



# “COMMON” MISCONCEPTIONS WITH MULTI-ENTITY EMPLOYMENT TAX REPORTING

Common Paymaster, Common Pay Agent &  
Relation to Common Law Employer



# Presented to:

- › Northstar Chapter Annual Statewide Payroll Conference
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# “Employment”, “Employee” & “Employer” ??

## › Why is this important?

- Tax-free benefits can only be provided to employees!
- Determines which legal entity is entitled to claim deduction for corporate income tax purposes.
- Establishes responsibility for (may vary for different tax types – FICA [Ch.21 §§3101-3128], FUTA Ch. 23 §§3301-3311], FITW [Ch. 24 §§3401-3456], SIT, SUI):
  - Paying wages
  - Depositing taxes
  - Filing tax returns
  - Direction and control of worksite employees
  - Restarting taxable wages bases when new employee are hired

# Common Law Employment

- › “Master-Servant” (Employer-Employee) relationship
  - 16<sup>th</sup> Amendment to US Constitution (FITW - ratified 1913)
  - Social Security Act (FICA, FUTA – enacted 1935)
  
- › Establishes independent contractor vs. employee status
  
  
- › ABC test
  
- › 20 factor test
  - Rev. Rul. 87-41
  - Form SS-8
  - Behavioral, Financial, Relational

# Common Law Employment – “ABC” Test

- › The worker is **free from the employer's control or direction** in performing the work.
- › The work takes place **outside the usual course of the business of the company** and off the site of the business.
- › Customarily, the worker is engaged in an **independent trade, occupation, profession, or business.**

# Common Law Employment – 20 Factor Test

- › Instructions
- › Training
- › Set hours of work
- › Full time required
- › Hiring, supervision, and paying assistants
- › Order or sequence test
- › Oral or written reports
- › Doing work on employer's premises
- › Furnishing tools and materials
- › Right to discharge
- › Right to terminate
- › Integration
- › Services rendered personally
- › Continuing relationship
- › Payment by the hour, week, or month
- › Payment of business and/or traveling expenses
- › Significant investment
- › Realization of profit or loss
- › Working for more than one firm at a time
- › Making service available to the general public

# Statutory Employment

## › Statutory employee

- A **driver** who distributes beverages (other than milk) or meat, vegetable, fruit, or bakery products; or who picks up and delivers laundry or dry cleaning, if the driver is your agent or is paid on commission.
- A **full-time life insurance sales agent** whose principal business activity is selling life insurance or annuity contracts, or both, primarily for one life insurance company.
- An individual **who works at home** on materials or goods that you supply and that must be returned to you or to a person you name, if you also furnish specifications for the work to be done.
- A **full-time traveling or city salesperson** who works on your behalf and turns in orders to you from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments. The goods sold must be merchandise for resale or supplies for use in the buyer's business operation. The work performed for you must be the salesperson's principal business activity.

# Statutory Employment

## › Statutory non-employee

- **Direct sellers** and **licensed real estate agents** are treated as self-employed for all Federal tax purposes, including income and employment taxes, if:
  - Substantially all payments for their services as direct sellers or real estate agents are directly related to sales or other output, rather than to the number of hours worked, and
  - Their services are performed under a written contract providing that they will not be treated as employees for Federal tax purposes.
  
- **Companion sitters** who are not employees of a companion sitting placement service are generally treated as self-employed for all federal tax purposes.



# Statutory Employment

## › Statutory employer

- IRC Sec. 3401(d)(1) – Chapter 24 – Income Tax Withholding

- (d) Employer

- For purposes of this chapter, the term “**employer**” means the person for whom an individual performs or performed any service, of whatever nature, as the employee of such person, except that—

- (1) if the person for whom the individual performs or performed the services does not have control of the payment of the wages for such services, the term “employer” (except for purposes of subsection (a)) means the person having control of the payment of such wages, and

- (2) in the case of a person paying wages on behalf of a nonresident alien individual, foreign partnership, or foreign corporation, not engaged in trade or business within the United States, the term “employer” (except for purposes of subsection (a)) means such person.

