that the payor is actually the common law employer, but section 3504-2 will give the IRS an alternative way to find the payor liable in case it is not determined to be the common law employer).

Submitting Comments: The proposed regulation can be found at <http://www.gpo.gov/fdsys/pkg/FR-2013-01-29/html/2013-01857.htm>.

The NRCPS will be hosting a call with our FMS members on Thursday, April 11th from 4-5pm EST to receive any comments to submit on behalf of the membership. Please register to attend online: <http://nrcps.adobeconnect.com/fmsmf41113/event/registration.html>

If you wish to submit your own comments directly to the IRS, they must be received by April 29, 2013. Comments can be submitted electronically via the Federal eRulemaking Portal at www.regulations.gov (Indicate IRS and REG-102966010) or by mail at:

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