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### §31.3506–1 Companion sitting placement services.

(a) *Definitions*—(1) *Companion sitting placement service.* For purposes of this section, the term ''companion sitting placement service'' means a person (whether or not an individual) engaged in the trade or business of placing sitters with individuals who wish to avail themselves of the sitters' services.

(2) *Sitters.* For purposes of this section, the term ''sitters'' means individuals who furnish personal attendance, companionship, or household care services to children or to individuals who are elderly or disabled.

(b) *General rule.* For purposes of subtitle C of the Internal Revenue Code of 1954 (relating to employment taxes), a companion sitting placement service shall not be treated as the employer of its sitters, and the sitters shall not be treated as the employees of the placement service. However, the rule of the preceding sentence shall apply only if the companion sitting placement service neither pays nor receives (directly or through an agent) the salary or wages of the sitters, but is compensated, if at all, on a fee basis by the sitters or the individuals for whom the sitting is performed.

(c) *Individuals deemed self-employed.* Any individual who, by reason of this section, is deemed not to be the employee of a companion sitting placement service shall be deemed to be self-employed for purposes of the tax on self-employment income (see sections 1401–1403 and the regulations thereunder in Part 1 of this chapter (Income Tax Regulations)).

(d) *Scope of rules.* The rules of this section operate only to remove sitters and companion sitting placement services from the employee-employer relationship when, under §§31.3121(d)–1 and 31.3121(d)–2, that relationship would otherwise exist. Thus, if, under §§31.3121(d)–1 and 31.3121(d)–2, a sitter is considered to be the employee of the individual for whom the sitting is performed rather than the employee of the companion sitting placement service, this section has no effect upon that employee-employer relationship.

(e) *Examples.* The provisions of this section may be illustrated by the following examples:

*Example 1.* X is an agency that places babysitters with individuals who desire babysitting services. X furnishes all the sitters with an instruction manual regarding their conduct and appearance, requires them to file semimonthly reports, and determines the total fee to be charged the individual for whom the sitting is performed. Individuals who need a babysitter contact the agency, are informed of the charges, and, if agreement is reached, a sitter is sent to perform the services. The sitter collects the entire amount of the charges and remits a percentage to X as a fee for the placement. X is a companion sitting placement service within the meaning of paragraph (a)(1) of this section. Therefore, since the agency does not actually pay or receive the wages of the sitters, X is not treated as the employer of the sitters for purposes of this subtitle. The sitters are deemed to be self-employed for the purpose of the tax imposed by section 1401.

*Example 2.* Assume the same facts as in example 1, except that the individual for whom the sitting is performed pays to X the entire amount of the charges. X retains a percentage and pays the difference to the sitter. Since X actually receives and pays the wages of the sitters, X is the employer of the sitters.

*Example 3.* As a service to the community a neighborhood association maintains a list of individuals who are available to babysit. Parents in need of a sitter contact the association and are provided with a list of names and telephone numbers. The association charges no fee for the service and takes no action other than compiling the list of sitters and making it available to members of the community. Issues such as hours of work, amount of payment, and the method by which the services are performed are all resolved between the sitter and parent. A, a parent, used the list to hire B to sit for A's child. B performs the services four days a week in A's home and follows specific instructions given by A. Under §31.3121(d)–1, B is the employee of A rather than the employee of the neighborhood association. Consequently, this section does not apply and B remains the employee of A.

(f) *Effective date.* This section shall apply to remuneration received after December 31, 1974.

(Secs. 3506 and 7805 of the Internal Revenue Code of 1954; 91 Stat. 1356 (26 U.S.C. 3506); 68A Stat. 917 (26 U.S.C. 7805))

[T.D. 7691, 45 FR 24129, Apr. 9, 1980]

### §31.3507–1 Advance payments of earned income credit.

(a) *General rule*—(1) *In general.* Every employer paying wages after June 30,

1979, to an employee with respect to whom an earned income credit advance payment certificate is in effect must, at the time of paying the wages, also pay the employee the advance earned income credit amount of that employee. For the purposes of applying this section and § 31.3507–2—

(i) In the case of an individual who receives wages which are subject to income tax withholding, the term ''employee'' has the same meaning as set forth in section 3401(c) and the regulations thereunder, and the term ''wages'' has the same meaning as set forth in sections 3401(a) and 3402(e) and the regulations under those sections; and

(ii) In the case of an individual who does not receive wages which are subject to income tax withholding, but who receives wages which are subject to employee FICA taxes, the term ''employee'' has the same meaning as set forth in section 3121(d) and the regulations thereunder and the term ''wages'' has the same meaning as set forth in section 3121(a) and the regulations thereunder.

