



STATE OF ARKANSAS  
**Department of Finance  
and Administration**

**REVENUE LEGAL COUNSEL**

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April 6, 2017



RE: Withholding Requirement Domestic Service  
Opinion No. 20170406

Dear [REDACTED],

Mr. Paul Gehring, Assistant Commissioner of Revenue for Policy and Legal with the Arkansas Department of Finance and Administration (DFA) recently received a document you mailed to him regarding payments to persons caring for your father. Mr. Gehring asked that I assist him in responding to the information provided in that document. Based on the nature of your questions, we are responding in a formal legal opinion.

The document you provided was a copy of IRS Form 3949-A Information Referral. Information you supplied revealed that your sister is paying four persons to care for your elderly father. That care includes giving him medication according to a schedule, providing oxygen as needed, and preparing his meals. These expenses are being paid from your father's bank account and W-2 or 1099 forms are not being provided to the workers. In addition, you have been told that one of the workers may be receiving payment for services while also receiving disability payments.

As the agency responsible for administering state income tax laws, I can only respond to those issues involving compliance with Arkansas income tax laws. State law requires every employer to withhold income tax from the wages of employees in accordance with the withholding tax tables promulgated by DFA. See Ark. Code Ann. §§ 26-51-905 & 26-51-908. For Arkansas income tax purposes, the term "employee" means any individual subject to state income tax who performs services for an employer and receives wages for the services. The term "employer" means a person doing business who has control of the payment of wages to an individual for services performed. "Wages" means remuneration in cash or other form for services performed by an employee for an employer. See Ark. Code Ann. § 26-51-902(13). However, Ark. Code Ann. § 26-51-902(13)(A) provides that "wages" does not include remuneration paid "(A) For domestic service in a private home[.]"

The term "domestic service" is not defined in state income tax law. However, guidance concerning the scope of that term can be found in other portions of state law. Arkansas Code Ann. § 11-4-203 is part of the state Minimum Wage Law and provides at Ark. Code Ann. § 11-4-203(3)(O) that domestic service includes companionship services for individuals unable to care for

themselves because of age or infirmity. A definition for “domestic service” has not been located for federal income tax purposes; however, Section 3506 of the Internal Revenue Code defines the term “sitter” to mean an individual who furnishes personal attendance, companionship, or household care services to children or to individuals who are elderly or disabled. The rules related to Internal Revenue Code Section 3506 provides that for employment tax purposes, a sitter is deemed to be self-employed.

Based on the guidance mentioned above, we conclude that the Arkansas State Income Tax provision in Ark. Code Ann. § 26-52-902(13)(A) excluding remuneration paid for domestic service in a private home would include the remuneration paid to persons who stay with your father during the day, ensure that he takes his medication as prescribed, cooks his meals, and provides other related household services. Because these remuneration payments are not “wages” for purposes of the withholding tax requirement, the withholding of state income tax from those payments is not generally required.

The absence of a duty to withhold Arkansas state income tax from the remuneration paid to those persons who provide services to your father does not mean there is no duty under the law for reporting the amounts paid to those persons. Arkansas Code Ann. § 26-51-811 provides that every individual having employees in whatever capacity and having control or payment of salaries, wages, remunerations or other income of \$2,500 or more in a year shall make a return with the Director of the Department of Finance and Administration under such regulations as may be prescribed by the director. Arkansas Code Ann. § 26-51-812 provides that the Director of DFA, if he or she deems it necessary to ensure compliance with the income tax laws of the state, may require an individual to withhold income tax and pay the amounts withheld to the director. Any person failing to deduct and withhold the tax due from a taxpayer as required by the director under Ark. Code Ann. § 26-51-812 shall be personally liable for the tax.

Based on the provisions of Ark. Code Ann. §§ 26-51-811 and -812 and the withholding tax provisions of state law, DFA has adopted the following rules:

#### **1.26-51-811(a) Recipients of Income – Generally**

Every individual, fiduciary and business entity of whatever type or nature (payor) located within Arkansas shall report to the Department, on Form 1099, all payments totaling \$2,500.00 or more made to taxpayers (payees, such as individuals, fiduciaries or business entities) during the tax year. Such payments shall include: interest; rent; salaries; wages; premiums; annuities; compensation; remuneration; gains; profits and other income. When such payments are not properly reported to the Department, the Department can disallow the payments as deductions or credits in computing the payor's Arkansas income tax liability. Moreover, the Department can require payors making payments as described above to withhold Arkansas income tax from such payments and remit the tax directly to the Department. ACA 26-51-812; ACA 26-51-901 et seq.

### **1.26-51-909(a) Filing Requirement**

Every employer shall file with the Director an annual statement of withholding (Federal Form W-2) for each employee along with an Arkansas Annual Withholding Tax Reconciliation (Form AR-3MAR).

Every employer shall also file with the Director a copy of all Federal Form 1099's issued during the year. The 1099's must be accompanied by a copy of the Federal Transmittal (Federal Form 1096).

### **1.26-51-909(b) Filing Requirement -- Due Date**

The Annual Withholding Tax Reconciliation statement with attached W-2's shall be filed with the Department on or before February 28 following the close of the income year.

The statement from the employer for the employee (Form W-2) shall be provided to the employee on or before January 31 following the close of the income year. However, if the employment of the employee is terminated during the calendar year, the employer shall furnish the W-2 to the employee at the time of termination of the employment.

The Form 1096 Transmittal with attached Form 1099's shall be filed with the Department on or before February 28 following the close of the income year.

Applying these rules to your situation, the persons employed to care for your father should be issued a Form 1099 by your father if they receive more than \$2,500 for those services. A copy of those Forms 1099 should be provided to DFA within the time frames provided by state law. If your father, or someone acting on his behalf, fails to issue the required Forms 1099, DFA is authorized to require that income tax be withheld from payments to those persons. If DFA requires this withholding, any person who pays the remuneration and fails to withhold income tax will become personally liable for the tax not withheld. A copy of this letter will be provided to representatives of the Income Tax Section and the Withholding Tax Section of DFA to determine whether the required Forms 1099 have been filed. If those Forms 1099 have not been filed, representatives of those sections will make the determination whether the discretionary authority of Ark. Code Ann. § 26-51-812 should be exercised to require income tax withholding on the wages of those persons notwithstanding the fact that payments to those persons are outside the definition of "wages" for regular withholding tax purposes.

While this opinion can only address tax reporting for state tax purposes, I do want to point out that the IRS has a process for determining the status of workers for federal tax purposes. That process employs a Form SS-8 (copy enclosed). Also, I have enclosed IRS Publication 15-A, IRS Publication 926, and U.S. Treasury Rule 26 CFR 31.3506.1 that touch on this subject from the federal tax compliance aspect of your question. You may contact the IRS to determine the proper tax reporting for federal income tax purposes.

Finally, you mention that one of the persons receiving cash payments to care for your father may be receiving disability payments. You may present these concerns to the Disability Determination for Social Security Administration. That office has a location on their website addressing how to report suspected social security disability fraud. That web address is:

<http://www.arkansas.gov/ddssa/>.

This opinion is based upon my understanding of the facts as set out in your inquiry and as current law and rules apply to those facts. Any changes in the facts or law could result in a different opinion. You may rely on this opinion for three years pursuant to Arkansas Gross Receipts Tax Rules GR-75(B).

Please contact me if I may provide further assistance.

Sincerely,

Gina M. Dougherty  
Attorney  
Office of Revenue Legal Counsel

Enclosures