What if a Contractor or Vendor Refuses to Provide a W-9 for a 1099?

February 1, 2016

By: Kelly M. Politte

This article discusses what a business should do if a contractor, vendor, or other person will not provide the information necessary for the business to prepare and file a 1099.

If a business (including sole proprietors) pays a contractor, vendor, or another person (collectively referred to as a "payee") $600 or more for services, goods, or rent over the course of a tax year, the business is required to report these payments to the IRS on an information return called Form 1099. *See, e.g.*, I.R.C. § 6041. The 1099 must state the payee's name, address, and tax identification number (TIN), as well as the total amount paid to the payee during the year, in order to be valid. *See* I.R.C. §§ 6041 and 6109(A)(3); Treas. Reg. §§ 1.6041-6 and 301.6109-1.

Form W-9 and TINs

IRS Form W-9 is typically used by a business to request a payee's name, address and taxpayer identification number (TIN) so the business can issue a 1099 to the payee and to the IRS. Filling out a W-9 form isn't very difficult as it really only requires a few pieces of basic information.

A business relies on the W-9 form as a source for a payee's personal information, the most important of which is the taxpayer Identification number (TIN). In the case of individuals, a TIN is actually the person's social security number (SSN). In the case of businesses, a TIN is the business's employer identification number (EIN).

There is no reason for a payee not to supply a TIN, unless the payee qualifies for an exemption (not likely), or is trying to avoid reporting the income or payments received to the IRS. Some payees refuse to provide this information to the business, however.

Payor's Obligations

The business that is required to issue and file Form 1099 is responsible for requesting that its contractors, vendors, or other payees fill out and return Form W-9. Accordingly, a business who pays a person (including other businesses) more than $600 per year should have the payee fill out and sign Form W-9 at the time that the independent contractor, vendor, or other relationship commences, and prior to paying any sums to the person. Indeed, filling out Form W-9 should be a provision of the contract or agreement which provides for the work, services, or goods, and payment therefore, although failure to include this requirement in the

contract or agreement does excuse a contractor, vendor, or other payee from providing the required information to the business on request.

Once a business obtains a filled out W-9 from a contractor, vendor, or other payee, the business must keep the form, or a copy thereof, in its records, and use the information on the form to prepare its 1099. Form W-9 is not filed with the IRS.

The information provided by a payee to a business on Form W-9 must be protected by the business. A business is not allowed to misuse or disclose the information provided to it by a worker, contractor, vendor, landlord, or other person, or the business may be subject to civil and/or criminal penalties.

The business that does not obtain a taxpayer identification number from a payee or properly and completely fill out its 1099 information returns to include the payee's information, including taxpayer identification number, or timely issue and file its 1099 information returns, may also be subject to penalties. There are exceptions to this, however. For instance, if a contractor, vendor, or other payee refuses to provide the correct or complete information to the requesting business in order for the business to properly issue and file its information returns, this may serve to mitigate the imposition of any penalties on the business.

Finally, a business is required to timely issue and file any required information returns. A contractor, vendor, or other payee's failure to provide a taxpayer identification number does not excuse the business from timely meeting its filing requirements. (See below for discussion of what to do if a payee neglects or refuses to provide information required to be shown on a 1099 information return.)

Payee's Obligations

A payee who receives a proper request from a business (including sole proprietors) to fill out a W-9 is required to fill out the form and return it to the business. The requirement is contained in section 6109 of the Internal Revenue Code and accompanying Treasury Regulations. *See* I.R.C. § 6109(a)(2), (3); *see also* Treas. Reg. § 301.6109-1(b)(1) ("A U.S. person whose number must be included on a document filed by another person must give the taxpayer identifying number so required to the other person on request."). Indeed, the general instructions on page one of the current Form W-9 indicate that it is mandatory to provide a taxpayer identification number to a business who properly requests it:

"An individual or entity (Form W-9 requester) who is required to file an information return with the IRS ***must obtain your correct taxpayer identification number (TIN)*** *which may be your social security number (SSN), individual taxpayer identification number (ITIN), adoption taxpayer identification number (ATIN), or employer identification number (EIN), to report on an information return the amount paid to you, or other amount reportable on an information return." (emphasis added)*

Backup withholding

Payments which are reported on an information return such as a 1099 tend not to be subject to federal income tax withholding. But a person (including a business) may be subject to backup withholding, at the rate of 28 percent, if the person neglects or refuses to provide an accurate and valid TIN when properly requested to do so by a business.

