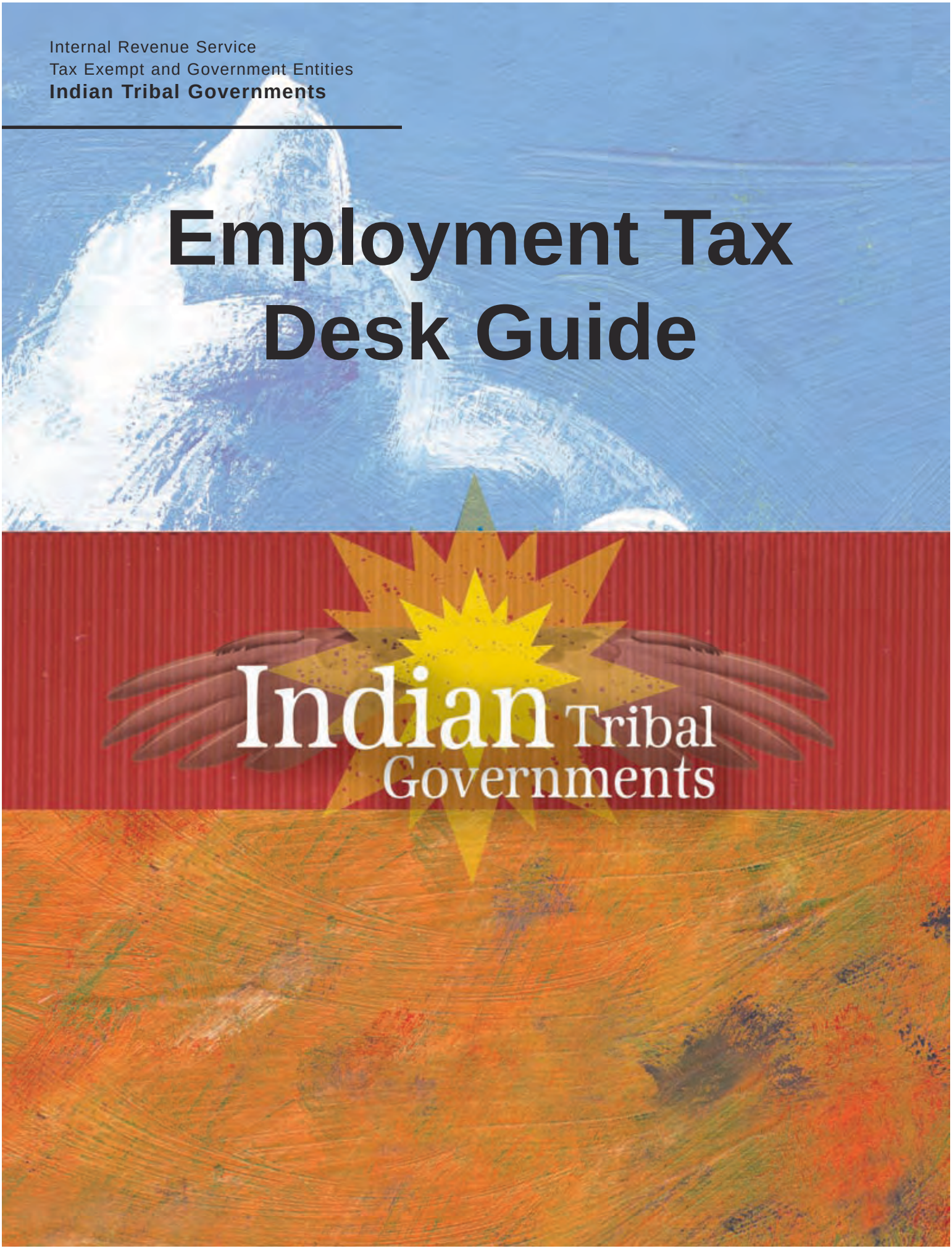
Internal Revenue Service
Tax Exempt and Government Entities
Indian Tribal Governments

Employment Tax Desk Guide



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CHAPTER 1
Introduction to Employment Tax Desk Guide for Indian Tribal Governments

The office of Indian Tribal Governments (ITG) at the Internal Revenue Service was established to help Indian tribes address their federal tax matters. During the planning and creation of this office, we received valuable input from Indian tribal governments and tribal associations so we would be better able to understand and meet your specialized needs.

The overall goal of this office is to use partnership opportunities with Indian tribal governments, tribal associations, and other federal agencies, to respectfully and cooperatively meet the needs of both the Indian tribal governments and the federal government, and to simplify the tax administration process.

This *Employment Tax Desk Guide* is intended to assist you in meeting federal employment tax responsibilities. It will provide you with key information and helpful tips for maintaining good records, preparing payroll, and filing and depositing employment taxes. **It is provided for general information only and should not be cited as any type of legal authority.** Your ITG specialist is available to answer any specific questions you may have. If you do not know who your specialist is, contact the ITG manager in your area per the **Area Contacts** chart shown later in this chapter.

The links to various publications throughout this document were current at the printing of this guide. To be sure you are referencing the most current document, form or publication, go to Forms and Publications. Contact your area specialist, or visit us at www.irs.gov/tribes for further information on any of the topics covered.

Are Federally Recognized Tribal Governments Subject to Employment Taxes?

Generally, Indian tribes in their role as employers are subject to federal employment tax laws and procedures. It is a well-established principle of tax law that in the ordinary affairs of life, Indians are U. S. citizens and are subject to the payment of federal income taxes.

Where a business enterprise or political subdivision of an Indian tribe is organized and operated by the tribe itself, such enterprise is considered a private tribal activity. When workers perform services in the employ of a private tribal activity, these services also constitute employment.

The federal statutes, regulations, case law, revenue rulings, and other sources of tax authority establish the role of Indian tribal governments as employers. As such, tribal governments are required to follow substantially the same procedures

as other employers. There are some special provisions that apply to tribal governments and they are addressed in later chapters. If you have questions about anything contained in, or omitted from this guide, please telephone your local IRS Indian Tribal Governments office.

Employment Tax Requirements

Employers are required to withhold and pay employment taxes. Employment taxes represent the income tax and social security and Medicare taxes (also known as FICA, Federal Insurance Contributions Act taxes) withheld from the wages of an employee, plus the employer's share of social security taxes and federal unemployment (FUTA) taxes, when applicable. The withheld (employee's) portion of employment taxes is referred to as "trust fund" taxes. FUTA will be addressed later in Chapter 15.

In addition to your responsibilities for withholding, depositing and reporting federal taxes, your state taxing authority or tribal governmental taxing agency may also have tax reporting requirements. This guide is designed to assist you in complying with **federal tax** requirements. You should contact your state and, in some cases, tribal taxing agencies for information concerning state and tribal tax requirements.

Who is an Employee?

Employees are defined in the Treasury Regulations as every individual who performs services subject to the will and control of an employer, both as to what is to be done and how it is to be done. The right to discharge or to fire an employee is an important indicator that the person having the right to discharge is an employer. The employee may have considerable discretion and freedom of action as long as the employer has the legal right to control both the method and the result of the employee's work.

An employee may be called a partner, an agent, or an independent contractor and still meet the criteria of an employee. The description is immaterial if the legal relationship of employer and employee exists. Managers and other supervisory personnel are employees. A corporate officer is an employee.

Tribal council members are not employees for purposes of employment taxes. Tribal council members and other situations unique to Indian tribes are discussed in Chapter 3.

Who is an Employer?

The Treasury Regulations define an employer as any person for whom an individual performs or performed any service. An employer may be an individual, a corporation, a partnership, a trust, an estate, an Indian tribe, educational institutions, organizations, federal/state/local governmental entities, and other entities.

CHAPTER 1
Introduction to Employment Tax Desk Guide for Indian Tribal Governments

We offer a number of products and services to assist you…

Publications

Publication 3908, *Gaming Tax Law for Indian Tribal Governments*

Publication 3747, *Introduction to Indian Tribal Governments*

Workshops available for presentation at your location:

Employment Tax
Gaming Tax Law
Tip Reporting
Anti-money Laundering

The ITG section of www.irs.gov includes a page on "Tax Tools for Tribes" which is available at the following website link:
http://www.irs.gov/govt/tribes/article/0,,id=174000,00.html
This site contains current electronic versions of the following:

- Publication 4268 (Employment Tax Guide for Tribes)
- Publication 3908 (Gaming and Bank Secrecy Act Law for Tribes)
- Publication 15 (Employer's Tax Guide)
- Publication 15-A (Employer's Supplemental Tax Guide)
- Publication 15-B (Employer's Tax Guide to Fringe Benefits)
- ITG News issuances for your area for the last 8 quarters
- An Excel file for calculating federal income tax withholding on per capita gaming distributions
- A "primer" for federal tax issues affecting individual Native Americans
- A guide on "Helpful Hints to Avoid Penalties"

CHAPTER 1
Introduction to Employment Tax Desk Guide for Indian Tribal Governments

AREA CONTACTS

Group Name	Manager	Contact
National Headquarters *District of Columbia*	Christie Jacobs *Washington, DC*	(202) 283-9800
Abusive Schemes *National Coverage*	Ken Voght *Buffalo, NY*	(716) 686-4860
Eastern U.S. & Southern Plains Alabama, *Arkansas, Connecticut, Delaware, Florida, Georgia, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, West Virginia*	Cathy Bird *Oklahoma City, OK*	(405) 297-4757
North Central *Illinois, Iowa, Kansas, Michigan, Minnesota, Missouri, Montana, Nebraska, North Dakota, South Dakota, Wisconsin, Wyoming*	Serina Halverson *Omaha, NE*	(402) 361-0286
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Customer Account Services toll-free		**(877) 829-5500**

Visit our web site:
www.irs.gov/tribes

Call for assistance:
Customer Account Services
(877) 829-5500

Write to the following address:
Internal Revenue Service
Indian Tribal Governments SE:T:GE:ITG
1111 Constitution Avenue, NW
Washington, DC 20224

CHAPTER 2
Employee or Independent Contractor

References:

- Publication 15, *Circular E, Employer's Tax Guide*
- Publication 15-A, *Employer's Supplemental Tax Guide*
- Publication 51, *Circular A, Agricultural Employer's Tax Guide*
- Publication 1779, *Independent Contractor or Employee*
- Form SS-8, *Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding.*
- Form 8919, *Uncollected Social Security and Medicare Tax on Wages*

Employees

A person who works for you may be classified as a common law employee, a statutory employee or an independent contractor. The classification of the worker determines which forms you must file and which taxes you must pay. An employer must generally withhold income taxes, withhold and pay social security and Medicare taxes, and pay unemployment tax on wages paid to an employee. **Note: wholly owned tribal government entities may be exempt from federal unemployment taxes. Please refer to Chapter 15 for further information.** An employer does not generally have to withhold or pay any taxes on payments to independent contractors.

I.R.C. §3121(d)(2) defines "employee" as "any individual who, under the usual **common law rules** applicable in determining the employer/employee relationship, has the status of an employee." The "usual common law rules" referred to in the statute and in the regulations, are those factors to which the courts have looked over the years in order to decide whether or not a person is an employee.

Generally, an employer/employee relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work, but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer.

In determining whether a worker is an employee or an independent contractor under the common law rules, three main categories must be considered:

1) behavioral control, 2) financial control, and 3) relationship of the parties.

1. Behavioral control—Facts that show whether there is a right to direct or control how the worker does the work include:
   - o Instruction the business gives to the worker, such as:
     - How, when, or where to do the work
     - What tools or equipment to use
     - What assistants to hire to help with the work
     - Where to purchase supplies and services
     - What work must be performed by a specified individual
     - What order or sequence to follow
   - o Training the business gives the worker

2. Financial control—Facts that show whether there is a right to direct or control the business part of the work include:

   - o Significant investment—the extent of the worker's investment
   - o Expenses—the extent to which the worker has unreimbursed business expenses
   - o Opportunity for profit or loss—the extent to which the worker can realize a profit or loss
   - o The extent to which the worker makes services available to others
   - o How the business pays the worker

3. Relationship of the parties—Facts that illustrate how the business and worker perceive their relationship include:

   - o Employee benefits—whether the business provides the worker with employee-type benefits
   - o Written contracts describing the relationship
   - o The permanency of the relationship
   - o The extent to which services performed by the worker are a key aspect of the business

Even after evaluating the above factors, there will be times when it is difficult to make the determination as to whether an individual is a **common law employee** or self-employed and should be treated as an independent contractor. Many individuals who have personal service contracts with tribal governments may be employees rather than independent contractors. The mere existence of a contract does not mean the individual is not an employee.

It is important to the worker that the employment status be determined as quickly as possible so that the earnings can be properly reported. To request a determination from the IRS as to whether or not a worker is an employee, file a

Form SS-8, *Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding*. Further information is provided in Chapter 3.

Some workers may be considered **statutory employees** (even though they are considered independent contractors under the common law rules) if they fall into any one of four categories and they meet three additional conditions. The law defines certain workers as employees by statute. These categories include: 1) drivers who distribute certain food products or deliver laundry or dry cleaning, 2) full- time life insurance sales agents, 3) individuals who work at home on materials and goods you supply and must be returned to you, and 4) full-time traveling or city salespersons who turn in orders to you from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments. Refer to Publication 15-A, Section 1, *Who are Employees?* for further information.

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. Workers who offer their services to the public are generally not employees. A Form 1099-MISC, *Miscellaneous Income,* should be furnished to independent contractors and filed with IRS.

Misclassified Workers to File New Social Security Tax Form

A new form has been developed for employees who have been misclassified as independent contractors by an employer. Form 8919, Uncollected Social Security and Medicare Tax on Wages, will now be used to figure and report the employee's share of uncollected social security and Medicare taxes due on their compensation.

Generally, a worker who receives a Form 1099 for services provided as an independent contractor must report the income on Schedule C and pay self-employment tax on the net profit, using Schedule SE. However, sometimes the worker is incorrectly treated as an independent contractor when they are actually an employee. When this happens, Form 8919 will be used beginning for tax year 2007 by workers who performed services for an employer but the employer did not withhold the worker's share of social security and Medicare taxes.

In addition, the worker must meet one of several criteria indicating they were an employee while performing the services. The criteria include:

- The worker has filed Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding, and received a determination letter from the IRS stating they are an employee of the firm.

- The worker has been designated as a section 530 employee by their employer or by the IRS prior to January 1, 1997

- The worker has received other correspondence from the IRS that states they are an employee.

- The worker was previously treated as an employee by the firm and they are performing services in a similar capacity and under similar direction and control.

- The worker's co-workers are performing similar services under similar direction and control and are treated as employees.

- The worker's co-workers are performing similar services under similar direction and control and filed Form SS-8 for the firm and received a determination that they were employees.

- The worker has filed Form SS-8 with the IRS and has not yet received a reply.

By using form 8919, the worker's social security and Medicare taxes will be credited to their social security record.

In the past, misclassified workers often used Form 4137 to report their share of social security and Medicare taxes. Misclassified workers should no longer use this form. Instead, Form 4137 should now only be used by tippped employees to report social security and Medicare taxes on allocated tips and tips not reported to their employers.

Misclassification of Employees

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 (IRC §3509). In some instances, you may have reasonable basis for not treating a worker as an employee and may be entitled to relief under Section 530 of the Revenue Act of 1978.

Examples of Employees

1) The tribal business pays Mr. Tom, an individual, $500 per week to clean the tribal office complex. Mr. Tom only works for the tribe. He does not have the right to hire or fire any assistants, and he is required to personally do the work. The tribe provides the supplies and tools. Based on these facts, Mr. Tom is considered an employee and the tribe should withhold income taxes and employment taxes. Mr. Tom will be issued a Form W-2.

2) Mr. Bills works as a deputy for the tribal police department. When Mr. Bills is off-duty, he has been repairing the roof of the tribal hospital. The tribe has determined when the work is to be done, has provided the supplies needed, and has determined how Mr. Bills will be paid. Based on these facts, Mr. Bills is considered an employee for the tribe for both jobs and should be issued a Form W-2 showing the withheld income taxes and employment taxes.

3) Ms. Fran is a tribal member but **not** a council member. Ms. Fran is on the Beautification Committee. She is required to attend the Ms. Indian Pageant Committee meeting and is paid $50. Ms. Fran is considered an employee and is subject to withholding of federal income taxes, FICA, and Medicare tax. Ms. Fran will also be issued a Form W-2.

Example of an Independent Contractor

The tribe pays Mr. Paul $1000 per week to clean the bingo halls. Mr. Paul operates his own janitorial service providing cleaning services for numerous entities. He has the right to hire and fire his own employees, and provides his own supplies. The tribe does not have the right to control Mr. Paul. Therefore, Mr. Paul is not an employee of the tribe and would be issued a Form 1099-MISC.

The following are examples of workers misclassified as independent contractors who should have been treated as employees:

- Pharmacist – Hired on contract. Worked only for the tribe.
- Bus Driver - Works as a janitor during the day. This is an additional wage to this employee.
- Janitor – Works when told & uses supplies provided by the tribe. Paid a flat fee per month.
- Speech Teacher – Hired on contract but worked only for the tribal school.
- Doctor – Paid by both tribe and IHS on a contract. Worked at the hospital. Whether wages were paid by either or both, Form 1099 is not acceptable.

If you have a question about the treatment of any of your workers, please contact your ITG Specialist.

Agricultural Labor (Farm Work)

There are special rules for social security and Medicare withholding on agricultural workers. See Chapter 14, Form 943, *Agricultural Employees*, for more information. Also, refer to Publication 51, Section 4, *Social Security and Medicare Taxes,* and also Section 13, *Federal Income Tax Withholding Methods.*

Crew Leaders

A crew leader is a person who furnishes and pays workers to do farm work for the farm operator. If there is no written agreement between this worker and the farm operator stating that he or she is an employee and if he or she pays the workers (either for himself or for the farm operator), then he or she is a crew leader. This person is an independent contractor and will receive a Form 1099-MISC for all of the work performed.

Employment taxes for farm workers must be filed on Form 943 and must be separate from other workers' employment taxes filed on Form 941.
Further information on agricultural workers is addressed in Chapter 14.

CHAPTER 3
Treatment of Certain Payments

References:

- Internal Revenue Code §7873
- Publication 15, *Circular E, Employer's Tax Guide*
- Publication 15-A (PDF), *Employer's Supplemental Tax Guide*
- Revenue Ruling 59-354 (Attachment A at the end of this guide)
- Revenue Ruling 63-136 (Attachment B at the end of this guide)
- Revenue Ruling 2000-6 (Attachment C at the end of this guide)
- Form 843, Claim for Refund and Request for Abatement
- Form 941c, Supporting Statement to Correct Information

In this chapter, we will discuss how certain payments are treated. Some of these payments are specific to Indian tribes, while others are not. For example, payments made from fishing rights-related activities and payments made to tribal council members are tribal specific issues. Payments made to elected and appointed officials and those payments made as bonuses are general in nature. The proper treatment of these payments for withholding and reporting purposes is sometimes confusing.

In the next four sections of this chapter, payments to tribal council members, fishing rights-related activities, bonuses, and payments to elected and public officials will be discussed. If you have questions about any of these payments, or how they are to be treated, you should contact your local Indian Tribal Governments office[1] for assistance.

Fishing Rights-Related Activities

Any income derived by a member of an Indian tribe (either directly or through a qualified Indian entity) or by a "qualified Indian entity" (defined later in this chapter) from a ***fishing-rights related activity*** of that member's or entity's tribe is exempt from federal & state taxation **(income tax, income tax withholding, FICA, unemployment tax, and self-employment tax).**

Wages are not exempt if paid by an employer who is not a member of the same tribe or is not a qualified Indian entity. Wages are also not exempt if paid to an employee who is not a member of the tribe whose fishing rights are exercised. *Tribal members must fish in their own waters to be exempt.*

Fishing rights-related activity means an activity (including aquaculture) directly related to harvesting, processing, or transporting fish harvested in the exercise of

[1] Contact information for your local IRS Indian Tribal Governments office is listed in Chapter 1 of this guide.

recognized fishing rights of such tribe or to selling fish, but only if substantially all of the harvesting was performed by members of the tribe.

A recognized fishing right must have been secured as of March 17, 1988, by a treaty between the tribe and the United States, by an Executive Order, or an Act of Congress.

As an employer exercising fishing rights-related activities you should:

- Verify your status as a qualified Indian entity.
- Verify your employee's proof of tribal membership.
- Verify time allocated to fishing versus nonfishing activity. For example, consider a game warden that is responsible for protecting other wildlife and has other duties, as well as patrolling the treaty waters of his tribe. His employer should verify the percentage of time he engages in fishing rights-related activities of his tribe.
- Maintain records to support each employee's time allocation.
- Maintain records to support the 90% gross receipts rule (defined later in this chapter).

Tax Return Preparation

- Do not include exempt wages on Form 941, Form 940, or Form W-2.
- Wages paid for nonfishing activities are subject to all applicable employment taxes and employment tax reporting, including Form W-2.
- If only fishing rights-related income is paid to an individual, no Form W-2 is required.
- A letter stating the amount and tax-exempt nature of his/her wages may be issued to the employee to be used for various non-tax purposes, such as bank loans.

  Note: *If a processor or transporter fails to meet the 90% rule, all income from that year is taxable.*

Special Definitions:

A "qualified Indian entity" is 100% owned by a federally recognized Indian tribe or tribal members, and substantially all management functions are performed by tribal members. It may be jointly owned by more than one tribe or members of more than one tribe.

90% Rule for processors and transporters -- If the entity engages to any extent in any substantial processing or transporting of fish, then at least 90 percent of the annual gross receipts of the entity must be derived from the exercise of protected fishing rights of tribes whose members own at least 10 percent of the equity interests in the entity.

Examples of categories of tribal employees whose wages may be exempt or partially exempt:

- Fishers, processors (including smoking), transporters
- Hatchery workers
- Environmental and conservation workers
- Enforcement staff and tribal court personnel
- Support staff, i.e. secretary, accounting, payroll
- Program director, executive director
- Fisheries biologist
- Fisheries aide
- Fishery and habitat policy analysts
- Water quality biologist
- Habitat inventory and assessment technician
- Legislative analyst
- Information and education services
- Data analyst
- Policy analyst
- Public information staff

For questions regarding this tax treatment, please contact your local Indian Tribal Governments office.[1]

[1] Contact information for your local IRS Indian Tribal Governments office is listed in Chapter 1 of this guide.

CHAPTER 3
Treatment of Certain Payments

Tribal Council Members

Revenue Ruling 59-354 , 1959-2 C.B. 24, sets forth a limited employment tax exception for amounts paid to tribal council members for services performed by them as council members. Revenue Ruling 59-354 holds that while these amounts are includible in the council member's gross income, they do not constitute wages for purposes of FICA, FUTA, and Federal income tax withholding.

Tribal chairmen and tribal councilmen are employees; however, salaries paid to them for services performed by them as council members are treated differently. These amounts should be included in the council member's gross income; however, they do not constitute wages for purposes of the Federal Insurance Contributions Act (FICA) or federal withholding taxes. Per Revenue Ruling 59-354, you are required to provide Forms W-2 to these individuals. Tribal officials are liable for federal income tax on these wages, and some may voluntarily have this tax withheld to avoid personal year-end deficiencies.

Council members' salaries will be shown in box 1, Wages, Tips, Other Compensation, of the Form W-2. Additionally, in box 14, Other, you should indicate *Revenue Ruling 59-354*. This will show why there are no amounts listed in the boxes for federal income tax withheld (box 2) or FICA (boxes 3, 4, and 7). Note: If the tribal council member requests to have federal taxes withheld, box 2 will reflect these voluntarily-withheld amounts.

Exhibit 3-1 (at the end of this chapter) is a sample of a W-2 for a tribal council member. Tribal council members may receive two Forms W-2, one for tribal council member wages and one for services performed in another capacity. See Form W-2 instructions for further information.

A copy of Revenue Ruling 59-354 is included as Attachment A at the end of this guide. Part of your responsibility as employer is to provide the council member with either a copy of the revenue ruling or a statement advising them that their W-2 is treated differently (i.e., salaries do not constitute wages for purposes of FICA or federal withholding taxes per Revenue Ruling 59-354). The council member should then attach a copy of the revenue ruling or statement to their individual tax return.

Claim for Overcollected Employee Social Security and Medicare Taxes

If the Indian tribal government withheld social security taxes and Medicare taxes from a tribal council member's salary, those overcollected taxes may be refunded to the tribal council member in one of two ways: 1) by filing Form 843, Claim for

Refund and Request for Abatement, with Form 941c attached, or 2) by filing a Form 941c with their current quarter 941 (to correct prior period Forms 941). NOTE: If you file a Form 843 Claim, your refund will include interest on the overpaid taxes; however, your refund will take longer to be processed. The second choice, filing a Form 941c with the current quarter Form 941, generates a refund more quickly; however, it does not include interest on the total.

