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Employee (Common-Law Employee)

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Under common-law rules, anyone who performs services for you is your employee ***if you can 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.

Example: Donna Lee is a salesperson employed on a full-time basis by Bob Blue, an auto dealer. She works 6 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 has 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.

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Independent Contractor (Self-Employed) or Employee?

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It is critical that business owners correctly determine whether the individuals providing services are employees or independent contractors.

Generally, you must withhold income taxes, withhold and pay Social Security and Medicare taxes, and pay unemployment tax on wages paid to an employee. You do not generally have to withhold or pay any taxes on payments to independent contractors.

Select the Scenario that Applies to You:

• I am an independent contractor or in business for myself

If you are a business owner or contractor who provides services to other businesses, then you are generally considered self-employed. For more information on your tax obligations if you are self-employed (an independent contractor), see our [Self-Employed Tax Center](#).

• I hire or contract with individuals to provide services to my business

If you are a business owner hiring or contracting with other individuals to provide services, you must determine whether the individuals providing services are employees or independent contractors. Follow the rest of this page to find out more about this topic and what your responsibilities are.

Determining Whether the Individuals Providing Services are Employees or Independent Contractors

Before you can determine how to treat payments you make 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](#)
- An [employee](#) (common-law employee)
- A [statutory employee](#)
- A [statutory nonemployee](#)

In determining whether the person providing service is an employee or an independent contractor, all information that provides evidence of the degree of control and independence must be considered.

Common Law Rules

Facts that provide evidence of the degree of control and independence fall into three categories:

1. **Behavioral:** Does the company control or have the right to control what the worker does and how the worker does his or her job?
2. **Financial:** Are the business aspects of the worker's job controlled by the payer? (these include things like how worker is paid, whether expenses are reimbursed, who provides tools/supplies, etc.)
3. **Type of Relationship:** Are there written contracts or employee type benefits (i.e. pension plan, insurance, vacation pay, etc.)? Will the relationship continue and is the work performed a key aspect of the business?

Businesses must weigh all these factors when determining whether a worker is an employee or independent contractor. Some factors may indicate that the worker is an employee, while other factors indicate that the worker is an independent contractor. There is no "magic" or set number of factors that "makes" the worker an employee or an independent contractor, and no one factor stands alone in making this determination. Also, factors which are relevant in one situation may not be relevant in another.

The keys are to look at the entire relationship, consider the degree or extent of the right to direct and control, and finally, to document each of the factors used in coming up with the determination.

Form SS-8

If, after reviewing the three categories of evidence, it is still unclear whether a worker is an employee or an independent contractor, [Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding \(PDF\)](#) can be filed with the IRS. The form may be filed by either the business or the worker. The IRS will review the facts and circumstances and officially determine the worker's status.

Be aware that it can take at least six months to get a determination, but a business that continually hires the same types of workers to perform particular services may want to consider filing the [Form SS-8 \(PDF\)](#).

Employment Tax Obligations

Once a determination is made (whether by the business or by the IRS), the next step is filing the appropriate forms and paying the associated taxes.

- [Forms and associated taxes for independent contractors](#)
- [Forms and associated taxes for employees](#)

Employment Tax Guidelines

There are specific employment tax guidelines that must be followed for certain industries.

- [Employment Tax Guidelines: Classifying Certain Van Operators in the Moving Industry \(PDF\)](#)
- [Employment Tax Procedures: Classification of Workers within the Limousine Industry \(PDF\)](#)

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 Internal Revenue Code section 3509 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. See [Publication 1976, Section 530 Employment Tax Relief Requirements \(PDF\)](#) for more information.

Misclassified Workers Can File Social Security Tax Form

Workers who believe they have been improperly classified as independent contractors by an employer can use Form 8919, Uncollected Social Security and Medicare Tax on Wages to figure and report the employee's share of uncollected Social Security and Medicare taxes due on their compensation. See the full article [Misclassified Workers to File New Social Security Tax Form](#) for more information.

Voluntary Classification Settlement Program

The [Voluntary Classification Settlement Program \(VCSP\)](#) is a new optional program that provides taxpayers with an opportunity to reclassify their workers as employees for future tax periods for employment tax purposes with partial relief from federal employment taxes for eligible taxpayers that agree to prospectively treat their workers (or a class or group of workers) as employees. To participate in this new voluntary program, the taxpayer must meet certain eligibility requirements, apply to participate in the VCSP by filing Form 8952, Application for Voluntary Classification Settlement Program, and enter into a closing agreement with the IRS.



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Independent Contractor Defined

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People such as doctors, dentists, veterinarians, lawyers, accountants, contractors, subcontractors, public stenographers, or auctioneers who are in an independent trade, business, or profession in which they offer their services to the general public are generally independent contractors. However, whether these people are independent contractors or employees depends on the facts in each case. The general rule is that an individual is an independent contractor if the payer has the right to control or direct only the result of the work and not what will be done and how it will be done. The earnings of a person who is working as an independent contractor are subject to Self-Employment Tax.

If you are an independent contractor, you are self-employed. To find out what your tax obligations are, visit the [Self-Employed Tax Center](#).

You are not an independent contractor if you perform services that can be controlled by an employer (what will be done and how it will be done). This applies even if you are given freedom of action. What matters is that the employer has the legal right to control the details of how the services are performed.

If an employer-employee relationship exists (regardless of what the relationship is called), you are not an independent contractor and your earnings are generally not subject to [Self-Employment Tax](#).

However, your earnings as an employee may be subject to FICA (Social Security tax and Medicare) and income tax withholding.

For more information on determining whether you are an independent contractor or an employee, refer to the section on [Independent Contractors or Employees](#).

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Type of Relationship

[Español](#)

Type of relationship refers to facts that show how the worker and business perceive their relationship to each other.

The factors, for the type of relationship between two parties, generally fall into the categories of:

- Written contracts
- Employee benefits
- Permanency of the relationship
- Services provided as key activity of the business

Written Contracts

Although a contract may state that the worker is an employee or an independent contractor, this is not sufficient to determine the worker's status. The IRS is not required to follow a contract stating that the worker is an independent contractor, responsible for paying his or her own self employment tax. How the parties work together determines whether the worker is an employee or an independent contractor.

Employee Benefits

Employee benefits include things like insurance, pension plans, paid vacation, sick days, and disability insurance. Businesses generally do not grant these benefits to independent contractors. However, the lack of these types of benefits does not necessarily mean the worker is an independent contractor.

Permanency of the Relationship

If you hire 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 the intent was to create an employer-employee relationship.

Services Provided as Key Activity of the Business

If a worker provides services that are a key aspect of the business, it is more likely that the business 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.

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Behavioral Control

[Español](#)

Behavioral control refers to facts that show whether there is a right to direct or control how the worker does the work. A worker is an employee when the business has the right to direct and control the worker. The business does not have to actually direct or control the way the work is done – as long as the employer has the right to direct and control the work.

The behavioral control factors fall into the categories of:

- Type of instructions given
- Degree of instruction
- Evaluation systems
- Training

Types of Instructions Given

An employee is generally subject to the business's 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 when performing the work.

Degree of Instruction

Degree of instruction means that the more detailed the instructions, the more control the business exercises over the worker. More detailed instructions indicate that the worker is an employee. Less detailed instructions reflect less control, indicating that the worker is more likely an independent contractor.

Note: 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.

Evaluation System

If an evaluation system measures the details of how the work is performed, then these factors would point to an employee.

If the evaluation system measures just the end result, then this can point to either an independent contractor or an employee.

Training

If the business provides the worker with training on how to do the job, this indicates that the business wants the job done in a particular way. This is strong evidence that the worker is an employee. Periodic or on-going training about procedures and methods is even stronger evidence of an employer-employee relationship. However, independent contractors ordinarily use their own methods.