An individual not having wages subject to either income tax withholding or employee FICA taxes is not entitled to advance payments of the earned income credit. Moreover, notwithstanding paragraph (a)(1)(i) and (ii) of this section, employers are not required to pay advance earned income credit amounts to agricultural workers paid on a daily basis. For this purpose an ''agricultural worker'' is an employee who performs ''agricultural labor'', as that term is defined in section 3121(g) and the regulations thereunder.

(2) *Cross references.* For determination of the advance earned income credit amount of an employee, see paragraph (b) of this section. For rules relating to the treatment of the payment of an employee's advance earned income credit amount as equivalent to payment by the employer of withholding and FICA taxes, see paragraph (c) of this section. For rules describing the earned income credit advance payment certificate, see § 31.3507–2 (a) and (b). For rules relating to the employee's furnishing of the earned income credit advance payment certificate and the payroll periods for which the certificate is effective, see § 31.3507–2 (c) and (d).

(b) *Advance earned income credit amount.* The advance earned income credit amount of an employee is determined, with respect to any payroll period, on the basis of the employee's wages from the employer for the period and in accordance with the advance amount tables prescribed by the Commissioner of Internal Revenue and then in effect for the payroll period. See, however, paragraph (c)(2) of this section. The advance amount paid is reflected on the employee's W–2 form as a separate item (and neither as a reduction of withholding nor an increase in compensation). For purposes of applying this section and § 31.3507–2, the term ''payroll period'' has the meaning set forth in section 3401(b) and the regulations thereunder. As required by section 3507(c)(2)(A), these advance amount tables must be similar in form to, and coordinated with, the tables prescribed under section 3402 (relating to income tax collected at the source). Sections 3507(c)(2)(B) and 3507(c)(2)(C) provide, respectively, separate rules for the treatment in the advance amount tables of the advance earned income credit of the following two separate classes of employees:

(1) Employees who are not married (within the meaning of section 143), or employees whose spouses do not have an earned income credit advance payment certificate in effect; and

(2) Employees whose spouses have an earned income credit advance payment certificate in effect.

If during the calendar year an employer has paid an employee amounts of earned income, within the meaning of section 43(c)(2)(A)(i), which in the aggregate equal or exceed $10,000, the employer need not make further payments of advance earned income credit to the employee during that calendar year.

(c) *Payment of advance earned income credit amount as payment of withholding and FICA taxes*—(1) *In general.* (i) The provisions of this paragraph (c) apply for all purposes of the Internal Revenue Code of 1954. Payments of advance earned income credit amounts pursuant to paragraph (a)(1) of this section

do not constitute the payment of compensation. These payments by the employer are treated as made—

(A) First, from the aggregate amount, with respect to all employees, required to be deducted and withheld for the payroll period under section 3401 (relating to income tax withholding);

(B) Second, from the aggregate amount, with respect to all employees, required to be deducted for the payroll period under section 3102 (relating to employee FICA taxes); and

(C) Third, from the aggregate amount of the taxes imposed for the payroll period under section 3111 (relating to employer FICA taxes).

For purposes of the requirements of sections 3401, 3102, and 3111, as the case may be, and 6302, amounts equal to the advance earned income credit amounts paid to employees are treated as if paid to the Treasury Department on the day on which the wages (and advance amounts) are paid to the employees. The employer must report the payment and treatment of the advance amounts on the employer's Form 941, 941E, 942, or 943, as the case may be, in accordance with the applicable instructions.

(ii) The provisions of paragraph (c)(1)(i) of this section may be illustrated by the following example:

*Example.* Employer X has ten employees, each of whom is entitled to advance earned income credit payment of $10. The total of advance amounts paid by the employer to the ten employees for the payroll period is $100. The total of income tax withholding for the payroll period is $90. The total of employee FICA taxes for the payroll period is $61.30, and the total of employer FICA taxes for the payroll period is also $61.30. Under the rules of paragraph (c)(1)(i) of this section, the total of advance amounts paid to employees is treated as if X had paid the Treasury Department on the day X paid the employees' wages: first, the $90 aggregate amount of income tax withholding; and second, $10 of the aggregate amount of employee FICA tax. X remains liable only for $112.60 of the aggregate FICA tax [$51.30+$61.30=$112.60].

(2) *Advance payments exceeding taxes due.* (i) if, for any payroll period, the aggregate amount of advance earned income credit amounts required to be paid by an employer under paragraph (a)(1) of this section exceeds the sum of the amounts for the payroll period referred to in paragraphs (c)(1)(i) (A) through (C) of this section, the employer reduces each advance amount paid for the payroll period by an amount which bears the same ratio to the excess of the advance amounts as the subject advance amount bears to the aggregate of advance amounts for the payroll period. However, this paragraph (c)(2) does not apply if the employer makes the election provided by paragraph (c)(3) of this section.

