



NATIONAL RESOURCE CENTER *for*  
PARTICIPANT-DIRECTED SERVICES

# **Notice 2014-7 and Notice 2015-15: What Your Organization Needs to Know**

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# Today's Agenda

- ❑ Analyze new IRS Q&A on Notice 2014-7 and how this guidance applies to F/EA operations
- ❑ Gain familiarity with IRS Notice 2015-15, a new proposed revenue procedure
  - ❑ Would require agents to obtain written authorization from employees as a condition of refunding overcollected FICA
  - ❑ IRS is seeking feedback from stakeholders
  - ❑ NRCPPDS will submit comments in collaboration with members
- ❑ Time for questions

# Notice 2014-7 Basics

- ❑ Announced that payments received by individual care providers who live in the same home as care recipients are now considered “difficulty of care” payments under Section 131 of the Internal Revenue Code
  - ❑ Notice’s language is specific to Medicaid waiver programs, but could apply to similar Medicaid programs operating under authorities other than 1915(c)
  - ❑ Notice doesn’t apply to private pay or Veterans’ programs
  - ❑ We’ll discuss this more later

# Notice 2014-7 Basics

- ❑ Difficulty of care (DOC) payments defined in the Internal Revenue Code as “compensation to a foster care provider for the additional care required because the qualified foster individual has a physical, mental, or emotional handicap”
- ❑ In the past, only foster care providers could receive DOC payments
- ❑ Notice’s purpose is to standardize federal tax treatment of Medicaid HCBS providers who perform similar duties with the same goal—to prevent institutionalization

# Notice 2014-7 Impact

- ❑ DOC payments are excludable from federal income
  - ❑ Workers can't choose to classify DOC payments as regular income – payments cannot be included in federal income for any reason
- ❑ Therefore **should not** have federal income tax withheld
- ❑ They do **NOT** affect FICA/FUTA exemption status
  - ❑ FICA and FUTA must still be paid unless an employee is exempt due to an eligible family relationship with the consumer/representative employer or other reason
- ❑ Cannot be considered income for purposes of determining worker's Medicaid/ACA tax credit eligibility
- ❑ Some states have chosen to follow Notice 2014-7 for state income tax purposes

# Difficulty of Care Payment Eligibility

- ❑ Eligible workers must live with the participant and cannot have a separate home where they reside, even if only part-time
- ❑ IRS expects eligible workers will “perform routines of private life” (e.g., share meals & celebrate holidays) in the participant’s residence, not elsewhere
- ❑ Do **NOT** use DOL definition of “live-in worker” to determine who is eligible for difficulty of care payments
  - ❑ Standards are very different
  - ❑ IRS’s standards are narrower

# Difficulty of Care Payment Eligibility

- ❑ Worker's family relationship to participant is not a determining factor as to whether worker is receiving DOC payments or not
- ❑ Multiple caregivers living in the same house with a participant can each receive DOC payments (e.g., parents providing care for a child)
- ❑ Eligibility hinges on whether the participant and worker live together – it doesn't matter who owns or rents the property
- ❑ Not all of worker's care must occur in the home for payments to be considered DOC
  - ❑ Transportation, shopping, attending doctor appointments, and attending community events are allowable

# Claiming Eligibility

- ❑ Employees who receive DOC payments can submit a statement to the F/EA certifying their status in order to stop federal income tax withholding
  - ❑ Can also handle it on their individual tax return
  - ❑ In that case, employee would receive refund for withheld FIT
- ❑ IRS will ask the worker for proof of address after his/her individual tax return is filed
  - ❑ Driver's license or other government-issued ID
  - ❑ Medical bill
  - ❑ Utility bill
  - ❑ Bank statement
  - ❑ Document from F/EA or case management agency



# Sample Certification Statement

Under penalties of perjury, I declare that I am an individual care provider receiving payments under a state Medicaid Home and Community-Based Services waiver program for care I provide to (Participant's Name) under the care recipient's plan of care.