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Financial Control

[Español](#)

Financial control refers to facts that show whether or not the business has the right to control the economic aspects of the worker's job.

The financial control factors fall into the categories of:

- Significant investment
- Unreimbursed expenses
- Opportunity for profit or loss
- Services available to the market
- Method of payment

Significant investment

An independent contractor often has a significant investment in the equipment he or she uses in working for someone else. However, in many occupations, such as construction, workers spend thousands of dollars on the tools and equipment they use and are still considered to be employees. There are no precise dollar limits that must be met in order to have a significant investment. Furthermore, a significant investment is not necessary for independent contractor status as some types of work simply do not require large expenditures.

Unreimbursed 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.

Opportunity for profit or loss

The opportunity to make a profit or loss is another important factor. If a worker has a significant investment in the tools and equipment used and if the worker has unreimbursed expenses, the worker has a greater opportunity to lose money (i.e., their expenses will exceed their income from the work). Having the possibility of incurring a loss indicates that the worker is an independent contractor.

Services available to the 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.

Method of payment

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.

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**Determination of Worker Status for Purposes
of Federal Employment Taxes and
Income Tax Withholding**► Information about Form SS-8 and its separate instructions is at www.irs.gov/formss8.

OMB. No. 1545-0004

For IRS Use Only:
Case Number:

Earliest Receipt Date:

Name of firm (or person) for whom the worker performed services		Worker's name	
Firm's mailing address (include street address, apt. or suite no., city, state, and ZIP code)		Worker's mailing address (include street address, apt. or suite no., city, state, and ZIP code)	
Trade name	Firm's email address	Worker's daytime telephone number	Worker's email address
Firm's fax number	Firm's website	Worker's alternate telephone number	Worker's fax number
Firm's telephone number (include area code)	Firm's employer identification number	Worker's social security number	Worker's employer identification number (if any)

Note. If the worker is paid for these services by a firm other than the one listed on this form, enter the name, address, and employer identification number of the payer. ►

Disclosure of Information

The information provided on Form SS-8 may be disclosed to the firm, worker, or payer named above to assist the IRS in the determination process. For example, if you are a worker, we may disclose the information you provide on Form SS-8 to the firm or payer named above. The information can only be disclosed to assist with the determination process. If you provide incomplete information, we may not be able to process your request. See *Privacy Act and Paperwork Reduction Act Notice* in the separate instructions for more information. **If you do not want this information disclosed to other parties, do not file Form SS-8.**

Parts I–V. All filers of Form SS-8 must complete all questions in Parts I–IV. Part V must be completed if the worker provides a service directly to customers or is a salesperson. If you cannot answer a question, enter "Unknown" or "Does not apply." If you need more space for a question, attach another sheet with the part and question number clearly identified. Write your firm's name (or worker's name) and employer identification number (or social security number) at the top of each additional sheet attached to this form.

Part I General Information

- This form is being completed by: ☐ Firm ☐ Worker; for services performed _____ to _____
(beginning date) (ending date)
- Explain your reason(s) for filing this form (for example, you received a bill from the IRS, you believe you erroneously received a Form 1099 or Form W-2, you are unable to get workers' compensation benefits, or you were audited or are being audited by the IRS).
- Total number of workers who performed or are performing the same or similar services: _____.
- How did the worker obtain the job? ☐ Application ☐ Bid ☐ Employment Agency ☐ Other (specify) _____
- Attach copies of all supporting documentation (for example, contracts, invoices, memos, Forms W-2 or Forms 1099-MISC issued or received, IRS closing agreements or IRS rulings). In addition, please inform us of any current or past litigation concerning the worker's status. If no income reporting forms (Form 1099-MISC or W-2) were furnished to the worker, enter the amount of income earned for the year(s) at issue \$ _____.
If both Form W-2 and Form 1099-MISC were issued or received, explain why.
- Describe the firm's business.

Part I General Information (continued)

- 7 If the worker received pay from more than one entity because of an event such as the sale, merger, acquisition, or reorganization of the firm for whom the services are performed, provide the following: Name of the firm's previous owner:
 Previous owner's taxpayer identification number: ___ Change was a: ☐ Sale ☐ Merger ☐ Acquisition ☐ Reorganization
☐ Other (specify) _____
 Description of above change: _____
 Date of change (MM/DD/YY): _____
- 8 Describe the work done by the worker and provide the worker's job title.
- 9 Explain why you believe the worker is an employee or an independent contractor.
- 10 Did the worker perform services for the firm in any capacity before providing the services that are the subject of this determination request?
☐ Yes ☐ No ☐ N/A
 If "Yes," what were the dates of the prior service?
 If "Yes," explain the differences, if any, between the current and prior service.
- 11 If the work is done under a written agreement between the firm and the worker, attach a copy (preferably signed by both parties). Describe the terms and conditions of the work arrangement.

Part II Behavioral Control (Provide names and titles of specific individuals, if applicable.)

- 1 What specific training and/or instruction is the worker given by the firm?
- 2 How does the worker receive work assignments?
- 3 Who determines the methods by which the assignments are performed?
- 4 Who is the worker required to contact if problems or complaints arise and who is responsible for their resolution?
- 5 What types of reports are required from the worker? Attach examples.
- 6 Describe the worker's daily routine such as his or her schedule or hours.
- 7 At what location(s) does the worker perform services (for example, firm's premises, own shop or office, home, customer's location)? Indicate the appropriate percentage of time the worker spends in each location, if more than one.
- 8 Describe any meetings the worker is required to attend and any penalties for not attending (for example, sales meetings, monthly meetings, staff meetings).
- 9 Is the worker required to provide the services personally? ☐ Yes ☐ No
- 10 If substitutes or helpers are needed, who hires them?
- 11 If the worker hires the substitutes or helpers, is approval required? ☐ Yes ☐ No
 If "Yes," by whom?
- 12 Who pays the substitutes or helpers?
- 13 Is the worker reimbursed if the worker pays the substitutes or helpers? ☐ Yes ☐ No
 If "Yes," by whom?

Part III Financial Control (Provide names and titles of specific individuals, if applicable.)

- 1 List the supplies, equipment, materials, and property provided by each party:
 The firm: _____
 The worker: _____
 Other party: _____
- 2 Does the worker lease equipment, space, or a facility? ☐ Yes ☐ No
 If "Yes," what are the terms of the lease? (Attach a copy or explanatory statement.)
- 3 What expenses are incurred by the worker in the performance of services for the firm?
- 4 Specify which, if any, expenses are reimbursed by:
 The firm: _____
 Other party: _____
- 5 Type of pay the worker receives: ☐ Salary ☐ Commission ☐ Hourly Wage ☐ Piece Work
☐ Lump Sum ☐ Other (specify) _____
 If type of pay is commission, and the firm guarantees a minimum amount of pay, specify amount. \$ _____
- 6 Is the worker allowed a drawing account for advances? ☐ Yes ☐ No
 If "Yes," how often? _____
 Specify any restrictions. _____
- 7 Whom does the customer pay? ☐ Firm ☐ Worker
 If worker, does the worker pay the total amount to the firm? ☐ Yes ☐ No If "No," explain. _____
- 8 Does the firm carry workers' compensation insurance on the worker? ☐ Yes ☐ No
- 9 What economic loss or financial risk, if any, can the worker incur beyond the normal loss of salary (for example, loss or damage of equipment, material)?
- 10 Does the worker establish the level of payment for the services provided or the products sold? ☐ Yes ☐ No
 If "No," who does? _____

