Backup withholding required even after W-9s are tossed

You must backup withhold on payments made to independent contractors if they don’t certify their Taxpayer Identification Numbers to you prior to payment. Contractors may make those certifications by providing you with Form W-9, which you must keep for three years.

**Caution:** You may want to retain these forms for longer than three years. An IRS legal memorandum (ILM) has concluded that a payer is liable for backup withholding penalties, even if the W-9 retention period had expired. (ILM 201037027)

**Note:** ILMs are intended as private advice from the IRS to the requesting party. They may be used for informational purposes only; they may not be used or cited as precedent.

**No W-9 + no backup withholding = penalties**

**Case in point:** A payer didn’t have a complete set of W-9s from all payees—some were trashed after the three-year retention period expired; others were never obtained. The payer also didn’t backup withhold. It acknowledged its mistakes to the IRS, began correcting the errors and asked the IRS not to impose penalties for failing to backup withhold.

**Payer:** Liability for failing to backup withhold lapses along with the three-year retention period for W-9s. The IRS concluded otherwise.

**IRS:** The W-9 retention period simply lessens payers’ record-keeping burdens, it doesn’t impact backup withholding. Payers may avoid penalties for failing to backup withhold if they can show that they had actually received the form.

**PAYROLL PRACTICE TIP:** 1099-MISC reporting and backup withholding go together, so the company’s liability may, in fact, be greater. To avoid backup withholding, remind Accounts Payable to require independent contractors to provide it with Forms W-9 prior to payment. For record-retention purposes, treat W-9s as payroll records—retain them until at least the later of four years after the due date of the tax for the return period to which the records relate, or the date the tax is paid.