(ii) The provisions of paragraph (c)(2) of this section may be illustrated by the following example.

*Example.* Assume the same facts as the example in paragraph (c)(1)(ii) of this section, except that the employer is a state government which does not pay FICA taxes. Under these facts, the advance amounts would be $10 greater than the $90 total of income tax withholding for the payroll period. Assume 10 employees each receiving $10 in advance payments. Under the rule of this paragraph (c)(2), the employer X reduces the amount of the advance amount paid to each employer by 1/10, computed as follows: $10/$100=1/10. This is the same result as would be obtained by reducing the advance payment of $10 for each of the ten employees by one-tenth 10/100 of the $10 excess or $1.00.

(3) *Election to treat excess amounts as advance tax payment.* In lieu of reducing advance payments under paragraph (c)(2) of this section, an employer may elect under this paragraph (c)(3) to pay in full all advance earned income credit amounts. However, if no election is made, the employer is required to reduce advance amounts paid in accordance with paragraph (c)(2) of this section. The election, if made, applies to all advance earned income credit amounts required to be paid for the payroll period. The employer reflects the election on the employer's Form 941, 941E, 942, or 943 as the case may be, and must specify (with supporting computations) the amount of the excess of advance amounts paid and the payroll period to which the excess relates. Separate elections may be made for separate payroll periods. The excess of advance amounts paid is treated as an advance payment by the employer of employment taxes described in paragraph (c)(3)(i) through (iii) of this section and due for the period reported on the

Form 941, 941E, 942, or 943 which includes the payroll period during which the excess amounts were paid. The amount of the excess advance payment is applied to the amounts of the employer's liability—

(i) First, for income tax withholding due under section 3401 for the reporting period in which the payment is made;

(ii) Second, for employee FICA taxes due under section 3102 for the reporting period in which the payment is made; and

(iii) Third, for employer FICA taxes due under section 3111 for the reporting period in which the payment is made.

If the amount of the employment taxes (as described) for which the employer remains liable for the reporting period in which the excess payment is made is less than the excess payment, the employer may claim a refund of that portion of the excess amount paid which exceeds the employer's remaining liability for these taxes for the reporting period. This refund may be claimed, in the same manner as a refund of wage withholding taxes paid by the employer under section 3401, on the employer's Form 941, 941E, 942, or 943, as the case may be, for the reporting period. In the absence of a claim for refund, that portion of the excess amount will be applied by the Internal Revenue Service against the employer's liability for employment taxes reported on the employer's Form 941, 941E, 942, or 943, as the case may be, filed for the next reporting period.

(4) *Failure to make advance payments.* The failure to pay an employee, at the time required by paragraph (a)(1) of this section, all or any part of an advance earned income credit amount as required by this section is treated, for all purposes including penalties, as a failure by the employer as of that time to deduct and withhold under chapter 24 of the Internal Revenue Code of 1954 an amount equal to the advance amount (or part thereof) not paid. This treatment applies to the failure to pay an advance amount to an eligible employee without regard to whether the employee is ultimately not entitled to claim the earned income credit (in full or in part) on a return for the year, so long as the employee has a valid earned income credit advance payment certificate in effect with the employer at the time when the wages were paid. If an employer fails to pay an advance earned income credit amount as required under this section, the advance amount will not be collected by the Internal Revenue Service from the employer if the employer has properly withheld and deposited all income taxes and FICA taxes applicable with respect to the employee. However, such amount may be collected if the employer has not properly withheld and deposited these taxes.

[T.D. 7766, 46 FR 10151, Feb. 2, 1981]

### § 31.3507–2 Earned income credit advance payment certificates.

(a) *Definition.* For the purposes of this section and § 31.3507–1, an earned income credit advance payment certificate is a statement furnished by an employee to the employer which—

(1) Certifies that the employee reasonably expects to be eligible to receive the earned income credit provided by section 43 for the employee's last taxable year under subtitle A of the Internal Revenue Code of 1954 which begins in the calendar year in which the wages are paid:

(2) Certifies that the employee does not have an earned income credit advance payment certificate in effect for the calendar year (in which the wages are paid) with respect to the payment of wages by another employer, and

(3) States if the employee's spouse has an earned income credit advance payment certificate in effect with any employer. For the rule for determining if an employee's spouse has a certificate in effect, see paragraph (c)(3) of this section.

(b) *Form and content of earned income credit advance payment certificate*—(1) *In general.* Form W–5 (Earned Income Credit Advance Payment Certificate) is the prescribed form for the earned income credit advance payment certificate. The Form W–5 must be prepared in accordance with the instructions applicable thereto and must set forth fully and clearly the data therein called for. In lieu of the prescribed form, a form the provisions of which are identical with those of the prescribed form may be used.