Signed:

Date:

# Claiming Eligibility

- ❑ Agent is not responsible for verifying accuracy of worker's statement
  - ❑ Must accept statement unless you already have knowledge the statement is untrue
- ❑ Handle these certifications as you would handle an employee's Form W-4 – in general, take their word for it
- ❑ F/EA shouldn't act as the “payroll police”
- ❑ Do not preemptively stop withholding; stop withholding only when you receive employee statement

# Payroll Processing for Exempt Employees

- ❑ If you receive a statement from an employee stating that he/she receives difficulty of care payments, you should stop withholding federal income tax immediately
- ❑ Notify employees that if their living situation changes for any reason, they must report the change to the F/EA or face a tax bill

# Payroll Processing for Exempt Employees

- ❑ If employee has certified that he/she receives DOC payments, **disregard employee's Form W-4** for that employment relationship because Form W-4 only handles withholding from federal income. DOC payments are excludable from federal income.
  - ❑ No need to obtain a new Form W-4 marked “exempt”
  - ❑ If employee's living arrangement changes, withhold at single, zero until Form W-4 can be obtained
- ❑ If Agency with Choice provider bound by the Affordable Care Act, use Federal Poverty Level safe harbor to determine affordability for full-time employees receiving DOC payments

# Example Scenario – Losing Eligibility

- ❑ Emily lives full-time with parent, to whom she provides care
- ❑ She submits a certified statement to the F/EA, who ceases withholding federal income tax
- ❑ Emily gets married and begins living in spouse's residence on weekends
- ❑ Payments Emily receives are no longer DOC payments
  - ❑ Failure to notify F/EA of this change will result in a tax bill for the employee

# Best Practices for Notice 2014-7 Compliance

- ❑ IRS recently confirmed no complete formal process yet
- ❑ However, they advised the following:
  - ❑ Stop federal income tax withholding when you receive a statement from the employee
  - ❑ If the employee wishes to refund past federal income tax withholding, they can handle it on their individual return OR request Form W-2c
  - ❑ If an employee requests Form W-2c from the agent, the agent should comply\*
  - ❑ Issuing Forms W-2c will require filing Form 941-X with Schedule R for each affected quarter

# Best Practices for Notice 2014-7 Compliance

- ❑ If you receive a statement from an employee but the employee was living in an eligible arrangement prior to your receiving the statement, you can refund FIT for the YTD amount if the employee asks you to do so
  - ❑ This is a courtesy gesture by the agent
- ❑ Even if this amount is not refunded, the employee will be able to exclude the amount from gross income and obtain a refund on their individual tax return

# What Should I Do?

- ❑ Agents should stop federal income tax withholding when they receive statements from employees
- ❑ For past payments, agents are advised to consider the tradeoffs between issuing new Forms W-2c to employees and not doing so
  - ❑ IRS confirmed that as of right now, no penalties for failure to issue Forms W-2c to employees affected by Notice 2014-7
- ❑ Expected procedures will likely grow more formalized over time



# Program Eligibility

- ❑ If your Medicaid program operates under an authority other than 1915(c), difficulty of care payments may come into play
  - ❑ Notice aimed at Medicaid-funded caregivers living with care recipients and providing nonmedical services, such as personal care
  - ❑ Generally, Medicaid self direction programs should meet IRS requirements
- ❑ If you have remaining questions about your program's eligibility, contact Victoria Driscoll at IRS Office of Chief Counsel
  - ❑ Contact her at (202) 317-4718

# State Issues

- ❑ Some states have chosen to follow Notice 2014-7 for state income tax withholding purposes
  - ❑ California (historically followed Section 131 of the Internal Revenue Code for state income tax purposes, but not yet made announcement on Notice 2014-7 and its expanded scope)
  - ❑ Kentucky (no formal announcement, but DOR officials in phone conversation have stated they will follow it)
  - ❑ Minnesota (officially announced)
- ❑ Contact your state for guidance if none is available
  - ❑ No formal announcement does not necessarily mean your state isn't following the Notice

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# Questions?

