

Another Reminder to Pay Withholding Taxes

11.17.17 | Linda J. Rosenthal, JD



The year 2017 will not go down in the record books as a quiet or uneventful one, and while everyone's attention seems to be on the newly proposed tax plans released by the House and the Senate, nonprofits need to remember the taxing requirements currently in place.

For the philanthropy community, the new political reality poses enormous possible challenges, particularly for 501(c)(3)s which have, in the past, safely relied on government funding and grants of key programs, especially in the realm of social services. The full details of the federal budget have not yet been decided, but many groups are already facing decisions and hard choices about how to generate new revenue and how to cope with too many bills to pay.

While exploring options, one decision should be avoided: delaying, or not paying, federal withholding taxes for employees.

Law of Withholding Taxes

We've written about this in an earlier post: [Payroll Taxes: The One Payment a Nonprofit Should NEVER Skip](#) (May 29, 2015). It's important enough, though, to emphasize again for readers who, at that earlier time, may not have paid attention because there were enough funds to make these payments.

Why is it so critical to avoid this mistake? Because the government may pursue individual board members and executives for this money.

Although nonprofits are exempt from payment of federal and state income taxes, they are still liable for the same duties and obligations that all employers face, including payment of payroll withholding taxes for employees. "There's no ambiguity or uncertainty about the duty to withhold and pay over payroll taxes. The law concerning nonpayment of withholding taxes is clear and unambiguous. These

funds are deemed to be held in trust for the United States; diversion of these funds for operational or business expenses is prohibited.”

Personal Liability for Withholding Taxes

There is also no question that the law holds individuals personally responsible for nonpayment of these taxes, and the penalties are severe. See 26 U.S. Code section 6672, “Failure to collect and pay over tax, or attempt to evade or defeat tax.”

“Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.” 26 U.S. Code section 6672, “Failure to collect and pay over tax, or attempt to evade or defeat tax.”

Under this law, the definition of a “person” includes “any officer or employee of a corporation who has a duty to collect, account for, or pay withholding taxes.”

While there is a limited exception for certain unpaid volunteer board members of tax-exempt organizations, there’s an exception to that exception; that is, “... if it results in no person being liable for the penalty imposed.... ”

Conclusion

There is a long line of cases in which “...the IRS has successfully held board members and executives of charitable organizations liable for misuse of withholding taxes that should have been remitted to the government.” The agency is aggressive in these matters, and – generally – the federal courts uphold these actions.

“Board members, executives, and employees who fall within the Code’s definition of a responsible person should actively ensure that their nonprofit has remitted all withholding taxes to the government on time.”

— *Linda J. Rosenthal, J.D., FPLG Information & Research Director*