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Internal Revenue Code Section 3509(b)

Determination of employer's liability for certain employment taxes

(a) In general.


If any employer fails to deduct and withhold any tax under chapter 24 or subchapter A of chapter 21 with respect to any employee by reason of treating such employee as not being an employee for purposes of such chapter or subchapter, the amount of the employer's liability for-

(1) Withholding taxes.

Tax under chapter 24 for such year with respect to such employee shall be determined as if the amount required to be deducted and withheld were equal to 1.5 percent of the wages (as defined in section 3401) paid to such employee.

(2) Employee social security tax.

Taxes under subchapter A of chapter 21 with respect to such employee shall be determined as if the taxes imposed under such subchapter were 20 percent of the amount imposed under such subchapter without regard to this subparagraph .

 (b) Employer's liability increased where employer disregards reporting requirements.

(1) In general.

In the case of an employer who fails to meet the applicable requirements of section 6041(a) , 6041A , or 6051 with respect to any employee, unless such failure is due to reasonable cause and not willful neglect, subsection (a) shall be applied with respect to such employee

(A) by substituting "3 percent" for "1.5 percent" in paragraph (1) ; and

(B) by substituting "40 percent" for "20 percent" in paragraph (2) .

(2) Applicable requirements.

For purposes of paragraph (1) , the term "applicable requirements" means the requirements described in paragraph (1) which would be applicable consistent with the employer's treatment of the employee as not being an employee for purposes of chapter 24 or subchapter A of chapter 21.

(c) Section not to apply in cases of intentional disregard.

This section shall not apply to the determination of the employer's liability for tax under chapter 24 or subchapter A of chapter 21 if such liability is due to the employer's intentional disregard of the requirement to deduct and withhold such tax.

(d) Special rules.

For purposes of this section-

(1) Determination of liability.

If the amount of any liability for tax is determined under this section-

(A) the employee's liability for tax shall not be affected by the assessment or collection of the tax so determined,

(B) the employer shall not be entitled to recover from the employee any tax so determined, and

(C) section 3402(d) and section 6521 shall not apply.

(2) Section not to apply where employer deducts wage but not social security taxes. This section shall not apply to any employer with respect to any wages if-

(A) the employer deducted and withheld any amount of the tax imposed by chapter 24 on such wages, but

(B) failed to deduct and withhold the amount of the tax imposed by subchapter A of chapter 21 with respect to such wages.

(3) Section not to apply to certain statutory employees.

This section shall not apply to any tax under subchapter A of chapter 21 with respect to an individual described in subsection (d)(3) of section 3121 (without regard to whether such individual is described in paragraph (1) or (2) of such subsection).