



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

SMALL BUSINESS/SELF-EMPLOYED DIVISION

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MEMORANDUM FOR DIRECTOR, ADVISORY, INSOLVENCY, AND QUALITY
DIRECTORS, COLLECTION AREA OPERATIONS
CHIEF, APPEALS

FROM: Scott D. Reisher */s/* **Scott D. Reisher**
Director, Collection Policy

SUBJECT: Interim Guidance for Conducting Trust Fund Recovery
Penalty Investigations in Cases Involving a Third-Party Payer

This memorandum provides interim guidance concerning Internal Revenue Code (IRC) § 6672 and its application to Trust Fund Recovery Penalty (TFRP) investigations in cases involving third-party payer arrangements. Please ensure that this information is distributed to all affected employees within your organization. This guidance is effective immediately.

Common law employers may designate a third party who is not the common law employer or a statutory employer under section 3401(d)(1) to take over some or all of the employer's Federal employment tax withholding, reporting, and payment responsibilities and obligations. The common law employer becomes the "client" of the third party. A common law employer is any person who has the status of employer under the usual common law rules applicable in determining the employer-employee relationship. Generally an employer-employee relationship exists when the person for whom the services are performed has the right to direct and control the worker who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished.

Some common third-party arrangements include:

- Payroll Service Provider (PSP)

- Professional Employer Organization (PEO) that is not the common law employer or statutory employer

Professional Employer Organizations are commonly referred to as employee leasing companies.

Under IRC § 6672, the TFRP may be recommended against any person required to collect, account for, and pay over taxes held in trust (a responsible person) who willfully fails to perform any of these activities. In addition to the examples of potentially responsible persons contained in IRM 5.7.3.3.1(2) and IRM 5.17.7.1.1(1), potentially responsible persons may include:

- Payroll Service Provider
- Responsible parties within a PSP
- Professional Employer Organization
- Responsible parties within a PEO
- Responsible parties within the common law employer (client of PSP/PEO)

Each recommendation for assertion of the TFRP against a third-party payer, i.e., a related responsible person (RRP), must stand on its own merits based on the facts the revenue officer discovers during the TFRP investigation regarding “responsibility” and “willfulness.”

Third-Party Payers:

Factors to be considered when determining the potential “responsibility” and “willfulness” of a third-party payer are:

Responsibility

- Identification of the person(s) within the third-party payer who had significant control over the payment of the client’s employment taxes.

Willfulness

- Willful means intentional, deliberate, voluntary, reckless, knowing, as opposed to accidental. No evil intent or bad motive is required.

Common Law Employers/Clients:

Factors to be considered for establishing “responsibility” and “willfulness” of a responsible person within a common law employer/client where there is a third-party payer arrangement are:

Responsibility

- The use of a third-party payer such as a PSP or a PEO does not relieve the common law employer and employees of the common law employer who are responsible for collecting, accounting for, and paying over the common law employer’s employment taxes from the responsibility of ensuring that all of the common law employer’s Federal employment tax obligations are met.

Willfulness

- Willful means intentional, deliberate, voluntary, reckless, knowing, as opposed to accidental. No evil intent or bad motive is required.

Additional factors to be considered when determining “willfulness”:

- Whether the responsible person had knowledge of a pattern of noncompliance by the third-party payer at the time the delinquencies were accruing.
- Whether the third-party payer used fraud or deception to conceal the noncompliance from detection by the client.
- Whether the client had received prior IRS notices indicating that employment tax returns have not been filed, or are inaccurate, or that employment taxes have not been paid.
- The length of time that the delinquency has gone on.
- Whether the client has turned a “blind eye” to the fact that its third-party payer was not complying with their Federal employment tax obligations.
- The actions the client has taken to ensure its Federal employment tax obligations have been met after becoming aware of the tax delinquencies, e.g. timely reporting the problem(s) to the IRS and the proper authorities, ensuring current tax debts have been timely reported and paid, and working with the IRS on a reasonable plan to resolve past debts.

The same guidance for contacting third parties and for issuing L3164A, as outlined in IRM 5.7.4.2.2, applies when working TFRP investigations involving third-party payers.

A copy of the contract or agreement for service between the client and the third-party payer may be used to support recommendations concerning the TFRP.

Consult with your local Area Counsel in any case involving whether a third-party payer is a responsible person(s) under IRC § 6672 for the TFRP.

This guidance will be incorporated into IRM 5.7.3, IRM 5.7.4 and IRM 5.17.7 within one year from the date of this memorandum.

If you have any questions, please feel free to contact me, or a member of your staff may contact Andra Kullman, Senior Program Analyst.

cc: www.irs.gov