

What You Need To Know To Be A Government Or Vendor F/EA: Key IRS Requirements, Issues, And New Initiatives



Presented at:

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I. What Are Self-Directed Support Services?

- The Centers for Medicare and Medicaid Services (CMS) defines **Self-Direction** as an approach that presents individuals with the option to control and direct Medicaid funds identified in an individual budget and in which the participants live in their own homes.
- National Institute on Consumer-directed Long-term Services at the National Council on the Aging defined **consumer/self direction** as:

*A philosophy and orientation to the delivery of HCB services whereby **informed** individuals assess their service needs, determine how and by whom these needs should be met, and monitor the quality of services received.*
- **Self-Directed support services** are based on the premise that the person with the disability knows best about his/her needs and how to address them and should be empowered to make decisions about the services they receive, including having choice and control over the types of support services they receive and *who, what, when and where* the support services are delivered.

I. *What Are Self-Directed Support Services?*

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- Self-Directed support services do not reflect one strategy. They reflect a continuum of approaches based on individuals' and representatives' abilities and the level of autonomy and control they wish to exercise related to the support services they receive and the individuals who provide them.
 - Although there is no single service delivery model that encompasses the entire range of self-directed support service programs, in general, a program can be considered Self-Directed if the individual receiving the service or his/her representative is responsible for:
 - Recruiting and selecting/hiring his/her support worker,
 - Orienting and training his/her support worker,
 - Determining his/her support worker's duties and work schedule,
 - Supervising his/her support worker(s),
 - Managing his/her support worker's payroll (or having an entity to perform the task on the individual's behalf such as a Government or Vendor Fiscal/Employer Agent),
 - Reviewing the performance of his/her support worker, and
 - Discharging his/her support worker, when necessary.
 - In an August 2001 Inventory of Self-Directed Support Service Programs, 49 states (129 programs) reported that they had either developed or were in the process of developing at least one publicly-funded self-directed support service program.

II. *Why Are Fiscal/Employer Agent Services Important In Successfully Implementing Self-Directed Support Service Programs?*


- Managing the employer-related tasks (particularly payroll) associated with self-directed support services can be a challenge for some individuals and their representatives.
- Initially, states and individuals tried to reduce the employer-related burden associated with self-directed support service programs by classifying support workers as independent contractors.
- However, the IRS has determined that, in general, home-based workers (e.g., support service workers) are employees and not independent contractors (see FY 2001 IRS National Taxpayer Advocate Report and IRS Notice 2003-70). If there is a question regarding the employment status of a support service worker, an IRS Form SS-8, *Determination of Worker Status For Purposes of Federal Employment Tax and Income Tax Withholding* should be filed to obtain a ruling from the Service.
- Under common law rules, anyone who performs services for an entity is the entity's employee if the entity can control what will be done and how it will be done even if the entity gives the employee freedom of action. What matters is that the entity has the right to direct and control the details of how the services are provided and the outcomes (IRS Publication 15A, 2005).
- In response to IRS findings, states have implemented Financial Management Services, in particular, Government and Vendor Fiscal/Employer Agents (F/EAs), to reduce the employer-related burden associated with self-directed support service programs while ensuring compliance with federal, state and local program, tax and labor rules and regulations.

III. *What Are Financial Management Services (FMS)?*

- CMS requires states that implement self-directed support services that offer a system of supports that assist individuals with managing their individual budgets and disbursing the resources allocated in their individual budgets. This includes managing support workers' payroll and processing and paying invoices for goods and services included in the individuals' budgets and service plans or *Financial Management Services*.

