



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

OFFICE OF THE CHIEF COUNSEL

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Dear _____ :

This letter responds to your request for general information dated June 20, 2012, concerning an employee's request for increased withholding on supplemental wages.

You have requested general information about the following issues:

(1) Can an employee request that an additional amount be withheld on Form W-4, Employee's Withholding Allowance Certificate, on supplemental wages paid separately from regular wages?

(2) Can an employee request either an additional amount of withholding or a specific percentage of income tax be withheld on a payment of supplemental wages (in excess of 25 or 35 percent) if the employer is using the flat 25 percent or 35 percent withholding rate on supplemental wages?

(3) Does a Form W-4 submitted by an employee apply to both withholding on regular wages and withholding on supplemental wages?

(4) If an employee provides a Form W-4 requesting additional withholding specifically for the separately paid bonus payment, should the employer apply the Form W-4 to the bonus payment?

(5) When Publication 15 (Circular E), Employer's Tax Guide, states that no other percentage is allowed for optional flat rate withholding and mandatory flat rate withholding, does that mean that only lower rates than the prescribed rates are not permitted?.

There are three procedures used to determine the amount of withholding on supplemental wages: (1) Mandatory flat rate withholding; (2) optional flat rate withholding; and (3) the aggregate procedure. As explained below, with respect to mandatory flat rate withholding, the prescribed applicable rate must be applied, no deviation from that rate is permitted, and employee requests for additional withholding on Form W-4 or otherwise have no effect. If mandatory flat rate withholding does not apply and an employer elects to use optional flat rate withholding rather than the aggregate procedure, the prescribed optional flat rate must be applied, no deviation from that rate is permitted, and employee requests for additional withholding have no effect. Finally, with respect to withholding under the aggregate procedure, an employee's request for increased withholding on a Form W-4 could increase the amount required to be withheld on a supplemental wage payment provided the Form W-4 is given effect by the employer consistent with the rules for the effective period of withholding exemption certificates in the regulations.

Mandatory Flat Rate Withholding

With respect to mandatory flat rate withholding, the regulations provide that only one rate can be applied with respect to mandatory flat rate withholding. Section 31.3402(g)-1(a)(2) of the regulations provides that if a supplemental wage payment, when added to all supplemental wage payments made by one employer (as defined in the regulations) to an employee during the calendar year exceeds \$1,000,000, the rate used in determining the amount of withholding on the excess (including any excess which is a portion of a supplemental wage payment) is equal to the highest rate of tax applicable under section 1 for such taxable years beginning in such calendar year. The regulations provide that if mandatory flat rate withholding applies, withholding must be at the rate prescribed, which is 35 percent for 2012. Under current law, the mandatory flat rate percentage is scheduled to change for wages paid on or after January 1, 2013. Section 31.3402(g)-1(a)(2) provides that mandatory flat rate withholding is applied without regard to whether income tax has been withheld from the employee's regular wages, without allowance for the number of withholding allowances claimed by the employee on Form W-4, without regard to whether the employee has claimed exempt status on Form W-4, without regard to whether the employee has requested additional withholding on Form W-4, and without regard to the withholding method used by the employer. Thus, no increase in withholding under the mandatory flat rate withholding on the supplemental wages is permitted based on an employee's request for withholding on Form W-4 or otherwise.

Optional Flat Rate Withholding

Section 31.3402(g)-1(a)(7) of the regulations provides that an employer may use optional flat rate withholding to determine the withholding required with respect to a payment of supplemental wages if three conditions are met: (1) Mandatory flat rate withholding does not apply to the payment or portion of the payment; (2) The supplemental wages are either not paid concurrently or are separately stated on the

payroll records of the employer; and (3) Income tax has been withheld from regular wages of the employee during the calendar year of the payment or the preceding calendar year.