What if a payee provides an incorrect TIN?

When a business files a Form 1099 with the IRS, the IRS uses its TIN matching program to verify that the name and TIN on the Form 1099 information return match and are correct.

If the TIN is incorrect, the IRS will notify the business by sending the business a CP2100 or a CP2100A Notice and a listing of incorrect name(s)/TIN(s) reported on the 1099 information return(s) filed by the business. The CP2100 or CP2100A Notice from the IRS will state the requirement that the business begin backup withholding, at the rate of 28 percent, from future payments to the payee who supplied the incorrect TIN.

Generally the business must begin backup withholding on all reportable payments to the payee within 30 days of receiving the notice, although the business should carefully review the notice for specific requirements.

The notice to the business will also state the requirement that the business send a "B" Notice, along with Form W-9, to the payee within 15 business days after the business receives a CP2100 or CP2100A Notice.

If the payee does not correct his TIN, the business may be required to send additional notices to the payee.

What if a payee refuses or neglects to provide a TIN?

If a payee refuses or neglects to provide a TIN when properly requested by a business, the business should immediately begin backup withholding, at the rate of 28 percent, on any reportable payments made to the payee (and remit this amount to the IRS).

The business should also make up to three solicitations to the payee for the payee's TIN, in order to avoid a penalty for failing to include a TIN on the Form 1099 information return filed by the business.

Finally, if a contractor, vendor, or other payee refuses or fails to provide his taxpayer identification number, the business should still fill out and timely file its 1099 information return(s) with a notation that the payee failed or refused to provide his taxpayer identification number. Failure to file Form 1099 based on a person's refusal or failure to provide his taxpayer identification number does not excuse the business from timely filing all required information returns.

Penalties

Both the business and the contractor, vendor, or other payee may be subject to penalties for their respective failures when it comes to information returns and providing the required information.

Payor Penalties

A business may be penalized, both civilly and criminally, for its failures with respect to its information return obligations. The following penalties are just a few examples of penalties a business may face:

- ***Penalties for misuse of TINs:*** If a business misuses or improperly discloses a payee's TIN or other information proved on a W-9 in violation of federal law, the business may be subject to civil and criminal penalties.
- ***Penalty for omitting information on an information return:*** A business is required to include a payee's name, address, and TIN on any 1099 information returns filed with respect to the payee. If the business fails to include the required information on the filed 1099(s), the business may be subject to penalties for such failures. In order to avoid a penalty for filing a 1099 information return that omits the payee's TIN, a business must generally make multiple attempts to solicit a TIN from the payee. The IRS prescribes certain rules and requirements for making the solicitations. For instance, generally, a business must make a first annual solicitation for the TIN (generally by December 31 of the year in

which the account is opened) and if a TIN is still not received make a second annual solicitation by December 31 of the following year. Other solicitations may be required.

- ***Other filing penalties:*** A payee's refusal to provide a TIN or other information to a business does not excuse the business from timely meeting its filing requirements with respect to information returns that must be filed. If a business is required to file a 1099 information return and fails to do so, or files late, the business may be subject to penalties for such failures.

Payee Penalties

A payee may face multiple civil and/or criminal penalties for failing to provide accurate information, including the payee's TIN, to a business that properly requests the same. The following are some of the penalties a payee may face:

- ***Penalty for failure to furnish a TIN:*** If a payee fails to furnish a correct TIN to a requester when it is properly requested, the payee may be subject to a penalty of $50 for each such failure.
- ***Civil penalty for false information with respect to withholding:*** If a payee makes a false statement with no reasonable basis that results in no backup withholding, the payee may be subject to a $500 penalty.
- ***Criminal penalty for falsifying information:*** Willfully falsifying certifications or affirmations may subject a payee to criminal penalties including fines and/or imprisonment.

When To Seek Help

The Internal Revenue Code and IRS Regulations concerning information return reporting requirements are complex. The many nuances, penalties, and other rules can be confusing even to the savviest person, and their application often varies based on a particular set of facts and circumstances.

Because each situation is unique and has its own facts and circumstances, we recommend you contact a tax attorney to discuss and obtain advice as to your particular situation. Whether you are a business, a contractor, a vendor, or other person, the tax attorneys at Hall Estill are here to help.

If you are unsure about your filing and/or reporting requirements, are facing penalties on account of any of the failures mentioned above, or have any other question or concern, we can help.

Attorneys

- Kelly M. Politte