Part IV Relationship of the Worker and Firm

- 1 Please check the benefits available to the worker: ☐ Paid vacations ☐ Sick pay ☐ Paid holidays
☐ Personal days ☐ Pensions ☐ Insurance benefits ☐ Bonuses
☐ Other (specify) _____
- 2 Can the relationship be terminated by either party without incurring liability or penalty? ☐ Yes ☐ No
 If "No," explain your answer. _____
- 3 Did the worker perform similar services for others during the time period entered in Part I, line 1? ☐ Yes ☐ No
 If "Yes," is the worker required to get approval from the firm? ☐ Yes ☐ No
- 4 Describe any agreements prohibiting competition between the worker and the firm while the worker is performing services or during any later period. Attach any available documentation.
- 5 Is the worker a member of a union? ☐ Yes ☐ No
- 6 What type of advertising, if any, does the worker do (for example, a business listing in a directory or business cards)? Provide copies, if applicable.
- 7 If the worker assembles or processes a product at home, who provides the materials and instructions or pattern?
- 8 What does the worker do with the finished product (for example, return it to the firm, provide it to another party, or sell it)?
- 9 How does the firm represent the worker to its customers (for example, employee, partner, representative, or contractor), and under whose business name does the worker perform these services?
- 10 If the worker no longer performs services for the firm, how did the relationship end (for example, worker quit or was fired, job completed, contract ended, firm or worker went out of business)?

Part V For Service Providers or Salespersons. Complete this part if the worker provided a service directly to customers or is a salesperson.

- 1 What are the worker's responsibilities in soliciting new customers?

- 2 Who provides the worker with leads to prospective customers?

- 3 Describe any reporting requirements pertaining to the leads.

- 4 What terms and conditions of sale, if any, are required by the firm?

- 5 Are orders submitted to and subject to approval by the firm? ☐ Yes ☐ No
- 6 Who determines the worker's territory?

- 7 Did the worker pay for the privilege of serving customers on the route or in the territory? ☐ Yes ☐ No
If "Yes," whom did the worker pay?
If "Yes," how much did the worker pay? \$ _____
- 8 Where does the worker sell the product (for example, in a home, retail establishment)?

- 9 List the product and/or services distributed by the worker (for example, meat, vegetables, fruit, bakery products, beverages, or laundry or dry cleaning services). If more than one type of product and/or service is distributed, specify the principal one.

- 10 Does the worker sell life insurance full time? ☐ Yes ☐ No
- 11 Does the worker sell other types of insurance for the firm? ☐ Yes ☐ No
If "Yes," enter the percentage of the worker's total working time spent in selling other types of insurance _____ %
- 12 If the worker solicits orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments, enter the percentage of the worker's time spent in the solicitation _____ %
- 13 Is the merchandise purchased by the customers for resale or use in their business operations? ☐ Yes ☐ No
Describe the merchandise and state whether it is equipment installed on the customers' premises.

**Sign
Here**

Under penalties of perjury, I declare that I have examined this request, including accompanying documents, and to the best of my knowledge and belief, the facts presented are true, correct, and complete.



Type or print name below signature.

Title ▶ _____

Date ▶ _____



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Employer's Supplemental Tax Guide

**(Supplement to Pub. 15,
Employer's Tax Guide)**

For use in **2016**



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Future Developments

For the latest information about developments related to Pub. 15-A, such as legislation enacted after it was published, go to www.irs.gov/pub15a.

What's New

Social security and Medicare tax for 2016. The social security tax rate is 6.2% each for the employee and employer, unchanged from 2015. The social security wage base limit is \$118,500, unchanged from 2015.

The Medicare tax rate is 1.45% each for the employee and employer, unchanged from 2015. There is no wage base limit for Medicare tax.

Social security and Medicare taxes apply to the wages of household workers you pay \$2,000 or more in cash or an equivalent form of compensation. Social security and Medicare taxes apply to election workers who are paid

\$1,700 or more in cash or an equivalent form of compensation.

2016 withholding tables. This publication includes the 2016 Formula Tables for Percentage Method Withholding; Wage Bracket Percentage Method Tables; Combined Federal Income Tax, Employee Social Security Tax, and Employee Medicare Tax Withholding Tables; and Tables for Withholding on Distributions of Indian Gaming Profits to Tribal Members.

Withholding allowance. The 2016 amount for one withholding allowance on an annual basis is \$4,050.

Work opportunity tax credit for qualified tax-exempt organizations hiring qualified veterans extended. The work opportunity tax credit is now available for eligible unemployed veterans who begin work after December 31, 2014, and before January 1, 2020. Qualified tax-exempt organizations that hire eligible unemployed veterans can claim the work opportunity tax credit against their payroll tax liability using Form 5884-C. For more information, visit IRS.gov and enter "work opportunity tax credit" in the search box.

New Pub. 5146 explains employment tax examinations and appeal rights. Pub. 5146 provides employers with information on how the IRS selects employment tax returns to be examined, what happens during an exam, and what options an employer has in responding to the results of an exam, including how to appeal the results. Pub. 5146 also includes information on worker classification issues and tip exams.

Motion picture project employers. Beginning January 1, 2016, all wages paid by a motion picture project employer to a motion picture project worker during a calendar year are subject to a single social security tax wage base (\$118,500 for 2016) and a single FUTA tax wage base (\$7,000 for 2016) regardless of the worker's status as a common law employee of multiple clients of the motion picture project employer. For more information, including the definition of a motion picture project employer and motion picture project worker, see Internal Revenue Code section 3512.

Reminders

Form 8922 replaced the "Third-Party Sick Pay Recap" Form W-2. Form 8922 replaces the "Third-Party Sick Pay Recap" previously done on Form W-2. For more information, see [*Form 8922, Third-Party Sick Pay Recap*](#) in section 6.

COBRA premium assistance credit. Effective for tax periods beginning after December 31, 2013, the credit for COBRA premium assistance payments can't be claimed on Form 941, Employer's QUARTERLY Federal Tax Return (or Form 944, Employer's ANNUAL Federal Tax Return). Instead, after filing your Form 941 (or Form 944), file Form 941-X, Adjusted Employer's QUARTERLY Federal Tax Return or Claim for Refund (or Form 944-X, Adjusted Employer's ANNUAL Federal Tax Return or Claim for Refund) to claim the COBRA premium assistance credit. Filing a Form 941-X (or Form 944-X) before filing a Form

941 (or Form 944) for the return period may result in errors or delays in processing your Form 941-X (or Form 944-X). For more information, see the Instructions for Form 941 (or the Instructions for Form 944) or visit IRS.gov and enter "COBRA" in the search box.

No federal income tax withholding on disability payments for injuries incurred as a direct result of a terrorist attack directed against the United States. Disability payments (including Social Security Disability Insurance (SSDI) payments) for injuries incurred as a direct result of a terrorist attack directed against the United States (or its allies) aren't included in income. Because federal income tax withholding is only required when a payment is includable in income, no federal income tax should be withheld from these payments.

Same-sex marriage. For federal tax purposes, marriages of couples of the same sex are treated the same as marriages of couples of the opposite sex. The term "spouse" includes an individual married to a person of the same sex. However, individuals who have entered into a registered domestic partnership, civil union, or other similar relationship that isn't considered a marriage under state law aren't considered married for federal tax purposes. For more information, see Revenue Ruling 2013-17, 2013-38 I.R.B. 201, available at www.irs.gov/irb/2013-38_IRB/ar07.html.

Notice 2013-61 provides special administrative procedures for employers to make claims for refunds or adjustments of overpayments of social security and Medicare taxes with respect to certain same-sex spouse benefits before expiration of the period of limitations. Notice 2013-61, 2013-44 I.R.B. 432, is available at www.irs.gov/irb/2013-44_IRB/ar10.html. You may correct errors to federal income tax withholding and Additional Medicare Tax withheld for prior years if the amount reported on your employment tax return, doesn't agree with the amount you actually withheld. This type of error is an administrative error. You may also correct errors to federal income tax withholding and Additional Medicare Tax withheld for prior years if section 3509 rates apply.