If the employer is using the optional flat rate withholding method, the employer must withhold at the optional flat rate and cannot take into account requests by the employee that the rate be increased or lowered. Only one rate applies for purposes of optional flat rate withholding on supplemental wages. The supplemental wage withholding regulations provide, with respect to optional flat rate withholding, that the determination of the tax to be withheld is made without reference to any payment of regular wages, without allowance for the number of withholding allowances claimed by the employee on Form W-4, and without regard to whether the employee has requested additional withholding on Form W-4. See section 31.3402(g)-1(a)(7)(ii) of the Employment Tax Regulations. The regulations in effect provide that the optional flat rate for supplemental wages paid in 2012 is 25 percent. See section 31.3402(g)-1(a)(7)(iii)(F) of the regulations. Under current law, the optional flat rate is scheduled to change for wages paid on or after January 1, 2013.

Aggregate Procedure

The aggregate procedure can be applied to a supplemental wage payment by an employer to determine the withholding required, provided mandatory flat rate withholding is not applicable to the payment or portion of the payment. Under the aggregate procedure the supplemental wages are added to the regular wages for a payroll period to determine how much income tax should be withheld.

A Form W-4 submitted by the employee applies to both regular and supplemental wages. Section 31.3402(f)(4)-1 of the regulations provides that, except as provided in section 31.3402(f)(4)-1(b) and 31.3402(f)(4)-1(c), a withholding exemption certificate that takes effect under section 3402(f) of the Code shall continue in effect with respect to the employee until another withholding exemption certificate takes effect under section 3402(f). Section 3402(f)(3) provides when a withholding exemption certificate takes effect.

Section 3402(f)(3)(A) provides that a withholding exemption certificate furnished the employer in cases in which no previous such certificate is in effect shall take effect as of the beginning of the first payroll period ending, or the first payment of wages made without regard to a payroll period, on or after the date on which such certificate is so furnished.

Generally, with the exception of withholding exemption certificates submitted to take effect for the next calendar year, section 3402(f)(3)(B) provides that a withholding exemption certificate furnished to the employer in cases in which a previous such certificate is in effect shall take effect as of the beginning of the first payroll period ending (or the first payment of wages made without regard to a payroll period) on or

after the 30th day after the day on which such certificate is so furnished. However, at the election of the employer, such a certificate may be made effective beginning with any payment of wages made on or after the day on which the certificate is so furnished and before the 30th day.

Thus, the employer has discretion to make withholding exemption certificates effective immediately after receiving the certificate from the employee. However, the employee cannot restrict the employer's application of a Form W-4 to one payment, except in the unusual factual circumstances in which the rules for the effective period for withholding exemption certificates would mean that it could be the only Form W-4 applicable to that one payment. Thus, if an employee submitted a request for additional withholding on Form W-4 immediately prior to the payment of a supplemental wage payment, the employer is permitted, but not required under section 3402(f)(3)(B), to put the Form W-4 into effect with respect to the payment of supplemental wages. However, after the Form W-4 becomes effective, the Form W-4 would remain in effect and apply to other wage payments, including regular wage payments, until replaced by another valid Form W-4. The employee could submit another Form W-4 immediately after receiving the supplemental wage payment, but under section 3402(f)(3)(B), the employer is only required to make the new Form W-4 effective as of the beginning of the first payroll period ending (or the first payment of wages made without regard to a payroll period) on or after the 30th day after the day on which the Form W-4 was furnished,. However, the employer could elect to put the Form W-4 into effect beginning with any payment of wages made on or after the day the certificate is furnished and before the 30th day after the receipt of the Form W-4.

This letter has called your attention to certain general principles of the law. It is intended for informational purposes only and does not constitute a ruling. See Rev. Proc. 2012-1, §2.04, 2012-1 IRB 7 (Jan. 3, 2012). If you have any additional questions, please contact our office at .

Sincerely,

Lynne Camillo
Branch Chief, Employment Tax Branch 2 (Exempt
Organizations/Employment Tax/Government
Entities)
(Tax Exempt & Government Entities)