A written statement must be obtained from each tribal council employee stating that the employee has not claimed, and will not claim, refund or credit for the amount of overcollection. The Indian tribal government can make a claim for both the employer and the employee shares of social security and Medicare taxes for those employees who provide the required written statements.

For those employees who do not provide statements, you (as employer) can make a claim for **only** the employer's share of social security and Medicare taxes.

Next, complete the Form 941c, Supporting Statement to Correct Information for each Form 843 or Form 941 being corrected. When completing the Form 941c, be sure to complete Part 1 by checking the appropriate box(es) and signing at the bottom of Part 1. The Tribe then reimburses the council members for their share of the social security and Medicare taxes.

Finally, complete Form W-2c for each employee for whom adjustments were made to social security and Medicare taxes. This corrects the previous Form W-2 filed. Submit the Forms W-2c along with the Form W-3c to Social Security Administration.

Form 843, Claim for Refund and Request for Abatement, and Form 941c, Supporting Statement to Correct Information, and their instructions have been included at the end of this chapter.

Benefit Payments for Training or Retraining

Revenue Ruling 63-136 (Attachment B at the end of this guide) addresses the issue of benefit payments, received by individuals undergoing training or retraining under the Area Redevelopment Act (75 Stat. 47-63), or the Manpower Development and Training Act of 1962 (76 Stat. 23-33). Examples of state-funded retraining programs are the Job Training Partnership Act (JTPA) and the Work Investment Act (WIA). A tribe may establish its own work employment program.

As stated in Revenue Ruling 63-136, these benefit payments are not taxable. These benefit payments are intended to aid the recipients in their efforts to acquire new skills that will enable them to achieve better employment opportunities. As such, these benefit payments fall into the same category as other unemployment relief payments made for the promotion of the general welfare. Accordingly, it is held that such payments are not includible in the gross incomes of the recipients.

Bonuses

Bonuses that the tribe pays an employee are includable in the employee's income and are shown as wages on the Form W-2. If the bonuses are paid to the employee in the form of goods or services, the fair market value of the goods or services will be added to the employee's income.

Bonuses are considered supplemental wages paid in addition to the employee's regular wages. How you withhold on bonuses depends on whether the bonus is identified as a separate payment from regular wages.

Bonus Combined with Regular Wages

If you pay bonuses with regular wages but do not specify the amount of each, withhold income tax as if the total were a single payment for a regular payroll period.

Bonus Identified Separately from Regular Wages

If you pay bonuses separately (or combine them in a single payment and specify the amount of each), the income tax withholding method depends partly on whether you withhold income tax from your employee's regular wages.

If you **withheld** income tax from an employee's regular wages, you can use one of the following methods for the bonus:

a) Withhold a flat 25% (no other percentage allowed).
b) Add the bonus and regular wages for the most recent payroll period this year.

c) Figure the income tax withholding as if the total were a single payment. Subtract the tax already withheld from the regular wages. Withhold the remaining tax from the bonus.

If you **did not withhold** income tax from the employee's regular wages, use method **b** above. (This would occur, for example, when the value of the employee's withholding allowances claimed on Form W-4 is more than the wages.)

Regardless of the method you use to withhold income tax on bonuses, they are subject to social security, Medicare, and FUTA (if applicable) taxes.

EXAMPLE 3.1

You pay Sharon a base salary on the first of each month. She is single and claims one allowance. Her July 1, 200X, pay is $2,000. Using the current wage bracket tables, you withhold $200. On July 15, 200X, you pay Sharon a bonus of $2,000. Electing to use supplemental payment method **b,** you:

1) Add the bonus amount to the amount of wages from the most recent pay date ($2,000 + $2,000 = $4,000).
2) Determine the amount of withholding on the combined $4,000 ($613 using the wage bracket tables).
3) Subtract the amount withheld from wages on the most recent pay date from the combined withholding amount ($613 - $200 = $413).
4) Withhold $413 from the bonus payment.

EXAMPLE 3.2

The facts are the same as in the above example, except that you elect to use the flat rate method of withholding on the bonus. You withhold 25% of $2,000, or $500, from Sharon's bonus payment.

Elected and Public Officials

To determine whether an elected or public official is an employee, Tribal Governments would use the 'common law' factors. The Tribal Government should use the 3-prong test to determine whether a common law employment relationship exists. The three prongs are 1) behavioral control; 2) financial

control; and 3) the relationship of the parties. Each determination is based upon its unique facts and circumstances. **If there is any question whether a person is a public official, obtain a copy of, or a reference to, the pertinent statute or ordinance relating to the establishment of the position.**

For more information on employer-employee relationships, refer to Chapter 2 of Publication 15, *Circular E, Employer's Tax Guide* and Chapter 2 of Publication 15-A (PDF), *Employer's Supplemental Tax Guide*. If you would like the IRS to determine whether services are performed as an employee or independent contractor, you may submit Form SS-8 (PDF), *Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding.* Form SS-8 is discussed more thoroughly on Page 23 of this guide.

Election Workers

If an election worker's compensation is subject to withholding of FICA tax, reporting is required for all compensation, regardless of the amount. If an election worker's compensation is not subject to withholding of FICA tax, information reporting is required for payments that aggregate $600 or more in a calendar year. See Revenue Ruling 2000-6 (Attachment B at the end of this guide) to determine when an election worker's compensation is subject to withholding of FICA tax.

In the following examples, all the wages paid in 200X have been for services as an election worker only.

1. If wages paid during the year are less than $600, no W-2 is required. The wages are not subject to FICA or federal income tax withholding. The election worker must report the earnings as wages.

2. If wages paid during the year are between $600 and $1,299, a Form W-2 should be issued. FICA and federal income tax withholding are not required to be withheld. The election worker must report the earnings as wages.

3. If wages are equal or greater than $1,300 (this amount is indexed for inflation), a W-2 should be issued. The wages are subject to FICA, but not federal income tax withholding. The election worker must report the earnings as wages.

Form SS-8

Occasionally, an Indian tribal government will be unable to determine whether a worker is an employee or whether the worker is self-employed and should be treated as an independent contractor. Many individuals who have personal service contracts with Indian tribal governments may be employees rather than independent contractors. The existence of a contract does not mean that the individual performing the service is not an employee. It is important to the worker that the employment status be determined as soon as possible so that the earnings can be properly reported.

If no clear resolution is possible, consider filing a Form SS-8, *Determination of Employee Work Status for Purposes of Federal Employment Taxes and Income Tax Withholding,* with the IRS for a determination. A Form SS-8 is used to gather information to determine whether a worker is an employee for federal employment taxes.

All pertinent facts relating to the individual's work arrangement should be obtained and submitted to the IRS on a Form SS-8. A Form SS-8 may be submitted by the tribal government or by the worker. If a contract has been executed between the worker and the entity, a copy of the contract should be furnished with the Form SS-8. When a Form SS-8 is submitted to the IRS, all the facts are analyzed and the determination of a worker's status is presented to the employer in the form of a determination or letter ruling.

Several problems arise for a worker when incorrectly treated as an independent contractor. To begin with, the worker would probably pay more taxes (i.e., Self-Employment Contributions Act (SECA) taxes) than if the worker were being correctly treated as an employee. As an employee, only the employee's portion of the social security and Medicare taxes are withheld and paid from the employee's wages. As an independent contractor, the worker is not eligible for any unemployment benefits or other benefit plans that the worker would have as an employee. Also, as an independent contractor, the worker may have to pay estimated tax payments each quarter.

EXHIBIT 3.1
Sample Form W-2 for Tribal Council Member

22222	a Employee's social security number 123-45-6789	OMB No. 1545-0008	
b Employer identification number (EIN) 00-0000000		1 Wages, tips, other compensation 5000.00	2 Federal income tax withheld
c Employer's name, address, and ZIP code Tribe XYZ 123 Main Street Anytown, USA 75432		3 Social security wages	4 Social security tax withheld
		5 Medicare wages and tips	6 Medicare tax withheld
		7 Social security tips	8 Allocated tips
d Control number		9 Advance EIC payment	10 Dependent care benefits
e Employee's first name and initial: Sara A. / Last name: Lee / Suff. 333 Elm Street Anytown, USA 75432 f Employee's address and ZIP code		11 Nonqualified plans	12a
		13 Statutory employee ☐ Retirement plan ☐ Third-party sick pay ☐	12b
		14 Other: See Revenue Ruling 59-354	12c
			12d

15 State / Employer's state ID number	16 State wages, tips, etc.	17 State income tax	18 Local wages, tips, etc.	19 Local income tax	20 Locality name

Form **W-2** Wage and Tax Statement 2008 Department of the Treasury—Internal Revenue Service

CHAPTER 4
Tipped Employees

References:

- Publication 15, *Circular E, Employer's Tax Guide*
- Publication 531, *Reporting Tip Income*
- Instructions for Form W-2, Box 1 and Box 8
- Publication 1872, *Tips on Tips, A Guide to Tip Income Reporting for Employees in the Food and Beverage Industry*
- Publication 1875, *Tips on Tips, A guide to Tip Income Reporting for Employers in the Food and Beverage Industry*
- Publication 3148, *Tips on Tips, A Guide to Tip Income Reporting for Employees Who Receive Tip Income*
- Publication 3144, *Tips on Tips, A guide to Tip Income Reporting for Employers in Businesses Where Tip Income is Customary*
- Instructions for Form 941, Line 5b, *Taxable Social Security Tips*
- Form 8027 and instructions, *Employer's Annual Information Return of Tip Income and Allocated Tips*
- Publication 1239, *Specifications for Filing Form 8027, Employer's Annual Information Return of Tip Income and Allocated Tips, Magnetically or Electronically*

References for your employees:

- Publication 1244, *Employee's Daily Record of Tips and Report to Employer* (This publication includes Form 4070, *Employee's Report of Tips to Employer,* and Form 4070A, *Employee's Daily Record of Tips.)*
- Form 4137, *Social Security and Medicare Tax on Unreported Tip Income*

Tips are Wages

Tips are defined as wages under IRC §3121(a) and §3401(a). Tips that are received by an employee in the course of employment should be reported to the employer whether received directly from customers or indirectly in the form of shared tips or tip-outs from fellow employees. For purposes of FICA, the term "wages" means all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash (unless specifically excepted). For purposes of federal income tax withholding, the term "wages" is similar to the one for FICA.

All tips received by an employee are taxable income subject to federal income tax. Tips paid in cash (or checks or other cash equivalent), including charged tips of $20 or more that an employee receives in a calendar month while working for any one employer, are wages subject to FICA and income tax withholding.

Tips of less than $20 received by an employee during a calendar month while working for a particular employer are not wages for FICA or federal income tax withholding purposes, even though such tips are taxable income. Once the amount of tips received in a calendar month reaches $20 from any one employer, the entire amount of tips received must be reported to the employer and included in wages (not just the amount over $20).

An employee who receives $20 or more in tips must report those tips in writing to his (or her) employer by the tenth day following the month in which the tips are received (or more often if required by the employer).

Service Charges

Service charges added to the customer's bill by the establishment as gratuities are receipts to the establishment. Although commonly thought of as tips, they constitute wages when distributed and paid to the tipped employee. These service charges are treated as wages and are includible on Form W-2.

Large Food and Beverage Establishments

There are special tip reporting requirements for large food and beverage establishments. A "large food and beverage establishment" is defined as a business operation with the following characteristics: food and beverages are provided for consumption on the premises, tipping is a customary practice, and there are more than 10 employees who work more than 80 hours on a typical business day.

For the Form 8027 filing requirement:

- Casino buffets are included if tipping is customary.
- Ten or more employees include the total of all employees at the establishment, not just the tipped employees.
- If an employer owns more than one establishment, a separate Form 8027 must be filed for each establishment.
- If there is more than one business operating within a single building, and if the receipts for the businesses are recorded separately, then each location should file a separate Form 8027.

File Form 8027, *Employer's Annual Information of Tip Income and Allocated Tips,* for large food and beverage establishments by the last day of February for the preceding calendar year. Extensions may be requested on Form 8809, *Request for Extension of Time to File Information Returns,* if the request is filed

before the due date of the return. Refer to Publication 1239, *Specifications for Filing Form 8027, Employer's Annual Information Return of Tip Income and Allocated Tips, Magnetically or Electronically,* to file electronically. The due date if filed electronically is March 31 for the preceding calendar year.

Allocated Tips

IRC §6053(c)(2) and (3) requires large food and beverage establishments to allocate tips to those employees who report tips of less than 8% of gross receipts to them. The total allocated is the difference between the 8% and the amount reported by the employees. The establishment must report these allocations in box 8 of the Form W-2. See Exhibit 4-1 for an example.

Tip Rate Reduction Requests

A request may be made for a reduced allocation rate by submitting a petition that clearly demonstrates that a rate less than 8% should apply. Refer to Instructions for Form 8027 on how to apply.

IRC §3121(q)

The Omnibus Budget Reconciliation Act of 1987 (OBRA) amended IRC §3121(q) to provide that tips are deemed to have been paid by the employer for purposes of FICA tax and to require that employers withhold both the employer and employee shares of FICA. IRC §3121(q) also provides that unreported tips are subject to employer FICA tax. IRC §3121(q) allows the Service to assess the employer's share of FICA taxes with respect to reported tips (i.e., where no statement reporting such tips was furnished by an employee or to the extent the statement is inaccurate or incomplete). The vehicle to assess this additional tax is in Section 3121(q) Notice and Demand. When determining the employer's additional FICA tax liability, the tips are deemed paid on the date the Notice and Demand is made to the employer by the Service.

Employer's General Responsibilities

IRC §3102(a) provides that the employer is responsible for deducting and depositing the employee's FICA tax on tips included in the written report furnished by the employee to the extent that collections can be made from the employee's wages (under the employer's control, excluding tips) on or after the time the written statement is furnished.

Additional FICA Tax Payable

IRC §6053(b) states that the employer must furnish to the employee a written statement showing the amount of employee FICA on tips, which exceeds the tax the employer can collect from the wages under the control of the employer. The regulations provide that the statement is provided on the employee's Form W-2. The employee is required to report and pay over to the Service the portion of employee tax, which the employer was unable to withhold due to the lack of employee wages available to cover the liability.

An employee's regular pay may not be enough for the employer to withhold all of the taxes an employee owes on the regular pay and reported tips. If this happens an employee may give the employer more money to cover the taxes.

If the employee's pay, under the employer's control, is not enough to cover all of the taxes, the Treasury Regulations at §31.3102-3(a)(1) clarify the sequence the employer must follow when paying over the withheld taxes as follows:

1. All taxes (FICA, federal withholding, and state and local) on regular pay, exclusive of tips
2. Social security and Medicare taxes on reported tips
3. Federal, state, and local taxes on reported tips

EXAMPLE 4.1
Employee taxes on wages and tips exceed regular wages

Grady Cimarron is a blackjack dealer for a tribal casino in Oklahoma. He routinely receives tips as a part of his compensation as a dealer. The casino pays him a salary of $200 per week ($400 every two weeks). He receives tips in cash each day that he works.

Grady keeps a daily tip record and reports tips to his employer every other Friday. He has a Form W-4, *Employee's Withholding Allowance Certificate*, on file with his employer (the casino). It reflects that he is single with one exemption. For the two-week period ending April 12, 200X, Grady reported $1,200 in cash tips to his employer. His regular wages for the same two-week period are $400. The casino tip policy allows Grady to keep his cash tips at the time he receives them.

The following computation illustrates that Grady's total withholding for wages and tips exceeds his regular wages, causing him to owe taxes to his employer on payday.

Gross Regular Pay				$400.00
Less:				
	Tax on Wages of $400.00	Tax on Tips of $1,200.00	Total Tax to be Withheld	
FICA	$ 30.60	$ 91.80	$122.40	
Federal Withholding	$100.00*	$200.00*	$300.00*	
State Withholding	$ 30.00	$ 20.00	$ 50.00	
Total	$160.60	$311.80	$472.40	-472.40
Net Paycheck				Zero **

* **These withholding amounts are for this example only to show the intended result. The withholding tables were not consulted for either federal or state withholding taxes.**

****The employee owes the amount of tax ($72.40) that exceeds his regular paycheck.**

Because all tips are taxable wages to the employee, this situation creates a withholding shortfall for Grady. The withholding on his wages plus his tips exceeds his biweekly paycheck from his regular salary.

If Grady does not make arrangements with his employer to pay all his FICA and withholding, his taxes will be applied in the following order:

1. Withholding on regular wages (FICA, federal income, state income) ($160.60)
2. FICA withholding tax on tips ($91.80)
3. Federal income tax withholding ($147.60 of the $200 due)

Net paycheck = 0 ($400 less $160.60, $91.80 and $147.60)

After his net paycheck is zero, Grady still owes $52.40 in federal income tax withholding and $20 in state withholding.

Because Grady's regular pay is not enough for his employer to withhold all the taxes he owes on his regular pay plus his reported tips, he may give his employer money for taxes. He may give his employer money until the close of the calendar year to pay the rest of the taxes.

His employer may also collect any taxes that remain unpaid from his next paycheck. If withholding taxes remain uncollected at the end of the year, Grady may be subject to a penalty for underpayment of estimated tax.

In the example, Grady's regular paycheck paid all his FICA (social security and Medicare taxes). This is not always the case; sometimes an employee may owe social security and Medicare taxes uncollected at the end of the year. These uncollected taxes will be shown in box 12 of Form W-2, *Wage and Tax Statement,* and must be reported on the employee's Form 1040, *U.S. Individual Income Tax Return.*

Your Tip Employment Tax Responsibilities

- Include tips as wages, withholding FICA and federal income tax, and include on Form 941 and Form W-2
- Allocate tips when required
- File the information report, Form 8027, if required

You and Your Employees' Record keeping Responsibilities (This is specific to large food and beverage establishments.)

Treasury Regulation §31.6053-1(b) states that the written statement furnished by the employee to the employer in respect to tips received by the employee shall be signed by the employee and should disclose:

- The name, address, and SSN of the employee.
- The name and address of the employer.
- The period for which, and the date on which, the statement is furnished. If the statement is for a calendar month, the month and year should be specified. If the statement is for a period of less than one calendar month, the beginning and ending dates of the period should be shown (i.e., January 1 through January 8, 200X).
- The total amount of tips received by the employee during the period covered by the statement, which are required to be reported to the employer.

Treasury Regulation §31.6053-1(b)(2)(i) indicates that no particular form is prescribed; however, Form 4070 (included in Publication 1244) may be used unless the employer provides some other form.

If the employer chooses to use another form, the form must meet the requirements of Treasury Regulation §31.6053-1(b)(2)(ii) as follows:

- The form is to be used solely for the purpose of reporting tips,
- It meets the requirements of subparagraph (1) (of the regulations as listed above), and
- A blank copy must be made available to the employee for completion and retention by such employee.

In lieu of a special form for tip reporting, Treasury Regulation §31.6053-1(b)(2)(ii) provides that an employer may provide regularly used forms (such as time cards) for use by the employees in reporting tips. Any such regularly used form must include the period for which and the date on which the statement is furnished, as well as the total amount of tips received by such employee. The form must also contain identifying information, which will ensure identification of the employee by the employer.

Tip Agreements

The IRS began its Tip Rate Determination/Education Program (TRD/EP) in October 1993 for businesses where tip income is customary. The objective of the program has been to improve and ensure compliance by employers and employees with statutory provisions relating to tip income.

Only employers in the food and beverage industry can choose either a Tip Rate Alternative Commitment (TRAC) or Tip Rate Determination Agreement (TRDA). Businesses in the gaming industry may enter into a Gaming TRDA or a new program Gaming Industry Tip Compliance Agreement (GITCA) written specifically for them issued as Revenue Procedure 2003-35. The program is entirely voluntary.

The employer may enter into a tip agreement depending on the specific business. The IRS will assist applicants in understanding and meeting the requirements for participation. Please contact your ITG specialist for any questions about entering into a tip agreement or to review your current agreement.

EXHIBIT 4.1,
Form W-2, Wage and Tax Statement showing allocated tips

22222	a Employee's social security number 123-45-6789	OMB No. 1545-0008	
b Employer identification number (EIN) 00-0000000		1 Wages, tips, other compensation 5000.00	2 Federal income tax withheld 515.00
c Employer's name, address, and ZIP code Tribe XYZ 123 Main Street Anytown, USA 75432		3 Social security wages 5000.00	4 Social security tax withheld 310.00
		5 Medicare wages and tips 5000.00	6 Medicare tax withheld 72.50
		7 Social security tips	8 Allocated tips 425.00
d Control number		9 Advance EIC payment	10 Dependent care benefits
e Employee's first name and initial: Sara A. / Last name: Lee / Suff. 111 Elm Street Anytown, USA 75432		11 Nonqualified plans	12a
		13 Statutory employee ☐ Retirement plan ☐ Third-party sick pay ☐	12b
		14 Other	12c
f Employee's address and ZIP code			12d

15 State / Employer's state ID number	16 State wages, tips, etc.	17 State income tax	18 Local wages, tips, etc.	19 Local income tax	20 Locality name

Form **W-2** Wage and Tax Statement — 2008 — Department of the Treasury—Internal Revenue Service

CHAPTER 5
Employee Business Expense Reimbursements

References:

- Publication 15, *Circular E, Employer's Tax Guide*
- Publication 17, *Your Federal Income Tax*
- Instructions for Forms W-2 and W-3
- Publication 1542, *Per Diem Rates*

Employees are often required to use their personal vehicles for business purposes or to incur business-related expenses in connection with their job. Often employers will reimburse employees for these "out-of-pocket" expenses. The reimbursement policy of the employer will determine the proper tax treatment of these reimbursed employee business expenses. This chapter addresses the two basic types of reimbursement arrangements that can exist between an employer and an employee and how these reimbursements are handled for income tax purposes.

There are two general types of expense reimbursement plans that an employer may use to reimburse employees for out-of-pocket business expenses. They are (1) an accountable plan, and (2) a nonaccountable plan. Each of these plans will be discussed in detail below, but the principal difference is whether employees are required to substantiate expenses (accountable plan) to their employer for the amounts they incur for job related expenses, or not (nonaccountable plan).

Nonaccountable Plan

Under a nonaccountable reimbursement plan, the employee is generally not required to substantiate any expenses to the employer. Reimbursements received by the employee under such a plan are included in the employee's Form W-2 as taxable wages subject to income tax withholding, social security, Medicare, and FUTA taxes. The employee may deduct the actual expenses incurred as a miscellaneous itemized deduction on his or her personal tax return.

Accountable Plan

To qualify as an accountable plan, the plan must contain the following features:

- The employee's expenses must be incurred in connection with his services as an employee with no personal expenses.
- The employee must substantiate expenses to the employer within a reasonable period of time from when the expenses were incurred.

- The employer must require that any excess advance or reimbursement over the actual substantiated expense be returned within a reasonable period of time.

Amounts paid under an accountable plan are not wages and are not subject to income tax withholding, social security, Medicare, or FUTA taxes.

If the expenses covered by this arrangement are not substantiated, or amounts in excess of expenses are not returned within a reasonable period of time, the amount is treated as paid under a nonaccountable plan. A reasonable period of time depends on the facts and circumstances. It is considered reasonable if:

1. Your employees receive the advance within 30 days of the time they incur the expense.
2. They adequately account for the expenses within 60 days after the expenses were paid or incurred.
3. They return any amounts in excess of expenses within 120 days after the expense was paid or incurred.

Also, it is considered reasonable if you give your employees a periodic statement (at least quarterly) that asks them to either return or adequately account for outstanding amounts and they do so within 120 days.

Per Diem and Car Allowances

A per diem allowance is a fixed amount of daily reimbursement an employer gives an employee for lodging, meals, and incidental expenses when the employee is away from home on business. You may reimburse your employees by travel days, miles, or some other fixed allowance. In these cases, your employee is considered to have accounted to you if the payments do not exceed rates established by the federal government. The standard mileage rates for auto expenses are reviewed below:

March 19, 2008	$0.505
February 1, 2007	$0.485
January 1, 2006	$0.445
September 1, 2005	$0.485

The federal per diem rates for meals and lodging in the continental U.S. are listed in Publication 1542**,** *Per Diem Rates.*

Per diem allowances may be used only if the time, place, and business purpose of the travel are substantiated by adequate records or other evidence. An employee can satisfy the substantiation requirements for business vehicle expenses in two general ways. First, an employee can submit periodically to the employer a log of business miles driven. The expense is deemed substantiated to the extent of the standard mileage rate (see table above). Second, an employee can submit documentation of actual vehicle expenses (gas, maintenance, insurance, etc.) with support for the percentage of business use of the vehicle (e.g., a log showing both business and personal mileage).

