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Employee or Independent Contractor…the Administration's Current Aggressive Approach…and What it means to Employers

This law firm has for many years urged companies to be very careful when treating workers as independent contractors rather than employees. In August 2009 we posted a comprehensive Newsletter identifying many of the issues to be considered by companies when dealing with the independent contractor situation[1] We followed that in November 2011 with a bullet Newsletter[2] advising of a then new IRS "amnesty" program[3] for companies that treated workers as independent contractors but wished to treat them as employees going forward; and in May 2014 with a Newsletter identifying multiple additional new risks under "Obamacare" if an employer improperly classifies a worker as an independent contractor.[4]

The Obama administration has, directly and through the US Department of Labor, aggressively pursued monetary and other benefits for American workers, while also pushing enforcement procedures to generate revenues through increased taxes, penalties and interest.[5]

The Most Recent Aggressive Department of Labor Position Statement

[1] The 2009 Newsletter is on our website at: http://waxmanlaw.com/wp-content/uploads/2013/04/IC-v-Employee-.pdf

[2] Our 2011 Newsletter is attached to this Newsletter as Appendix A.

[3] Known as the Voluntary Classification Settlement Program (VCSP)

[4] The 2014 Newsletter is on our website at: http://waxmanlaw.com/wp-content/uploads/2013/04/ICs-and-ACA-050514.pdf

[5] Other administration efforts notably include the very recent efforts to substantially increase the threshold salary requirements for "white collar" workers' exemptions to the overtime rules under the Fair Labor Standards Act.

The most recent event in this course of conduct is the July 15, 2015 release, by the US Department of Labor, of its Administrative Interpretation No. 2015-1[6] which sets forth a six prong test for determining whether the independent contractor designation may be appropriate.

At first glance, two key employee favoring positions jump off the pages of this release:

First, the DOL Administrator starts from the conclusion that "most workers are employees under the FLSA[7]."

Second, the DOL for the most part discards the long applied common law test under which the key determination was the extent of the company's control over the worker. The DOL now relies on the so-called "economic realities" test, in which control is only one of six designated factors:

1. Is the Work an Integral Part of the Employer's Business?
2. Does the Worker's Managerial Skill Affect the Worker's Opportunity for Profit or Loss?
3. How does the Worker's Relative Investment Compare to the Employer's Investment?
4. Does the Work Performed Require Special Skill and Initiative?
5. Is the Relationship between the Worker and Employer Permanent or Indefinite?
6. What is the Nature and Degree of the Employer's Control?

Significantly the DOL states that: "All of the factors must be considered in each case, and no one factor (particularly the control factor) is determinative."

How Will this be Enforced?

Since the Interpretation is so new, it is difficult to predict where it may ultimately lead. However, we believe there are several important factors that are immediately clear despite the lack of history:

- A worker who is truly not under the company's control may nevertheless be deemed an employee if some or all of the other five "economic realities" point in that direction.

- This approach appears to be a direct result of what has been called the "skyrocketing" use of contract labor in the wake of increased government regulation and enforcement, most notably the Affordable Care Act. Thus, this approach may have less impact if other factors lead to a decrease in contract labor.

- We see no end to this approach during the remainder of the Obama term and beyond, unless a far more "employer friendly" administration is elected next year.

- The States are also taking a revenue driven approach…in fact, the second paragraph of the Interpretation expressly refers to the fact that the US DOL has agreed to

[6] Administrative Interpretation No. 2015-1 is found at: http://www.dol.gov/whd/workers/Misclassification/AI-2015_1.pdf

[7] The Fair Labor Standards Act, which is the federal "wage and hour" law.

collaborative enforcement efforts with "many states"[8] and the IRS.

- The work force has become sufficiently sophisticated so that in many cases when an independent contractor's relationship with the company terminates, he or she immediately files for unemployment insurance benefits. Thus gives rise to Department of Labor enforcement problems when the company has treated the worker as an independent contractor.

Several Ways to Approach this Problem.

If your company has been treating workers as independent contractors but you are not sure this is defensible, you may cross your fingers and hope to not get caught. However, if you wish to take a more pro-active approach:

1. Do it Yourself

You may study the voluminous literature and make informed decisions on your own.

2. Ask the Government

A company (or a worker) may file an IRS Form[9] to obtain an official determination of the worker's status, at least for federal tax purposes. A similar procedure is available for New York State tax purposes.[10]

3. Terminate all Independent Contractor Relationships

One simple solution is to "bite the bullet" and refuse to engage any worker on an independent contractor basis. While this can eliminate much of the substantial financial exposure described elsewhere in this letter, it may result in the loss of valuable workers and the payment of taxes and benefits that otherwise might not be due.

4. Seek Professional Guidance

If you do not find the three above approaches appealing, you may seek professional advice. Qualified professionals can help a company analyze its situation and hopefully avoid some of the pitfalls described in this letter. The attorneys at Richard H. Waxman, P.C. are ready and able to advise companies that are confronted by this issue and by other legal matters that affect employers in these difficult times.

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[8] Actually 22 States according to the US DOL blog at: http://blog.dol.gov/2015/07/15/employee-or-independent-contractor/

[9] SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding

[10] Unemployment Insurance Division of the New York State Department of Labor invites companies to let them decide whether workers are independent contractors by submitting the issue along with the circumstance and copies of documents to its Liability and Determination Section for a "formal determination." See NYS Dept. of Labor website at http://www.labor.state.ny.us/ui/dande/ic.shtm

Very truly yours,

Richard H. Waxman

If you wish to learn more about our Employment Law practice, visit the Employment Law section of our website at: www.waxmanlaw.com.

For your convenience a separate .pdf copy of this newsletter is attached.

We encourage you to pass this Newsletter on to people within your organization, and to your clients and friends.

You may have to print this letter or the attached .pdf copy to see the footnotes.

Please note that this Alert is limited to a very brief overview of the topics covered. It is not intended to be relied upon, and must not be relied upon, as legal advice for any specific situation. Appropriate legal advice must always be based on numerous factors including without limit all of the specific facts of the case and the jurisdictions whose law may apply.