

TRANSPORTATION DISTRIBUTION & LOGISTICS ALERT

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IRS Provides Taxpayers with the Opportunity to Reclassify Independent Contractors with Reduced Tax Liability

By Kelley E. Kaufman

Companies' improper classification of workers as independent contractors can have significant legal consequences. Though trucking companies regularly employ independent contractors as drivers, classification issues can arise. The determination of whether a worker is properly classified as an independent contractor or an employee is highly fact-specific and will depend upon the individual circumstances of each case. Misclassifying independent contractors can implicate legal compliance issues in a variety of areas, including taxation, wages and benefits, unemployment and workers' compensation, discrimination and more.

Recently, the Internal Revenue Service ("IRS") announced details of a Voluntary Classification Settlement Program ("VCSP") for taxpayers who wish to reclassify independent contractors as employees. The VCSP would provide eligible taxpayers with partial relief from federal employment taxes if they agree to prospectively treat workers as employees. Companies interested in participating in the

program first must apply to the IRS and meet specific eligibility requirements. If accepted, they also will be required to enter into a closing agreement with the IRS to finalize the terms.

What does this mean for your company?

The IRS's announcement serves as a reminder that independent contractor relationships are the focus of increasing enforcement activity at both the federal and state level. Companies who use independent contractors should audit their current arrangements carefully to ensure compliance with the law and – if warranted – take corrective action. If you wish to consider participation in the VCSP, consider seeking counsel and carefully evaluate any potential nontax ramifications that can result from participation in the program. ■

Kelley E. Kaufman practices in the Labor and Employment Law practice group.
kkaufman@mwn.com / 717.237.5248



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OFCCP Mid-Atlantic Region Issues Scheduling Letters

By Rick L. Etter

The Office of Federal Contract Compliance Programs (OFCCP) recently issued scheduling letters from its offices throughout the Mid-Atlantic Region. The OFCCP is the agency responsible for auditing federal government contractors and subcontractors to ensure they are complying with Executive Order 11246, which establishes affirmative action obligations for companies with more than 50 employees whose products or services are used to perform contracts with the federal government. Because these obligations flow through to subcontractors, most employers in the transportation industry fall under the OFCCP's jurisdiction (even if they don't know it).

For many employers, the first time they learn of their affirmative action obligations is when they receive a scheduling letter from the OFCCP. The OFCCP sends a scheduling letter to notify a government contractor or subcontractor that a particular establishment has been selected for a compliance evaluation. In response to the scheduling letter, the contractor or subcontractor must submit its written Affirmative Action Program (AAP) along with supporting information, including detailed data on compensation, hiring, promotion, and termination decisions. A sample scheduling letter can be viewed at http://www.dol.gov/ofccp/regs/compliance/OMB_appr_letter.pdf. If you receive a scheduling letter, you should immediately contact us because you have only 30 days to submit your response.

The OFCCP uses the information obtained from the scheduling letter to identify personnel decisions that cannot be supported by documentation and then relies on statistics to establish systemic discrimination. For this reason, you should perform your own statistical analyses prior to submitting your response to the OFCCP. More importantly, we strongly recommend that such statistical analyses be coordinated by counsel and protected by the attorney-client privilege. While there are a number of vendors and consultants who offer compliance review support as part of their AAP services, their work is not protected by the attorney-client privilege and is therefore discoverable by plaintiff's attorneys and may be available to the public under the Freedom of Information Act (FOIA). Make no mistake, an OFCCP scheduling letter should be treated in the same manner as a class action lawsuit because that is exactly what it is.

If you receive a scheduling letter, Rick Etter or Schaun Henry have the experience and know-how to steer you safely through the OFCCP's compliance evaluation process. ■

Rick L. Etter practices in the Labor and Employment Law, and Education Law practice groups.
retter@mwn.com / 717.237.5367



McNees Transportation, Distribution and Logistics Group

Barbara A. Darkes, Chair
717.237.5381/bdarkes@mwn.com
Timothy R. Deckert
717.237.5413/tdeckert@mwn.com
James J. Franklin
717.237.5375/jfranklin@mwn.com

Kandice J. Giurintano
717.237.5452/kgiurintano@mwn.com
Schaun D. Henry
717.237.5346/shenry@mwn.com
Kimberly A. Selemba
717.237.5359/kselemba@mwn.com

Curtis N. Stambaugh
717.237.5435/cstambaugh@mwn.com

The *Transportation, Distribution and Logistics Alert* is edited by Kimberly A. Selemba. Kimberly is a member of the firm's Litigation, Injunction, and Transportation, Distribution and Logistics practice groups.

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