If the per diem or allowance exceeds the federal rate, and you do not require your employees to return the difference between the two rates, you must report the excess amount as wages. This excess amount is subject to income tax withholding, and payment of social security, Medicare, and FUTA taxes. Report the nontaxable (substantiated) portion of the per diem or mileage allowance in box 12 of Form W-2 using code L.

The following is an example of how you would report per diem payments to employees that are in excess of the allowable federal per diem rate:

EXAMPLE 5.1

The tribe sent an employee on a 5-day business trip to Phoenix and gave the employee a $225 ($45 per day) advance to cover meals and incidental expenses. The federal per diem for meals and incidental expenses for Phoenix is $42 per day. The tribe does not require the employee to return the difference between the advance and the federal rate for Phoenix. The $15 ($3 x 5) will be included in box 1 on Form W-2. Box 12 on Form W-2 will show $210 using code L.

EXHIBIT 5.1 - Reporting Reimbursements Table

Reporting Reimbursements

If the type of reimbursement (or other expense allowance) arrangement is under	Then the employer reports on Form W-2:
An ACCOUNTABLE PLAN with:	
Actual expense reimbursement Adequate accounting made and excess returned	No amount
Actual expense reimbursement Adequate accounting and return of excess both required but excess not returned	The excess amount as wages in box 1.
Per diem or mileage allowance up to the federal rate Adequate accounting and excess returned	No amount
Per diem or mileage allowance up to the federal rate Adequate accounting and return of excess both required but excess not returned	The excess amount as wages in box 1. The amount up to the federal rate is reported only in box 12 – it is not reported in box 1.
Per diem or mileage allowance exceeds the federal rates Adequate accounting up to the federal rate only and excess not returned	The excess amount as wages in box 1. The amount up to the federal rate is reported only in box 12 – it is not reported in box 1.
A NONACCOUNTABLE PLAN with:	
Either adequate accounting or return of excess, or both, not required by plan.	The entire amount as wages in box 1.
No reimbursement plan	The entire amount as wages in box 1.

CHAPTER 6
Fringe Benefits

References:

- Publication 15, *Circular E, Employer's Tax Guide*
- Publication 15-A, *Employer's Supplemental Tax Guide*
- Publication 15-B, *Employer's Tax Guide to Fringe Benefits*
- Publication 463, *Travel, Entertainment, Gift, and Car Expenses*
- Publication 970, *Tax Benefits Education*
- Publication 521, *Moving Expenses*
- Publication 525, *Taxable and Nontaxable Income*
- Publication 1542, *Per Diem Rates*
- Instructions for Forms W-2 and W-3

IRS Publication 15-B, *Employer's Tax Guide to Fringe Benefits,* addresses the question, "Are Fringe Benefits Taxable?" If the recipient of a taxable fringe benefit is your employee, the benefit is subject to employment taxes and must be reported on Form W-2, *Wage and Tax Statement.* However, you can use special rules to withhold, deposit, and report the employment taxes. Refer to Section 4 of Publication 15-B, *Rules for Withholding, Depositing and Reporting.*

What is a Fringe Benefit?

Treasury Regulation §1.61-21 states that gross income includes compensation for services, including fees, commissions, fringe benefits or similar items. A fringe benefit is any property, service, cash or cash equivalent in addition to regular pay provided to an employee by an employer in connection with the performance of services. Whether a particular fringe benefit is taxable depends on whether there is a specific statutory exclusion that applies to the benefit. Employers should treat taxable fringe benefits as wages for employment tax purposes.

Because the tax treatment of fringe benefits can vary depending on the facts and circumstances under which they are provided, it may be helpful to follow a three-step analysis:

- Identify the particular fringe benefit and start with the assumption that its value will be taxable as compensation to the employee.
- Check to see if there are any statutory provisions that exclude the fringe benefit from the employee's gross income.
- Value any portion of the benefit that is not excludable for inclusion in the employee's gross income.

The following are examples of fringe benefits:

- Accident/health benefits
- Allowances not accounted for (i.e., clothing)
- Automobile allowances
- Awards and prizes
- Back pay awards
- Bonuses
- Cafeteria plans
- Club memberships
- Dependent care assistance program
- Educational reimbursements
- Employee discounts
- Frequent flier credits
- Group term life insurance
- Law enforcement housing assistance
- Legal counseling
- Local transportation for commuting
- Lodging on the employer's premises
- Meal money
- Moving expense reimbursements
- Parking
- Professional licenses or dues for professional organizations
- Severance pay
- Scholarships and fellowships
- Sick pay
- Stipends
- Travel reimbursement
- Use of vacation homes
- Vacations

The fringe benefits listed above may or may not be taxable to the employee who receives the benefit. Refer to Publication 15-B to determine if fringe benefits are taxable and how to value them.

Employer-provided Vehicles

Employer-provided vehicles are sometimes available for employees to use during off-duty hours. The personal use of a tribally owned vehicle is a taxable fringe benefit. Personal use includes the value of commuting to and from work in the vehicle, even if the vehicle is taken home for the convenience of the employer.

The value of the fringe benefit must be included in income as wages and is subject to income and employment taxes. There are three methods that can be used to determine the value of the vehicle provided to the employee:

- The commuting value rule,
- The cents-per-mile rule, or
- The automobile lease rule

There are certain employees designated as "control employees" who must use the automobile lease rule. A "control employee" is a government employee whose compensation is equal to or exceeds Federal Government Executive Level V. (See the Office of Personnel Management web site at www.opm.gov/oca/payrates/index.asp for compensation information.) See Chapter 3 of Publication 15-B for further information on control employees.

Qualified Nonpersonal Use Vehicle

A qualified nonpersonal use vehicle is any vehicle the employee is not likely to use more than minimally for personal purposes because of its design. Qualified nonpersonal use vehicles are:

- Clearly marked police and fire vehicles
- Unmarked vehicles use by law enforcement officers - The officer must be authorized to carry a firearm, execute search warrants and make arrests.
- An ambulance or hearse used for its specific purpose
- Any vehicle designed to carry cargo with a loaded gross vehicle weight over 14,000 pounds
- Delivery trucks with seating for the driver only or driver plus a folding jump seat
- A passenger bus with a capacity of at least 20 passengers used for a specific purpose
- School buses
- Tractors and other special purpose farm vehicles

If an employee drives one of these vehicles home, the personal use of the vehicle is not a taxable fringe benefit.

All Other Employer-Provided Vehicles

If you have an employer-provided vehicle that does not qualify as a nonpersonal use vehicle, and the employee uses the vehicle for personal use (which includes commuting), the personal use of the vehicle is a noncash taxable fringe benefit. It is the employer's responsibility to determine the actual value of this fringe benefit and to include the taxable portion in the employee's income.

EXAMPLE 6.1

A tribally owned pickup truck that is not a police vehicle has the name of the tribe marked on the vehicle. Usually the employee is allowed to take the vehicle home because he is "on call". The vehicle is not a qualified nonpersonal use vehicle, thus, the commuting is a noncash taxable fringe benefit. The value of the personal use of this vehicle must be included as wages to the employee, and it is subject to income and employment taxes.

Lodging on Your Business Premises

You can exclude the value of lodging furnished to an employee from the employee's wages if it meets the following tests:

- It is furnished on your business premises,
- It is furnished for your convenience, and
- The employee accepts it as a condition of employment.

This exclusion does not apply if you allow your employee to choose to receive additional pay instead of lodging.

EXAMPLE 6.2

A hospital gives Joan, an employee of the hospital, the choice of living at the hospital free of charge or living elsewhere and receiving a cash allowance in addition to her regular salary. If Joan chooses to live at the hospital, the hospital cannot exclude the value of the lodging from her wages because she is not required to live at the hospital to properly perform the duties of her employment.

EXAMPLE 6.3

A police officer of an Indian tribal government is required to live in housing furnished by the tribe, as a condition of employment. The tribe requires this as a matter of security for the residents in the neighborhood and as a convenience for the tribe to protect the housing facilities. The value of the lodging is not included in the police officer's salary since the housing is a condition of employment, it is on the business premises, and it is a convenience to the tribe.

Employee Business Expenses – Accountable and Nonaccountable Plans

IRS Publication 15, *Circular E, Employer's Tax Guide,* defines employee business expense reimbursements. A reimbursement or allowance arrangement is a system by which you substantiate and pay the advances, reimbursements, and charges for your employees' business expenses. How you report a reimbursement or allowance amount depends on whether you have an accountable or a nonaccountable plan. If a single payment includes both wages and an expense reimbursement, you must specify the amount of the reimbursement.

These rules apply to all ordinary and necessary employee business expenses that would otherwise qualify for a deduction by the employee.

Accountable Plan

Amounts paid under an accountable plan are not wages and are not subject to income tax withholding and payment of social security, Medicare and SUTA and/or Federal unemployment (FUTA) taxes.

To be an accountable plan, your reimbursement or allowance arrangement must require your employees to meet all three of the following rules:

- They must have paid or incurred deductible expenses while performing services as your employees;
- They must adequately account to you for these expenses within a reasonable period of time; and
- They must return any amounts in excess of expenses within a reasonable period of time.

If the expenses covered by this arrangement are not substantiated or amounts in excess of expenses are not returned within a reasonable period of time, the amount is treated as paid under a nonaccountable plan. This amount is subject

to income tax withholding and payment of social security, Medicare, and SUTA and/or FUTA taxes for the first payroll period following the end of the reasonable period.

A reasonable period of time depends on the facts and circumstances. Generally, it is considered reasonable if your employees receive the advance within 30 days of the time they incur the expense, adequately account for the expenses within 60 days after the expenses were paid or incurred, and they return any amounts in excess of expenses within 120 days after the expense was paid or incurred. Also, it is considered reasonable if you give your employees a periodic statement (at least quarterly) that asks them to either return or adequately account for outstanding amounts and they do so within 120 days.

Nonaccountable Plan

Payments to your employee for travel and other necessary expenses of your business under a nonaccountable plan are wages and are treated as supplemental wages subject to income tax withholding and payment of social security, Medicare, and SUTA and/or FUTA taxes. Your payments are treated as paid under a nonaccountable plan if:

- Your employee is not required to or does not substantiate timely those expenses to you with receipts or other documentation, or
- You advance an amount to your employee for business expenses and your employee is not required to or does not return timely any amount he or she does not use for business expenses.

See Section 7 of Publication 15 for more information on supplemental wages.

Per Diem or other Fixed Allowance

You may reimburse your employees by travel days, miles, or some other fixed allowance. In these cases, your employee is considered to have accounted to you if the payments do not exceed rates established by the federal government. The 2008 standard mileage rate for auto expenses is .485 cents per mile 1/1/08 through 3/18/08, and .505 cents per mile beginning 3/19/08. The government per diem rates for meals and lodging in the continental United States are listed in Publication 1542, *Per Diem Rates.* Other than the amount of these expenses, your employees' business expenses must be substantiated (for example, the business purpose of the travel or the number of business miles driven).

If the per diem or allowance paid exceeds the amounts specified, you must report the excess amount as wages. This excess amount is subject to income tax withholding and payment of social security and Medicare taxes. Show the amount equal to the specified amount (i.e., the nontaxable portion) in box 12 of the Form W-2, using code L.

CHAPTER 7
Pension Plans

References:

- Publication 15, *Circular E, Employer's Tax Guide*
- Publication 15-A, *Employer's Supplemental Tax Guide*
- Publication 505, *Tax Withholding and Estimated Tax*
- Publication 560, *Retirement Plans for Small Business*
- Publication 571, *Tax-Sheltered Annuity Plans*
- Instructions for Forms W-2 and W-3
- Announcement 2001-93, *Reporting Elective Deferral Catch-up Contributions on the 2002 Form W-2*
- Form 5500, *Annual Return/Return of Employee Benefit Plan,*

The purpose of this chapter is to provide information regarding the various pension plans that Indian tribal governments may have as well as annual reporting requirements applicable to these plans. Since the area of pension law can be quite complex, this chapter is not intended to be all-inclusive. It is intended to provide basic information. The pension plan administrator should address more detailed questions.

Types of pension plans that may be maintained by Indian tribal governments:

(1) **Simplified Employee Pension Plan (SEP)** – SEPs provide a simplified method for employers to make contributions to a retirement plan for their employees. Instead of setting up a qualified plan with a separate trust, the employer makes contributions to an IRA; (commonly referred to as a SEP-IRA) that meets the requirements of IRC section 408(k).

(2) **SIMPLE Plan** – Savings Incentive Match Plan for Employees. A SIMPLE Plan also referred to as a SIMPLE-IRA to distinguish it from a SIMPLE-401 (k) plan, is described under IRC section 408(p). In a SIMPLE Plan, employees are allowed to elect to defer compensation up to a prescribed amount. The employer must either match the employee contributions or make a non-elective contribution on behalf of the employees. A SIMPLE plan can be established only if the employer had 100 or fewer employees who earned $5,000 or more in compensation during the preceding year. An employer cannot sponsor a SIMPLE if they currently sponsor another plan.

(3) **Section 401(k) Plan** – A Section 401(k) plan, also referred to as a cash or deferred arrangement (CODA), is an arrangement in which participants may make elective deferrals (pretax contributions) to a plan that is qualified under IRC section 401(a). The CODA must be part of a profit sharing plan, stock bonus plan, or a pre-ERISA money purchase plan. Indian tribal governments

are allowed to maintain 401(k) plans, effective January 1, 1997. (Treas. Reg. section 1.410(b)-9 defines a Section 401(k) plan.)

(4) **Section 403(b) Plan**- A vehicle by which contributions may be deferred from tax and invested in annuity contracts and/or mutual funds for retirement planning purposes. Indian tribal governments are eligible to maintain this type of plan only in limited circumstances. Generally, the organization associated with the tribal government must be an educational institution, a 501(c)(3) organization, or a grandfathered Indian tribe (see definitions).

(5) **Qualified Plan –** A qualified plan, also referred to as a 401(a) plan, is a plan that satisfies the requirements of IRC section 401(a). Examples of qualified plans are as follows: profit sharing plan, money purchase plan, 401(k) plan, target benefit plan or a defined benefit plan.

All of the plans listed above, with the exception of certain qualified plans, are deferred compensation plans that allow employees to save for retirement on a pretax basis. The 401(k) and 403(b) plans are each named after the respective sections of the Internal Revenue Code that authorize them.

Note: Governmental Deferred Compensation Plans under IRC 457 are not included in the types of plans that can be maintained by Indian Tribal governments. They are not an eligible employer for 457 purposes.

Definitions

Deferred Compensation – With regard to pensions, deferred compensation is an amount the employer deducts from the employee's current compensation and pays to a retirement plan. Employees do not pay tax on qualified deferred compensation until distributions are received. Participation in a deferred compensation plan allows employees to "defer" or delay, receiving a portion of their wages until a later date, generally when they retire or reach a distributable event.

Rollover – The contribution or direct transfer of a qualified plan distribution to another plan within 60 days. The plan receiving the rollover may be any of the following:

- another qualified plan
- an IRA
- a SEP-IRA
- for distributions made after December 31, 2001, a section 403(b) plan

501(c)(3) Organization - Defined generally as one organized and operated

exclusively for the following purposes:

- religious
- charitable
- scientific
- public safety testing
- literary or education
- to encourage national or international amateur sports competition
- for the prevention of cruelty to children or animals

These organizations include:

- charities
- social welfare agencies
- private hospitals
- health care organizations
- private schools
- religious institutions
- research facilities

Grandfathered Indian Tribe - An Indian tribal government, a subdivision, agency or instrumentality of an Indian tribal government, or a corporation chartered under federal, state, or tribal law which is owned in part by any of the foregoing is treated as an employer described in 501(c)(3) with respect to any annuity contract purchased in a plan year beginning before January 1, 1995.

Catch-up Contributions – Elective deferrals that are made pursuant to IRC section 414(v) in excess of the limits under IRC sections 402(g), 403(b), 408(p), and 415 to the following type plans: 401(k) plans, 403(b) plans, SARSEPs (SEPs that include a salary reduction arrangement), SIMPLE-IRA plans or SIMPLE-401 (k) plans. Catch-up contributions may be made only by participants who are at least age 50 by the end of the year in which the catch-up contributions are being made.

Qualified Plan – A qualified plan is a plan that meets the requirements of IRC section 401(a). These requirements are generally designed to ensure that the plan is established and operated for the benefit of a broad class of employees. Meeting the requirements entitles the plan sponsor, the trust or other funding vehicle, and participants to certain income tax advantages.

Nonqualified Plan – A nonqualified plan is a plan that does not meet the requirements of IRC section 401(a). As a result, the plan sponsor, participants and trust, or other plan funding vehicle, are generally not entitled to income tax benefits, unless the plan is intended to be, and meets the requirements of, for example, section 402(b) plans, SEPs, SIMPLE plans and certain IRAs.

Salary-reduction Arrangement – An agreement where the employee chooses to have part of his pay contributed to a retirement plan rather than receive it in cash.

Elective-Deferral - Contributions made by the employer at the election of the employee to a retirement plan via a salary reduction agreement. The elective deferrals are excluded from the employee's gross income (compensation) and include deferrals under a section 401(k) arrangement, a section 403(b) plan, a SIMPLE-IRA plan and a SARSEP.

Nonelective Contributions – Employer contributions made to any type of plan, excluding those employer contributions made under a salary reduction agreement. Employer contributions also do not include matching contributions.

Income Tax Withholding

Generally, the participant's pretax contributions (deferred compensation) plus any earnings on these contributions will not be included in gross income until that amount is paid or made available to the participant or beneficiary.

Therefore, this amount will not be subject to income tax withholding at the time the contribution is made. However, the total amount contributed during the tax year will be reflected on the participant's Form W-2.

Social Security, Medicare, and FUTA Taxes

Qualified plans, Tax-sheltered Annuities, SEPS, and SIMPLE Retirement Plans – Generally, elective deferrals made by an employee are excluded from the employee's gross income. However, they are included in wages for purposes of social security, Medicare, and FUTA taxes.

Employer contributions to these plans are not included in the definition of wages and are not subject to social security, Medicare, or FUTA taxes unless the payment is made for services rendered.

Nonqualified Deferred Compensation Plans – Annual deferrals under a nonqualified plan are treated as wages subject to social security, Medicare, and FUTA (if applicable) taxes in the tax year in which the later of the following occurs: (a) when the services are performed, or (b) when there is no substantial risk of forfeiture of the employee's right to the deferred amount. A substantial risk of forfeiture exists where rights in property that are transferred are conditioned upon the future performance of services or the occurrence of a

condition related to the purpose of the transfer. Annual deferrals mean the amount of compensation deferred under the plan whether by salary reduction or nonelective employer contribution during a taxable year.

EXAMPLE 7.1

The tribe's nonqualified plan provides for elective deferrals from current salary, as well as a one percent of salary nonelective contribution for each employee who participates in the plan and who is employed with the tribe during the plan year. All deferrals and contributions, including the tribe's contributions, are fully and immediately vested.

Because these contributions are not subject to a substantial risk of forfeiture (and the services to which they relate have already been performed), the elective deferrals are required to be taken into account as wages for purposes of the social security, Medicare, and FUTA (if applicable) tax at the time of the deferral. The tribe's nonelective contribution is required to be taken into account as wages at the time of the contribution for purposes of the social security, Medicare, and FUTA tax.

EXAMPLE 7.2

Assume the same facts as in Example 1, except that the plan has three-year vesting for the tribe's nonelective contribution. Therefore, an employee's rights to the nonelective contributions (and the associated earnings) are subject to a substantial risk of forfeiture until the employee has been employed by the tribe for three years.

The tribe's nonelective contributions (and earnings thereon) are not wages for purposes of the social security, Medicare, and FUTA taxes until the employee has completed three years of service. At that time, the aggregate amount of the tribe's nonelective contributions, plus earnings thereon, is required to be taken into account as wages for purposes of the social security, Medicare, and FUTA tax. Once an individual has met the vesting requirements, future nonelective contributions by the tribe are required to be taken into account as wages for these purposes when the contribution is made.

The following are examples of how you would prepare a Form W-2 to reflect deferred compensation depending on whether the plan is a qualified plan or a nonqualifying plan.

EXAMPLE 7.3
Qualified Plan

Sarah Lee earned $30,000 during the year of which she elected to contribute 10% ($3,000) to her employer's qualified 401(k) pension plan. The employer also contributed 5% ($1,500) to the pension plan on Sarah's behalf.
Sarah had federal withholding of $3,000, social security withholding of $1,860, and Medicare withholding of $435.

Sarah's W-2 will reflect the following amounts:

Box 1 - $27,000.00 ($30,000 gross wages less $3,000 elective deferral)
Box 3 - $30,000.00 – Although Sarah's elective deferrals are not included in gross wages for the purpose of federal income tax; they are includable wages for the social security tax.
Box 5 - $30,000.00 – Sarah's elective deferrals are includable wages for Medicare tax purposes.
Box 12 - D $3,000.00 – Code D is the code for elective deferrals to a section 401(k) cash or deferral arrangement. (See W-2 instructions for other retirement plan codes)
Box 13 - Check the Retirement Plan box
Box 14 - $1,500.00 – This is the nonelective employer contribution made on behalf of an employee. This is not a mandatory entry.

If your state has a state income tax, then box 16 on Form W-2 will normally be the same amount as the amount shown in box 1 providing the employee was a resident of the state for the entire year.

EXHIBIT 7-3
Form W-2

22222	a Employee's social security number 123-45-6789	OMB No. 1545-0008	
b Employer identification number (EIN) 00-0000000		1 Wages, tips, other compensation 27000.00	2 Federal income tax withheld 3000.00
c Employer's name, address, and ZIP code Tribe XYZ 123 Main Street Anytown, USA 75432		3 Social security wages 30000.00	4 Social security tax withheld 1860.00
		5 Medicare wages and tips 30000.00	6 Medicare tax withheld 435.50
		7 Social security tips	8 Allocated tips
d Control number		9 Advance EIC payment	10 Dependent care benefits
e Employee's first name and initial: Sara A Last name: Lee Suff. 333 Elm Street Anytown, USA 75432 f Employee's address and ZIP code		11 Nonqualified plans	12a D 3000.00
		13 Statutory employee ☐ Retirement plan ☒ Third-party sick pay ☐	12b
		14 Other 1500.00	12c
			12d

15 State / Employer's state ID number	16 State wages, tips, etc.	17 State income tax	18 Local wages, tips, etc.	19 Local income tax	20 Locality name

Form **W-2** Wage and Tax Statement — 2008 — Department of the Treasury—Internal Revenue Service

EXAMPLE 7-4
Nonqualified Plan

Assume the same facts as above except that instead of a 401(k) plan, the plan is a nonqualified plan, and there is no substantial risk of forfeiture of the deferred amount.

Box 1 - $27,000.00
Box 3 - $31,500.00 – Note that both Sarah's contributions (elective deferrals) and the employer's contributions (nonelective deferrals) are includable wages for the social security tax.
Box 5 - $31,500.00 – Same as above with regard to the Medicare tax.
Box 12 – D $3,000.00
Box 13 – Check the Retirement Plan box
Box 14 - $1,500.00 – Not mandatory

EXHIBIT 7.4
Form W-2

22222	a Employee's social security number 123-45-6789	OMB No. 1545-0008	
b Employer identification number (EIN) 00-0000000		1 Wages, tips, other compensation 27000.00	2 Federal income tax withheld 3000.00
c Employer's name, address, and ZIP code Tribe XYZ 123 Main Street Anytown, USA 75432		3 Social security wages 31500.00	4 Social security tax withheld 1953.00
		5 Medicare wages and tips 31500.00	6 Medicare tax withheld 457.00
		7 Social security tips	8 Allocated tips
d Control number		9 Advance EIC payment	10 Dependent care benefits
e Employee's first name and initial: Sara A. / Last name: Lee / Suff. 333 Elm Street Anytown, USA 75432 f Employee's address and ZIP code		11 Nonqualified plans	12a D 3000.00
		13 Statutory employee ☐ Retirement plan ☒ Third-party sick pay ☐	12b
		14 Other 1500.00	12c
			12d

15 State Employer's state ID number	16 State wages, tips, etc.	17 State income tax	18 Local wages, tips, etc.	19 Local income tax	20 Locality name

Form W-2 Wage and Tax Statement 2008 Department of the Treasury—Internal Revenue Service

CATCH-UP CONTRIBUTIONS

Participants over age 50 may contribute additional elective deferrals “catch-up contributions” to 401(k), 403(b), SIMPLE IRA, or SEP plans. The catch-up contribution limits are shown on the chart on page 53.