Additional Medicare Tax withholding. In addition to withholding Medicare tax at 1.45%, you must withhold a 0.9% Additional Medicare Tax from wages you pay to an employee in excess of \$200,000 in a calendar year. You are required to begin withholding Additional Medicare Tax in the pay period in which you pay wages in excess of \$200,000 to an employee and continue to withhold it each pay period until the end of the calendar year. Additional Medicare Tax is only imposed on the employee. There is no employer share of Additional Medicare Tax. All wages that are subject to Medicare tax are subject to Additional Medicare Tax withholding if paid in excess of the \$200,000 withholding threshold.

For more information on what wages are subject to Medicare tax, see the chart, *Special Rules for Various Types of Services and Payments*, in section 15 of Pub. 15. For more information on Additional Medicare Tax, visit IRS.gov and enter "Additional Medicare Tax" in the search box.

Outsourcing payroll tax duties. You are responsible to ensure that tax returns are filed and deposits and payments are made, even if you contract with a third party to perform these acts. You remain responsible if the third party fails to perform any required action. If you choose to outsource any of your payroll and related tax duties (that is, withholding, reporting, and paying over social security, Medicare, FUTA, and income taxes) to a third-party payer, such as a payroll service provider (PSP) or reporting agent, visit IRS.gov and enter "outsourcing payroll duties" in the search box for helpful information on this topic. For more information see *Agent With an Approved Form 2678 and Reporting Agents* in [section 7](#).

Federal tax deposits must be made by electronic funds transfer (EFT). You must use EFT to make all federal tax deposits. Generally, an EFT is made using the Electronic Federal Tax Payment System (EFTPS). If you don't want to use EFTPS, you can arrange for your tax professional, financial institution, payroll service, or other trusted third party to make electronic deposits on your behalf. Also, you may arrange for your financial institution to initiate a same-day wire payment on your behalf. EFTPS is a free service provided by the Department of Treasury. Services provided by your tax professional, financial institution, payroll service, or other third party may have a fee.

For more information on making federal tax deposits, see *How To Deposit* in Pub. 15. To get more information about EFTPS or to enroll in EFTPS, visit www.eftps.gov or call 1-800-555-4477 or 1-800-733-4829 (TDD). Additional information about EFTPS is also available in Pub. 966.

You must receive written notice from the IRS to file Form 944. If you have been filing Forms 941 (or Forms 941-SS, Employer's QUARTERLY Federal Tax Return—American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, and the U.S. Virgin Islands, or Formularios 941-PR, Planilla para la Declaración Federal TRIMESTRAL del Patrono), and believe your employment taxes for the calendar year will be \$1,000 or less, and you would like to file Form 944 instead of Forms 941, you must contact the IRS to request to file Form 944. You must receive written notice from the IRS to file Form 944 instead of Forms 941 before you may file this form. For more information on requesting to file Form 944, see the Instructions for Form 944.

Employers can request to file Forms 941 instead of Form 944. If you received notice from the IRS to file Form 944 but would like to file Forms 941 instead, you must contact the IRS to request to file Forms 941. You must receive written notice from the IRS to file Forms 941 instead of Form 944 before you may file these forms. For more information on requesting to file Form 941, see the Instructions for Form 944.

Aggregate Form 941 filers. Agents must complete Schedule R (Form 941), Allocation Schedule for Aggregate Form 941 Filers, when filing an aggregate Form 941. Aggregate Forms 941 can only be filed by agents approved by the IRS under section 3504 of the Internal Revenue Code. To request approval to act as an agent for an employer, the agent files Form 2678 with the IRS.

Aggregate Form 940 filers. Agents must complete Schedule R (Form 940), Allocation Schedule for Aggregate Form 940 Filers, when filing an aggregate Form 940, Employer's Annual Federal Unemployment (FUTA) Tax Return. Aggregate Forms 940 may only be filed by agents acting on behalf of home care service recipients who receive home care services through a program administered by a federal, state, or local government. To request approval to act as an agent on behalf of home care service recipients, the agent files Form 2678 with the IRS.

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 EFTPS to your benefit.

- For *e-file*, visit www.irs.gov/efile for additional information.
- For EFTPS, visit www.eftps.gov or call EFTPS Customer Service at 1-800-555-4477 or 1-800-733-4829 (TDD).

Electronic submission of Forms W-4, W-4P, W-4S and W-4V. 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.

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 Form W-4, 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.

5. You must also meet all recordkeeping requirements that apply to the paper forms.

For more information, see:

- Regulations sections 31.3402(f)(5)-1(c) (for Form W-4), and
- Announcement 99-6 (for Forms W-4P, W-4S, and W-4V). 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.

Additional employment tax information. Visit IRS.gov and enter "employment taxes" in the search box.

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. You may call 1-800-829-4059 (TDD/TTY for persons who are deaf, hard of hearing, or have a speech disability) with any employment tax questions. You may also use this number for assistance with unresolved tax problems.

Furnishing Form W-2 to employees electronically. You may set up a system to furnish Form W-2 electronically. Each employee participating must consent (either electronically or by paper document) to receive his or her Form W-2 electronically, and you must notify the employee of all hardware and software requirements to receive the form. You may not send a Form W-2 electronically to any employee who doesn't 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 requirement to your employees.

- The employee must be informed that he or she will receive a paper Form W-2 if consent isn't 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 his or her Form W-2 and whether or not the request for a paper statement is treated as a withdrawal of his or her consent to receiving his or her Form W-2 electronically.
- 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 doesn't 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).

Photographs of missing children. The IRS 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 Pub. 15. It contains specialized and detailed employment tax information supplementing the basic information provided in Pub. 15. This publication also contains tables for withholding on distributions of Indian gaming profits to tribal members. Pub. 15-B contains information about the employment tax treatment of various types of noncash compensation.

Ordering publications and forms. See *Ordering Employer Tax Forms and Publications* in Pub. 15 and *How To Get Tax Help*, later, for more information on how to obtain forms and publications.

Useful Items

You may want to see:

Publication

- └ 15-B Employer's Tax Guide to Fringe Benefits
- └ 505 Tax Withholding and Estimated Tax
- └ 515 Withholding of Tax on Nonresident Aliens and Foreign Entities
- └ 583 Starting a Business and Keeping Records
- └ 1635 Employer Identification Number: Understanding Your EIN

Comments and suggestions. We welcome your comments about this publication and your suggestions for future editions. You can send us comments from www.irs.gov/formspubs. Click on *More Information* and then click on *Give us feedback*.

Or you can write to:

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.

Although we can't respond individually to each comment received, we do appreciate your feedback and will consider your comments as we revise our tax forms, instructions, and publications.

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* in 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 isn't an employee under the common-law rules (see [section 2](#)), you generally don't 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 Pub. 15 for information on backup withholding.

Independent Contractors

People such as doctors, veterinarians, 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 generally 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 doesn't 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, isn't considered an employee. A director of a corporation isn't 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 and Special Rules for Ministers* (section 4).

Additional information. For more information about the treatment of special types of employment, the treatment of special types of payments, and similar subjects, see Pub. 15 or Pub. 51, *Agricultural Employer's Tax Guide*.

Statutory Employees

If workers are independent contractors under the common law rules, such workers may nevertheless be treated as employees by statute, (also known as "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 next under *Social security and Medicare taxes*.

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. You must 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 don't have a substantial investment in the equipment and property used to perform the services (other than an investment in facilities for transportation, such as a car or truck).
- The services are performed on a continuing basis for the same payer.

