

1. Using the Form to Show Why the W-2 Box 10 Amount Is Not Taxable

On Box 10 of the Form W-2, the employer reports the total amount of dependent care assistance provided to the employee for the year. But it is the employee's obligation to justify, by filing and completing Form 2441 with his or her Form 1040, that the amounts in Box 10 are not taxable.

Form 2441 also addresses amounts that are available for the employee's use during a grace period provided under a DCAP.

2. Care Provider Information Must Be Included on Form 2441, Including the Taxpayer Identification Number (TIN)

An employee may not claim an exclusion for reimbursement of dependent care expenses unless he or she provides with his or her tax return the name, address, and taxpayer identification number (TIN) of the care provider. This requirement should be explained in the DCAP's informational materials. No TIN is necessary for exempt organizations-only the name and address of the provider. If the care provider is an individual, the TIN is the individual's Social Security number. Employees provide this and other information on Form 2441.

a) What happens if the care provider refuses to provide a Social Security number or other TIN to the employee?

This is one of the frequently asked questions that the IRS addresses on its website. The requirement that this information be provided on the Form 2441 does not apply if the employee exercised "due diligence" in attempting to obtain the TIN, which is defined as a "serious and earnest effort" to get the information from the provider.

The employee may use IRS Form W-10 (Dependent Care Provider's Identification and Certification) to obtain the necessary information. Acceptable alternative sources of the TIN include copies of the provider's Social Security card, a letter or invoice from the provider showing the necessary information, or a completed Form W-4, if the provider is a household employee of the employee.

If the provider refuses to supply the TIN, the employee may still claim the exclusion if he or she enters

the available information (e.g., the name and address of the provider) on Form 2441 and attaches a statement explaining that the provider did not provide the requested information.

The Instructions to Form W-10 explain that a care provider must provide the employee with a valid TIN, even if the provider is not required to file a tax return, and warn that a care provider who does not do so "is subject to penalty of \$50 for each failure unless the failure is due to reasonable cause and not willful neglect." The penalty, however, does not apply to qualified tax-exempt care providers.

Must the Plan Require the Employee to Provide the Caregiver's TIN When Submitting a Claim for Reimbursement?

There is no specific requirement in the FSA claims substantiation rules that employees must provide the plan with their caregivers' TINs. Moreover, given privacy concerns, some individuals may be reluctant to provide their TIN, if that information will be disclosed (other than on the Form 2441). It seems reasonable to rely on a participant's statement that he or she has obtained (or exercised due diligence to obtain) the care provider's TIN. This would seem to satisfy the requirement that in order for dependent care assistance amounts to be excluded from the employee's wages for purposes of FICA and federal income taxes, it must be "reasonable to believe" that the employee will be able to exclude the payment or benefit from income under Code §129.

If the caregiver refused to provide its TIN to the employee, the plan could still permit reimbursement if the employee gives the employer the same statement that the employee must provide to the IRS according to the Form 2441 Instructions and IRS Pub. No. 503. * Also, the employee should agree in writing with the employer that the employee will provide that statement on the Form 2441.

Note that the federal government's cafeteria plan requires DCAP participants to "submit a letter indicating that you have attempted to obtain an SSN or TIN from the provider and were unable to do so, as the provider does not have one or will not provide it to you."

† An employer should investigate even further if it has reason to believe that the failure to provide the TIN is linked to other concerns, such as the use of a provider that doesn't qualify under the Code.

* IRS Publication 503, "Provider Identification Test: Due diligence," advises the taxpayer to explain "that

you requested the information from the care provider, but the provider did not give you the information," noting that the statement "will show that you used due diligence in trying to furnish the necessary information."

Due diligence can also be shown by obtaining the provider's completed Form W-10 or other items listed in Publication 503. See also Instructions for Form 2441, Line Instructions: Line 1: Due Diligence.

b) Can a DCAP reimburse dependent care expenses incurred outside the U.S. if the provider doesn't have a TIN?

As discussed above, an employee who cannot provide the provider's TIN will lose the DCAP exclusion unless he or she explains on Form 2441 that he or she requested the TIN and the provider did not comply with the request. But when a foreign day-care provider provides services outside the U.S., the circumstances are different-the provider may not have a U.S. TIN to give the employee.

Indeed, the IRS directs U.S. citizens and residents living abroad whose care providers do not have and are not required to obtain a U.S. TIN to enter the code "LAFCP" (living abroad foreign care provider) on their returns in the space for the care provider's identification number.

Thus, it would seem reasonable for a DCAP to reimburse the foreign provider's services, assuming that they otherwise qualify for reimbursement under the plan. However, the cautious approach would be to obtain, before reimbursing the claim, a statement from the employee that the expenses were for services provided outside the U.S. by a foreign care provider and that the provider does not have and is not required to obtain a U.S. TIN.

(Form 2441-Employees Must File It with Their Form 1040) (EBIA 2016)