

IRM 4.23.5.6.4

Statutory Employees

(Last Revised: 11-03-2009)

- (1) If a worker is not an employee under the usual common law rules or a corporate officer, the worker and the taxpayer may nevertheless still be subject to employment taxes. IRC 3121(d)(3) lists individuals in four occupational groups who, under certain circumstances, are considered employees for FICA tax and, in some instances, employees for FUTA tax, but not for income tax withholding. These workers are referred to as statutory employees. They are:
 - a. Agent-drivers or commission-drivers,
 - b. Full-time life insurance salespersons,
 - c. Home workers, and
 - d. Traveling or city salespersons.
- (2) Workers in these four occupational groups are employees for FICA tax purposes, even if they do not meet the common law test but meet the general and specific requirements for each occupational group.
- (3) To qualify as a statutory employee, a worker must first meet general requirements prescribed specifically for the category under which the worker is qualifying (Treas. Regs. 31.3121(d)-1(d)). Exhibit 4.23.5-3 contains the requirements that determine statutory employees under FICA. See Exhibit 4.23.5-3.
- (4) By definition, a worker cannot be a statutory employee under IRC 3121(d)(3) if that worker is a common law employee. This conclusion is supported by the legislative history of IRC 3121(d). See S. Rep. No. 1669, 81st Cong., 2d. Sess. 144 (1950), 1950-2 C.B. 302, 346 - 348, and Lickiss v. Commissioner, T. C. Memo 1994-103.
- (5) Statutory employees are not employees for the purpose of deducting trade or business expenses. Therefore, they may deduct their expenses on Schedule C rather than as miscellaneous itemized deductions. They receive a Form W-2. A check is made in Box 13 in the "Statutory Employee Box" to indicate that the worker is a statutory employee. Income tax withholding is not withheld from statutory employees. See Rev. Rul. 90-93, 1990-2 C.B. 33.
- (6) If statutory employees also have earnings from self-employment, they may not use expenses from services as a statutory employee to reduce net earnings from self-

employment for SECA purposes. This is because services as a statutory employee do not constitute the carrying on of a trade or business for purposes of SECA. Statutory employees are required to file a Schedule C for services performed as a statutory employee which is separate from the Schedule C that reports net earnings from self-employment.