- Solely responsible for payment of wages, depositing taxes, and filing tax returns.
- Gets to the entity that holds the cash!

# Common Paymaster

- › **Sec. 3306.** (p) For purposes of sections 3301, 3302, and 3306(b)(1), if two or more related corporations concurrently employ the same individual and compensate such individual through a common paymaster which is *one of such corporations*, each such corporation shall be considered to have paid as remuneration to such individual only the amounts actually disbursed by it to such individual and shall not be considered to have paid as remuneration to such individual amounts actually disbursed to such individual by another of such corporations.

**Notes:** Sec. 3301 = FUTA tax rate, Sec. 3302 = FUTA credit, Sec. 3306(b)(1) = FUTA wage base  
“Mirror” provision contained in Sec. 3121(s) - [FICA]

# Common Paymaster

- › Minimum threshold for percentage of employee population
- › Recognized for federal employment tax purposes and some state unemployment agencies
- › Avoids duplication of taxable wage limits

# Common Paymaster Illustrated



Company A	Company B	Company C	Company D
Employee 1 Employee 2 Employee 3 Employee 4	Employee 5 Employee 1 Employee 6 Employee 7	Employee 8 Employee 9 Employee 1 Employee 10	Employee 11 Employee 12 Employee 13 Employee 1

# Common Pay Agent

## › Payroll Service Provider (PSP)

- Authorized to:
  - prepare paychecks, Forms 940/941 and W-2 for common law employer/client
  - File Forms 940/941 signed by client
  - Make federal tax deposits and federal tax payments
- **PSP assumes no liability for their employer/clients' employment tax withholding, reporting, payment, and/or filing duties.**

## › Reporting Agent

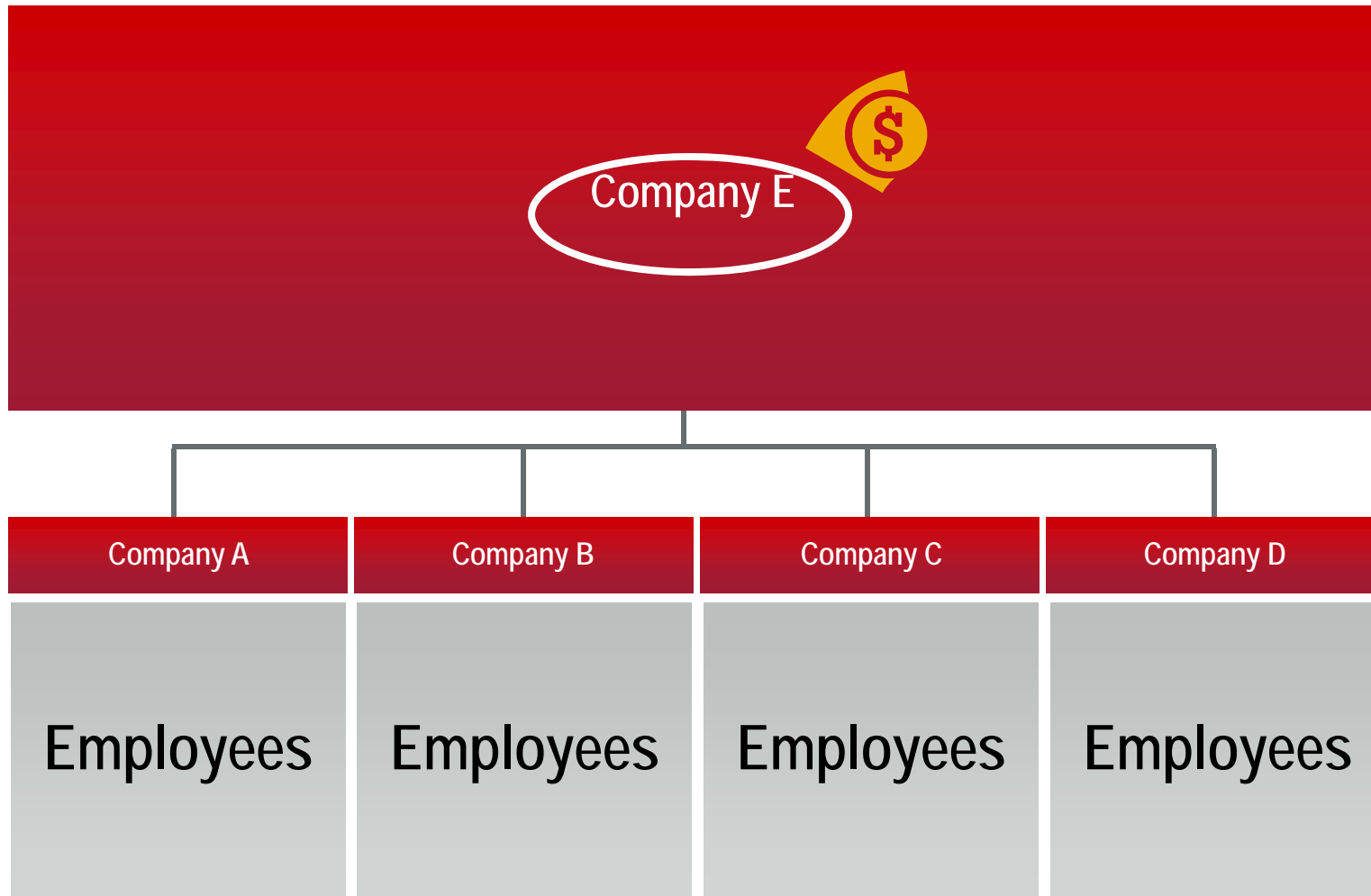
- PSP authorized (by Form 8655) to:
  - sign and file Forms 940/941 electronically
  - sign and file on paper the limited number of employment tax forms for which the IRS has no electronic capacity