Catch-up contributions are combined with regular contributions for W-2 reporting.

EXAMPLE 7.5

Jerry Q. Public, age 52, earned $25,000 during the year. He contributed 10% ($2,500) of his salary to his employer’s qualified 401(k) plan. In addition, Jerry contributed $500 in catch-up contributions during the year. His employer contributed $1,250 to the pension plan on Jerry’s behalf. Jerry had federal withholding of $2,800, social security withholding of $1,550, and Medicare withholding of $363.

Jerry’s W-2 will reflect the following amounts:

Box 1 - $22,000 ($25,000 gross wages less $3,000, which is the $2,500 annual deferral plus $500 catch-up contribution).
Box 3 - $25,000 – The annual deferral and catch-up contributions are includable wages subject to social security tax.
Box 5 - $25,000 – Same as above with regard to the Medicare tax
Box 12 – D $3,000 – Annual deferral and catch-up contributions are combined in this box using the proper retirement code (see W-2 instructions).
Box 13 – Check the Retirement Plan box
Box 14 - $1,250 – Not mandatory

EXHIBIT 7.5
Form W-2

22222	a Employee's social security number 123-45-6789	OMB No. 1545-0008	
b Employer identification number (EIN) 00-0000000		1 Wages, tips, other compensation 22000.00	2 Federal income tax withheld 2800.00
c Employer's name, address, and ZIP code Tribe XYZ 123 Main Street Anytown, USA 75432		3 Social security wages 25000.00	4 Social security tax withheld 1550.00
		5 Medicare wages and tips 25000.00	6 Medicare tax withheld 363.00
		7 Social security tips	8 Allocated tips
d Control number		9 Advance EIC payment	10 Dependent care benefits
e Employee's first name and initial: Jerry Q. Last name: Public Suff. 111 Elm Street Anytown, USA 75432 f Employee's address and ZIP code		11 Nonqualified plans	12a Code D 3000.00
		13 Statutory employee ☐ Retirement plan ☒ Third-party sick pay ☐	12b Code
		14 Other 1250.00	12c Code
			12d Code

15 State Employer's state ID number	16 State wages, tips, etc.	17 State income tax	18 Local wages, tips, etc.	19 Local income tax	20 Locality name

Form **W-2** Wage and Tax Statement 2008 Department of the Treasury—Internal Revenue Service

DISTRIBUTIONS

Reporting of distributions from these plans must be made on Form 1099-R, rather than Form W-2. For each year the employee receives a payment from the pension plan, the plan administrator or annuity provider is required to issue the employee a Form 1099-R no later than January 31 of the following year.

Loans to employees from a Pension plan may be considered distributions and taxable.

Note: On occasion, the annuity provider may send withholding from pension distributions to the plan sponsor or employer. In those cases, the plan sponsor/employer will be required to file Form 945, *Annual Return of Withheld Federal Income Tax,* to report the withheld amounts.

Indian Tribes and IRC Section 403(b) Pension Plans

The following information is presented to clarify the law regarding Indian tribes and IRC Section 403(b) pension plans.

- Indian tribes and wholly owned tribal entities (with the exception of tribally owned public schools and qualified 501(c)(3) organizations) do not currently qualify to establish a pension plan for their employees under IRC Section 403(b). Contributions to the plan are not allowable and are not excludable from gross income by the employees.

- Tribes that entered into a contract for a 403(b) plan prior to 01/01/95 are allowed to continue the plan and make current contributions *for the employees who were participating before 1/1/95* as if they were a 501(c)(3) organization. Current employee contributions are excludable from the employee's gross income as authorized in IRC Section 403(b)(1).

- If the tribe entered into a contract for a 403(b) plan subsequent to 12/31/94, the plan is not qualified under the code and the tribe should be referred to Revenue Procedure 2002-47 which explains acceptable methods to voluntarily correct the situation. If the tribe ceases contributions, this revenue procedure explains how the tribe may receive a letter giving them 403(b) status for prior years. The revenue procedure also includes a schedule of the *Voluntary Correction Program (VCP)* fees.

CONTRIBUTION LIMITS

Effective Year	Elective deferral limits for 403(b) and 401(k) plans
2003	$12,000
2004	$13,000
2005	$14,000
2006	$15,000
2007	$15,000
2008 and thereafter	$15,500 (indexed in $500 increments)
Effective Year	**Elective deferral limits for SIMPLE-IRA and SIMPLE 401(k) plans**
2003	$8,000
2004	$9,000
2005	$10,000
2006	$10,000
2007	$10,000
2008 and thereafter	$10,500 (indexed in $500 increments)

CATCH-UP PROVISIONS

Effective Year	Catch-up contributions for deductible 403(b) and 401(k) (non-simple only) for individuals over age 50
2002	$1,000
2003	$2,000
2004	$3,000
2005	$4,000
2006	$5,000
2007 and thereafter	$5,000 (indexed in $500 increments)
Effective Year	**Catch-up contributions for SIMPLE-IRA and SIMPLE 401(k) plans**
2002	$500
2003	$1,000
2004	$1,500
2005	$2,000
2006	$2,500
2007 and thereafter	$2,500 (indexed in $500 increments)

Form 5500

All pension benefit plans covered by ERISA are required to file a Form 5500 an exception to this requirement is a “governmental plan”.

Section 414(d) of the Code provides that a “governmental plan” includes a plan established and maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.

Certain plans of Indian tribal governments (ITG) are also governmental plans under § 414(d). Specifically, section 906(a)(1) of the Pension Protection Act of 2006 (PPA ‘06) amended § 414(d) with respect to ITG plans to provide that the term ‘governmental plan’ includes a plan which is established and maintained by an Indian tribal government (as defined in section 7701(a)(40)), a subdivision of an Indian tribal government (determined in accordance with section 7871(d)), or an agency or instrumentality of either, and all of the participants of which are employees of such entity substantially all of whose services as such an employee are in the performance of essential governmental functions but not in the performance of commercial activities (whether or not an essential government function).

The provisions of section 906 of PPA ’06 apply to plan years beginning on or after August 17, 2006 (PPA’s date of enactment). For example, an ITG plan with an October 1 to September 30 plan year is a governmental plan under § 414(d) as amended by PPA ’06 only if it satisfies this definition in operation beginning on October 1, 2006. Notice 2006-89 provides that the Service and Treasury anticipate issuing guidance on §414(d) as amended and that, until such guidance is issued, an ITG plan will be treated as satisfying the requirements to be a governmental plan under § 414(d) if it complies with those requirements based on a reasonable and good faith interpretation of the amendment made by section 906(a)(1) of PPA ’06. Section III.B. of the notice provides certain approaches that, if taken by September 30, 2007, permit separate plans to be established for commercial ITG employees and for other ITG employees who perform essential governmental functions (governmental ITG employees) under the reasonable and good faith compliance standard. Section III.E. indicated that the relief provided in Section III applied pending the issuance of further guidance relating to § 414(d), including the amendment made by section 906(a)(1) of PPA ’06. The notice also invited comments from the public on whether additional transition issues need to be addressed.

Since the issuance of Notice 2006-89, the Service and Treasury have continued to consult with Indian tribal government representatives. Based on those consultations and the comments received in response to Notice 2006-89, and until future guidance is issued, the transition relief provided under Notice 2006-89 has been revised so that the date "September 30, 2007" in Section III.B. of Notice 2006-89 was replaced with "the date that is six months after guidance is issued under § 414(d) of the Code, as amended by section 906 of the Pension Protection Act of 2006, on the determination of whether a retirement plan maintained by an ITG is a governmental plan with the meaning of §414 (d)."

This extension is conditioned on the plans involved not being amended, for periods before the extended date, to reduce benefits unless the reduction: (i) does not vary based upon whether the participant is a governmental ITG employee or a commercial ITG employee, or (ii) is made to the plan for commercial ITG employees and is the minimum reduction necessary to satisfy the requirements of the Code. If a reduction occurs that does not meet either of these conditions, the extension provided under this notice ends on the date the reduction goes into effect.

CHAPTER 8
Cafeteria Plans

References:

- Publication 15, *Circular E, Employer's Tax Guide*
- Publication 15-A, *Employer's Supplemental Tax Guide*
- Publication 15-B, *Employer's Guide to Fringe Benefits*
- Form 5500, *Annual Return/Return of Employee Benefit Plan*
- Publication 502, *Medical and Dental Expenses*
- Publication 503, *Child and Dependent Care Expenses*
- Form 8839, *Qualified Adoption Expenses* (attachment to Form 1040)

Section 125 of the Internal Revenue Code makes it possible for employers to offer their employees a choice between cash and a variety of nontaxable benefits.

A cafeteria plan is a written benefit plan maintained by an employer for the benefit of its employees. The plan must allow employees to choose between two or more benefits consisting of cash (or a taxable benefit which is treated as cash) and certain "qualified benefits."

The written plan must include the following provisions:

- a specific description of each benefit available under the plan and the period of coverage
- the rules governing which employees are eligible to participate in the plan
- the procedures for making elections under the plan, including when elections may be made, the rules governing irrevocability of elections and the periods for which elections are effective
- the manner in which employer contributions may be made, such as by salary reduction agreement between the employer and employee, by non-elective employer contributions, or by both
- the maximum amount of employer contributions available to any participant
- the plan year

Examples of qualified benefits of a cafeteria plan are:

- accident and health benefits
- adoption assistance
- dependent care assistance
- group-term life insurance coverage

Filing Requirements

Contributions to a cafeteria plan are usually made pursuant to salary reduction agreements between the employer and the employee in which the employee agrees to contribute a portion of his or her salary on a pretax basis to pay for the qualified benefits. Salary reduction contributions are not actually or constructively received by the participant. Therefore, those contributions are not considered wages for federal income tax purposes. In addition, those sums generally are not subject to FICA and FUTA. Employers may report employees' nontaxable cafeteria plan benefits on the Form W-2, in box 14.

If you maintain a cafeteria plan, you must report information about the plan each year by the last day of the 7th month after the plan year ends. Use Form 5500, *Annual Return/Report of Employee Benefit Plan.*

For more detail, refer to Publication 15, *Circular E, Employer's Tax Guide,* Publication 15-A*, Employer's Supplemental Tax Guide*, and Publication 15-B, *Employer's Tax Guide to Fringe Benefits.*

CHAPTER 9
Scholarships & Educational Assistance

References:

- Publication 15, *Circular E, Employer's Tax Guide* (Section 15, Special Rules for Various Types of Services and Payments, for students)
- Publication 15-A, *Employer's Supplemental Tax Guide* (Section 5, Wages and Other Compensation, Scholarship and Fellowship Payments)
- Publication 15-B, *Employer's Guide to Fringe Benefits*, (Section 2, Fringe Benefit Exclusion Rules, Working Condition Fringe Benefits
- Publication 970, *Tax Benefits for Education*
- Instructions for Forms W-2 and W-3
- Notice 87-31, 1987-1 C.B. 475

Educational Assistance

Section 127 of the Internal Revenue Code (IRC) addresses educational assistance programs and whether income to the recipient should be included in income.

Gross income of an employee does not include amounts paid or expenses incurred by the employer for educational assistance to the employee. The income exclusion from employee gross income is limited to $5,250 per employee in educational assistance during a calendar year. The excludable amount is not subject to income tax withholding or other employment taxes. The education need not be job-related.

Job-related educational expenses are excluded from an employee's income as a "working condition" fringe benefit. This is a tax-free benefit of property or service provided by an employer to an employee that, if the employee had paid for it, the employee could have deducted as an unreimbursed employee business expense on Form 1040. The exclusion is, generally, available for any form of educational instruction or training that improves or develops the job-related capabilities of an employee.

For purposes of IRC §127, the term "educational assistance" means:

- The payment, by an employer, of expenses incurred by or on behalf of an employee for education of the employee (including, but not limited to tuition, fees, and similar payments, books, supplies, and equipment); and
- The provision, by an employer, of courses of instruction for such employee (including books, supplies, and equipment), but does not include payment for or the provision of, tools or supplies which may be retained by the employee after completion of a course of instruction, or meals, lodging, or transportation. The term "educational assistance" also does not include any

payment for, or the provision of, any benefits with respect to any course or other education involving sports, games, or hobbies.

Scholarships

A scholarship or fellowship grant is any amount paid or allowed to, or for the benefit of, an individual to aid such individual in the pursuit of study or research. A scholarship may, for example, be in the form of a reduction owed by the recipient to an educational organization for tuition, room and board, or any other fee.

Section 117 of the Internal Revenue Code provides an exclusion from income for certain scholarships made to an individual who is candidate for a degree. Per IRC § 170, an educational institution is defined as an educational organization, which maintains a regular faculty, a curriculum, and has a regularly enrolled body of students on site.

Nontaxable Benefits

Only "qualified scholarships" may be excluded from income. Where participants are degree candidates, such payments will ordinarily be excludable from the recipient's gross income to the extent of their qualified tuition and related expenses. The student may be either an undergraduate or graduate.

A qualified scholarship is defined as any amount expended for "qualified tuition and related expenses." Qualified tuition and related expenses are tuition and fees required for the enrollment or attendance of a student at an educational institution, fees, books, supplies and equipment required for courses of instruction at such an educational organization.

Amounts received for room, board, travel, and incidental living expenses are not related expenses. Thus, scholarship receipts that exceed expenses for "qualified tuition and expenses" are not excludable from a recipient's gross income.

The scholarship may be tax free only if the student is a candidate for a degree at an educational institution. Thus, in the case of nondegree candidates, the entire amount of the scholarship is includable in gross income of the recipient regardless of its use.

Reporting Taxable Scholarship Benefits

Do not issue Form 1099-MISC to report scholarship or fellowship grants.

A scholarship or fellowship grant represents payment for services when the grantor requires the recipient to perform services in return for granting of the scholarship or fellowship. A requirement that the recipient pursue studies, research, or other activities primarily for the benefit of the grantor is treated as a requirement to perform services.

A scholarship or fellowship grant conditioned upon either past, present, or future services by the recipient, or upon services that are subject to the direction or supervision of the grantor represents payment for services and is considered wages.

The grantor of such an amount is subject to certain withholding and reporting requirements respecting wages, including withholding for income taxes and filing of Forms W-2. The application of social security and Medicare taxes depends on the nature of the employment and the status of the grantor.

Exceptions. You do not have to include in income the part of any scholarship or fellowship that represents payment for teaching, research, or other services, if you receive the amount under either 1) The National Health Service Corps Scholarship Program, or 2) The Armed Forces Health Professions Scholarship Financial Assistance Program. You must also be a candidate for degree at an eligible educational institution, and use part of the scholarship or fellowship to pay qualified education expenses.

Other taxable scholarship or fellowship payments (to a degree or nondegree candidate) are not required to be reported by you to the IRS on any form. The recipient of these payments is responsible for determining whether such payment is, in whole or in part, includable in gross income for federal income tax purposes. You may wish to advise scholarship recipients that the amount of their scholarship or fellowship stipends that exceeds their qualified tuition and related expenses, if any, is generally includible in gross income for federal income tax purposes.

CHAPTER 10
Earned Income Credit (EITC)

References:

- Publication 15, *Circular E, Employer's Tax Guide*
- Publication 15-A, *Employer's Supplemental Tax Guide*
- Form W-5, *Earned Income Credit Advance Payment Certificate*
- Notice 797, *Possible Federal Refund Due to the Earned Income Tax Credit (EIC)*

The EITC is a refundable tax credit for certain workers whose earned income is below a certain level. Because it is a "credit", the EITC is subtracted from the amount of tax owed, if any, on the workers individual income tax return. As a refundable credit, any excess over the total tax is refunded to the individual. Even workers who have not filed a tax return in the previous year, because their wages were below minimum income-level requirements to file, may be able to get the credit – but only if they file a tax return. Therefore, you must notify each employee who worked for you at any time during the year, and from whom you did not withhold any income tax, about EITC. You will meet the notification requirements by giving the employee either Notice 797, *Possible Federal Refund Due to the Earned Income Tax Credit (EITC)*; your own written statement as long as it has the exact wording of Notice 797; or the official IRS Form W-2, *Wage and Tax Statement*, which contains a statement on the back of Copy B. You do not need to notify employees who claimed exemption from withholding on Form W-4, *Employee's Withholding Allowance Certificate*.

An eligible employee can receive advance payments of up to 60% of the maximum credit for one qualifying child. To claim the advance EITC, eligible employees should fill out a Form W-5, *Earned Income Credit Advance Payment Certificate*, and return it to you. Employees must file a new W-5 each year they claim the advanced earned income credit. Use the advance EITC tables in Publication 15 each payroll period to figure the correct amount of advance payment to include in the employee's pay. The advance payment first reduces the withheld income tax and then the employee and employer social security and Medicare taxes, thereby reducing your total tax liability.

Note: An employee's advance EITC payments are limited (See Publication 15 for current year's limitation), although the credit may be more. The worker will need to claim Earned Income Tax Credit and include the advance Earned Income Tax Credit amount from their W-2 in order to receive any additional amount of EITC on their Individual Income tax return.

CHAPTER 11
Employment Taxes

References:

- Publication 15, *Circular E, Employer's Tax Guide*
- Publication 15-A, *Employer's Supplemental Tax Guide*
- Publication 505, *Tax Withholding and Estimated Tax*
- Publication 509, *Tax Calendars for 2008*
- Publication 515, *Withholding of Tax on Nonresident Aliens and Foreign Entities*
- Publication 519, *U.S. Tax Guide for Aliens*
- Publication 919, *How Do I Adjust My Tax Withholding?*
- Form W-4, *Employee's Withholding Allowance Certificate, Instructions*
- Publication 966, *Electronic Choices for Paying All your Federal Taxes*
- Form I-9, *Employment Eligibility Verification*
- Publication 1635, *Understanding Your Employer Identification Number*
- Form SS-4, *Application for Employer Identification Number*
- Form 8109, *Federal Tax Deposit Coupon*
- Publication 1932, *How to Make Correct Federal Tax Deposits*

Form SS-4

When you have employees, you will need to apply for an EIN (Employer's Identification Number) to identify the tax returns of your tribe's business. If you don't already have an EIN, you need to get one if you:

- pay wages to employees
- are required to withhold taxes for non-wage payments
- operate your entity as a corporation, partnership, or
- file any of these tax returns:
    - employment
    - excise
    - fiduciary or
    - alcohol, tobacco and firearms

If you have not applied for an EIN and you are required to have one, you should obtain Form SS-4, *Application for Employer Identification Number,* from the IRS. The address to mail your completed Form SS-4 can be found on the back of the form.

Form SS-4, Line 9a, Type of Entity, has a box that indicates Indian Tribal Governments/Enterprises. By designating this box, you will let the Internal Revenue Service know of your status as a federally recognized Indian tribal

government. This will reduce errors and facilitate processing of your returns by routing them to specially trained employees. It allows us to code the returns so any questions will be directed to the Indian Tribal Governments Division of IRS. Because it takes several weeks to receive an EIN after the Form SS-4 has been filed, apply for your EIN well before your tax returns are due. You may be able to obtain an EIN sooner by telephone or fax.

To obtain an EIN, you may apply for one online. Go to the IRS website at www.irs.gov/businesses and click on *Employer ID Numbers.*

Note: Taxpayers who apply for one online have an option to view, print, and save their EIN assignment notice at the end of the session.

You may also apply for an EIN by calling toll-free (800) 829-4933, Monday through Friday from 7:00 a.m. until 10:00 p.m. local time (Pacific Time for Alaska). You can also fax an EIN request 24 hours a day/ 7 days a week. Instructions on the Form SS-4 indicate which location will accept your faxed request. Fax locations are:

- Brookhaven, NY (631) 447-8960
- Cincinnati, OH (859) 669-5760
- Philadelphia, PA (859) 669-5760

Note: Use your EIN on all items you send to the IRS or Social Security Administration (SSA).

This section introduces federal employment taxes. It briefly explains your responsibilities as an employer to withhold and pay these taxes, and it gives other related information. Employment taxes represent the income tax and social security and Medicare (FICA) taxes withheld from the wages of an employee plus the employer's share of social security taxes and federal unemployment (FUTA) taxes, when applicable. The withheld (employee's) portion of employment taxes is referred to as "trust fund" taxes. FUTA will be addressed later in this guide.

If the tribe is required to withhold income or social security and Medicare taxes, a return reporting the amounts withheld must be filed. Form 941, *Employer's Quarterly Federal Tax Return*, is used for this purpose. However, other forms are used under certain circumstances.

- Farms operated for a profit require Form 943, *Employer's Annual Tax Return for Agricultural Employees*.

- Form 944, *Employer's Annual Federal Tax Return*, is used for employers whose liability for social security, Medicare and withheld federal income taxes for the calendar year is $1, 000 or less.
- Form 945, *Annual Return of Withheld Federal Income Tax*, is used to report income tax withheld from nonpayroll payments, such as pensions, IRAs, gambling winnings, per capita payments, and backup withholdings.

Alternative Signature Method. Effective with returns filed after June 2005, corporate officers or duly authorized agents may sign employment tax forms by rubber stamp, mechanical device, or computerized software program. This rule, as outlined in Revenue Procedure 2005-39, applies to such forms as Form 940, *Employer's Annual Federal Unemployment Tax Return* (FUTA); Form 941, *Employer's Quarterly Federal Tax Return*; Form 943, *Employer's Annual Federal Tax Return for Agricultural Employees*; and Form 945, *Annual Return of Withholding Federal Income Tax*. For further details, see Revenue Procedure 2005-39 on page 82 of Internal Revenue Bulletin 2005-28 at www.irs.gov/pub/irs-irbs/irb05-28.pdf.

You may use the following publications for additional information:

- Publication 15, *Employer's Tax Guide (Circular E),* explains the rules and methods of withholding, paying, depositing and reporting federal income tax, social security and Medicare taxes and federal unemployment (FUTA) tax on wages, tips and fringe benefits. It also explains who is an employee, what are taxable wages and what are taxable tips.
- Publication 15-A, *Employer's Supplemental Tax Guide*, provides specialized information supplementing the basic employment tax information provided in Circular E, such as a more detailed discussion of fringe benefits and information on how to report third-party sick pay.

Form W-4, Employee's Withholding Allowance Certificate

To know how much federal income tax to withhold from an employee's wages, you should have a Form W-4, *Employee's Withholding Allowance Certificate*, on file for each employee. The amount to be withheld is determined by the employee's gross wages and the information submitted by the employee on Form W-4.

This information includes:

- employee's marital status

- number of withholding allowances claimed
- employee's request to have additional tax withheld or
- employee's claim to exemption from withholding

Ask each new employee to give you a signed Form W-4 by his or her first day of work. This certificate is effective with the first wage payment and will last until the employee files a new certificate.

If an employee does not give you a signed Form W-4, withhold tax as if the employee were a single person who has claimed no withholding allowances. If not enough tax is withheld and your employee has not provided a Form W-4 or has claimed an exemption from withholding, he or she may be subject to penalties. An employee who claims exemption from withholding must renew his or her status by filing a new Form W-4 with you by February 15 of each year.

Note: Student status does not automatically exempt the employee from income tax withholding.

Generally, Forms W-4 are for your records. They need not be sent to IRS.

For more information on withholding, see Publication 505, *Tax Withholding and Estimated Tax*. You can help your employees determine whether they are having the right amount of income tax withheld by ordering Publication 919, *How Do I Adjust My Tax Withholding?*

Form I-9, Employment Eligibility Verification

As an employer, you must verify that each new employee is legally eligible to work in the United States. Both you and the employee must complete the Immigration and Naturalization (INS) Form I-9, *Employment Eligibility Verification.* For questions or more information on employer responsibilities, call the INS at 1-800-375-5283 or visit the INS web site at http://uscis.gov. To request Form I-9, call 1-800-870-3676 or you may download the form at http://uscis.gov/graphics/formsfee/forms/index.htm.

Federal Income Tax

The wages you pay your employees generally are subject to income tax withholding if their wages for any payroll period are more than the dollar amount of their withholding allowances for that period. The amount to be included is figured separately for each payroll period. Wages include all pay you give an employee for services performed. The pay may be in cash or in other forms. It includes salaries, vacation allowances, bonuses, commissions and fringe

benefits not excluded by law. It does not matter how payments are measured or paid. Wages paid in any form other than money (such as goods, lodging and meals) are measured by the fair market value. See Publication 15, *Employer's Tax Guide (Circular E),* for more information about income tax withholding.