- In general, Financial Management Services (FMS) can:
 - Assist individuals/representatives in calculating and managing their individual budgets;
 - Act as a "bank" receiving and disbursing public funds in accordance with individuals' approved budgets;
 - Monitor an individual's spending of public funds and any underage and overage in accordance with the individual's approved budget;
 - Collect, process and maintain support workers' time sheets;
 - Manage payroll for support workers hired by the individual/representative including federal, state and local employment taxes;
 - Broker and process the payment of workers' compensation, health and other insurance benefits;
 - Process and pay invoices for goods and services included in individual budgets;
 - Provide skills training to individuals/representatives related to employer-related tasks (e.g., recruiting, hiring, training, managing and discharging support workers and managing payroll and paying bills) or to service workers (Agency with Choice); and
 - Implement program accountability and individual protections (e.g., internal controls).

III. What Are Financial Management Services (FMS)? (continued)

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- In cases where the FMS entity is a co-employer with the individual/representative (e.g., Agency with Choice), the entity also may provide services directly to support workers (e.g., worker training) or provide support workers directly to individuals/representatives (e.g., emergency back-up services).

 - There are two basic models of FMS:
 - Fiscal/Employer Agent (Government and Vendor)
 - Agency with Choice

 - CMS recognizes FMS as qualified Medicaid waiver services and requires states to provide them when implementing self-directed support service waiver programs.
 - However, currently they are not considered qualified Medicaid State Plan services without an 1115 Research and Demonstration Waiver, according to CMS.

 - This presentation will focus on the Government and Vendor Fiscal/Employer Agent FMS models and the IRS rules pertaining to these models.

IV. What Is A Fiscal/Employer Agent?

- Under the Fiscal/Employer Agent (F/EA) model, the individual or his/her representative is the common law employer of his/her support service worker. An IRS approved Fiscal/Employer Agent has federal authority under section 3504 of the IRS code to act as the Agent for the individual or his/her representative (e.g., the common law employer) for the purpose of withholding, filing and paying federal income tax withholding and employment taxes. Also, It typically provides a variety of other fiscal and payroll services that are described later.

- There are two models of F/EAs that operate under section 3504 of the IRS code:
 - Government F/EA (in accordance with IRS Revenue Procedure 80-4 and Proposed Notice 2003-70)

 - Vendor F/EA (in accordance with IRS Revenue Procedures 70-6 and Proposed Notice 2003-70)

- Both F/EA models work well as the neutral site or “bank” for individuals’ budget allocations. In general, direct service providers should not be F/EA for the same program participants because of the conflict of interest of being both the *public funds manager* and the *direct service provider*.

- Both F/EA models provide a good vehicle for public funds to follow the individual service recipient rather than the direct care service provider (Money Follows the Person).

V. *Types Of Fiscal/Employer Agents (F/EAs)*



F/EA Model	Operating Entity	Worker's Common Law Employer	F/EA Responsibilities
Government Fiscal/Employer Agent (FMS)	State/County (Section 3504 of the IRS Code and IRS Rev. Proc. 80-4 and 2003-70)	Individual or representative unless agency-based services used.	Under IRS Rev. Proc. 80-4 and Proposed Notice 2003-70, a government entity acts as "employer agent" for individuals for limited purpose of withholding, filing and depositing federal employment taxes. Government F/EAs also often invoice a state for public funds and disburse and track these funds, manage payroll, pay vendors for goods and services provided in accordance with the individual's service plan, generate reports to individuals/representatives and state and county governments, assist individuals with conducting criminal background checks and verifying citizenship status of prospective workers and broker worker's compensation and health insurance.
Vendor Fiscal/Employer Agent (FMS)	Vendor (Section 3504 of the IRS Code and IRS Rev. Proc. 70-6 and 2003-70)	Individual or representative unless agency-based services used.	Same as Government Employer Agent described above except as vendor in accordance with IRS Rev. Proc. 70-6 and Proposed Notice 2003-70.