Federal unemployment (FUTA) tax. For FUTA tax (the unemployment tax paid under the Federal Unemployment Tax Act), the term "employee" means the same as it does for social security and Medicare taxes, except that it doesn't include statutory employees defined in *categories 2 and 3*, earlier. Any individual who is a statutory employee described under *category 1 or 4*, earlier, is also an employee for FUTA tax purposes and subject to FUTA tax.

Income tax. Don't 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 (Form 1040), Profit or Loss From Business, or Schedule C-EZ (Form 1040), Net Profit From Business. A statutory employee's business expenses are deductible on Schedule C (Form 1040) or C-EZ (Form 1040) and aren't subject to the reduction by 2% of his or her adjusted gross income that applies to common-law employees.

H-2A agricultural workers. On Form W-2, don't check box 13 (Statutory employee), as H-2A workers aren't statutory 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 won't 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) won't be treated as the employer of the sitters if that person doesn't 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 aren't 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 are liable for employment taxes for that worker and the relief provision, discussed next, won't apply. See section 2 in Pub. 15 for more information.

Relief provision. 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 doesn't 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 doesn't 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 doesn't 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) organization exempt from tax under section 501(a) of the code, and
- Isn't otherwise treated as an employee of the organization for employment taxes.

Voluntary Classification Settlement Program (VCSP). Employers who are currently treating their workers (or a class or group of workers) as independent contractors or other nonemployees and want to voluntarily reclassify their workers as employees for future tax periods may be eligible to participate in the VCSP if certain requirements are met. File Form 8952 to apply for the VCSP. For more information, visit IRS.gov and enter "VCSP" in the search box.

2. Employee or Independent Contractor?

An employer must generally withhold federal income taxes, withhold and pay over social security and Medicare taxes, and pay unemployment tax on wages paid to an employee. An employer doesn't generally have to withhold or pay over any federal 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 next.

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 employer.

The extent of the worker's investment. An independent contractor often has a significant investment in the facilities or tools he or she uses in performing services for someone else. However, a significant investment isn't 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 often paid a flat fee or on a time and materials basis 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 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 didn't 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 isn't 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 doesn't 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 isn't 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 isn't 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 isn't 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 isn't paid for any articles that aren't 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 isn't clear how long that it will take to complete the project, and Steve isn't 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 isn't 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 doesn't meet the tests for a common-law employee, discussed earlier in this section, you don't have to withhold federal income tax from his or her pay (see Statutory Employees

in section 1). However, even if a salesperson isn't an employee under the usual common-law rules for income tax withholding, his or her pay may still be subject to social security, Medicare, and FUTA taxes as a statutory employee.

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. Isn't an employee under common-law rules.

3. Employees of Exempt Organizations

Many nonprofit organizations are exempt from federal income tax. Although they don't 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 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 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. See *Members of recognized religious sects opposed to insurance* in section 4.

FUTA 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 can't be waived. Don't file Form 940 to report wages paid by these organizations or pay the tax.

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 aren't section 501(c)(3) organizations may also be exempt from federal income tax under section 501(a) or section 521. However, these organizations aren't 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 aren't subject to social security and Medicare taxes.
2. If an employee is paid less than \$50 in a calendar quarter, his or her wages aren't subject to FUTA tax for the quarter.

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

4. Religious Exemptions and Special Rules for Ministers

Special rules apply to the treatment of ministers for social security and Medicare tax purposes. An exemption from social security and Medicare taxes is available for ministers and certain other religious workers and members of certain recognized religious sects. For more information on getting an exemption, see Pub. 517.

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.

Ministers are employees if they perform services in the exercise of ministry and are subject to your will and control. The common-law rules discussed in [section 1](#) and [section 2](#) should be applied to determine whether a minister is your employee or is self-employed. Whether the minister is an employee or self-employed, the earnings of a minister aren't subject to federal income, social security, and Medicare tax withholding. However, even if the minister is a common law employee, the earnings as reported on the minister's Form 1040 are subject to self-employment tax and federal income tax. You don't withhold these taxes from wages earned by a minister, but if the minister is your employee, you may agree with the minister to voluntarily withhold tax to cover the minister's liability for self-employment tax and federal income tax. For more information, see Pub. 517.

Form W-2. If your minister is an employee, 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 Pub. 15. Don't include a parsonage allowance (excludable housing allowance) in this amount. You may report a designated parsonage or rental allowance (housing allowance) and a utilities allowance, or the rental value of housing provided in a separate statement or in box 14 on Form W-2. Don't 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 Pub. 517.

Exemptions for ministers and others. Certain ordained ministers, Christian Science practitioners, and members of religious orders who haven't taken a vow of poverty may apply to exempt their earnings from self-employment tax on religious grounds. The application must be based on conscientious opposition because of personal considerations to public insurance that makes payments in the event of death, disability, old age, or retirement, or that makes payments toward the cost of, or provides services for, medical care, including social security and Medicare benefits. 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. See Pub. 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 won't 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 to waive all social security and Medicare 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

Pub. 15 provides a general discussion of taxable wages. Pub. 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 Pub. 15) 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 Pub. 463, Travel, Entertainment, Gift, and Car Expenses, and section 5 of Pub. 15 for more information. These rules generally apply to temporary work assignments both inside and outside the U.S.

Employee Achievement Awards

Don't 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 don't indicate that the payment is disguised compensation. Excludable employee achievement awards also aren't 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 doesn't discriminate in favor of highly compensated employees. An award can't 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 can't be more than \$1,600. The \$400 and \$1,600 limits can't 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 doesn't 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, despite any service condition attached to the amount, received under the National Health Service Corps Scholarship Program; the Armed Forces Health Professions Scholarship and Financial Assistance Program; and a comprehensive student work-learning-service program operated by a work college, as defined in section 448(e) of the Higher Education Act of 1965.

Any amounts that you pay for room and board aren't excludable from the recipient's gross income. A qualified scholarship isn't subject to social security, Medicare, and FUTA taxes, or federal income tax withholding. For more information, see Pub. 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 won't 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 aren't 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, and 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 aren't limited to, the National Labor Relations Act, Fair Labor Standards Act, Equal Pay Act, and Age Discrimination in Employment Act. See Pub. 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 Compensation Benefits

If you pay, under a plan, supplemental unemployment compensation 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 aren't taxable and aren't 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 doesn't matter whether the separation is temporary or permanent.

There are special rules that apply in determining whether supplemental unemployment compensation benefits are excluded from wages for social security, Medicare, and FUTA tax purposes. To be excluded from wages for such 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 doesn't accrue until a prescribed period after termination.

- Benefits aren't 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 compensation benefits must be based on the withholding certificate (Form W-4) that the employee gave to you.

For more information, see Revenue Ruling 90-72, 1990-36 I.R.B. 13.

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, and FUTA taxes, and federal income tax withholding. See Regulations section 1.280G-1 for more information.

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. 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.
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.

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 can't 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 General Instructions for Forms W-2 and W-3 for details. For nonemployee reporting of these payments, see *Box 7. Nonemployee Compensation* in the Instructions for Form 1099-MISC.

Exempt payments. Payments by most small business corporations and payments under certain qualified plans are exempt from the golden parachute rules. See section 280G(b)(5) and (6) 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 visiting IRS.gov and entering "AFR" in the search box. 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. Don't 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 don't affect the application or reporting of social security, Medicare, or FUTA taxes.

The provisions don't 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 2008-113 provides guidance on the correction of certain operation failures of a NQDC plan. Notice 2008-113, 2008-51 I.R.B. 1305, is available at www.irs.gov/irb/2008-51_IRB/ar12.html. Also see Notice 2010-6, 2010-3 I.R.B. 275, available at www.irs.gov/irb/2010-03_IRB/ar08.html and Notice 2010-80, 2010-51 I.R.B. 853, available at www.irs.gov/irb/2010-51_IRB/ar08.html.