The income tax to be withheld is figured on ***gross*** wages before any deductions are made for social security and Medicare taxes. You may figure the withholding by different methods, the most common of which are the percentage method and the wage bracket tables method. Publication 15 contains the applicable tables and instructions for using both of these withholding methods, and it gives more information on reporting and withholding requirements on wages and tip income.

Social Security and Medicare Taxes

Under the Federal Insurance Contributions Act (FICA), you must withhold social security and Medicare taxes from wages that you pay your employees each payroll period.

Generally, meals, lodging, clothing, services and other payments in-kind are subject to social security and Medicare taxes, as are wages paid in cash. However, meals are not taxable wages if furnished for the employer's convenience and on the employer's premises. Lodging is not taxable if furnished for the employer's convenience, on the employer's premises and as a condition of employment.

You, as an employer, must withhold and deposit the employee's part of the taxes and pay a matching amount. The social security tax is withheld from the employee's gross wages until the employee's cumulative wages for the year reach the wage base limit. Any wages above the wage base limit are not subject to social security withholding. However, there is no wage base limit for Medicare tax; **all covered wages are subject to Medicare tax.**

The United States has social security agreements with many countries that eliminate dual taxation and coverage. Compensation subject to social security and Medicare taxes may be exempt under one of these agreements. You can get more information and a list of agreement countries from the Social Security Administration (SSA) at www.ssa.gov/international.

Federal Unemployment Tax (FUTA)

FUTA will be discussed in depth later in this guide.

How and When to Deposit

In general, you must deposit income tax withheld and both the employer and employee social security and Medicare taxes (minus any advance EITC payments). But first, you must determine which deposit schedule to use.

There are two deposit schedules – **monthly or semiweekly** – for determining when you deposit social security, Medicare and withheld income taxes. These schedules tell you when a deposit is due after a tax liability arises (e.g., when you have a payday).

IMPORTANT NOTE:
Remember that Form 941 is a quarterly return, but deposits may be required on a monthly or semiweekly schedule. Publication 509, *Tax Calendars for 2008,* is a useful publication for employers to monitor due dates of deposits. Whether you are a monthly or semiweekly depositor, Publication 509 has deposit due date schedules for both types of depositors. The calendars in this publication also include due dates for filing returns, providing information returns to employers, and other important dates employers need to know.

Lookback Period

Your deposit schedule for a calendar year is determined from the total taxes (not reduced by any advance EITC payments) reported on your Form 941 (line 11) in a four-quarter lookback period. The lookback period for Form 941 filers begins July 1 and ends June 30. See Publication 15 for the table that explains the lookback period for the current calendar year. If you reported $50,000 or less of taxes for the lookback period, you are a monthly schedule depositor; if you reported more than $50,000 you are a semiweekly schedule depositor.

Monthly Deposit Schedule

Under the monthly deposit schedule, deposit Form 941 taxes on payments made during a month by the 15th day of the following month.

Note: If this is a new tribal entity, during the first calendar year, your tax liability for each quarter, in the lookback period, is considered to be zero. Therefore, you are a monthly schedule depositor for the first calendar year of the business unless the $100,000 Next-Day Deposit rule (discussed later) applies.

Semiweekly Deposit Schedule

You are a semiweekly schedule depositor for a calendar year if the total taxes on Form 941 (line 11) during your lookback period were more than $50,000. If the payday falls on Wednesday, Thursday, and or Friday, you must deposit the Form 941 taxes no later than the following Wednesday. (See Exhibit 11.1 below). If the payday falls on Saturday, Sunday, Monday and/or Tuesday, deposit by Friday.

EXHIBIT 11.1
Semiweekly Deposit Schedule

Semiweekly Deposit Schedule	
If the payday falls on a…	**Then deposit taxes by the following…**
Wednesday, Thursday and/or Friday	Wednesday
Saturday, Sunday, Monday and/or Tuesday	Friday

$100,000 Next-Day Deposit Rule

If you accumulate a tax liability (reduced by any advance EITC payments) of $100,000 or more on any day during a deposit period, you must deposit the tax by the next banking day, regardless of whether you are a monthly or semiweekly schedule depositor. The term deposit period refers to the period during which tax liabilities are accumulated for each required deposit due date. For monthly schedule depositors, the deposit period is a calendar month. If you are a monthly depositor and become subject to the rule, you become a semiweekly depositor for the remainder of the year and all of the following year.

How to Deposit

The two methods of depositing employment taxes are by Electronic Federal Payment System (EFTPS) and by using Federal Tax Deposit (FTD) coupons, Form 8109.

You are required to make electronic deposits using EFTPS for all your tax liabilities in 2008 if your total deposits of all federal depository taxes were more than $200,000 in 2006 or you were required to use EFTPS in 2007. For more details, see Chapter 11, *Depositing Taxes*, in Publication 15.

Note: Even if you are not required to make electronic tax deposits, you may voluntarily participate in EFTPS. To enroll, call 1-800-945-8400 or 1-800-555-4477. You can obtain additional information on EFTPS requirements by accessing Publication 966, Electronic Federal Tax Payment System, at: http://publish.no.irs.gov/PUBS/PDF/22397b07.PDF. **You can register on-line and receive more information by using the EFTPS website at:** http://www.eftps.gov

If you are not required to use EFTPS, you can use FTD coupons to make your required deposits at a financial institution or Federal Reserve Bank (FRB) that is an authorized depositary[2] for federal taxes. The IRS will issue you a book of coupons 5 to 6 weeks after you receive your EIN. After the initial mail out, FTD coupons will be automatically mailed by the IRS depending upon the number of FTD coupons you use.

[2] An authorized depositary is a financial institution (e.g., a commercial bank) that is authorized to accept federal tax deposits.

If you prefer, you may mail your coupon and payment to:

Financial Agent, Federal Tax Deposit Processing
P.O. Box 970030
St. Louis, MO 63197

Make sure your check or money order is made payable to **Financial Agent**.

Note: It is very important to clearly mark the correct type of tax and tax period on the FTD coupon. This information is used by the IRS to properly credit your account.

Deposit Penalties

Penalties may apply if you do not make required deposits on time, make deposits for less than the required amount, or if you do not use EFTPS when required. Always ensure your deposits are timely. Check with your local depository or FRB for information concerning their cutoff time (exact hour they start dating deposits as received on their next banking day).

Note: If you use EFTPS to make deposits, you must make your deposit one calendar day prior to your tax due date. Otherwise, the payment will post late and penalties may be assessed.

Deposits not made in a proper or timely manner may be subject to penalties. For amounts not properly or timely deposited, the penalty rates are:

- 2% - Deposits made 1 to 5 days late.
- 5% - Deposits made 6 to 15 days late.
- 10% - Deposits made 16 or more days late.
- 10% - Deposits made at an unauthorized financial institution, paid directly to the IRS or paid with your tax return. See Publication 15 for more exceptions.
- 10% - Amounts that are subject to electronic deposit requirements but not deposited using EFTPS.
- 15% - Amounts still unpaid more than 10 days after the date of the first notice the IRS sent asking for the tax due or the day on which you receive the notice and demand for immediate payment, whichever is earlier.

The following example illustrates how a tribe would figure their deposit requirements and due dates.

EXAMPLE 11.1

Tribal Enterprises
EIN: 11-1111111
1512 Poplar St.
Inn, MI 48200

Period Ending	Number of Employees	Gross Wages	*FICA Withheld	*Employer's FICA	Income Tax Withheld	Total Taxes
1/31	4	$ 4,800.00	$ 367.20	$ 367.20	$ 400.00	$1,134.40
2/28	4	$ 4,750.00	$ 363.38	$ 363.38	$ 406.00	$1,132.76
3/31	3	$ 4,200.00	$ 321.30	$ 321.30	$ 340.00	$ 982.60
Quarterly Totals		$13,750.00	$1,051.88	$1,051.88	$1,146.00	$3,249.76
*Social Security and Medicare taxes are referred to as FICA						

Tribal Enterprises, Inc., as a monthly depositor, must deposit each month's taxes by the 15th of the following month ($1,134.40 by February 15th; $1,132.76 by March 15th and $982.60 by April 16th (April 15th is a Sunday). If the **total** taxes for all three months of the quarter had been less than $2,500, then they could have been deposited or paid with the Form 941 to be filed by April 30.

CHAPTER 11
Employment Taxes

The following list provides a brief summary of basic federal employment tax responsibilities. If any date shown below falls on a Saturday, Sunday, or Federal holiday, use the next business day. Because the individual circumstances for each tribe can vary greatly, their responsibilities for withholding, depositing, and reporting employment taxes can differ. Each item in this list is discussed in more detail in Publication 15, *Circular E, Employer's Tax Guide.*

New Employees:

- Verify work eligibility of employees via Form I-9, *Employment Eligibility Verification* (available from U.S. Citizenship and Immigration Services by calling 1-800-870-3676 or at www.uscis.gov).
- Record employee's name and SSN from social security card.
- Ask employee for Form W-4, *Employee's Withholding Allowance Certificate.*
- Provide employee Form W-5, *Earned Income Credit Advance Payment Certificate* (if applicable).

Each Payday:

- Withhold federal income tax based on each employee's Form W-4.
- Withhold employee's share of social security and Medicare taxes, as applicable.
- Include advanced earned income credit payment in paycheck if employee requested it on Form W-5.
- Deposit requirements:
    - You may pay the income, social security, and Medicare taxes with Form 941 if your total tax liability for the quarter is less than $2,500 and the taxes are paid in full with a timely filed return.
    - If your total tax liability for the quarter is $2,500 or more, see Publication 15, *Circular E*, for deposit requirements.

Quarterly (by April 30, July 31, October 31, and January 31):

- File Form 941, *Employer's Quarterly Federal Tax Return*

Annually:

- **For Employees:**

  - Before *December 1* - remind employees to submit a new Form W-4 if they need to change their withholding.
  - Form W-5 expires on *December 31.* Eligible employees who want to receive advanced payments of the earned income credit in the next year must give you a new Form W-5.
  - Reconcile amounts on Forms 941 with Forms W-2 and W-3.
  - By *January 31* - furnish each employee copies B, C, and 2 of Form W-2.
  - By *February 15* - ask for a new Form W-4 from employees claiming exemption from income tax withholding.
  - File copy A of Forms W-2 via transmittal Form W-3 with the SSA by: 1) *February 28* if filing paper forms, or 2) *March 31* if filing electronically.

- **For Independent Contractors:**

  - By *January 31* - furnish each recipient a Form 1099 (such as Form 1099-MISC). Form W-9 may be used to secure the vendor's Taxpayer Identification Number (SSN or EIN).
  - By *January 31* - file Form 945 for any nonpayroll income tax withholding, such as backup withholding. See the Instructions for Form 945 for details on depositing nonpayroll income tax withholding.
  - File copy A of Forms 1099 via transmittal Form 1096 with the IRS by: 1) *February 28* if filing paper forms or 2) *March 31* if filing electronically.

CHAPTER 12
Preparation of Payroll Checks

References:

- Publication 15, *Circular E, Employer's Tax Guide*
- Publication 15-A, *Employer's Supplemental Tax Guide*
- Publication 51, *Circular A, Agricultural Employer's Tax Guide*
- Publication 463, *Travel, Entertainment, Gift, and Car Expenses*
- Publication 966, *Electronic Choices to Pay all Your Federal Taxes*

Payroll Files

In Chapter 11, Form W-4, *Employee's Withholding Allowance Certificate*, Form W-5, *Earned Income Credit Advance Payment Certificate*, and Form I-9, *Employment Eligibility Verification,* are discussed. These are forms that your employees may have on file with your payroll department. It is important to maintain separate files for each employee with his or her completed, signed payroll forms.

Payroll Records

Other records of employment taxes maintained in your payroll records are discussed in Publication 15, *Circular E, Employer's Tax Guide*. Payroll records should be retained for 4 years. Those records include:

- notification of assignment of employer identification number, or other record of your employer identification number
- amounts and dates of all wage, annuity, and pension payments
- amounts of tips reported
- records of allocated tips
- fair market value of in-kind wages paid
- names, addresses, social security numbers, and occupations of employees and recipients
- any employee copies of Form W-2 that were returned to you as undeliverable
- dates of employment
- periods for which employees and recipients were paid while absent due to sickness or injury and the amount and weekly rate of payments you or third-party payers made to them
- copies of employees' and recipients' income tax withholding allowance certificates
- dates and amounts of tax deposits you made and acknowledgment numbers for deposits made using the Electronic Federal Tax Payment System (EFTPS)

- copies of returns filed, including 941 TeleFile Tax Records and confirmation numbers
- records of fringe benefits provided, including substantiation
- Notice 797, *Possible Federal Refund Due to Earned Income Tax Credit,* or other proof of notification of Earned Income Tax Credit (EITC) eligibility
- Form I-9, *Employment Eligibility Verification*
- travel reimbursement plan for nonaccountable plans

Payroll Period

The payroll period is a span of time for which wages are paid. When you have a regular payroll period, withhold income tax for that time period even if your employee does not work the full period.

Each tribe or entity determines the dates on which it will pay its employees. Some entities have weekly paydays, some on the first and fifteenth of the month (semimonthly), some pay every other week (biweekly), some on a monthly basis, and some at irregular intervals. Some entities have different classes of workers (for instance, factory and office) who are paid at different times. It is important to know the payroll period covered for each individual for each paycheck you are about to issue. Knowing the proper payroll period is one element to ensure you are withholding the proper amount of federal income tax from your employee's wages. Publication 15, *Circular E*, has a detailed discussion of this topic.

Wages

Wages subject to federal employment taxes include all pay you give an employee for services performed. The pay may be in cash or in other forms. It includes salaries, vacation allowances, bonuses, commissions, and fringe benefits. It does not matter how you measure or make the payments. Publication 15-A, *Employer's Supplemental Tax Guide*, provides additional information on wages and other compensation, including:

- adoption assistance
- awards
- back pay
- below-market loans
- cafeteria plans
- deferred compensation
- educational assistance

- group-term life insurance
- outplacement services
- retirement plans
- supplemental unemployment benefits, and other

A common item that must be included as wages is employee business expense reimbursement that is under a **nonaccountable** plan. Accountable and non-accountable plans are discussed in Publication 463, *Travel, Entertainment, Gift, and Car Expenses,* and in Chapter 5 of this guide

Unusual situations may be encountered in determining gross wages paid to an employee. The general rule is all payments in cash, cash equivalents, goods, and services are wages for purposes of withholding. Publication 15-A, *Employer's Supplemental Tax Guide,* is a good reference for the purpose of determining what constitutes wages.

Timekeeping

A manual or computerized timekeeping system is generally used to record the hours employees worked during any given pay period. Some type of record will be given to the payroll department as a voucher from which a paycheck will be generated. The timesheet or other voucher should be signed by the appropriate party, or parties, and retained for record keeping purposes.

Once the payroll department is assured of proper reporting of time, it should be determined if any miscellaneous items (as discussed above) should be included in the gross wage computation. Gross wages are the dollar value of the total wages for the pay period. Gross wages are the starting point for computing withholdings and net payroll.

Part-Time Workers

For income tax withholding and social security, Medicare, and federal unemployment tax (FUTA) purposes, there are no differences among full-time employees, part-time employees, and employees hired for short periods. It does not matter whether the worker has another job or has the maximum amount of social security tax withheld by another employer. Income tax withholding may be figured the same way as for full-time workers, or it may be figured by the part-year employment method explained in Publication 15-A.

CHAPTER 12
Preparation of Payroll Checks

Review Payroll Records

After gross wages are computed for each employee, the employee's file should be inspected to determine federal income tax withholding allowances, state income tax withholding allowances (if applicable), and whether the employee has on file a Form W-5, *Earned Income Credit Advance Payment Certificate*. The employer may be required to withhold other items such as child support payments, wage garnishments by court order, federal income tax wage levies, health insurance, charitable payroll deductions, and other items.
The payroll department should retain copies of all items that support a deduction to an employee's wages for a period of 4 years.

Federal Income Tax Withholding

To know how much federal income tax to withhold from employees' wages, you should refer to Form W-4, *Employee's Withholding Allowance Certificate*, on file for each employee. If a new employee does not give you a completed Form W-4; withhold tax as if he or she is single, with no withholding allowances.

Form W-4 remains in effect until the employee gives you a new one. If an employee gives you a Form W-4 that replaces an existing Form W-4, begin withholding no later than the start of the first payroll period ending on or after the 30th day from the date you received the replacement Form W-4.

The amount of income tax withholding must be based on marital status and withholding allowances. Your employees may not base their withholding amounts on a fixed dollar amount or percentage. However, the employee may specify a dollar amount to be withheld in addition to the amount of withholding based on filing status and withholding allowances claimed on Form W-4.

Employees may claim fewer withholding allowances than they are entitled to claim. They may wish to claim fewer allowances to ensure that they have enough withholding or to offset other sources of taxable income that are not subject to adequate withholding.

An employee may claim exemption from income tax withholding because he or she had no income tax liability last year and expects none this year. See the Form W-4 instructions for more information. The wages are still subject to social security and Medicare taxes.

In general, if you pay wages to nonresident aliens, you must withhold income tax (unless exempted by regulations), social security, and Medicare taxes just as you would for a U. S. citizen. The general rules for nonresident aliens are found in

Publication 515, *Withholding of Tax on Nonresident Aliens and Foreign Corporations*, and Publication 519, *U. S. Tax Guide for Aliens*.

Social Security and Medicare Taxes

The Federal Insurance Contributions Act (FICA) provides for a federal system of old age, survivors, disability, and hospital insurance. The old age, survivors, and disability insurance part is financed by the social security tax. The hospital insurance part is financed by the Medicare tax. Each of these taxes is reported separately.

Social security and Medicare taxes are levied on both the employer and employees. The employer must withhold and deposit the employee's part of the taxes, and must pay a matching amount. Generally, employee wages are subject to social security and Medicare taxes regardless of the employee's age or whether he or she is receiving social security benefits.

Advance Earned Income Tax Credit (EITC) Payment

An employee who is eligible for the earned income tax credit (EITC) and has a qualifying child is entitled to receive EITC payments with his or her pay during the year. To get those payments, the employee must provide to you a properly completed Form W-5, *Earned Income Credit Advance Payment Certificate*, using either the paper form or using an approved electronic format. You are required to make advance EIC payments to employees who give you a completed and signed Form W-5. Publication 15, *Circular E, Employer's Tax Guide*, has a more detailed section on advance earned income credit payments.

Other Payroll Deductions

Before arriving at the employee's net paycheck, you must also review the individual's payroll folder to determine if you are required to withhold other amounts. Many states require the employer to withhold state income taxes. You should contact your state tax authority for information and instructions on their requirements.

Miscellaneous payroll deductions may include insurance, charitable items, union dues, and others. In each case, you should have an authorization signed by the employee to allow you to make deductions from their wages and remit to the various organizations. Each signed authorization should have instructions on

when and where to remit payments. It is important as an employer to be able to account for each deduction from an employee's paycheck.

There may be involuntary deductions from an employee's paycheck such as a court ordered judgment, a federal or state tax levy, or court enforced child support payments. In these cases, the employer is required to make the deductions and remit them to the appropriate agency, even if the employee disagrees with the process. The employer is required by federal or state law to honor the levy or court order. Again, the employer is required to keep all payroll records for at least 4 years.

Net Paycheck

Once you ensure you have computed the payroll correctly, you are ready to issue payroll checks. You may want to use a computerized or manual payroll system to monitor the process. Often, someone other than the payroll clerk is required to sign payroll checks as a matter of internal control.

Many computerized payroll systems automatically print a check stub with fields to list the gross wages and each of the items deducted, with columns for the current pay period and year-to-date totals for each category. If your system does not automatically track these items, you may want to design a spreadsheet to do so. Employees need to be able to reconcile these items from time to time during the year to ensure they are withholding the proper amounts.

Payroll Taxes

After you have computed payroll, you must calculate your payroll tax liability. Federal income tax, social security tax, and Medicare taxes are withheld from your employees. Taxes withheld from your employees make up what is known as "trust fund" taxes. They are called trust fund taxes because you are entrusted to deposit the taxes withheld from your employees' wages with a federal depository. Please refer to Chapter 19 for more specific information on trust fund penalties.

NOTE: As the employer, you are entrusted with the responsibility of remitting other payroll deductions withheld from wages of employees (as previously addressed in this chapter) to the proper payee.

EXAMPLE 12.1
Sample Payroll Ledger Sheet for an Hourly Employee Paid Weekly
For the Quarter Ending March 31

Name	SSN	Address	W-4	W-5
John Doe	123-45-6789	111 Elm St. Anytown, USA	Married, 3 exemptions	None

Date	Hrs.	Hourly Rate	Gross Pay	Social Security	Medicare	Federal WH	State WH	Insurance	Other	Net Pay
January										
Week 1	40	$10.00	$400.00	$24.80	$5.80	$7.00	$4.00	$25.00	$0.0	$333.40
Week 2	38	$10.00	$380.00	$23.56	$5.51	$5.00	$4.00	$25.00	$0.0	$316.93
Week 3	40	$10.00	$400.00	$24.80	$5.80	$7.00	$4.00	$25.00	$0.0	$333.40
Week 4	40	$10.00	$400.00	$24.80	$5.80	$7.00	$4.00	$25.00	$0.0	$333.40
February										
Week 5	38	$10.00	$380.00	$23.56	$5.51	$5.00	$4.00	$25.00	$0.0	$316.93
Week 6	38	$10.00	$380.00	$23.56	$5.51	$5.00	$4.00	$25.00	$0.0	$316.93
Week 7	40	$10.00	$400.00	$24.80	$5.80	$7.00	$4.00	$25.00	$0.0	$333.40
Week 8	40	$10.00	$400.00	$24.80	$5.80	$7.00	$4.00	$25.00	$0.0	$333.40
March										
Week 9	32	$10.00	$320.00	$19.84	$4.64	$0.00	$2.00	$25.00	$0.0	$268.52
Week 10	31	$10.00	$310.00	$19.22	$4.50	$0.00	$0.00	$25.00	$0.0	$261.28
Week 11	40	$10.00	$400.00	$24.80	$5.80	$7.00	$4.00	$25.00	$0.0	$333.40
Vacation	40	$10.00	$400.00	$24.80	$5.80	$7.00	$4.00	$25.00	$0.0	$333.40
Week 13	40	$10.00	$400.00	$24.80	$5.80	$7.00	$4.00	$25.00	$0.0	$333.40
Total			$4,970.00	$308.14	$72.07	$71.00	$46.00	$325.00	$0.0	$4,147.79

EXAMPLE 12.2
Sample Payroll Ledger Sheet for a Salaried Employee Paid Semi-Monthly

Name	SSN	Address	W-4	W-5
Jim Doe	000-65-4321	116 Elm St. Anytown, USA	Married, 2 exemptions	None

Date	Semi-Monthly Salary	Gross Pay	Social Security	Medicare	Federal WH	State WH	Insurance	Other	Net Pay
Jan 15	$ 900.00	$ 900.00	$ 55.80	$13.05	$32.00	$10.00	$35.00	$0.0	$754.15
Jan 31	900.00	900.00	55.80	13.05	32.00	10.00	35.00	$0.0	754.15
Feb 15	900.00	900.00	55.80	13.05	32.00	10.00	35.00	$0.0	754.15
Feb 28	900.00	900.00	55.80	13.05	32.00	10.00	35.00	$0.0	754.15
Mar 15	900.00	900.00	55.80	13.05	32.00	10.00	35.00	$0.0	754.15
Mar 31	900.00	900.00	55.80	13.05	32.00	10.00	35.00	$0.0	754.15
	$5,400.00	$5,400.00	$334.80	$78.30	$192.00	$60.00	$210.00	$0.0	$4,524.90

CHAPTER 13
Form 941, Employer's Quarterly Federal Tax Return

References:

- Publication 15, *Circular E, Employer's Tax Guide*
- Publication 15-A, *Employer's Supplemental Tax Guide*
- Form 941, *Employer's Quarterly Federal Tax Return*, and Instructions
- Schedule B (Form 941), *Employer's Record of Federal Tax Liability*
- Form 941c, *Supporting Statement to Correct Information,* and instructions
- Form 944, *Employer's Annual Federal Tax Return*, and Instructions

Due Dates for Filing Form 941

Form 941 is due by the last day of the month after each quarter ends. The return filing dates are listed below:

QUARTER	ENDS	DUE DATE
January, February, March	March 31	April 30*
April, May, June	June 30	July 31*
July, August, September	September 30	October 31*
October, November, December	December 31	January 31*
*If the due date for a return falls on a Saturday, Sunday or legal holiday, **the due date is the next business day.**		

If you paid the quarterly tax payments in full, you are allowed an additional 10 days to file the return. For example, your return for the quarter that ends on June 30 would be due on August 10 instead of July 31.