VI. *What Is A Government Fiscal/Employer Agent?*

- Under the **Government Fiscal/Employer Agent** (F/EA) model, a state or local government agency may apply for and receive approval from the IRS (under IRS Revenue Procedure 80-4 and Proposed Notice 2003-70) to act as an **employer agent** on behalf of individuals/representatives for the limited purpose of withholding, filing and depositing federal employment taxes (e.g., FICA and FUTA) and income taxes (if required) for workers that individuals hire directly. Also, the F/EA often invoice a state for public funds; disburse and track these funds; manage Federal Advanced Earned Income Credits as necessary; withhold, file and deposit state income and unemployment and disability insurance and local taxes, as required; collect, verify and process workers' timesheets; prepare and distribute payroll checks to workers hired by individuals; and process and pay invoices for goods and services included in individuals' service plans. It also may broker worker's compensation and other insurances, assist in conducting criminal background checks on prospective workers and verifying workers' citizenship/legal alien status and generate standardized reports for state/county agencies and individuals/representatives, as required.
- In accordance with IRS Proposed Notice 2003-70, a Government F/EA may either perform all of the Agent tasks itself or delegate some tasks to a reporting agent or subagent.
- This FMS model allows the government F/EA to perform the payroll function for individuals/representatives without being considered the common law employer of their support service workers.
- This FMS model provides individuals/representatives with a high level of choice and control while providing employer-related supports and assuring them and the state that federal and state tax and labor law compliance has been achieved.
- In August 2001, this model was not frequently used by states implementing Self-Directed support service programs.

VII. *What Is A Vendor Fiscal/Employer Agent?*

- Under the **Vendor Fiscal/Employer Agent** (F/EA) model, a vendor entity may apply for and receive approval from the IRS (under IRS Revenue Procedure 70-6 and Proposed Notice 2003-70) to act as an **employer agent** on behalf of individuals/representatives for the limited purpose of withholding, filing and depositing federal employment taxes (e.g., FICA and FUTA) and income taxes (if required) for workers that individuals hire directly. Also, F/EAs often invoice a state for public funds; disburse and track these funds; manage Federal Advanced Earned Income Credits as necessary; withhold, file and deposit state income and unemployment and disability insurance and local taxes, as required; collect, verify and process workers' timesheets; prepare and distribute payroll checks to workers hired by individuals; and process and pay invoices for goods and services included in individuals' service plans. The F/EA also may broker worker's compensation and other insurances, assist in conducting criminal background checks on prospective workers and verifying workers' citizenship/legal alien status and generate standardized reports for state/county agencies and individuals/representatives, as required.
 - Rev. Proc. 70-6 and Proposed Notice 2003-70 are silent on whether a Vendor F/EA can delegate some of its agent tasks to another entity (e.g., reporting agent or subagent) that does not hold the IRS Form 2678.
- This FMS model allows the F/EA to perform the payroll function for individuals/representatives without being considered the common law employer of their support service workers. In August 2001, it was found to be the most popular FMS model used (43% of intermediary service organizations reporting) by states implementing self-directed support service programs.
- This FMS model provides individuals/representatives with a high level of choice and control while providing employer-related supports and assuring them and the state program agencies that federal and state tax and labor law compliance has been achieved.

VIII. *Obtaining Federal Approval To Be A Government Or Vendor F/EA*

■ **Government F/EA Requirements**

Filing the IRS Form SS-4, *Application for Employer Identification Number* and Obtaining a Separate FEIN for F/EA to File Certain Federal Tax Forms (See Handout)

- Preparing and submitting the IRS Form SS-4 and receipt of separate FEIN for F/EA
- Retiring the F/EA's separate FEIN when the F/EA no longer performs the functions for the service program

Filing the IRS Form SS-4 and Obtaining a FEIN for Program Participants/Representatives (See Handout)

- Preparing and submitting the IRS Form SS-4 and receipt of FEIN
- Retiring FEIN when program participant is no longer an employer

IRS Form 2678, *Employer Appointment of Agent* (See Handout)

- Preparing and submitting one IRS Form 2678 and Request for Employer Agent Approval Letter and receipt of Approval from the IRS
- Maintaining copies of completed and signed IRS Forms 2678 on file for each individual/representative it represents
- Revoking the IRS Form 2678