Social security, Medicare, and FUTA taxes. Employer contributions to nonqualified deferred compensation (NQDC) plans, as defined in the applicable regulations, are treated as wages subject to social security, Medicare, and FUTA taxes 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 can't 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 aren't 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 aren't 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 a public 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 aren't included in box 1 on Form W-2 in the year the deferrals are made and aren't 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 aren't subject to social security, Medicare, or 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, Medicare, and FUTA taxes. See Pub. 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 Pub. 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 in this section. 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 Aren't Sick Pay

Sick pay doesn't include the following payments.

1. **Disability retirement payments.** Disability retirement payments aren't sick pay and aren't 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 aren't sick pay and aren't 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 isn't the general workers' compensation law of a state. If the statute limits benefits to work-related injuries or sickness and doesn't 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 aren't sick pay and aren't subject to employment taxes. For more information, see Regulations section 31.3121(a)(2)-1.
4. **Medical expense payments.** Payments under a definite plan or system for medical and hospitalization expenses, or for insurance covering these expenses, aren't sick pay and aren't subject to employment taxes.
5. **Payments unrelated to absence from work.** Accident or health insurance payments unrelated to absence from work aren't sick pay and aren't 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 \$20,000 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 isn't sick pay and isn't 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 doesn't 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 isn't reimbursed on a cost-plus-fee basis, the third party isn't 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 isn't 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 employee 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** part of social security and Medicare taxes from the sick pay payments.
2. Makes timely deposits of the **employee** part of social security and Medicare taxes.
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 can make electronic deposits 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 aren't 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 shouldn't 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 Pub. 15 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, aren't 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 don't apply to amounts paid under a definite plan or system, as defined under Sick Pay Plan, earlier in this section, 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 hadn't 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 isn't subject to social security, Medicare, or FUTA taxes. Also, see Amounts not subject to federal income tax withholding, later in this section.

Example. Sandra became entitled to sick pay on November 24, 2015, and died on December 31, 2015. On January 12, 2016, Sandra's sick pay for the period from December 24 through December 31, 2015, was paid to her survivor. The payment isn't 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 aren't 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 don't 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 doesn't apply to Medicare tax. For 2016, the social security tax wage base is \$118,500 and the FUTA tax wage base is \$7,000.

Example. If an employee receives \$110,000 in wages from an employer in 2016 and also receives \$15,000 of sick pay, only the first \$8,500 (118,500-110,000) 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 in this section.

- **Payments after 6 months absence from work.** Social security, Medicare, and FUTA taxes don't 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 11, 2015. He was paid sick pay for 9 months before his return to work on September 14, 2016. Sick pay paid to Ralph after June 30, 2016, isn't 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 12, 2016. Because the 6-month period begins again in March, only the sick pay paid to Ralph after August 31, 2016, is exempt from social security, Medicare, and FUTA taxes.

- **Payments attributable to employee contributions.** Social security, Medicare, and FUTA taxes don't 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 2016. 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 2016, 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 × 70%) of each payment made to Alan is taxable sick pay. The remaining \$600 of each payment that is due to employee contributions isn't taxable sick pay and isn't subject to employment taxes. Also, see Example of Figuring and Reporting Sick Pay, later in this section.

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 in this section), or
- A third party that isn't 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 can't choose how much federal income tax 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 doesn't 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 Pub. 15 for guidance on withholding employment taxes from supplemental wages, including the rules for withholding federal income tax when wages to an individual exceed \$1 million during the year.

Third party not an agent. Sick pay paid by a third party that isn't your agent isn't 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 shouldn't 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 whether full or partial payments. 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 federal income tax withholding. The following amounts, whether paid by you or a

third party, aren't wages and aren't 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 isn't 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 aren't subject to federal income tax withholding. For more information, see the corresponding discussion under Amounts not subject to social security, Medicare, or FUTA taxes, earlier in this section.

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 Pub. 15 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 in this section) 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, any 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 next). 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 – The amount of sick pay the employee must include in income.

Box 2 – The amount of any federal income tax withheld from the sick pay.

Box 3 – The amount of sick pay subject to employee social security tax.

Box 4 – The amount of employee social security tax withheld from the sick pay.

Box 5 – The amount of sick pay subject to employee Medicare tax.

Box 6 – The amount of employee Medicare tax (including Additional Medicare Tax, if applicable) withheld from the sick pay.

Box 12 (Code J) – Show any sick pay that was paid by a third-party and wasn't includible in income (and not shown in boxes 1, 3, and 5) because the employee contributed to the sick pay plan. Don't include nontaxable disability payments made directly to a state.

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 depositing and reporting rules for a third party that isn't your agent depend on whether liability has been transferred as discussed under *Third party not employer's agent*, earlier in this section.

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 doesn't include any liability transferred to the employer.

Liability not transferred to the employer. If the third party doesn't satisfy the requirements for transferring liability for FUTA tax and the employer 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.

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. The discussion that follows 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.

Form 941, line 8, 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 Form 941, lines 2, 5a, 5c, and 5d (if applicable). 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 8 the **employee** part of social security and Medicare taxes withheld and deposited by the third party.
- **Third party.** The third party must include on Form 941 the **employee** part of the social security and Medicare taxes (and federal income tax, if any) it withheld. The third party doesn't 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 and 5d (if applicable), column 1, in a similar manner. On line 8, 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.

Form 8922, Third-Party Sick Pay Recap. The third party (or in certain cases, the employer) must file Form 8922 to report sick pay paid by a third party for or on behalf of employers for whom services are normally performed. Form 8922 doesn't show the names of individuals who received the third-party sick pay but the total amounts paid in the calendar year to all employees whose sick pay wages are required to be reported on Form 8922.

Third-party sick pay is reported on Form 8922 if the liability for the employer part of social security tax and Medicare tax has been shifted by the third party or insurer paying the sick pay to the employer for whom services are normally rendered. Whether the third party or employer reports the sick pay on Form 8922 depends on which entity is filing Forms W-2 reporting the sick pay paid to individual employees receiving the sick pay. The third party reports the sick pay on Form 8922 if the employer is filing Forms W-2 reporting the third party sick pay under the name and EIN of the employer. However, if the third party is filing Forms W-2 with respect to the sick pay under the name and EIN of the third party, the employer files Form 8922 reporting the sick pay.

If the third party is paying all employment taxes, including the employer part of social security tax and Medicare tax, with respect to the sick pay, the third party files Forms W-2 using its name and EIN as employer with respect to the sick pay for each employee receiving sick pay and reports social security and Medicare taxes and federal income tax withholding on its Form 941. Neither the third party nor the employer reports the sick pay on Form 8922.

Third parties that are agents with respect to the payment of sick pay (because they have no insurance risk) are required to report sick pay on Form 992 only if the agency agreement between the employer and the agent imposes the following requirements.

The agreement must require the agent to:

- Withhold and pay **employee** part of social security tax and Medicare tax and income tax withholding on the sick pay, and
- Report the withheld amounts on Form 941 using the agent's name and EIN.

The agreement must require the employer to:

- Pay and report the **employer** part of social security tax and Medicare tax on a Form 941 using the employer's name and EIN and report the sick pay on Form W-2.

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 Form 992 as discussed above, for each employee who receives sick pay from the third party. If the optional rule is used:

- The third party doesn't provide you with the sick pay statement described next, and
- You (not the third party) files Form 992. Form 992 is needed to reconcile the sick pay shown on your Forms 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** part of social security tax withheld.
- Any **employee** part of Medicare tax withheld.

Example of Figuring and Reporting Sick Pay

Note. The following example is for wages paid in 2015.