Semiweekly schedule depositors, and monthly schedule depositors who accumulate $100,000 or more on any day, must complete a Schedule B *(Employer's Records of Federal Tax Liability)* and attach it to Form 941. You do not need to complete a Schedule B if you accumulate less than $2,500 in tax liability (reduced by any advance earned income credit payment) during the quarter, and you pay in full with a timely filed return.

The IRS uses Schedule B to determine if you have timely deposited your employment and withholding tax liabilities. Unless Schedule B is properly completed and filed with your Form 941, the IRS may not be able to process your return correctly, and deposit penalties could be applied.

Do not file more than one Form 941 per quarter and do not report more than one calendar quarter on a return.

Seasonal employers are not required to file for quarters when they regularly have no tax liability because they have paid no wages. To alert the IRS that you will

not have to file a return for one or more quarters during the year, check the seasonal employer box above line 17 on Form 941 each time you file. The IRS will mail two Forms 941 to you once a year after March 1. The preprinted name and address information will not include the date the quarter ended. You must enter that date when you file the return.

If you are not a seasonal employer, but you receive a preaddressed Form 941 for a quarter in which you have no employees or may have temporarily stopped paying salaries, file a return anyway. This ensures that you will continue to receive Form 941. If the tribe has an entity that ceases to do business or pay wages, a final return needs to be filed. The instructions on Form 941 give information on how to file the final return.

Annual Employment Tax Filing for Small Employers- Starting with calendar year 2006, certain employers will need to file new Form 944, *Employer's Annual Federal Tax Return*, instead of Form 941. Form 944 must be filed by employers whose liability for social security, Medicare and withheld federal income taxes for the calendar year is $1,000 or less. The IRS will directly notify employers who are required to file Form 944. If you believe you are eligible but are not notified, you can contact the IRS at 1-800-829-0115 to determine your eligibility. **Do not file Form 944 unless directed to do so by the IRS.**

Always use the preaddressed form mailed to you. If you do not receive a preaddressed form, print or type the tribe's name and address **exactly** as shown on the previous return.

The date your quarter ends and your **EIN** must also be shown. If you have not received notification of your EIN, write "Applied for" and the date you applied in the space provided for the EIN.

Where to mail Forms 941 without a payment:

Internal Revenue Service
Ogden, UT 84201-0046

Regardless of where the tribal government is located, all Forms 941 that are not accompanied by a payment should be mailed to the Ogden address.

Payment With Return

You may make a payment with Form 941 instead of depositing it if your net tax liability during the quarter (line 10 of Form 941) is less than $2,500 and you pay in full with a timely filed return. Form 941-V Payment Voucher would be used. See Publication 15 for additional information and exceptions.

Where to mail Forms 941 together with a payment and Form 941-V, Payment Voucher:

Internal Revenue Service
P. O. Box 660264
Dallas, TX 75266-0264

Regardless of where the tribal government is located, all Forms 941 that are accompanied by a payment should be mailed to the Dallas address.

Note: Do not use the Form 941-V payment voucher to make federal tax deposits.

Correcting Form 941

Starting in January 2009, when employers and payers need to correct previously filed employment tax returns, the new Form 941X, *Adjusted Employer's Quarterly Federal Tax Return or Claim for Refund,* will be used, replacing the Form 941c, *Supporting Statement to Correct Information* and Form 843, *Claim for Refund and Request for Abatement.* Form 941X is a stand-alone form corresponding to, and relates line-by-line with, the employment tax return it is correcting. The employer will be able to file Form 941X when an error is discovered, rather than having to wait to file it at the end of the quarter with the next employment tax return.

Corrections being made prior to January 2009 should continue using the following:

Errors made in figuring taxes in an earlier quarter can be corrected on a current Form 941 by making an adjustment to the current quarter's taxes. For example, an error in reporting income tax withholding on your first quarter 200X Form 941 and discovered in April 200X can be corrected on the second quarter 200X Form 941.

File a Form 941c, *Supporting Statement to Correct Information,* along with the Form 941 on which you make the adjustment. **Do not file Form 941c separately.** An example of a corrected Form 941 and related Form 941c are located at the end of this chapter. Section 13 of Circular E describes in detail how to correct errors to income tax withholding, social security and Medicare taxes.

Filing by Other Methods

You may be able to file Form 941 by telephone if you meet certain criteria. A 941 TeleFile package is automatically mailed to eligible employers each quarter. You may also use your personal computer to transmit tax return information through an approved third-party transmitter. Visit the IRS Web Site at www.irs.gov/efile for a list of approved business providers.

EXHIBIT 13-1 - Sample Form 941, *Employer's Quarterly Federal Tax Return* and related Form 941c

Form **941 for 2008:** Employer's QUARTERLY Federal Tax Return
(Rev. January 2008) Department of the Treasury — Internal Revenue Service
950108
OMB No. 1545-0029

(EIN) Employer identification number: 8 9 – 1 2 3 4 5 6 7
Name (not your trade name): ACD Tribe
Trade name (if any):
Address: P.O. Box 8080 (Number, Street, Suite or room number)
Anywhere (City) | SD (State) | 12345 (ZIP code)

Report for this Quarter of 2008 (Check one.)
- [ ] 1: January, February, March
- [x] 2: April, May, June
- [ ] 3: July, August, September
- [ ] 4: October, November, December

Read the separate instructions before you fill out this form. Please type or print within the boxes.

Part 1: Answer these questions for this quarter.

1 Number of employees who received wages, tips, or other compensation for the pay period including: *Mar. 12* (Quarter 1), *June 12* (Quarter 2), *Sept. 12* (Quarter 3), *Dec. 12* (Quarter 4)	1	300
2 Wages, tips, and other compensation	2	1,269,293 . 19
3 Total income tax withheld from wages, tips, and other compensation	3	175,391 . 26
4 If no wages, tips, and other compensation are subject to social security or Medicare tax ☐ Check and go to line 6.		

5 Taxable social security and Medicare wages and tips:

	Column 1		Column 2
5a Taxable social security wages	1,269,293 . 19	× .124 =	157,392 . 36
5b Taxable social security tips	0 .	× .124 =	.
5c Taxable Medicare wages & tips	1,269,293 . 19	× .029 =	36,809.5 .

5d Total social security and Medicare taxes (*Column 2*, lines 5a + 5b + 5c = line 5d)	5d	194,201 . 86
6 Total taxes before adjustments (lines 3 + 5d = line 6)	6	369,593 . 12
7 TAX ADJUSTMENTS (read the instructions for line 7 before completing lines 7a through 7g):		
7a Current quarter's fractions of cents		.
7b Current quarter's sick pay		.
7c Current quarter's adjustments for tips and group-term life insurance		.
7d Current year's income tax withholding (attach Form 941c)		-2,030 . 10
7e Prior quarters' social security and Medicare taxes (attach Form 941c)		.
7f Special additions to federal income tax (attach Form 941c)		.
7g Special additions to social security and Medicare (attach Form 941c)		.
7h TOTAL ADJUSTMENTS (combine all amounts: lines 7a through 7g)	7h	-2,030 . 10
8 Total taxes after adjustments (combine lines 6 and 7h)	8	367,563 . 02
9 Advance earned income credit (EIC) payments made to employees	9	16,997 . 00
10 Total taxes after adjustment for advance EIC (line 8 – line 9 = line 10)	10	350,566 . 02
11 Total deposits for this quarter, including overpayment applied from a prior quarter	11	350,566 . 02
12 Balance due (If line 10 is more than line 11, write the difference here.) For information on how to pay, see the instructions.	12	0 .
13 Overpayment (If line 11 is more than line 10, write the difference here.)	.	Check one ☐ Apply to next return. ☐ Send a refund.

▶ You **MUST** fill out both pages of this form and **SIGN** it. Next ▶

For Privacy Act and Paperwork Reduction Act Notice, see the back of the Payment Voucher. Cat. No. 17001Z Form **941** (Rev. 1-2008)

Name *(not your trade name)*: ACD Tribe | Employer identification number (EIN): 89-1234567

Part 2: Tell us about your deposit schedule and tax liability for this quarter.

If you are unsure about whether you are a monthly schedule depositor or a semiweekly schedule depositor, see *Pub. 15 (Circular E)*, section 11.

14 [S] [D] Write the state abbreviation for the state where you made your deposits OR write "MU" if you made your deposits in *multiple* states.

15 Check one:
- ☐ Line 10 is less than $2,500. Go to Part 3.
- ☐ You were a monthly schedule depositor for the entire quarter. Fill out your tax liability for each month. Then go to Part 3.

Tax liability: Month 1 .
Month 2 .
Month 3 .
Total liability for quarter . Total must equal line 10.

- ☑ You were a semiweekly schedule depositor for any part of this quarter. Fill out *Schedule B (Form 941): Report of Tax Liability for Semiweekly Schedule Depositors*, and attach it to this form.

Part 3: Tell us about your business. If a question does NOT apply to your business, leave it blank.

16 If your business has closed or you stopped paying wages . . . . . ☐ Check here, and enter the final date you paid wages / /.

17 If you are a seasonal employer and you do not have to file a return for every quarter of the year . . ☐ Check here.

Part 4: May we speak with your third-party designee?

Do you want to allow an employee, a paid tax preparer, or another person to discuss this return with the IRS? See the instructions for details.

☑ Yes. Designee's name and phone number: J. Smith, CPA (605) 555 – 1234

Select a 5-digit Personal Identification Number (PIN) to use when talking to IRS. 5 4 3 9 9

☐ No.

Part 5: Sign here. You MUST fill out both pages of this form and SIGN it.

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete.

X Sign your name here | Print your name here | Print your title here

Date / / | Best daytime phone ( ) –

Part 6: For paid preparers only (optional)

Paid Preparer's Signature
Firm's name (or yours if self-employed)
Address | EIN | ZIP code
Date / / | Phone ( ) – | SSN/PTIN
☐ Check if you are self-employed.

Page 2 Form 941 (Rev. 1-2008)

990306

Schedule B (Form 941):

Report of Tax Liability for Semiweekly Schedule Depositors

(Rev. January 2006) Department of the Treasury — Internal Revenue Service

OMB No. 1545-0029

(EIN) Employer identification number: 8 9 – 1 2 3 4 5 6 7

Name *(not your trade name)*: ACD Tribe

Calendar year: 2 0 0 8 (Also check quarter)

Report for this Quarter ... (Check one.)

- ☐ 1: January, February, March
- ☑ 2: April, May, June
- ☐ 3: July, August, September
- ☐ 4: October, November, December

Use this schedule to show your **TAX LIABILITY** for the quarter; **DO NOT** use it to show your deposits. You must fill out this form and attach it to Form 941 (or Form 941-SS) if you are a semiweekly schedule depositor or became one because your accumulated tax liability on any day was $100,000 or more. Write your daily tax liability on the numbered space that corresponds to the date wages were paid. See Section 11 in *Pub. 15 (Circular E), Employer's Tax Guide*, for details.

Month 1

1		9		17		25	
2		10		18		26	
3		11		19		27	
4		12		20		28	
5		13		21		29	
6		14		22		30	56750 . 94
7		15	56,750 . 93	23		31	
8		16		24			

Tax liability for Month 1: 113,501.87

Month 2

1		9		17		25	
2		10		18		26	
3		11		19		27	
4		12		20		28	
5		13		21		29	
6		14		22		30	58766 . 02
7		15	58766 . 01	23		31	
8		16		24			

Tax liability for Month 2: 117,532 . 03

Month 3

1		9		17		25	
2		10		18		26	
3		11		19		27	
4		12		20		28	
5		13		21		29	
6		14		22		30	59,766 . 06
7		15	59,766 . 06	23		31	
8		16		24			

Tax liability for Month 3: 119,532 . 12

Fill in your total liability for the quarter (Month 1 + Month 2 + Month 3) = Total tax liability for the quarter ▶

Total must equal line 10 on Form 941 (or line 8 on Form 941-SS).

Total liability for the quarter: 350,566 . 02

For Paperwork Reduction Act Notice, see separate instructions. Cat. No. 11967Q Schedule B (Form 941) Rev. 1-2006

Form **941c** (Rev. October 2006)
Department of the Treasury
Internal Revenue Service

Supporting Statement To Correct Information

Do Not File Separately

► File with Forms 941, 941-M, 941-SS, 943, 944, 944(SP), 944-SS, 945, or Form 843.

OMB No. 1545-0256

Page No.

Name: ACD Tribe

Employer identification number (EIN): 89 1234567

Telephone number (optional): 605-555-1111

A This form supports adjustments to Form: Check only one box. (see instructions)

☑ 941 ☐ 941-M ☐ 941-SS ☐ 943
☐ 944 ☐ 944(SP) ☐ 944-SS ☐ 945

B This form is attached to and filed with the return for the period ending (month, year) ► 06/2008

C Enter the date that you discovered the error(s) reported on this form. (If you are making more than one correction and the errors were not discovered at the same time, explain in Part V.) ► 04/30/2008

Part I **Signature and Certification** (You **must** complete this part for the IRS to process your adjustments for overpayments.) Skip Part I if all of your adjustments are underpayments. **(Part I applies to wages only.)**

I certify that Forms W-2c, Corrected Wage and Tax Statement, have been filed (as necessary) with the Social Security Administration, and that (check appropriate boxes):

☑ All overcollected federal income taxes for the current calendar year and all social security and Medicare taxes for the current and prior calendar years have been repaid to employees. For claims of overcollected employee social security and Medicare taxes in earlier years, a written statement has been obtained from each employee stating that the employee has not claimed and will not claim refund or credit for the amount of the overcollection.

☐ All affected employees have given their written consent to the allowance of this credit or refund. For claims of overcollected employee social security and Medicare taxes in earlier years, a written statement has been obtained from each employee stating that the employee has not claimed and will not claim refund or credit for the amount of the overcollection.

☐ The social security tax and Medicare tax adjustments represent the employer's share only. An attempt was made to locate the employee(s) affected, but the affected employee(s) could not be located or will not comply with the certification requirements.

☐ None of this refund or credit was withheld from employee wages.

Sign Here Signature ► Title ► Date ►

Part II **Federal Income Tax Withholding (Including Backup Withholding) Adjustment**

	(a) Period Corrected (For quarterly returns, enter date quarter ended. For annual returns, enter year.)	(b) Withheld Income Tax Previously Reported for Period	(c) Correct Withheld Income Tax for Period	(d) Withheld Income Tax Adjustment
1	3/2008	168,421.03	166,390.93	-2,030.10
2				
3				
4				
5	**Net withheld income tax adjustment.** If more than one page, enter total of all columns (d) on first page only. Enter here and on the appropriate line of the return with which you file this form. ►		5	

Part III **Social Security Tax Adjustment** (Use the tax rate in effect during the period(s) corrected. You must also complete Part IV.)

	(a) Period Corrected (For quarterly returns, enter date quarter ended. For annual returns, enter year.)	(b) Wages Previously Reported for Period	(c) Correct Wages for Period	(d) Tips Previously Reported for Period	(e) Correct Tips for Period	(f) Social Security Tax Adjustment
1						
2						
3						
4						
5	**Totals.** If more than one page, enter totals on first page only. ►					
6	**Net social security tax adjustment.** If more than one page, enter total of all columns (f) on first page only. Enter here and on the appropriate line of the return with which you file this form. ►				6	
7	**Net wage adjustment.** If more than one page, enter total of all lines 7 on first page only. If line 5(c) is smaller than line 5(b), enter difference in parentheses ►				7	-2,030.10
8	**Net tip adjustment.** If more than one page, enter total of all lines 8 on first page only. If line 5(e) is smaller than line 5(d), enter difference in parentheses ►				8	

For Paperwork Reduction Act Notice, see page 4. Cat. No. 11242O Form **941c** (Rev. 10-2006)

Form 941c (Rev. 10-2006) Page 2

Part IV Medicare Tax Adjustment

	(a) Period Corrected (For quarterly returns, enter date quarter ended. For annual returns, enter year.)	(b) Wages and Tips Previously Reported for Period	(c) Correct Wages and Tips for Period		(d) Medicare Tax Adjustment
1					
2					
3					
4					
5	Totals. If more than one page, enter totals on first page only ▶				
6	Net Medicare tax adjustment. If more than one page, enter total of all columns (d) on first page only. Enter here and on the appropriate line of the return with which you file this form ▶			6	
7	Net wage and tip adjustment. If more than one page, enter total of all lines 7 on first page only. If line 5(c) is smaller than line 5(b), enter difference in parentheses ▶			7	

Part V Explanation of Adjustments

16 new employees did not turn in the Form W-4 for a 2 month period so federal income tax withholding was done at the highest rate. 12 existing employees made changes to their Forms W-4 and returned them timely to the payroll department but they were not processed timely by the payroll department. These forms were turned in to their supervisors on 3/1/2008

Form 941c (Rev. 10-2006)

CHAPTER 14
Form 943, Agricultural Employees

References:

- Publication 51, *Circular A, Agriculture Employer's Tax Guide*
- Publication 15, *Circular E, Employer's Tax Guide*
- Form 943, *Employer's Annual Tax Return for Agricultural Employees*

In General

Agricultural workers are subject to FICA tax if certain wage tests are met. Amounts paid to seasonal farmworkers are excluded from FICA tax if specific provisions are met.

You are an employer of farmworkers if your employees:

- Raise or harvest agricultural or horticultural products on a farm (including the raising and feeding of livestock).
- Work in connection with the operation, management, conservation, improvement, or maintenance of your farm and its tools and equipment, or services pertaining to hurricane labor.
- Handle, process, or package an agricultural or horticultural commodity if you produced over half of the commodity (for a group of up to 20 unincorporated operators, all of the commodity).
- Perform work related to cotton ginning, turpentine, gum resin products, or the operation and maintenance of irrigation facilities.

The term "farm" includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, as well as plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising or harvesting of agricultural or horticultural commodities and orchards.

Farmwork does not include reselling activities that do not involve any substantial activity of raising agricultural commodities, such as a retail store or a greenhouse used primarily for display or storage. Refer to Publication 51 for information to distinguish between farm and nonfarm activities.

Taxable Wages

Cash wages you pay to employees for farmwork are subject to social security and Medicare taxes, if the wages meet the wage test (discussed below). They are also

subject to income tax withholding. Additionally, they may also be liable for federal unemployment (FUTA) tax.

Cash wages include checks, money orders, etc. Do not count the value of food, lodging, and other noncash items. For more information on what payments are considered taxable wages, see Publication 15, *Employer's Tax Guide (Circular E).*

Wage Test

All cash wages you pay to an employee during the year for farmwork are subject to social security and Medicare taxes and income tax withholding if **either** of the two tests below is met:

- You pay cash wages to an employee of $150 or more in a year for farm work (count all cash wages paid on a time, piecework, or other basis); or
- The total you pay for farm work (cash and noncash) to all your employees is $2,500 or more during the year.

EXAMPLE 14-1

A tribe is the owner of a local mushroom farm. The tribe paid their employees to plant mushrooms. John was paid $95, Tom was paid $175, and Kirk $900. The tribe had no other employees on the farm. Wages paid to Tom and Kirk were subject to FICA tax because they met the $150 or more requirement. John's wages were not subject to FICA because he did not meet the wage requirement

Exceptions: The $150 and $2,500 test do not apply to the following situations:

1) Wages you pay to a farmworker who receives less than $150 in annual cash wages are not subject to social security and Medicare taxes, or income tax withholding, even if you pay $2,500 or more in that year to all your farm workers, if the farmworker:

   a) Is employed in agriculture as a hand-harvest laborer,
   b) Is paid piece rates in an operation that is usually paid on a piece-rate basis in the region of employment,
   c) Commutes daily from his or her home to the farm, and
   d) Had been employed in agriculture less than 13 weeks in the preceding calendar year.

Amounts you pay to these seasonal farmworkers, however, count toward the $2,500-or-more test to determine whether wages you pay to other farm workers are subject to social security and Medicare taxes.

EXAMPLE 14-2

A tribe, a local avocado grower, hired Marion, a high school student, to harvest a new crop of avocados. Marion, who had never harvested avocados before, was paid by the pound as is customary in the industry. Marion was transported by a bus provided by the tribe from her home to the farm. She was given instructions by the tribe on where and how to harvest the avocados. The tribe inspected and approved the avocados that Marion harvested. Marion earned $125.

The amount earned by Marion is not subject to FICA tax based on the provision of IRC 3121(a)(8)(B). This exception to FICA tax applies regardless of the fact that the worker had the status of common law employee.

Due Date of Form 943

Form 943, *Employer's Annual Tax Return for Agricultural Employees*, should be filed with the Internal Revenue Service by January 31. However, if you deposited all Form 943 taxes when due, you may file Form 943 in February; check the Form 943 instructions for the specific date.

Making Payment with Form 943

Make a payment with your Form 943 only if:

1. Your net taxes for the year (line 11 on Form 943) are less than $2,500 **or**
2. You are a monthly schedule depositor making a payment in accordance with the Accuracy of Deposits Rule. (See section 7 of Publication 51 for more details.) This amount may be $2,500 or more.

Otherwise, you must deposit the amount at an authorized financial institution or by using the Electronic Federal Tax Payment System. Do not use the Form 943-V payment voucher to make federal tax deposits.

Caution: If you pay an amount with Form 943 that should have been deposited, you may be subject to a penalty.

For information about depositing social security, Medicare taxes, and income tax withheld, see Publication 51. This publication also contains information about penalties that may apply if deposits are not made on time and/or if the Form 943 is not filed timely.

Where to file

Government entities, including Indian tribal governments, use the following addresses to file Form 943, regardless of the location of the tribal government:

Return without payment:	**Internal Revenue Service** **Ogden, UT 84201-0008**
Return with payment:	**Internal Revenue Service** **P.O. Box 105085** **Atlanta, GA 30348-5085**

There are special rules for social security and Medicare withholding on agricultural workers. Refer to Section 4, Social Security and Medicare taxes, in Pub 51. Also refer to Section 13, Federal Income Tax Withholding Methods, for withholding methods.

Crew Leaders

A crew leader is a person who furnishes and pays workers to do farmwork for a farm operator. A crew leader must pay the workers on his/her behalf, or on behalf of the farm operator and the crew leader must not have a written agreement with the farm operator stating that he or she is an employee. A crew leader is an independent contractor and will receive a Form 1099-MISC for all of the work performed.

Employment taxes for farmworkers must be filed on Form 943 and must be separate from other workers filed on Form 941.

Refer to Publication 51, *Circular A, Agricultural Employer's Tax Guide*, for more complete information on agricultural workers.

CHAPTER 15
Form 940, Employer's Annual Federal Unemployment (FUTA) Tax Return

References:

- Publication 15, *Employer's Tax Guide (Circular E)*
- Publication 15-A, *Employer's Supplemental Tax Guide*
- Form 940, *Employer's Annual Federal Unemployment (FUTA) Tax Return and* Instructions
- Consolidated Appropriations Act 2001

Beginning January 1, 2000, Indian tribes are not required to file Form 940, *Employer's Annual Federal Unemployment (FUTA) Tax Return*, as long as they participate in the State Unemployment (SUTA) system. This is due to the Consolidated Appropriations Act, 2001 (CAA) that was signed in to law on December 21, 2000 (Public Law No. 106-554.)

Services performed in the employ of tribes generally are no longer subject to the FUTA tax unless the tribal government elects not to participate in the state unemployment system.

This applies to all enterprises wholly owned by an Indian Tribe whether or not they might compete with similar private businesses. This also includes entities that are jointly owned by two or more tribes providing they are wholly owned. If an enterprise is jointly owned by an Indian tribe and another entity that is not tribally owned, then this entity would not be exempt from paying FUTA.

In other words, the enterprise must be owned 100% by the tribe or tribes. There are certain services which may be excluded from the required coverage. See Publication 15 or Publication 15-A for a list of these exceptions.

With the enactment of the CAA, states must now also give Indian tribes the option to elect the reimbursement method rather than paying the SUTA tax (tax contribution method). Employers electing the reimbursement option are required to reimburse the Unemployment Fund on a dollar-for-dollar basis for benefits paid to their former employees and charged to their accounts. This requirement applies to benefit payments that are calculated based on remuneration paid to employees on or after the date the election becomes effective.