# Notice 2015-15

- ❑ Proposed Revenue Procedure on FICA refunding
  - ❑ Would require that employers or agents obtain written authorization from employees OR repay/reimburse each employee's share before refunding overcollected FICA
  - ❑ Could impact year-end processes for Fiscal/Employer Agents seeking refunds on behalf of employees who did not reach the annual FICA wage threshold (currently \$1,900)
- ❑ IRS is seeking comments through May 31, 2015
  - ❑ NRCPPDS will submit comments in collaboration with membership

# Notice 2015-15: Purpose

- ❑ Seeks to streamline FICA refunding process and protect employee interests
  - ❑ Agents will not receive refunds of employer shares of overpaid FICA without either:
    - Repaying/reimbursing employee shares, or
    - Securing employee's consent to claim refund of employee share
- ❑ Employees and employers are frequently seeking refunds for the same overcollected FICA
  - ❑ Causes problems at IRS
  - ❑ IRS wants to make sure employers & agents aren't seeking refunds for employee FICA without employees' knowledge

# Notice 2015-15: Key Quotes

- ❑ “No refund for the employer share of the overpaid FICA taxes will be allowed unless the employer has first repaid or reimbursed its employee **or has secured the employee’s consent to the allowance of the claim for refund** and includes a claim for the refund of such employee tax.”
- ❑ Agents must certify that the agent “has repaid or reimbursed the employee share of the overpayment of FICA tax to the employee OR has secured the written consent of the employee to allowance of the refund or credit.”

# Notice 2015-15: Prior Years

- ❑ For prior tax years, employer or agent must also certify that “it has obtained the employee’s written statement confirming that the employee has not made any previous claims (or the claims were rejected) and will not make any future claims for refund or credit of the amount of the overcollection.”
- ❑ Could come into play for F/EAs in the event an employee was FICA exempt in past years (e.g., family relationship) but was treated as non-exempt

# Notice 2015-15: Obtaining Consent

- ❑ No need to obtain written authorization if agent makes “reasonable efforts” to obtain the employee’s consent but cannot:
  - ❑ Locate the employee
  - ❑ Receive written consent from employee due to employee’s choice
    - Can be either not to furnish a statement
    - Or can be choice to furnish a statement that does not authorize agent to refund overcollected FICA
- ❑ In these cases, employer may claim a refund of the overpaid employer share of the tax but not obtain a refund of the employee share



# Refunding under Notice 2015-15

- ❑ An agent need not repay or reimburse employees or obtain the consents for the filing of a refund claim prior to filing the claim in order for the claim to be valid
- ❑ BUT, agent must repay or reimburse employees or obtain employees' consents before the IRS can grant the claim
- ❑ If an agent files a claim for refund based on certification that consents were secured from employees and IRS grants the refund, FICA will be refunded to the agent

# Employee Statements

- ❑ May be received on paper or in electronic format
  - ❑ Fax is acceptable
  - ❑ Electronic system must be reasonably accessible to employee and should be designed such that only employee can give consent for his/her share of FICA refunding
    - Must furnish hard copy of electronic statement per IRS request
  - ❑ Electronic option can be provided as a choice but must not be required of employees

# Employee Statements

- ❑ Must clearly inform employee of the purpose of employee consent
- ❑ Must provide name/contact information for any employee questions
- ❑ Must give reasonable period of time to respond (minimum 45 days from the date of the request)
- ❑ Must include statement that electronic employee consent was furnished by the named employee to the best of agent's knowledge and belief

# Reasonable Efforts

- ❑ An agent's attempt to locate an employee will be a "reasonable effort" if the following are met:
  - ❑ Agent properly requests employee consent as provided in Notice 2015-15;
  - ❑ Request for consent sent electronically provides for an acknowledgment of receipt of email message (read-receipt message not sufficient);
  - ❑ Agent retains a record of mailing/emailing/personally delivering the request for consent;
  - ❑ If mailing is undeliverable, agent makes an effort to determine the employee's current address;
  - ❑ If email results in delivery failure or employee does not acknowledge receipt of email, agent mails a request for consent in paper format to the employee's last known address.

# Other Requirements

- ❑ Agents must retain employee consent statement as part of its records (4 years required, 7 years recommended)
- ❑ Employee consent statement **must** be made under penalties of perjury
- ❑ IRS requires agents to use this language or something close to it:
  - ❑ “I declare, under penalties of perjury, that I have examined the above statements and information and to the best of my knowledge and belief they are true, correct, and complete.”

# Comments on Notice 2015-15

- ❑ NRCPDS will solicit comments from members on the Notice
- ❑ Stay tuned for more updates

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# Questions?