

IRS sets out rules for reporting sick pay paid by third parties

Notice 2015-6, 2015-05 IRB

In a Notice, IRS has provided that Form 8922 (Third-Party Sick Pay Recap) must be used by third parties and employers to report total payments of certain sick pay paid by third parties on or after Jan. 1, 2014. In particular, Form 8922 must be used for filing "third-party sick pay recaps" to reconcile the reporting of sick pay paid by a third party on behalf of employers to employees where the liability for Federal Insurance Contributions Act (FICA) taxes on the sick pay is split between the employer and the third party under applicable regs.

Background. Sick pay is any amount paid to an employee for any period during which the employee is temporarily absent from work because of injury, sickness, or disability. Sick pay doesn't include disability retirement payments or payments for medical and hospitalization expenses.

Third-party sick pay is sick pay that is paid to an employee by some person (the third party) other than the employer for whom services are normally performed. [Code Sec. 3121\(a\)](#) and [Code Sec. 3306\(b\)](#) provide that any third party that pays sick pay that is included in wages is treated as the employer for purposes of FICA and federal unemployment tax (FUTA), with respect to such wages, except as provided in regs.

A third-party payer of sick pay can be either an agent of the employer or a third party that is not an agent of the employer. [Reg. § 32.1](#) of the Temporary Employment Tax Regulations under the Act of Dec. 29, 1981 (P.L. 97-123) ("temporary regs," dealing with Social Security taxes with respect to payments on account of sickness or accident disability) sets out rules concerning liability for FICA taxes, income tax withholding, and reporting with respect to third-party sick pay. These rules are still in effect.

The requirements for federal income tax withholding on sick pay and the applicable method for determining the amount of withholding depend on whether the sick pay is paid by the employer, by an agent of the employer, or by a third party that isn't the employer's agent. [Reg. § 31.3401\(a\)-1\(b\)\(8\)\(i\)](#) of the Employment Tax Regulations provide the rules for determining

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whether a third party is an agent of the employer. Sick pay paid by the employer to an employee is wages subject to income tax withholding to the extent the sick pay is includible in the gross income of the employee. Sick pay paid by an agent of the employer is also wages subject to income tax withholding to the extent includible in gross income. Sick pay that is paid by a third party that isn't an agent of the employer (i.e., a third party with insurance risk with respect to the sick pay benefits provided) isn't wages under **Code Sec. 3401(a)** and so isn't subject to mandatory income tax withholding (but an employee may request such withholding).

The Social Security Administration (SSA) and IRS match amounts reported on Forms 941 and on the aggregate of Forms W-2 filed by taxpayers to verify that employers' and employees' wage records are correct and appropriate FICA tax and income tax withholding are paid. If liability for the employer FICA tax on sick pay is transferred from the third party to the employer, the sick pay wages and liability for the employer FICA tax are reported on the Form 941 of the employer and on the Form 941 of the third party. However, the sick pay wages are reported only on Forms W-2 filed by one party. Because of this split reporting, the Forms 941 and Forms W-2 of the third party may have differing wage totals and taxes, or the Forms 941 and the Forms W-2 of the employer may have differing wage totals and taxes. Form 8922 is designed to reconcile differences between wages and taxes reported on Form 941 and wages and taxes reported on Forms W-2 arising from the payment of third-party sick pay in these circumstances.

New guidance. **Notice 2015-6** provides that Form 8922 must be used by third parties and employers to report total payments of certain sick pay paid by third parties on or after Jan. 1, 2014. This includes using Form 8922 for filing "third-party sick pay recaps" to reconcile the reporting of sick pay paid by a third party on behalf of employers to employees in situations in which the liability for FICA taxes on the sick pay is split between the employer and the third party under applicable regs.

Forms 8922 must be filed instead of the Form W-2 (Wage and Tax Statement) and Form W-3 (Wage and Tax Statements) third-party sick pay recaps, which were filed with the SSA for third-party sick pay paid before Jan. 1, 2014. Employers and third parties will file the Form 8922 with IRS rather than the SSA, and will no longer file third-party sick pay recaps with SSA for payments made on or after Jan. 1, 2014.

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If a taxpayer (either a third party or an employer) was formerly obligated to file with SSA third-party sick pay recaps on Forms W-2 and W-3 for sick pay paid in 2013 and prior years, and the sick pay is paid under the same factual circumstances, that same taxpayer instead will be required to file Form 8922 with IRS for sick pay paid in 2014 and later years.

