

ACKNOWLEDGED SIGNIFICANT ADVICE, MAY BE DISSEMINATED

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Collecting a Fee for the Issuance of Forms 1099 and W-2

This memorandum responds to your request for technical assistance on the issue of whether employers and payors may collect a fee for supplying to employees and payees:

(1) original Forms W-2 and Forms 1099; (2) corrected Forms W-2 and Forms 1099; and (3) reissued Forms W-2 and Forms 1099. For the reasons set forth below, we have concluded that the effect of various provisions of federal tax law should preclude payors from collecting a fee for supplying original and corrected Forms W-2 and 1099. However, payors may collect a fee for supplying duplicate copies of such forms.

Background:

To assist the Internal Revenue Service in ascertaining whether a taxpayer has reported has true income, the law requires persons engaged in a trade or business who make certain payments to others in the course of that trade or business to file information returns. For example, § 6041 provides that all persons who, in the course of a trade or business, make payments of rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable gains, profits, and income of \$600 or more in a calendar year, must report these payments. Returns of information must also be filed for other types of payments, including payments aggregating \$10 or more in a calendar year of dividends (§ 6042); patronage dividends (§ 6044); interest (§ 6049); and royalties (§ 6050N). The statements must be filed with the Service and generally must be reported on Forms 1099. See, e.g., § 1.6041-1(a)(2) of the Income Tax Regulations. Payors also are required to furnish a Form 1099 to each payee whose name appears in the return. See §§ 6041(d), 6042(c), 6044(e), 6049(c), 6050N(b).

Every person who is required to deduct and withhold from an employee a tax under § 3101 or 3402, and every employer engaged in a trade or business who pays remuneration for services

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performed by an employee, must furnish a Form W-2 to each such employee. Section 6051. The Form W-2 must show the total amount of wages paid, and the total amount deducted and withheld as tax. Each statement must be supplied to the employee generally on or before January 31 of the year succeeding the calendar year in which the remuneration was paid. Section 6051.

Law and Analysis:

As set forth above, every payor who is required to file an information return with the Service must also furnish a written statement to each payee. See e.g., §§ 6041(d), 6042(c), 6044(e), 6049(c), and 6050-N(b). Employers required to withhold income or social security tax from an employee, and employers engaged in a trade or business, must furnish to the employee a copy of a Form W-2. Section 6051(a). Thus, federal tax law requires payors to provide employees and other payees with originals of Forms 1099 and W-2. The statutory obligations apply without regard to whether the employees and other payees pay a fee for the statements.

In addition, an employer or payor who fails to furnish a statement to a person with respect to whom information is required generally is subject to certain civil and criminal penalties. For example, § 6722 imposes a \$50 penalty on an employer or payor for each failure to furnish a payee statement on or before the prescribed date. If one or more failures are due to intentional disregard of the requirement to furnish timely payee statements, the penalty imposed with respect to each such failure is \$100. Section 6722(c). These penalties also apply to failures to include all of the information required to be shown on a payee statement or the inclusion of incorrect information. Section 6722(b). Section 7204 provides that persons who willfully fail to furnish a statement in accordance with § 6051 shall, for each such offense, be fined not more than \$1,000, or imprisoned not more than 1 year, or both. Further, under 18 U.S.C. § 3571, the amount of the penalty under § 7204 may be increased to \$100,000 in the case of an individual and to \$200,000 in the case of an organization.

Taken together, the foregoing provisions of federal tax law effectively preclude payors from collecting fees for furnishing original and corrected Forms W-2 and 1099 to employees and other payees. We also note that Congress specifically prohibited the practice of payors imposing a separate charge for the filing of Forms 1099 in the one instance that Congress seemed to be aware of it. Before the enactment of § 6045(e)(3), real estate

reporting persons who prepared Forms 1099 for their customers

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generally imposed a separate charge for such forms, Section 6045(e)(3), However, makes this practice unlawful.

Payors and employees may also be prohibited from charging for information returns by laws outside of the Code. For example, state law may prohibit the practice since there would be no consideration given by the employer or payor who recoups from the employee or payee the cost of issuing a form. In addition, a payee may have an action for common law fraud against a payor who deceives him into believing that he is required to pay for an original or corrected Form W-2 or 1099. 37 C.J.S. Fraud § 2 (1943). Moreover, an employer who charges a low income employee for a Form W-2 may violate the minimum wage laws. Fair Labor Standards Act, 29 U.S.C. § 206 (1988).¹

Duplicate Forms W-2 and 1099 are sometimes issued to employees and payees who lost or destroyed the original forms. these payors, however, have timely furnished correct Forms W-2 and 1099, and have met the requirements of federal tax law. Furthermore, these payors would not incur any federal tax penalty by refusing to comply with an employee's or other payee's request for another copy of a Form W-2 or 1099. Thus, payors may collect a fee for furnishing payees additional copies of Forms W-2 or 1099.

Conclusion:

There is no provisions in the Code (other than § 6045(e)) that explicitly prohibits an employer or payor from charging a separate fee for timely furnishing Forms 1099 or W-2. A payor's statutory obligation to timely furnish such correct forms to payees, however, should effectively preclude the payor from collecting a fee for such forms. Employers or payors who fail to timely furnish employees and payors with the appropriate form containing correct information may be subject to civil and criminal penalties. Imposing a charge for these forms, moreover, may violate certain laws outside of the Internal Revenue Code.

In contrast, payors who have timely furnished correct Forms W-2 and 1099 to employees and other payees have satisfied their

¹ We express no opinion as to the viability of state law causes of action and those arising under Titles of the United States Code other than Title 26. We mention these non-Code causes of action only in the interests of providing thorough advice.

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statutory obligations under the Code. Thus, they may collect a fee for furnishing additional copies of such forms.

If you have any questions concerning this memorandum, please contact Elizabeth K. Wickstrom at (202) 622-4920.

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