VIII. *Obtaining Federal Approval To Be A Government Or Vendor F/EA (continued)*

IRS Form 8821, *Tax Information Authorization* (See Handout)

- Preparing and submitting the IRS Form 8821 for each individual/ representative
 - When using a reporting agent or subagent, including the entity as the second appointee on the IRS Form 8821
- Renewing IRS Forms 8821
- Revoking IRS Forms 8821 when F/EA no longer represents a program participant

Government F/EA Using a Reporting Agent (See Handout)

- Preparing and submitting an IRS Form 8655, *Reporting Agent Authorization*
- Revoking IRS Form 8655 when F/EA no longer uses a reporting agent

Government F/EA Using a Subagent

- Obtaining signed informed consent statements from each individual/representative the F/EA represents stating he/she knows a subagent is being used and he/she concurs with this

VIII. *Obtaining Federal Approval To Be A Government Or Vendor F/EA (continued)*

■ Vendor F/EA Requirements

Filing the IRS Form SS-4, Application for Employer Identification Number and Obtaining a Separate FEIN for F/EA to File Certain Federal Tax Forms (See Handout)

- Preparing and submitting the IRS Form SS-4 and receipt of separate FEIN
- Retiring the F/EA's separate FEIN when the F/EA no longer performs the functions for the service program

Filing the IRS Form SS-4 and Obtaining a FEIN for Individuals/Representatives (See Handout)

- Preparing and submitting the IRS Form SS-4 and receipt of FEIN
- Retiring FEIN when individual/representative is no longer an employer

IRS Form 2678, *Employer Appointment of Agent* (See Handout)

- Preparing and submitting an IRS Form 2678 for each individual/representative the F/EA represents with a Request for Employer Agent Approval Letter and receipt of Approval from the IRS
- Revoking the IRS Form 2678 when individual/representative is no longer represented by the F/EA

VIII. *Obtaining Federal Approval To Be A Government Or Vendor F/EA (continued)*

IRS Form 8821, Tax Information Authorization (See Handout)

- Preparing and submitting the IRS Form 8821 for each individual/ representative
 - When using a reporting agent for each individual/representative the F/EA represents and if using a reporting agent, including it as the second appointee on the IRS Form 8821
- Renewing IRS Forms 8821
- Revoking IRS Forms 8821 when F/EA no longer represents an individual/representative

Vendor F/EA Using a Reporting Agent (See Handout)

- Preparing and submitting an IRS Form 8655, *Reporting Agent Authorization*
- Revoking IRS Form 8655 when F/EA no longer uses a reporting agent
- Obtaining an informed consent statement from each individual/representative saying he/she knows a reporting agent is being used and he/she concurs with this.

Procedure For When an Individual/Representative Switches F/EA Mid-Year or Stops Being an Employer and Using the F/EA (Permanently)

- Revoke IRS Form 2678 with old F/EA and execute Form with new F/EA
- Revoke IRS Form 8821 with old F/EA and execute Form with new F/EA

Note: States often have a state income tax or unemployment insurance power of attorney or both requirement and Government and Vendor F/EAs need to be aware of this.

IX. *IRS Requirements For Government And Vendor F/EAs To Manage The Payroll Process*

■ **Government F/EA Requirements**

FUTA Filing and Payment (See Handout)

- Completing and filing the IRS Form 940 (Govt F/EA itself vs. reporting or subagent)
- Depositing FUTA (Govt F/EA itself vs. reporting or subagent)

FICA Filing and Payment (See Handout)

- Completing and filing the IRS Form 941 (Govt F/EA itself vs. reporting or subagent)
- Depositing federal income tax withholding and FICA (Govt F/EA itself vs. reporting or subagent)

Process For When Government F/EA Switches Subagent or Reporting Agent Mid-Year

- Particularly problematic. Highly recommended that Government F/EAs switch subagents or reporting agents on January 1st.