Dave, an employee of Edgewood Corporation, was seriously injured in a car accident on January 1, 2015. Dave's last day of work was December 31, 2014. The accident wasn't job related.

Key, an insurance company that wasn't an agent of the employer, paid Dave \$2,000 sick pay each month for 10 months, beginning in January 2015. 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 2015 through October 2015. Dave returned to work on November 2, 2015.

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 per month \times 70% = \$1,400 taxable portion per payment; \$1,400 \times 6 months = \$8,400 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) isn't 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 tax 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.

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 wouldn't prepare a Form W-2 for Dave. However, Key would file Form 992. Key and Edgewood must each prepare Forms 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*, above in this section. 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 wouldn't prepare a sick pay statement, and Edgewood, not Key, would file Form 8922 reflecting the sick pay shown on Edgewood's Forms 941.

Liability not transferred. If Key didn't 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 wouldn't report the sick pay.

Payments received after 6 months. The payments received by Dave in July through October aren't 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 2014). 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.

THIRD PARTY SICK PAY – NOT AS AN AGENT AND LIABILITY TRANSFERRED TO EMPLOYER		
	Employer Responsibilities	Third Party Responsibilities
Withhold Employee Taxes		
Income	No	Yes, if Form W-4S is submitted
Social Security	No	Yes
Medicare	No	Yes
Deposit Employee Taxes		
Income	No	Yes — Using Third Party EIN
Social Security	No	Yes — Using Third Party EIN
Medicare	No	Yes — Using Third Party EIN
Deposit Employer Taxes		
Social Security	Yes — Using Third Party EIN	No
Medicare	Yes — Using Third Party EIN	No
FUTA	Yes — Using Third Party EIN	No
Report Employee Wage and Taxes on Form 941		
Income	Report Taxable Wages	Report Tax Withheld
Social Security	*Report Taxable Wages	*Report Taxable Wages
Medicare	*Report Taxable Wages	*Report Taxable Wages
	*Adjustment on Line 8 for employee taxes deposited by third party	*Adjustment on Line 8 for employer taxes deposited by employer
Report Employee Wage and Taxes on Form W-2*		
Income	Yes	No — File Form 8922
Social Security	Yes	No — File Form 8922
Medicare	Yes	No — File Form 8922

*See the instructions earlier if operating under the *Optional rule for Form W-2*.

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 that 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 tax 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 won't 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.

Agent With an Approved Form 2678

Employers and payers must use Form 2678 to request approval for an agent to file returns and make deposits or payments of their employment or other withholding taxes. See Revenue Procedure 2013-39, 2013-52 I.R.B. 830, available at www.irs.gov/irb/2013-52_IRB/ar15.html; Revenue Procedure 84-33, 1984-1 C.B. 502; and the General Instructions for Forms W-2 and W-3 for procedures and reporting requirements. Form 2678 doesn't apply to FUTA taxes reportable on Form 940 unless the employer is a home care service recipient receiving home care services through a program administered by a federal, state, or local government agency.

Agents filing an aggregate Form 940 must file Schedule R (Form 940). Agents filing an aggregate Form 941 must file Schedule R (Form 941).

Reporting Agents

Electronic filing of Forms 940, 941, and 944. Reporting agents may file Forms 940, 941, and 944

electronically. For details, see Pub. 3112, IRS *e-file* Application and Participation. For information on electronic filing of Forms 940, 941, and 944, see Revenue Procedure 2007-40, 2007-26 I.R.B., 1488, available at www.irs.gov/irb/2007-26_IRB/ar13.html. For more information on electronic filing, visit the IRS website at www.irs.gov/efile or call 1-866-255-0654.



For more information on agents with an approved Form 2678 and reporting agents, see section 16 of Pub. 15.

Employee's Portion of Taxes Paid by Employer



The information provided in this section doesn't take into account an employer that chooses to pay the Additional Medicare Tax on behalf of the employee.

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 wages 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 2016, the factor is .9235 ($1 - .0765$). If the stated pay is more than \$109,434.75 (2016 wage base \$118,500 \times .9235), follow the procedure described under Stated pay of more than \$109,434.75 in 2016, below.

Stated pay of \$109,434.75 or less in 2016. For an employee with stated pay of \$109,434.75 or less in 2016, figure the correct wages (wages plus employer-paid employee taxes) 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.

On Form W-2, to figure the correct social security tax to enter in box 4, multiply the amount in box 3 by the social security withholding rate of 6.2% and enter the result in box 4. To figure the correct Medicare tax to enter in box 6, multiply the amount in box 5 by the Medicare withholding rate of 1.45% and enter the result in box 6.

Example. Donald Devon hires Lydia Lone for only one week during 2016. He pays her \$500 for that week. Donald agrees to pay Lydia's part of the social security and Medicare taxes. To figure her reportable wages, he divides \$500 by .9235. The result, \$541.42, 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 \$541.42 by the social security tax rate of 6.2% (.062). The result, \$33.57, is entered in box 4 of Form W-2. To figure the amount to report as Medicare tax, Donald multiplies \$541.42 by the Medicare tax rate of 1.45% (.0145). The result, \$7.85, is entered in box 6 of Form W-2. Although he didn't actually withhold the amounts from Lydia, he will report these amounts as taxes withheld on Form 941 or Form 944 and is responsible for the employer share of these taxes.

For FUTA tax and federal income tax withholding, Lydia's weekly wages are \$541.42.

Stated pay of more than \$109,434.75 in 2016. For an employee with stated pay of more than \$109,434.75 in 2016, the portion of stated wages subject to social security tax is \$109,434.75 (the first \$118,500 of wages \times .9235). The stated pay in excess of \$109,434.75 isn't subject to social security tax because the tax only applies to the first \$118,500 of wages (stated pay plus employer-paid employee taxes). Enter \$118,500 in box 3 of Form W-2. The social security tax to enter in box 4 is \$7,347 (\$118,500 \times .062).

To figure the correct Medicare wages to enter in box 5 of Form W-2, subtract \$109,434.75 from the stated pay. Divide the result by .9855 ($1 - .0145$) and add \$118,500.

For example, if stated pay is \$120,000, the correct Medicare wages are figured as follows.

$$\$120,000 - \$109,434.75 = \$10,565.25$$

$$\$10,565.25 \div .9855 = \$10,720.70$$

$$\$10,720.70 + \$118,500 = \$129,220.70$$

The Medicare wages are \$129,220.70. Enter this amount in box 5 of Form W-2. The Medicare tax to enter in box 6 is \$1,873.70 (\$129,220.70 \times .0145).

Although these employment tax amounts aren't actually withheld from the employee's pay, report them as withheld on Forms 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 tax purposes, the correct wage amount for federal income tax withholding is \$129,220.70 (\$120,000 + \$7,347 + \$1,873.70), which is included in box 1 of Form W-2.

Household and agricultural employees. The discussion above doesn't 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 isn't 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 bilateral 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 to foreign social security taxes under these agreements are potentially exempt from U.S. social security taxes, including the Medicare portion. For more information, visit the SSA website at www.socialsecurity.gov/international, or see Pub. 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. Don't withhold income taxes from amounts totally exempt from tax. If part of a distribution is taxable and part is nontaxable, withhold income taxes only on the part subject to tax when known. The method and rate of withholding depends on (a) the kind of payment, (b) whether the payments are delivered outside the United States and 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 in this section, for special withholding rules that apply to payments outside the United States and payments to foreign persons.

The recipient of certain 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 in this section.

Federal Income Tax Withholding

Periodic Payments

Periodic payments are those made in installments at regular intervals over a period of more than 1 year. They may

be paid annually, quarterly, monthly, etc. Withholding from periodic payments of a pension or annuity is figured in the same manner as withholding from wages.