# Common Pay Agent

## › Sec. 3504 agent

- Perform acts such as the withholding, reporting and paying of federal employment taxes with regard to wages paid by the agent for the employer, **as well as the agent's own employees.**
- Agrees to **assume liability** along with the employer for the employer's Social Security, Medicare and federal income tax withholding responsibilities.
- Extends 3401(d) provision to FICA
- Technically not permitted for FUTA
- Election made through Form 2678
- Recognized for **most** State Income Tax Withholding, but **not** State Unemployment Insurance
- Reduces administration burden but does **not** reduce liability (wage bases still computed at common law employer level)

# Common Pay Agent Illustrated



# Professional Employer Organizations (PEOs)

- › Certified Professional Employer Organizations (CPEOs) codified in Sec. 3511 effective January 1, 2016.
  - Perform federal employment tax withholding, reporting, and payment functions related to the wages it pays to workers performing services for its customers
  - Pays wages to the customer's workers and is responsible for the withholding, reporting and paying of federal employment taxes with regard to these wages.
  - Additional requirements (certification, reporting, successorship, credits)
  
- › “Co-employment” not recognized by Internal Revenue Service/Code. Prior IRS opinions argue, at best, a PEO is a Statutory Employer
  
- › For SUI taxation, approximately 2/3 of states define PEO as a statutory employer, other 1/3 follow common law rules



# Other Non-Traditional Employment Relationships

- › “Captive leasing” – No statutory support for this
- › Employment Management Companies
- › Disregarded entities (Single-member LLCs)
  - Rev.Rul. 99-6, New Treasury regulations

# Current Audit Focus

## › “Payrolling”

- Reporting of employment and employment taxes to entity other than true employer
- “Disconnect” between employment reporting and financial reporting
- Targeted by USDOL as part of SUTA Dumping – “fraudulent reporting”

## › Common law employer may not be unique FEIN

- CA, IN, NC

# Questions and Answers

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