This modified procedure only affects the filing of the third-party sick pay recaps and doesn't otherwise affect the current rules for (1) furnishing statements of the third-party sick pay to individual employees on Form W-2; (2) filing with SSA copies of the Forms W-2 together with Form W-3, that are not third-party sick pay recaps; and (3) reporting such payments to the IRS on Form 941, Employer's QUARTERLY Federal Tax Return (or on Form 944, Employer's ANNUAL Federal Tax Return, if applicable). The change to using Form 8922 also has no effect on liability for FICA tax, income tax withholding, FUTA tax (collectively, "employment taxes"), or other taxes.

Notice 2015-6 sets out rules on the responsibility for the withholding and payment of employment taxes and for reporting employment taxes and wages with respect to third-party sick pay.

Beginning with sick pay wages paid on or after Jan. 1, 2014, an employer or third party is required to file Form 8922 after the end of the calendar year if the employer is including the employer FICA tax on sick pay wages on the employer's Form 941 but the third party (whether as an agent that has agreed to be responsible for the reporting or not as an agent) is including the employee FICA tax on the same sick pay wages on the third party's Form 941 (split liability). Whether the employer or the third party is required to file the Form 8922 depends on which entity is filing Form W-2 with respect to the sick pay. If the sick pay is reported on Forms W-2 under the name and EIN of the third party (whether as an agent that has agreed to be responsible for such reporting or not as an agent) in this split liability situation, Form 8922 must be filed by the employer. If the sick pay is reported on Forms W-2 under the name and EIN of the employer in this split liability situation, the third party (whether as an agent or not as an agent) must file Form 8922.

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Thus, the requirement to file Form 8922 can arise in three situations:

- (1) A third party is required to file Form 8922 when the third party is liable for the employee FICA tax (whether or not the third party is also liable for income tax withholding) but the liability for the employer FICA tax and for reporting the sick pay on Forms W-2 has been transferred to the employer;
- (2) An employer is required to file Form 8922 when the third party is liable for the employee FICA tax and income tax withholding, the liability for the employer FICA tax has been transferred to the employer, and the employer and third party have entered into an agreement to have the third party act as the employer's agent for reporting on Forms W-2; and
- (3) A third party that is an agent under [Reg. § 32.1\(e\)](#) is required to file Form 8922 when the agency agreement provides that (a) the agent will withhold and pay employee FICA tax and report the taxes on its Form 941, and (b) the employer will pay the employer FICA tax, report the employer FICA tax on its Form 941, and report the employee's wages on Forms W-2.

When there is no split reporting of sick pay on Forms 941, there is no obligation to file Form 8922. Except as provided in (3) above, there is generally no obligation to file Form 8922 for sick pay paid by an agent. There is also no obligation to file Form 8922 when the third party paying the sick pay isn't an agent and doesn't transfer liability for the FICA employer tax on the sick pay to the employer.

To ease the transition from Form W-2 and Form W-3 third party sick pay recaps to use of Form 8922, if the third party is filing Form 8922 (that is, the "Insurer/Agent" box on Form 8922 is checked), the third party may, but is not required to, provide the other party's (that is, the employer's) name and Employer Identification Number (EIN). If the third party is providing the other party's (that is, the employer's) name and EIN, it must file a separate Form 8922 with respect to the sick pay paid to employees of that employer.



Thus, a third party has three choices in filing Form 8922:

. . . (a) It may submit one Form 8922 that completes all information on the form other than the boxes for other party's name and other party's EIN;

. . . (b) It may choose to provide the other party's name and the other party's EIN with respect to all third-party sick pay that it pays for all employers. (If it makes this choice, it files a separate Form 8922 for the sick pay wages and taxes related to each employer.);

. . . (c) It may choose to provide the other party's name and other party's EIN for the third-party sick pay that it pays for some but not all employers. (If it makes this choice, it files a separate Form 8922 for the sick pay wages and taxes related to each employer for which it is supplying the name and EIN, and it files one Form 8922 for the wages and taxes related to the employers for which it is not supplying the name and EIN.)

Notice 2015-6 supersedes **Notice 91-26, 1991-2 CB 619** .

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