Process for When An Individual Stops Using a Government F/EA and Being an Employer (Permanently)

- Government F/EA files both FICA and FUTA in aggregate. So, only the IRS Forms 2678 (in file only), 8821 and individual's FEIN need to be retired. Individual state's processes must be followed including final filings of state income and unemployment taxes and retirement of individuals' state income and unemployment registration numbers.

IX. *IRS Requirements For Government And Vendor F/EAs To Manage The Payroll Process (continued)*

■ Vendor F/EA Requirements

FUTA Filing and Payment (See Handout)

- Completing and filing the IRS Form 940 (Vendor F/EA itself vs reporting agent)
- Depositing FUTA (Vendor F/EA itself vs reporting agent)

FICA Filing and Payment (See Handout)

- Completing and filing the IRS Form 941 (Vendor F/EA itself vs reporting agent)
- Depositing federal income tax withholding and FICA (Vendor F/EA itself vs reporting agent)

Process For When An Individual Switches Vendor F/EAs Mid-Year

- Particularly problematic. Highly recommended that individuals switch F/EAs on January 1st.

Process for When An Individual Stops Using a Vendor F/EA and Being an Employer (Permanently)

- When Vendor F/EA files both FICA and FUTA in aggregate in 2006, just the IRS Forms 2678, 8821 and individual's FEIN need to be retired. Individual state's processes must be followed including final filings of state income and unemployment taxes and retirement of individuals' state income and unemployment registration numbers.

X. *IRS Requirements For Government And Vendor F/EAS To Manage the End Of Year Tax Procedures*

■ **Government and Vendor F/EA Requirements**

Preparing and Filing IRS Forms W-2 (See Handout)

- Preparation of Form in compliance with IRS instructions for employer agents
- Electronic filing requirement when filing 250 or more forms
- Instructions for completion of Box 15
- Process for when individual/representative switches Vendor F/EA mid-year

Preparing and Filing IRS Forms W-3 (See Handout)

- Preparation of Form in compliance with IRS instructions for employer agents
- Instructions for completion of Box 15
- Not required if IRS Forms W-2 are filed electronically
- Process for when the individual/representative switches Vendor F/EA mid-year

Processing FICA Refunds (See Handout)

- Methods that can be used by a F/EA to refund over collected FICA
- State agencies receiving the employer portion of over collected FICA
- Process for when the individual/representative switches Vendor F/EA mid-year

XI. When Is The Individual Versus The Representative Considered The Common Law Employer By The IRS?

- If a person who is a representative for an individual program participant has an executed IRS Power of Attorney, (IRS Form 2848) with the individual, the IRS automatically considers the individual the common law employer with a POA representing and signing for the individual. The IRS Forms 2678 and 8821 would be executed between the individual and the F/EA with the Power of Attorney (POA) signing on the individual's behalf.
- If the individual's representative does not have an executed IRS Power of Attorney (IRS Form 2848) with the individual, the IRS recognizes the representative as the common law employer, not the individual. The IRS Forms 2678 and 8821 would be executed between the representative and the F/EA.

XII. IRS Requirements For Record/Document Maintenance

- A Government or Vendor F/EA's records should include:
 - Assignment verification of EIN,
 - Amounts and dates of all wage payments,
 - Names, addresses, social security numbers, employer identification numbers and occupations of employees and recipients,
 - Any employee copies of Forms W-2 and W-2c that were returned to you as undelivered,
 - Dates of employment of each employee,
 - Periods for which employees were paid while absent due to sickness or injury and the amount of weekly payments the F/EA or its reporting or subagent made them,
 - Copies of employees' income tax withholding allowance certificates (Form W-4),
 - Dates and amounts of tax deposits that F/EA or its reporting or subagent made and acknowledgement numbers for deposits made by EFTPS,
 - Copies of returns filed, including confirmation numbers if e-filed, and
 - Records of fringe benefits and expense reimbursement provided to employees, including substantiation.

- Also, the F/EA should maintain all documentation related to obtaining permission to be an F/EA for individual/representative and the revocation of such permission (IRS Forms 2678, 8821, 8655, FENs) and related correspondence.