If a tribe wishes to use the reimbursement option, each of their subdivisions, subsidiaries, and wholly-owned business enterprises will each need to make a separate election as to whether or not to use the reimbursement method. Some entities may find the tax contribution method more advantageous to their particular enterprise.

Two or more wholly-owned tribal enterprises can elect the benefit reimbursement option as a group for the purposes of sharing the cost of benefits paid to former employees. The members of the group shall be severally and jointly liable for reimbursement.

States may enact safeguards (including requiring the tribe to post a payment bond) to ensure that tribes using the reimbursement method make the required payments to the state. For state specific information on unemployment benefits employment assistance, or employer information, visit the website of the Office of Workforce Security at http://www.workforcesecurity.doleta.gov/.

However, regardless of whether a tribe uses the reimbursement method or the tax contribution method to pay SUTA, if the tribe fails to make required payments to the state's unemployment fund or payments of penalty or interest, then the tribe may be terminated from the program by the state. This would result in tribal employees not being covered for unemployment insurance.

States are not required to terminate coverage due to nonpayment. This is generally done only as a last resort because termination of coverage punishes workers who have no control over whether their employers satisfy their unemployment compensation obligations.

The law requires states to notify the Internal Revenue Service and the United States Department of Labor when the tribe is terminated from coverage due to nonpayment.

Once the IRS is notified that the tribe is in noncompliance with the state, the tribe will become liable for FUTA taxes and will be required to file Form 940 with the IRS.

Form 940 is an annual return. It is due on January 31 of the subsequent year. However, if you deposited all FUTA tax when due, you have ten additional days to file. If the due date falls on a Saturday, Sunday, or legal holiday, the due date will be the next business day.

The FUTA tax rate for 2007 and 2008 is 6.2% and is applicable to the first $7,000 of wages you pay each employee during the year. Only the employer pays the FUTA tax. Do not collect or deduct it from your employees' wages. .

Although Form 940 covers a calendar year, you may have to make deposits of the tax before filing the return. Deposit FUTA tax quarterly if the FUTA tax exceeds $500. For more information on FUTA taxes, the tribe should refer to

CHAPTER 15
Form 940, Employer's Annual Federal Unemployment (FUTA) Tax Return

Publication 15, *Employer's Tax Guide (Circular E)* and Publication 15-A, *Employer's Supplemental Tax Guide*, for assistance with filing Form 940.

Note: When a tribe is required to file Form 940, due to failure to meet state unemployment program requirements, tribal employees will not be eligible for unemployment compensation benefits, even though the tax per the Form 940 is paid. In essence, the tribe's employees will not receive unemployment compensation benefits when they otherwise would be eligible.

Who are Employers?

In general, you are an employer for Unemployment Compensation (UC) tax purposes and must pay UC tax when you would qualify as an employer if you were subject to FUTA. Under FUTA, you are an employer generally if you:

- Paid wages of $1,500 or more in any calendar quarter to employees (other than farm workers or household workers) **or**
- Have one or more employees (other than farm workers or household workers) at any time in each of any 20 or more weeks (calendar).

The 20 weeks do not have to be consecutive. Count all regular, temporary and part-time employees, and count employees on vacation or sick leave.

Note: The definition of an employer may change from state to state.

The tribe should refer to Publication 15 and Publication 15-A for assistance with the definition of an employer for FUTA purposes.

Who are Employees?

The rules used for purposes of social security and Medicare tax also apply in determining who are common-law employees for purposes of paying the UC tax.

For UC tax, as for social security and Medicare taxes, there are statutory employees and nonemployees in addition to common-law employees.

Amounts paid to Tribal council members for services performed by them as council members do not constitute wages for Federal Unemployment Taxes. For further information, see Chapter 3, Treatment of Certain Payments, and Attachment A, Revenue Ruling 59-354.

Note: The definition of an employee may change from state to state.

The tribe should refer to Publication 15, *Employer's Tax Guide (Circular E)* and Publication 15-A, *Employer's Supplemental Tax Guide* for assistance with the definition of employees for FUTA purposes.

What are UC Wages?

Wages subject to UC will vary from state to state because each state has a different method for computing UC. States may base the UC on a wage base and an experience rate.

A state experience rate is the rate at which the state taxes your payroll for UC. This rate may be adjusted from time to time based on the number and length of claims for unemployment compensation that your former employees make against the fund. If you do not know your rate, contact your state employment security agency. Each state may have a different wage base upon which the UC is computed. This rate can vary from year to year. It may also vary, depending on the duties performed.

For example, a state's 200X wage base subject to UC is $10,100. The UC program has assigned the tribe an experience rate of 1%, based upon the employment history of the tribe. The tribe would pay a maximum of $10,100 x 1% or $101 per year for each employee subject to UC.

What if Wages are not Paid in Cash?

If you pay your employees in some medium that is neither cash nor a readily negotiable instrument (such as a check), you are said to pay them "in-kind." Payments in-kind may be in the form of goods, lodging, food, clothing, or services. Generally, wages paid in-kind are treated the same way as wages paid in money. The value of a wage payment in-kind is its fair market price on the day the payment is made.

CHAPTER 16
Wage Reports

References:

- Publication 15, *Circular E, Employer's Tax Guide*
- Form W-2, *Wage and Tax Statement*
- Form W-3, *Transmittal of Wage and Tax Statements*
- Instructions for Forms W-2 and W-3

Form W-2, Wage and Tax Statement

You must give each of your employees the statement by January 31 following the end of the calendar year covered. If not computer-generated, every effort should be made to ensure that Forms W-2 provided to employees are legible.

Form W-2 must show total wages and other compensation paid (even if not subject to withholding); total wages subject to social security and Medicare taxes; allocated tips (if any); amounts deducted for income, social security and Medicare taxes; and the total advance earned income credit payment.

If employment ends before the close of the year, the employee may request the form earlier. You must give the employee a Form W-2 within 30 days of the employee's request or final payment, whichever is later.

You should keep any undeliverable employee copies of Form W-2 (Copies B and C) as part of your records for 4 years.

If you file more than 250 Forms W-2 for the year, you are required to file them electronically. See Chapter 17 for electronic filing requirements or Forms W-2 and W-3 instructions.

Form W-3, Transmittal of Wage and Tax Statements

Each year, you must file Form W-3 in order to transmit copy A of Forms W-2 to the Social Security Administration (SSA) by the last day of February (paper) or the last day of March (electronic) after the calendar year for which the Forms W-2 are prepared. The SSA will process these forms and provide the IRS with the income tax data that it needs from those forms.

The Form W-3 is required to be filed electronically if you file more than 250 Forms W-2 for the year. See Chapter 17 for electronic filing requirements or Forms W-2 and W-3 instructions.

Paper Forms W-2 (copy A) and W-3 (entire page) should be mailed to:

Social Security Administration
Data Operations Center
Wilkes-Barre, PA 18769-0001

Note: The totals on the Form W-3 you file should equal the totals from all Forms 941 filed for the same year.

Correcting Forms W-2 and W-3

If there is an error made on Forms W-2 or W-3, make the correction by filing Form W-2c, *Corrected Wage and Tax Statement*, and Form W-3c, *Transmittal of Corrected Wage and Tax Statements.* See Chapter 17 or Forms W-2 and W-3 instructions for further information.

Reconciling Forms W-2, W-3, 941, and 943

Certain amounts reported on the four quarterly Forms 941 should agree with the Forms W-2 and Form W-3 filed with the SSA. The following amounts should agree on forms 941, W-2 and W-3: income tax withholding, social security wages, social security tips, Medicare wages and tips, and the advance earned income tax credit. If the totals do not agree, the discrepancy should be investigated.

The Combined Annual Wage Reporting (CAWR) is the system that permits employers to file a single statement to report the employees' earnings. Both the IRS and SSA use the information reported by employers to ensure the proper amount of taxes has been paid and reported. CAWR cases are identified by the SSA when it appears that the amounts, as noted above, do not agree with the Forms 941, 943, W-2, and W-3, or for not filing any or all of the required Forms W-2.

Upon receipt of the notification of a CAWR discrepancy, you should review your copies of the Forms 941, W-2, and W-3 that were filed and do a complete review to find the error. A complete explanation of the error and what you did to make the necessary corrections (including any corrected forms) should be sent to the address noted on the CAWR discrepancy notice. If you have questions about a CAWR discrepancy, please contact your local ITG Manager.

To reduce the discrepancies between amounts reported on Forms W-2, W-3 and Forms 941/943:

- Be sure the amounts on Form W-3 match the total amounts from Forms W-2.
- Reconcile Form W-3 with your four quarterly Forms 941 (or annual Forms 943 or 944) by comparing amounts reported for income tax withholding, social security wages, Medicare wage and tips, and social security tips.
- The amounts for social security and Medicare taxes on the four quarterly Forms 941 (or annual Forms 943 or 944) should be approximately twice the amounts shown on Form W-3. This is because the amounts on the Forms 941 represent both the employee and employer share of FICA while the Forms W-2 only represents the employee share.

Remember: Amounts reported on Forms W-2, W-3, and 941/943/944 may not match for valid reasons. If they do not match, you should determine that the reasons are valid. Keep your reconciliation in case you receive a CAWR discrepancy notice.

CHAPTER 17
Magnetic Media Filing Requirements for Form W-2, Wage and Tax Statements

References:

- Instructions for Forms W-2 and W-3
- Social Security Business Services Online User Handbook (1-888-772-2970)
- Social Security Number Verification Service (1-800-772-6270)
  SSNVS information line for technical questions (1-888-772-2970)
  Internet website: www.ssa.gov/employer
- Social Security Specifications for Filing Forms W2 Electronically (EFW2) for Tax Year 2007 (EFW2 updated annually)
- Social Security Business Services Online at www.ssa.gov/bso/bsowelcome.htm
- Form 8508, *Request for Waiver from Filing Information Returns Electronically/Magnetically*

Forms W-2, *Wage and Tax Statements*

Forms W-2 are filed with the Social Security Administration (SSA). Employers are required to file Forms W-2, Wage and Tax Statements, to report wages, tips, social security withholdings, Medicare tax withholdings, federal income tax withholdings, and other items with regard to an employee's annual wages. The SSA provides Form W-2 information to the Internal Revenue Service.

Social Security Business Services Online (BSO), is a suite of business services enabling organizations and authorized individuals to conduct business with, and submit confidential information to, the SSA. It allows registered users to submit a wage file, create, save, print, and submit Forms W-2 and W-2c online, view status, error, and notice information, acknowledge notices, request a one-time 15-day extension, and verify names and social security numbers of employees. Other services include Electronic Records Express, which enables users to upload electronic records to support the processing of disability claims. You must be a registered BSO user to use these services. Other services will be added in the future. You can register online.

When employers file **250 or more Forms W-2** for a given year, they are required to file them with the SSA electronically. The employer must provide a paper copy of Form W-2 to employees, and retain a copy of the paper document for their own records. They should also retain copies of electronic files transmitted.

Electronic submission of Forms W-2 and W-3 is considered the best practice and is recommended by the Social Security Administration.

CHAPTER 17
Magnetic Media Filing Requirements for Form W-2, Wage and Tax Statements

Information from the Social Security Employer Services Online User Handbook for Tax Year 2007:

Before year-end, you should register with the SSA either by accessing the Internet site at www.ssa.gov/employer, or telephoning 1-800-772-6270 Monday through Friday from 7 a.m. to 7 p.m. Eastern time. It is preferable to register in December for new registrations and submitting test files. Register early so you'll be ready when the filing season begins.

The SSA has Employer Services Liaison Officers (ESLO) in regional offices across the country that can help you with information and expertise. A list of specialists can be found at www.ssa.gov/employer/wage_reporting_specialists.htm

The SSA must confirm your identity before issuing a **User ID** and **password.** They also have to know how to contact you if the need arises. You will be asked to provide your name as it appears on your Social Security Card, Social Security Number (SSN), date of birth, mailing address, work telephone number, fax number (optional), e-mail address (optional), company name, Employer Identification Number (EIN), and company telephone number. Your SSN, date of birth, and EIN will be verified against SSA records.

Once the information is verified, a **User ID** will be issued immediately.

The first time you log on to the system, you will be asked to create and enter your own personal **password**. You can change your **password** at any time, and you are required to change it at least once every 365 days for security purposes.

The SSA will notify the tribe of the electronic registration.

If the tribe wishes to participate in the verification of social security numbers online, access to this service involves a more rigorous process and requires pre-authorization from the tribal entity/employer. If access is requested, the employer will be notified via first class mail within two weeks and will include an **activation code**, which is needed to activate the service.

Commercial Software Packages

Most commercial software packages for payroll programs have detailed instructions for year-end closing and procedures for transmitting data electronically. You will also need to consult with your software developers to determine if they have compatible state W-2 electronic products if you are

required to file W-2s with your state. You will also want to verify with your state if they support the EFW2 format used by the SSA.

Requests for Waiver of Requirement

Under the Treasury Regulations at section 301.6011-2(c)(2), the Commissioner of Internal Revenue may waive the electronic requirements upon a written showing of hardship by the filer. In determining whether hardship has been shown, the principal factor to be taken into account is the amount, if any, by which the cost of filing returns electronically exceeds the cost of filing returns on paper forms.

A request for waiver must be filed at least 90 days before the filing of the first return for which a waiver is requested. The filer must send the request to the IRS using Form 8508, *Request for Waiver from Filing Information Returns Electronically/Magnetically.*

Accuracy

Accurate reporting of employee's Form W-2 information directly affects the eligibility for, and amount of any Social Security and Medicare benefits payable to employees and their families. That is why we continually emphasize the importance of recording the right employee name, SSN and wages for each employee. Accurate reporting can also prevent penalty assessments for inaccurate or late filing.

Frequently Asked Questions

1. **Who should I call if I have problems with registration?**

   Call 1-800-772-6270 Monday through Friday between 7:00 a.m. and 7:00 p.m. Eastern time.

2. **What if I have 250 or more Form W-2s and I submit paper forms to the SSA?**

   The IRS may penalize you.

3. **Where can I find AccuWage?**

   By accessing www.ssa.gov/employer/accuwage

4. When is my filing deadline to the SSA?

A paper copy of Form W-2 must be provided to the employee by January 31 of each year.

Form W-2 information must be transmitted to the SSA no later than February 28 for paper copies. For files transmitted electronically, the deadline is March 31.

5. Can I correct Form W-2 information that has already been processed?

You can submit corrections to the Form W-2 processed information electronically, or using paper Forms W-3c and W-2c. If more than 250 corrections, you must transmit the correction electronically.

6. I believe my Social Security payments reported to IRS on Form 941 and my Form W-2 reports filed with SSA last year may not balance. What should I do?

Check your records. If your Form W-2 reports need to be corrected, you should file Forms W-3c and W-2c with SSA. If your Form W-2 reports were correct as filed, then you should file Form 941c with IRS to correct your previous Form 941.

What if Records are Lost or Destroyed?

Fires, natural disasters, equipment failure, and human error may cause records to be lost or destroyed. The extent to which payroll records can be reconstructed depends primarily on back ups, storage, and cataloging of archived records.

Reconstructed records are no substitute for maintenance of original records, as they are never as accurate or complete as the originals. An extensive effort to reconstruct records is sometimes required. However, a reconstruction may lack the authenticity and credibility of original records to regulators, state agencies, federal agencies, or the courts. Reconstructed records, simply put, are better than nothing.

In this chapter, we will briefly discuss record retention, as well as duplicate information that may be available from banks, regulators and government agencies.

Back up of Records

Instructions on how to back up your accounting and payroll records can be found in accounting and bookkeeping textbooks, from the manufacturer of your payroll system, and many other sources. The form of back up will depend on the system you use to maintain your records. For instance, a manual peg-board payroll system creates carbon copies of payroll entries. A computerized system will be stored on your computer's hard-drive.

However you decide to back up your payroll records, it is important to follow instructions, and to test a back up copy from time to time to ensure you are copying the intended files. Back ups of either manual or computerized systems should be made routinely, checked for accuracy, and should be stored in a safe place.

Storage

The site you select for storage of records should be carefully chosen. You will want your back up copies to be reasonably secure from physical damage including fire, flood, theft, insects, rodents, temperature and humidity. While paper documents may seem more sensitive to these hazards, you will want to provide the same safeguards for your computerized records.

You also want to ensure privacy of your records by restricting access to those persons with a "need to know." Payroll records contain a great deal of personal information, and employees depend on their employers to keep this information confidential. Employee names, addresses, and social security numbers, in addition to items like notices of employee levies, garnishments, and child support payments should always be kept secure.

Record Retention

As previously stated in this guide, there are predetermined periods of time for which records should be maintained. The general rule is 4 years.

Original records should be well labeled and well organized. Because payroll records "close out" at year-end, a new file should be started for each employee for each year. Some payroll records such as Form W-4, garnishments, court ordered deductions for child support, and others, may span more than one calendar year. A copy of the original document should be made for the prior year file. Keep the original in the new file folder for the employee.

All payroll reconciliation workpapers generated in your payroll office should be retained. Some entities reconcile payroll every payday, or every week, or every month. Often payroll reconciliations coincide with the payroll deposits you make with the bank, or over the telephone or online using the Electronic Federal Tax Payment System (EFTPS). You will want to keep all the workpapers, receipts, recordation of telephone or online deposits, photocopies of checks written for payroll deposits, copies of the front and back of canceled checks written for payroll deposits, and any IRS correspondence. These records will be useful when you prepare your quarterly payroll reports, and they should be retained for at least 4 years.

Copies for Easy Access

Sometimes, the Internal Revenue Service will send out correspondence with regard to payroll tax deposits, or payroll tax reports. This correspondence may have a short response time. It is recommended you keep accessible copies of payroll deposits and payroll reports for the past two years. (This should be an **extra copy** in addition to the ones you are going to take to storage).

Preparing Hard Copy Files for Storage

CHAPTER 18
Records Retention

After you file year-end payroll reports, Forms W-2 and W-3, you will prepare files for storage. It is well worth the time to organize, label, and place the files (whether they are electronic or hard copy) in some sort of storage container. If you store large quantities of records, it is helpful to label the box with a list of contents and the calendar year. For instance, you may have a storage box labeled Payroll Records – 2007. You should also attach a packing list to inventory the contents of each box.

Preparing Computerized Copies for Storage

After you follow established procedures for backing up your computerized payroll records, test the media on which they are stored. You want to ensure you copied the correct information and there are no glitches or errors to prevent you from reloading it if the need arises.

A secure, off-site location is generally recommended for storage of back ups to your computerized records. They should be well labeled and write-protected so no one can accidentally write over your valuable back up.

Reconstruction

After taking steps to prepare complete and accurate records and storing them according to established procedures, something unexpected may happen to cause your records to be lost or destroyed.

Every effort should be made to find lost records, or partial records that may have "survived" a disaster. If partial records are recovered, they are the best place to begin a reconstruction.

A reconstruction of records is best approached in reverse order. In other words, begin with the end of the year and work backward. The following steps may be helpful in the reconstruction process:

1. Determine exactly what has been lost.
2. Determine if you lost the only copy of an item.
3. For those items where you lost the only copy, rank the relative importance of the lost items, starting with those of highest importance.
4. Make a list of the items you determine warrant the time and expense of reconstruction.
5. Determine if there is a state, federal, or other agency from which you can request a copy of a lost report.

For instance, from the Internal Revenue Service, you can request either a transcript of a filed return, or a photocopy of a filed return. Either can be certified as an actual copy and can take the place of your copy of a lost return. Transcripts are available at no cost.

6. For items of public record, contact your local courthouse for a copy.
7. For bank records, contact your bank. It could be expensive to get copies of canceled checks, but they are available.

You will want to evaluate the need for the records in relation to the cost of reconstruction. For assistance with IRS records, you should contact your Indian Tribal Governments office[3].

[3] Contact information for your local IRS Indian Tribal Governments office is listed in Chapter 1 of this guide.

CHAPTER 19
Penalties

References:

- Publication 15, *Circular E, Employer's Tax Guide*
- Notice 746, *Information About Your Notice, Penalty, and Interest*

The best way to avoid penalties is to have an in-depth understanding of what can be done to reduce or eliminate them before they are ever assessed. In an effort to assist, we have created a "Helpful Hints to Avoid Penalties" guide, which is included on the "Tax Tools for Tribes" CD-Rom referenced in Chapter 1. Hopefully the suggestions outlined in this guide will reduce penalty assessments, but if a penalty is asserted, the guide also outlines the steps required to address it.

The ultimate goal of each payroll/accounting department is timely compliance with the different filing, paying, and depositing requirements. There may be times when this doesn't happen.

The following is a list of the penalties that may be assessed for failure to comply with filing and payment requirements:

Failure to File – a penalty of 5% (of the tax required to be shown on a return) may be imposed for each month or part of a month that a return is not filed (not to exceed 25%)

Failure to Pay – a penalty of .05% will be imposed on any tax shown on the return not timely paid (not to exceed 25%)

Dishonored Check – 2% of the amount of the bad check. If the check is less than $750, the penalty is the amount of the or $15 whichever is less.

Failure to Timely File an Information Return - You may be required to file information returns to report certain types of payments made during the year (i.e., Forms 1099-MISC, 1099-R, W-2, etc.). This penalty applies if you fail to timely file, you fail to include all information required to be shown, or you include incorrect information on a return. The penalty is:

> $15 per return if correctly filed within 30 days of due date (maximum penalty of $75,000 per year or $25,000 for small businesses, defined below),
>
> $30 per return if correctly filed more than 30 days after the due date but before August 1 ($150,000 maximum or $50,000 for small businesses), or

$50 per return if not filed or correctly filed after August 1 ($250,000 maximum or $100,000 for small businesses)

(You are a small business if your average annual gross receipts for the 3 most recent tax years ending before the calendar year in which the information returns were due are $5 million or less.)

Failure to Timely Furnish a Copy of any Information Return to the Payee – a penalty of $50 per return is imposed for failure to provide an information return to the payee by January 31. You may also be subject to the penalty for failure to include all information required to be shown or if you include incorrect information on the statement (penalty not to exceed $100,000).

Failure to Make Federal Tax Deposits On Time in an Authorized Government Depository - Penalties may apply if you do not make required deposits on time, make deposits for less than the required amount, or if you do not use EFTPS (Electronic Federal Tax Payment System) when required. For amounts not properly or timely deposited, the penalty rates are:

2% - Deposits made 1 to 5 days late
5% - Deposits made 6 to 15 days late
10% - Deposits made 16 or more days late (Also applies to amounts paid within 10 days of the date of the first notice the IRS sent asking for the tax due.)
10% - Deposits made at an unauthorized financial institution, paid directly to the IRS, or paid with your tax return (unless otherwise excepted)
10% - Amounts subject to electronic deposit
15% - Amounts still unpaid more than 10 days after the date of the first notice the IRS sent asking for the tax due or the day on which you receive notice and demand for immediate payment, whichever is earlier.

Failure to Collect and Pay Over Trust Fund Taxes – If income, social security and Medicare taxes that are to be withheld are not withheld or are not deposited or paid to the United States Treasury, the trust fund recovery penalty may apply. This penalty is the full amount of the unpaid trust fund tax. It may be imposed on all persons who are determined by the IRS to be responsible for collecting, accounting for, and paying over theses taxes. Refer to Chapter 20 for further information on the trust fund recovery penalty.

If a penalty is assessed and you don't feel that the assessment is correct or you still have questions, the law allows the IRS to remove or reduce the penalties if you can show you acted reasonably and in good faith, or relied on the incorrect advice of an IRS employee.

Upon receipt of your assessment notice, you may send us a signed statement explaining why you believe the penalty should be removed or reduced. Please

be sure to explain in detail what caused the problem. Your statement will be reviewed and you will be notified if your explanation is accepted.

Please refer to Notice 746, *Information About Your Notice, Penalty, and Interest*, for detailed information on why penalties are assessed and in what amounts, and the removal of penalties. Contact your local Indian Tribal Governments office for further assistance.

How are Penalties Paid?

If you receive a notice of penalty, it will include instructions to send payment with the voucher at the bottom of the notice. Do not pay penalties via EFTPS. If you have questions regarding the payment of penalties, please call your ITG Specialist.

CHAPTER 20
The Collection Process

The Collection Process: What To Do When You Owe Taxes

It is highly recommended that you have one designated office for each entity to receive and review all IRS notices. It is important to pay attention to the time frame as stated in the notice and then to respond to the notice promptly. This internal control will alleviate notices being lost or misdirected.

