

IRS Announces New Voluntary Worker Classification Settlement Program

September 29, 2011

To be eligible for participation in the VCSP, a taxpayer must have consistently treated the workers as non-employees; the taxpayer must have filed all required Forms 1099 for the workers for the previous three years; and the taxpayer cannot currently be under audit by the IRS or under audit concerning classification of the workers by DOL or by a state government agency.

In [Announcement 2011-64](#), the Internal Revenue Service (IRS) on September 21, 2011, provided notice and details regarding a new Voluntary Classification Settlement Program (the "VCSP"), which provides partial relief from federal employment taxes for eligible taxpayers that agree to prospectively treat workers as employees. To participate in the VCSP, the taxpayer has to meet certain eligibility requirements that are outlined below, apply to participate in the VCSP and enter into a closing agreement with the IRS.

Under long-standing IRS guidance, the determination of whether a worker is performing services as an employee or as an independent contractor depends on the facts and circumstances, and is generally based on the common-law test of whether the service recipient has the right to direct and control the workers on how to perform the services. Currently, for taxpayers under IRS examination, a Classification Settlement Program is available to resolve federal employment tax issues related to worker misclassification. This program permits the prospective reclassification of workers as employees, with reduced federal employment tax liabilities for past non-employee treatment.

The VCSP is the result of this determination and is available for taxpayers who want to voluntarily change the prospective classification of their workers. The VCSP applies to taxpayers who are currently treating their workers (or a class or group of workers) as independent contractors or other non-employees and who want to prospectively treat the workers as employees. To be eligible, a taxpayer must meet the following requirements:

- The taxpayer must have consistently treated the workers as non-employees;
- The taxpayer must have filed all required Forms 1099 for the workers for the previous three years; and

- The taxpayer cannot currently be under audit by the IRS or under audit concerning classification of the workers by the U.S. Department of Labor or by a state government agency.

A taxpayer who participates in the VCSP will agree to prospectively treat the class of workers as employees for future tax periods. In exchange, the taxpayer will: (1) pay 10 percent of the employment tax liability that may have been due on compensation paid to the workers for the most recent tax year; (2) will not be liable for any interest and penalties on that liability; and (3) will not be subject to an employment tax audit with respect to their worker classification of the workers for prior years.

Additionally, with respect to the three calendar years following the taxpayer's voluntary reclassification under the VCSP, the taxpayer will agree to extend the statute of limitations on assessment of employment taxes from three to six years. Therefore, while the taxpayer will not be liable for employment taxes with respect to periods prior to the voluntary reclassification, the taxpayer must agree to extend the statute of limitations for the assessment of employment taxes for the three following calendar years.

Taxpayers who wish to participate in the VCSP are required to submit the recently published [Form 8952](#) ("Application for Voluntary Classification Settlement Program (VCSP)") at least 60 days before they want to begin treating the workers as employees. The IRS will contact the taxpayer once it has reviewed the Form 8952 and verified the taxpayer's eligibility.

The VCSP offers employees who have misclassified their workers as non-employees with an opportunity to voluntarily correct this issue prospectively with limited exposure for the past liabilities associated with worker misclassifications. In addition, the impact of reclassifying workers as employees may have a significant impact on the taxpayer's ERISA covered plans in that such plans may need to be amended to cover reclassified workers for the prospective period only.

All taxpayers who classify workers as non-employees should consider reviewing that classification and determining whether a filing under the VCSP is appropriate.

About Duane Morris

Duane Morris assists its employer clients with tax and benefits issues, including the determination of whether a filing under the VCSP is appropriate.

For Further Information

If you have any questions about this *Alert*, please contact any of the [attorneys](#) in our [Employment, Labor, Benefits and Immigration Practice Group](#) or the attorney in the firm with whom you are regularly in contact.

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