- All records should be kept at least four years for possible IRS review.

XIII. Staying Up-to-Date With IRS Rules, Publications, Forms And Instructions

- Government and Vendor F/EAs should stay up-to-date with IRS rules, publications, forms and instructions by reviewing www.irs.gov on a periodic basis and at least quarterly.
 - Publication 926, 15 and 15a
 - Forms SS-4, 2678, 8821, 8655, 940, 941, 941(c), 843, W-2 and W-3
 - Remember, a form and its instructions can be updated separately (e.g. effective date for IRS Form SS-4 is December 2001, whereas the effective date for the instructions is September 2003).


- F/EAs also should review the IRS/SSA Reporter that is available at www.irs.gov. They should receive the Reporter with the IRS Form 941 sent to them each quarter.

XIV. Issues Encountered By Government And Vendor F/EAs In Implementing IRS Requirements


- Government F/EAs having trouble with the IRS Request for Employer Agent Approval Process with and without using a reporting or subagent.
- Government and Vendor F/EAs having trouble obtaining their separate FEIN.
- Vendor F/EAs are receiving Employer Agent Approval Notices from the IRS with the wrong FEIN for some individuals/representatives.
- Vendor F/EAs having trouble completing the IRS Form that allows them to electronically file- no category for them to identify themselves on the current form.
- When Vendor F/EAs filed FICA in the aggregate and FUTA in the individual from 2002-2005 as instructed by IRS, individuals/representatives are receiving Notices of Non-Filing Form 941.
- When Vendor F/EAs filed FICA and FUTA in the aggregate from 1995-2001 as instructed by IRS, individuals and representatives are receiving balance due notices stating they do not qualify for the reduced FUTA payment because aggregate FUTA filing does not match individual SUTA filing. Also, some individuals/representatives have received Notices of Non-Filing Form 940.

XIV. Issues Encountered By Government And Vendor F/EAs In Implementing IRS Requirements

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- Some Vendor F/EAs were told they could not complete the Third Party Designee section of the IRS Form SS-4.
 - Some Vendor F/EAs and reporting agents have contacted IRS about tax filing and payment issues with an executed IRS Form 8821 and were told that the form was not sufficient for them to speak to IRS staff regarding the issue(s).
 - F/EAs what is the process for getting individuals out of filing requirements when their federal employment taxes are filed in the aggregate for them by the F/EA.
 - Vendor F/EAs have received large numbers of telefile Forms 941.
 - Vendor F/EAs are receiving large numbers of pre-populated (with FEIN and employer name) Forms 941.
 - Vendors or individuals are receiving requests for the Form W-3 when Forms W-2 are filed under the Agent's separate FEIN on their behalf (electronic or hard copy).
 - When some Vendor F/EAs submit IRS Forms SS-4 to obtain individuals'/representatives' FEINs stating they are household employers using an agent, the IRS FEIN Notification Letter does not reflect the proper tax filing process (e.g., states the Schedule H is to be filed).
 - F/EAs need clarification on interpreting the language for FICA exemption for Paid Family Workers (bullet #1).
 - Some IRS regional offices are requiring guardian papers for a surrogate to sign the IRS Form SS-4. Are these really necessary or is the IRS Form 2848 sufficient (See slide XI)?

XV. New Initiatives At The IRS

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- Status of Proposed Notice 2003-70 (See Handout)
 - New 2005 IRS Form 941(See Handout)
 - New IRS Form 940 effective tax year 2006 (See Handout)
 - Elimination of the IRS Form 940 EZ effective tax year 2006
 - New Form 944, Employer's Annual Federal Tax Return effective tax year 2006
 - Revision of the IRS Form 941(c)
 - Revision of the IRS Form 2678
 - Revision of the IRS Form SS-4
 - New Code for Household Employers Using an Agent on FEIN effective January 1, 2007

XVI. Questions And Discussion