If the recipient wants income tax withheld, he or she must designate the number of withholding allowances on Form W-4P, line 2, and can designate an additional amount to be withheld on line 3. If the recipient doesn't want any federal income tax withheld from his or her periodic payments, he or she can check the box on Form W-4P, line 1, and submit the form to you. If the recipient doesn't 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 \$1,720 a month.

If you receive a Form W-4P that doesn't 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 attempts to choose not to have income tax withheld.

There are some kinds of periodic payments for which the recipient can't 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 non-qualified 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 (if permitted). Distributions from an IRA that are payable on demand are treated as nonperiodic payments. A recipient can choose not to have income tax withheld from a nonperiodic payment by submitting Form W-4P (containing his or her correct TIN) and checking the box on line 1. Generally, the choice not to have federal income tax withheld will apply to any later payment from the same plan. A recipient can't 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 doesn't contain his or her correct TIN, you can't 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 eligible retirement plans, such as qualified pension or annuity plans, 401(k) pension plans, 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 another eligible retirement plan, are subject to a flat 20% withholding rate. The 20% withholding rate is required and a recipient can't choose to have less federal income tax withheld from eligible rollover distributions. However, you shouldn't withhold federal income tax if the entire distribution is transferred in a direct rollover to a traditional IRA, or another eligible retirement plan such as a qualified pension plan, governmental section 457(b) plan, or 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 aren't "eligible rollover distributions" and aren't subject to the mandatory 20% federal income tax withholding. See Pub. 505 for details. See also Nonperiodic Payments—10% Withholding, earlier in this section.

Payments to Foreign Persons and Payments Outside the United States

Unless the recipient is a nonresident alien, withholding in the manner described earlier is required on any periodic or nonperiodic payments that are delivered outside the United States and its possessions. A recipient can't 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, many 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 Pub. 515 and Pub. 519. A foreign person should submit Form W-8BEN, Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding and Reporting (Individuals), to you before receiving any payments. The Form W-8BEN must contain the foreign person's TIN.

Special rules may apply to nonresident aliens who relinquished U.S. citizenship or ceased to be long-term residents of the United States after June 16, 2008. For more information, see section 5 of Notice 2009-85, 2009-45 I.R.B. 598, available at www.irs.gov/irb/2009-45_IRB/ar10.html. Also see Form W-8CE, Notice of Expatriation and Waiver of Treaty Benefits.

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 Forms 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. Alternative Methods for Figuring Withholding

You may use various methods of figuring federal income tax withholding. The methods described next may be used instead of the common payroll methods provided in Pub. 15. Use the method that best suits your payroll system and employees.



Employers must use a modified procedure to figure the amount of federal income tax withholding on the wages of nonresident alien employees. This procedure is discussed in Pub. 15. Before you use any of the alternative methods to figure the federal income tax withholding on the wages of nonresident alien employees, see Pub. 15. Don't use the Combined Federal Income Tax, Employee Social Security Tax, and Employee Medicare Tax Withholding Table on pages 49–68 for figuring withholding on nonresident alien employees.

Annualized wages. Multiply the employee's amount of wages for the current payroll period by the number of payroll periods in a year to determine the annualized wages. Using your employee's annualized wages, figure the withholding using Table 7—ANNUAL Payroll Period in the Percentage Method Tables for Income Tax Withholding in Pub. 15. Divide the amount from the table by the number of payroll periods in the year, and the result will be the amount of withholding for each payroll period.

Average estimated wages. You may withhold the tax for a payroll period based on estimated average wages, with necessary adjustments, for any quarter. For details, see Regulations section 31.3402(h)(1)-1.

Cumulative wages. An employee may ask you, in writing, to withhold tax on cumulative wages. If you agree to do so, and you have paid the employee for the same kind of payroll period (weekly, biweekly, etc.) since the beginning of the year, you may figure the tax as follows.

Add the wages you have paid the employee for the current calendar year to the current payroll period amount. Divide this amount by the number of payroll periods so far this year, including the current period. Figure the withholding on this amount, and multiply the withholding by the

number of payroll periods so far this year, including the current period. Use the *Percentage Method* discussed in Pub. 15. Subtract the total tax already deducted and withheld during the calendar year from the total amount of tax calculated. The excess is the amount to withhold for the current payroll period. See Revenue Procedure 78-8, 1978-1 C.B. 562, for an example of the cumulative method.

Part-year employment. A part-year employee who figures income tax on a calendar-year basis may ask you to withhold tax by the part-year employment method. The request must be in writing, under penalties of perjury, and must contain the following information.

- The last day of any employment during the calendar year with any prior employer.
- A statement that the employee uses the calendar year accounting period.
- A statement that the employee reasonably anticipates that he or she will be employed by all employers for a total of no more than 245 days in all terms of continuous employment (defined below in this section) during the current calendar year.

Complete the following steps to figure withholding tax by the part-year method.

1. Add the wages to be paid to the employee for the current payroll period to any wages that you have already paid to the employee in the current term of continuous employment. See definition for "term of continuous employment" below.
2. Add the number of payroll periods used in step 1 to the number of payroll periods between the employee's last employment and current employment. To find the number of periods between the last employment and current employment, divide the number of calendar days between the employee's last day of earlier employment (or the previous December 31, if later) and the first day of current employment by the number of calendar days in the current payroll period.
3. Divide the step 1 amount by the total number of payroll periods from step 2.
4. Find the tax in the withholding tax tables on the step 3 amount. Be sure to use the correct payroll period table and to take into account the employee's withholding allowances.
5. Multiply the total number of payroll periods from step 2 by the step 4 amount.
6. Subtract from the step 5 amount the total tax already withheld during the current term of continuous employment. Any excess is the amount to withhold for the current payroll period.

See Regulations section 31.3402(h)(4)-1(c) for more information about the part-year method.

Term of continuous employment. A term of continuous employment may be a single term or two or more following terms of employment with the same employer. A

term of continuous employment includes holidays, regular days off, and days off for illness or vacation. A term of continuous employment begins on the first day that an employee works for you and earns pay. It ends on the earlier of the employee's last day of work for you or, if the employee performs no services for you for more than 30 calendar days, the last workday before the 30-day period. If an employment relationship is ended, the term of continuous employment is ended even if a new employment relationship is established with the same employer within 30 days.

Other methods. You may use other methods and tables for withholding taxes, as long as the amount of tax withheld is consistently about the same as it would be as discussed under the *Percentage Method* in Pub. 15. If you develop an alternative method or table, you should test the full range of wage and allowance situations to be sure that they meet the tolerances contained in Regulations section 31.3402(h)(4)-1 as shown in the chart below.

If the tax required to be withheld under the annual percentage is—	The annual tax withheld under your method may not differ by more than—
Less than \$10.00	\$9.99
\$10 or more but under \$100	\$10 plus 10% of the excess over \$10
\$100 or more but under \$1,000	\$19 plus 3% of the excess over \$100
\$1,000 or more	\$46 plus 1% of the excess over \$1,000

Formula Tables for Percentage Method Withholding (for Automated Payroll Systems)

Two formula tables for percentage method withholding are on pages 27–30. The differences in the Alternative Percentage Method formulas and the steps for figuring withheld tax for different payroll systems are shown in this example.

MARRIED PERSON (Weekly Payroll Period)

If wages exceeding the allowance amount are over \$164 but not over \$521:

Method:	Income Tax Withheld:
Percentage (Pub. 15)	10% of excess over \$164
Alternative 1 (pages 27–28) . . .	10% of such wages minus \$16.40
Alternative 2 (pages 29–30) . . .	Such wages minus \$164, times 10% of remainder

Nonresident alien employees. Employers must use a modified procedure to figure the amount of federal income tax withholding on the wages of nonresident alien