When employment tax returns are filed, we check to see if the math is accurate and if the correct amount of tax has been paid or timely deposited. If you have not paid all you owe, we send a bill called a Notice of Tax Due and Demand for Payment. The bill includes the taxes, plus penalties and interest. We encourage you to pay your bill by check or money order as quickly as possible. If you have received a bill for unpaid taxes, you should pay the entire amount, or tell us right away why you cannot. If you have received a tax notice or if you would like to know if there are any outstanding tax debts, call the IRS Indian Tribal Governments office[4] in your area for assistance.

If you do not pay the taxes you owe and if you make no effort to pay them, we can ask you to take action to pay your taxes, such as selling or mortgaging assets or getting a loan. If you still make no effort to pay your bill or to work out a payment plan, we may also take more serious action, such as seizing bank accounts or other assets.

If you Cannot Pay in Full, There's Still Something You Can Do…

If you cannot pay all your taxes now, pay as much as you can. Paying now reduces the amount of interest and penalty owed on the account. Then, immediately call or write the IRS Indian Tribal Governments office, or visit the nearest IRS office to explain your situation. They will assist you with resolving the account.

What if You Believe Your Bill is Wrong?

If you believe your bill is wrong, let us know as soon as possible. Call the number on your bill or contact the IRS Indian Tribal Governments office in your area for assistance.

To help us correct the problem, gather a copy of the bill along with copies of any records, tax returns, and canceled checks, etc., that will help us understand why you believe your bill is wrong. If we find you are correct, we will adjust your account.

[4]Contact information for your local IRS Indian Tribal Governments office is listed in Chapter 1 of this guide.

CHAPTER 20
The Collection Process

Before any action that is explained in this section is taken, you have the opportunity to voluntarily pay what is owed. But if you do not pay your taxes in full and do not contact us to let us know why you cannot pay or why you disagree with our decision to take enforcement action, the law requires us to take action. We may:

- **File a lien** against property (make a legal claim to property as security or payment for a tax debt)
- **Serve a levy** on property (legally seize property to satisfy a tax debt)
- **Assess a trust fund recovery penalty** for employment taxes

These *enforced collection actions* are the means by which the *Notice and Demand for Tax Payment* is enforced. Publication 1660, *Collection Appeal Rights,* and Publication 5, *Your Appeal Rights and How to Prepare a Protest if You Don't Agree,* give detailed information regarding the appeals process.

Liens

Liens give a legal claim to property as security or payment for a tax debt. A *Notice of Federal Tax Lien* may be filed only after:

- We assess the liability,
- We send you a *Notice and Demand for Payment* (a bill that tells how much is owed in taxes); and
- You neglect or refuse to pay the debt within 10 days after we notify you about it.

Once these requirements are met, a lien is created for the amount of the tax debt. Filing this notice publicly notifies other possible creditors that the federal government has a claim against the debtor's property, including property acquired after the lien is filed.

Liens can be attached to all property or rights to property, including an employer's accounts receivable.

Levies

A levy is a legal seizure of property to satisfy a tax debt. Levies are different from liens. A lien is a claim used as security for the tax debt, while a levy actually takes the property to satisfy the tax debt.

If the taxes are not paid, or arrangements are not made to settle the debt, the IRS may seize and sell any type of real or personal property.

Generally, these three requirements must be met before a levy action is taken:

- Tax is assessed and a *Notice and Demand for Payment* is issued,
- Someone neglects or refuses to pay the tax, and
- A *Final Notice of Intent to Levy* and *Notice of Your Right to a Hearing* (levy notice) was issued at least 30 days before the levy.

Trust Fund Recovery Penalty

To encourage prompt payment of withheld income and employment taxes, including social security taxes, railroad retirement taxes, or collected excise taxes, Congress passed a law that provides for the trust fund recovery penalty. (These taxes are called *trust fund taxes* because you actually hold the employee's money in trust until you make a federal tax deposit in that amount.)

If we plan to assess the trust fund recovery penalty, we will send you a letter stating that you have been determined to be a *responsible* person. You have 60 days after you receive our letter to appeal our proposal. If you do not respond to our letter, we will assess the penalty against you as a responsible person and send you a *Notice and Demand for Payment.* Also, we can apply this penalty whether or not you are out of business.

A responsible person is a person or group of people who has the duty to perform and the power to direct the collecting, accounting, and paying of trust fund taxes. This person may be:

- an officer or an employee of a corporation,
- a tribal council member,
- a member or employee of a partnership,
- a corporate director or shareholder,
- a member of a board of trustees of a nonprofit organization, or
- another person with authority and control over funds to direct their disbursement,
- another corporation.

Assessing the Trust Fund Recovery Penalty

We may assess the penalty against anyone:

- **Who is responsible** for collecting or paying withheld income and employment taxes, or for paying collected excise taxes, and
- **Who willfully** fails or neglects to collect or pay them.

For willfulness to exist, the responsible person must:

- Have been aware or should have been aware of the unpaid taxes, and
- Have used the funds to keep the business going or allowed available funds to be paid to other creditors.

Employment Taxes Are:

- The amount you should withhold from your employees for both income and social security tax, plus
- The amount of social security tax you pay on behalf of each employee.

If you ignore the federal tax deposit and filing requirements, the amount you owe can increase dramatically.

If you do not pay your employment taxes on time, or if you were required to and did not include your payment with your return, we will charge you interest and penalties on any unpaid balance. We may charge you penalties of up to 15% of the amount not deposited, depending on how many days the deposit is late.

If you do not pay withheld trust fund taxes, we may take additional collection action. We may require you to:

- File and pay your taxes monthly rather than quarterly, or
- Open a special bank account for the withheld amounts, under penalty of prosecution. See Form 8109, *Federal Tax Deposit Coupon,* and Publication 15, *Circular E, Employer's Tax Guide.*

There is a special program to help you with tax problems that cannot be resolved through normal IRS channels.

The Taxpayer Advocate Service is an independent organization within the IRS whose employees assist taxpayers who are experiencing economic harm, who are seeking help in resolving tax problems that have not been resolved through normal channels, or who believe that an IRS system or procedure is not working as it should. You may be eligible for Taxpayer Advocate Service assistance if:

- You are experiencing economic harm or significant cost (including fees for professional representation),

- You have experienced a delay of more than 30 days to resolve your tax issue, or
- You have not received a response or resolution to the problem by the date that was promised by the IRS.

The service is free, confidential, tailored to meet your needs, and is available for businesses as well as individuals. There is at least one Local Taxpayer Advocate in each state, as well as in Puerto Rico and the District of Columbia. Because they are part of the IRS, Advocates know the tax system and how to navigate it. If you qualify, you will receive personalized service from a knowledgeable Advocate who will:

- Listen to your situation,
- Help you understand what needs to be done to resolve it, and
- Stay with you every step of the way until your problem is resolved.

You can reach the Taxpayer Advocate Service by:

- Calling toll–free 1-877-777-4778 or TTY/TTD 1-800-829-4059.
- Writing or calling your Local Taxpayer Advocate, whose address and phone number are listed in the government listings in your local telephone directory and in IRS Publication 1546*, Taxpayer Advocate Service - Your Voice at the IRS*
- Filing Form 911*, Request for Taxpayer Advocate Service Assistance (And Application for Taxpayer Assistance order),* with the Taxpayer Advocate Service, or
- Requesting that an IRS employee complete Form 911 on your behalf.

To obtain a copy of Form 911 or learn more about the Taxpayer Advocate Service, go to www.irs.gov/advocate.

GLOSSARY OF TERMS

Application for Taxpayer Assistance Order	ATAO
Consolidated Appropriations Act	CAA
Combined Annual Wage Reporting	CAWR
Cash or Deferred Arrangement	CODA
Electronic Data Transfer	EDT
Electronic Filing	E-FILE
Electronic Federal Tax Payment System	EFTPS
Employer Identification Number	EIN
Earned Income Tax Credit	EITC
Employee Retirement Income Security Act	ERISA
Frequently Asked Questions	FAQs
Federal Insurance Contributions Act	FICA
Federal Reserve Bank	FRB
Flexible Spending Account	FSA
Federal Tax Coupon	FTD
Federal Unemployment Tax Act	FUTA
Immigration and Naturalization Service	INS
Individual Retirement Account	IRA
Internal Revenue Code	IRC
Internal Revenue Service	IRS
Magnetic Media Reporting & Electronic Filing	MMREF
Old-Age, Survivors, and Disability Insurance	OASDI
Online Wage Reporting Service	OWRS

GLOSSARY OF TERMS

Personal Identification Number	PIN
Railroad Retirement Tax Act	RRTA
Salary Reduction Simplified Employee Pension	SARSEP
Self-Employment Contributions Act	SECA
Simplified Employee Pension Plan	SEP
Savings Incentive Match Plan	SIMPLE
Social Security Administration	SSA
Social Security Number	SSN
Trust Fund Recovery Penalty	TFRP
Unemployment Compensation	UC
Publication 15 Circular E, Employer's Tax Guide	Pub 15, or Circular E
Publication 15-A, Employer's Supplemental Tax Guide	Pub 15-A
Publication 15-B, Employer's Tax Guide to Fringe Benefits	Pub 15-B
Publication 51, Agriculture Employer's Tax Guide	Pub 51, or Circular A

Revenue Ruling 59-354

SECTION 61 – Gross Income Defined
1959-2 Cumulative Bulletin 24; July 1959

26 CFR 1.61-2: Compensation for services, including fees, commissions, and similar items (Also Sections 3121, 3306, 3401; 31.3121(a)-1, 31.3306(b)-1, 31.3401(a)-1.)

Although includible in gross income under section 61 of the Internal Revenue Code of 1954, amounts paid to members of Indian tribal councils for services performed by them as council members do not constitute "wages" for the purposes of the Federal Insurance Contributions Act, the Federal Unemployment Tax Act and the collection of income tax at source on wages.

Amounts paid to other salaried employees of such Indian councils and to employees of private tribal business enterprises constitute "wages" subject to the Federal employment taxes, including the withholding of income tax under section 3402 of the Internal Revenue Code of 1954.

Advice has been requested whether the salaries of members of Indian tribal councils are subject to Federal income tax and Federal employment taxes and whether the tribal councils are liable for the withholding and payment of such taxes.

The constitution and bylaws of the various Indian tribes provide that the members of the council are elected from among the full tribal membership; that their duties include representing the tribe in business 25 dealings with the United States Government and the public generally; that the council is a policy determining group; and that the members also have some duties to perform in legislative and executive capacities for the tribe. Their duties appear to be similar to the duties of a city council.

Section 61(a) of the Internal Revenue of 1954 defines the term "gross income" to include "income derived from any source whatever."

Exemption from the payment of Federal income tax may not be implied and, if exemption of Indians from the payment of such tax exists, it must derive plainly from the Federal tax statutes or from treaties or agreements with the Indian tribes concerned or some Act of Congress dealing with their affairs. See Revenue Ruling 54-456, C.B. 1954-2, 49. Accordingly, Indians are required to include in gross income all income they receive which has not been specifically exempted in some manner from Federal income tax.

There is no provision in the Federal income tax laws, which would exempt Indians, as such, from income taxation. Accordingly, unless income of an Indian derived from a particular source is otherwise exempt; such income will be subject to tax in his hands the same as it would be in the hands of any other taxpayer. Similarly, all remuneration received by an Indian for services performed as an employee for his employer which constitutes "wages," as that term is defined in the Federal employment tax statutes, is subject to the taxes imposed by such statutes.

Where a business enterprise of an Indian tribe is organized and operated by the tribe itself, such enterprise is considered a private tribal activity and services performed in its employ constitute employment. In this connection, see Revenue Ruling 56-110, Cumulative Bulletin 1956-1, 488.

A review of many court decisions and legislative enactments pertaining to Indian tribes indicates that the powers vested in any tribe or tribal council by existing law, within the meaning of section 16 of the Wheeler-Howard Act, 25 U.S.C. 476, precludes a conclusion that services performed by members of such councils in their capacities as council members constitute employment for Federal employment tax purposes. Accordingly, it is held that the amounts paid to members of tribal councils for services performed by them as council members do not constitute "wages" for purposes of the Federal Insurance Contributions Act, Federal Unemployment Tax Act and the collection of income tax at source on wages (chapters 21, 23 and 24, respectively, Subtitle C, Internal Revenue Code of 1954).

It is held further that services performed by other salaried employees of tribal councils and by employees of tribal business enterprises constitute employment and their wages are subject to the Federal employment taxes, including the withholding of income tax under section 3402 of the Code. The tribal councils are responsible for the withholding of taxes where applicable and for the payment of any taxes owing with respect to the wages paid to such employees

Revenue Ruling 63-136

SECTION 61 –Gross Income Defined
1963-2 Cumulative Bulletin 19; January 1, 1963

26 CFR 1.61-1: Gross income.

Benefit payments made to individuals undergoing training or retraining under either the Area Redevelopment Act or the Manpower Development and Training Act of 1962 are not includible in the gross incomes of the recipients.

Advice has been requested whether benefit payments received by individuals undergoing training or retraining under the Area Redevelopment Act, 75 Stat. 47-63, or the Manpower Development and Training Act of 1962, 76 Stat. 23-33, are includible in the gross incomes of the recipients.

The Area Redevelopment Act provides for certain types of Federal assistance to areas of substantial and persistent unemployment and underemployment, which have been designated redevelopment areas, for the purpose of aiding such areas in financing their redevelopment.

The purpose of the Manpower Development and Training Act of 1962 is to deal with the problems of unemployment resulting from technological developments and structural changes in the economy.

Both of these Acts authorize the Secretary of Labor to enter into agreements under which payments are made to the several states for the purpose of enabling them, as agents of the United States, to make weekly payments to individuals selected for training or retraining under one of the Acts. Payments made under either of the Acts are equal to the amount of the average weekly unemployment compensation payment payable for a week of total unemployment by the state making such payment. Both Acts also provide that no retraining payment may be made to any person for any week for which he has received, or is seeking, unemployment compensation under any Federal or state unemployment compensation law; however, these provisions do not prevent a person from receiving training or retraining benefits for any week for which it is later determined that he was not eligible to receive unemployment compensation.

The Manpower Development and Training Act of 1962 authorizes the payment of benefits to persons undergoing on-the-job training. However, the amount of any payment which would otherwise be made to such a person is reduced by an amount which bears the same ratio to the payment as the number of compensated hours per week bears to forty hours. That Act also authorizes

additional payments for transportation and subsistence in the case of persons whose training is provided in facilities which are not within commuting distance of their regular place of residence.

Revenue Ruling 55-652, C.B. 1955-2, 21, and I.T. 3230, C.B. 1938-2, 136, hold that unemployment compensation payments made by a state or Federal agency are not subject to Federal income tax in the hands of the recipients. A similar position has been taken with respect to other payments which were made in the interest of the general welfare. See Revenue Ruling 57-102, C.B. 1957-1, 26, which holds that benefit payments received by a blind person from the State of Pennsylvania constitute disbursements from a general welfare fund in the interest of the general public and are not includible in the gross income of the recipients. See also Revenue Ruling 131, C.B. 1953-2, 112, and I.T. 3447, C.B. 1941-1, 191.

Benefit payments made under the Area Redevelopment Act and the Manpower Development and Training Act of 1962 are intended to aid the recipients in their efforts to acquire new skills that will enable them to obtain better employment opportunities, and, as such, fall in the same category as other unemployment relief payments made for the promotion of the general welfare.

Accordingly, it is held that such payments are not includible in the gross incomes of the recipients.

Revenue Ruling 2000-6

SECTION 6041 – Information at Source
2001-1 Cumulative Bulletin 512; February 7, 2000

26 CFR 1.6041-2: Return of information as to payments to employees. (Also Sections 3121, 3401, 6051); (Also Section 1.6041-1.)

ISSUE

How do the information reporting requirements of §§ 6041(a) and 6051(a) of the Internal Revenue Code apply to election workers?

FACTS

Election workers are individuals who are generally employed to perform services for state and local governments (governments) at election booths in connection with national, state, or local elections. Governments typically pay election workers a set fee for each day of work. Election workers' wages are includible in gross income as compensation for services. Section 61(a)(1). An individual employed as an election worker may also perform services for the government in another capacity.

A state and the Social Security Administration may agree to extend social security coverage to services of employees of the state or its political subdivisions under § 218 of the Social Security Act (§ 218 agreement). A § 218 agreement may cover the services of election workers. If so, the § 218 agreement may specify the level of fees the election workers must receive to be entitled to coverage. Information about a state's § 218 agreement can be obtained from the State Social Security Administrator.

Situation 1: Government A pays V $ 200 in a calendar year for services as an election worker. A does not employ V in any other capacity. The services of A's election workers are not covered by a § 218 agreement. V is not covered by a retirement plan maintained by A.

Situation 2: Government B pays W $ 200 in a calendar year for services as an election worker. B does not employ W in any other capacity. The services of B's election workers are covered by a § 218 agreement if their remuneration is $ 100 or more in a calendar year. W is not covered by a retirement plan maintained by B.

Situation 3: Government C pays X $ 1,100 in calendar year 2000 for services as an election worker. C does not employ X in any other capacity. The services of C's election workers are not covered by a § 218 agreement. X is not covered by a retirement plan maintained by C.

Situation 4: Government D pays Y $ 200 in a calendar year for services as an election worker. D also employed Y in another capacity, in which Y earned wages of $ 300 that are subject to income tax withholding. The services of D's election workers are not covered by a § 218 agreement. Y is not covered by a retirement plan maintained by D.

Situation 5: Government E pays Z $ 200 in a calendar year for services as an election worker. E also employed Z in another capacity, in which Z earned wages of $ 500 that are subject to income tax withholding. The services of E's election workers are not covered by a § 218 agreement. Z is not covered by a retirement plan maintained by E.

LAW

Taxes under the Federal Insurance Contribution Act (FICA) apply to "wages" as defined in § 3121(a). That section provides that the term wages includes only remuneration for "employment." Section 3121(b)(7)(F)(iv) provides that the services of an election worker are not employment for FICA purposes if the worker's remuneration is less than $ 1,000. For calendar years beginning on or after January 1, 2000, the amount is indexed for inflation. The applicable amount for the year 2000 is $ 1,100. Because service performed by an election worker for calendar year 2000 for an amount less than $ 1,100 is excluded from employment for FICA purposes, that amount is not wages for FICA purposes unless covered under a § 218 agreement.

Similarly, section 3121(u)(2)(B)(ii)(V) provides that the services of an election worker are not employment for purposes of the Medicare tax portion of the FICA if the worker's remuneration is less than $ 1,000 in a calendar year. For calendar years beginning on or after January 1, 2000, the amount is indexed for inflation. The applicable amount for the year 2000 is $ 1,100. For services performed before January 1, 1995, the § 3121(u)(2)(B)(ii)(V) exclusion was for remuneration of less than $ 100. Rev. Rul. 88-36, 1988-1 C.B. 343, A2, provides that an election worker is subject to Medicare tax unless the remuneration paid to the worker in a calendar year is less than $ 100.

Section 3401(a) provides that, for purposes of income tax withholding, the term "wages" means all remuneration (other than fees paid to a public official) for services performed by an employee for an employer. Section 31.3401(a)-2(b)(2) of the Employment Tax Regulations states that amounts

paid to precinct workers for services performed at election booths are "in the nature of fees paid to public officials" and not subject to income tax withholding.

Sections 6041(a) and 6051(a) both impose a duty to file information reports of compensation paid to workers.

Section 6041(a) provides:

> All persons engaged in a trade or business and making payment in the course of such trade or business to another person, of rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable gains, profits, and income ... of $ 600 or more in any taxable year ... shall render a true and accurate return to the Secretary, under such regulations and in such form and manner and to such extent as may be prescribed by the Secretary, setting forth the amount of such gains, profits, and income, and the name and address of the recipient of such payment.

Under § 1.6041-1(b)(1) of the Income Tax Regulations, the term "all persons engaged in a trade or business," as used in § 6041(a), includes organizations the activities of which are not for the purpose of gain or profit.

The general rule stated in § 1.6041-1(a)(2) is that the required return is made on Forms 1096 and 1099, except that § 1.6041-1(a)(2)(ii) provides that compensation paid to an employee by an employer shall be reported on Forms W-3 and W-2 under the provisions of § 1.6041-2 (relating to return of information as to payments to employees).

Under § 1.6041-2(a)(1), payments of wages not subject to income tax withholding must be reported on Form W-2 if the total of those payments and the amount of the employee's wages subject to income tax withholding, if any, is $ 600 or more in a calendar year. For example, if a payment of $ 700 was made to an employee and $ 400 thereof represents wages subject to withholding under section 3402 and the remaining $ 300 represents compensation not subject to withholding, such wages and compensation must both be reported on Form W-2. If the employee has no wages subject to income tax withholding, the employer is required to file Form W-2 for that employee if payments to that employee equal $ 600 or more in a calendar year.

Section 1.6041-2(a)(1) provides that, at the election of the employer, components of amounts required to be reported on Form W-2 pursuant to this subparagraph may be reported on more than one Form W-2. Thus the

amounts paid to an individual for services as an election worker may be reported on a separate W-2 from amounts paid to the individual for service in another capacity, even though the amounts are aggregated to determine whether reporting applies.

Section 6051(a) imposes a reporting requirement on the following two categories of payors of remuneration:

> Every person required to deduct and withhold from an employee a tax under section 3101 [employee FICA tax] or 3402 [income tax withholding] ... or every employer engaged in a trade or business who pays remuneration for services performed by an employee... .

Section 6051(a) does not require reporting of compensation that is not subject to withholding of FICA tax or income tax.

Section 6051(c) provides that the Secretary may prescribe by regulations the reporting of additional items. No regulations requiring employers to furnish additional information have been published.

ANALYSIS

Compensation of an election worker is not subject to income tax withholding. Sections 3401(a) and 31.3401(a)-2(b)(2). If an election worker's compensation is less than $ 1,100 for calendar year 2000, it is generally not subject to FICA tax. Sections 3121(b)(7)(F)(iv) and 3121(u)(2)(B)(ii)(V). However, under a state's § 218 agreement, an election worker's compensation may be subject to both the old-age, survivors and disability insurance (OASDI) and the Medicare portions of the FICA tax at a level below $ 1,100 for calendar year 2000.

Section 6041(a) applies to payments of compensation that are not subject to withholding of FICA or income tax. If an election worker's compensation is not subject to withholding of FICA tax, the § 6041(a) reporting requirement applies to payments that aggregate $ 600 or more in any taxable year. Under § 1.6041-2(a)(1), compensation subject to income tax withholding is taken into account in determining whether the $ 600 reporting requirement applies.

Section 6051(a) requires reporting of compensation subject to either FICA tax or income tax withholding. No reporting is required by §§ 6051(a) and 31.6051-1(a) and (b) for items of income that are not subject to withholding of FICA tax or income tax. If an election worker's compensation is subject to withholding of FICA tax, reporting is required by § 6051(a), regardless of the amount of compensation.

HOLDINGS

The reporting requirements applicable to governments that employ election workers are as follows:

Situation 1: Neither FICA tax nor income tax withholding applies to the $ 200 paid to V. The reporting requirements of § 6041(a) apply. Because V earns fees that are less than $ 600, Government A is not required to issue Form W-2 to V.

Situation 2: FICA tax, but not income tax withholding, applies to the $ 200 paid to W because the fees exceed the $ 100 threshold in the § 218 agreement. Government B must follow the reporting requirements of § 6051(a), reporting on Form W-2 the fees of $ 200 and the FICA tax withheld.

Situation 3: FICA tax, but not income tax withholding, applies to the $ 1,100 paid to X for calendar year 2000. Government C must follow the reporting requirements of § 6051(a), reporting on Form W-2 the fees of $ 1,100 and the FICA tax withheld.

Situation 4: Neither FICA tax nor income tax withholding applies to the $ 200 paid to Y for services as an election worker, but the $ 300 payment is subject to income tax withholding. Government D must follow the reporting requirements of § 6051(a), reporting on Form W-2 the $ 300 payment and the income tax withheld. Section 6041(a) does not require reporting of the $ 200 payment because the total of the two payments is less than $ 600 for the calendar year.

Situation 5: Neither FICA tax nor income tax withholding applies to the $ 200 paid to Z for services as an election worker, but the $ 500 payment is subject to income tax withholding. Government E must follow the reporting requirements of §§ 6041(a) and 6051(a), reporting on Form W-2 both the $ 200 and the $ 500 payments and the amount of income tax withheld.

EFFECT ON OTHER REVENUE RULING(S)

This ruling modifies Rev. Rul. 88-36, A2, to reflect the increase in the amount of remuneration applicable for purposes of the Medicare tax exclusion under § 3121(u)(2)(B)(ii)(V), currently $ 1,100 for calendar year 2000.

Department of the Treasury
Internal Revenue Service
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