Beware Increased Worker Classification Audits


Bruce Ely *William Thistle*

As many of you are aware, there has been a marked increase in the emphasis on worker misclassification, not only by the Internal Revenue Service and U.S. Department of Labor, but by the states. The IRS and the U.S. DOL have signed a memorandum of understanding (in essence, an exchange of information agreement), and the U.S. DOL signed a similar agreement with the Alabama DOL last fall. The latter agreement, and its March 2015 amendment, is referred to as a "Partnership Agreement."

This is not just an issue for Federal Express and Uber. Our law firm is handling or has recently settled several independent contractor classification audits, some of which involve labor law issues and some of which involve tax issues – or both. In a few cases, unfortunately, the client turned to (or on) their CPA and asked the CPA why he or she didn't warn them about this issue years ago? Or, going further, why didn't the CPA suggest that the client have outside counsel review its independent contractor relationships and, if needed, consider quietly converting certain workers to employee status?

Here are some practical suggestions. First and foremost, if you're preparing the client's Forms 941 or 1099, it should be clear to the client that you are relying on them for the proper classification of their workers, either as employees or independent contractors. Yes, we know, we're suggesting that you add yet another clause to your form engagement letter for those clients….

Secondly, think about suggesting to these clients, and perhaps all your clients, that someone in your firm be allowed to review their existing worker relationships, including their independent contractor agreements, to apply the 20 "common law" factors and the Revenue Act of 1978's Section 530 "safe harbor" to determine if the client has a defensible case if they are audited or investigated. Perhaps the independent contractor relationship should be strengthened, *e.g.*, implementing a clear independent contractor agreement and work guidelines that comply with the 20-factor test. Perhaps the client should convert one or more of its workers to employee status under the IRS' Voluntary Compliance Settlement Program. Our firm has recently used the VCSP to the advantage of multiple clients.

Most of your clients have been reading the newspapers lately and are already aware of this issue. But even if not, you might remind them of the looming January 1, 2016 deadline for the minimum health insurance coverage requirements of the Affordable Care Act (Obama Care), which apply the 20-factor test in determining whether a worker is an employee or independent contractor, but disavow Section 530 protections. In other words, this issue will be gathering even more attention going forward. Addressing it now may spare you and your clients from headaches in the future. And, remember, and "an ounce of prevention is worth a pound of cure."

If we can be of assistance, please don't hesitate to contact us at bely@babc.com or wthistle@babc.com.

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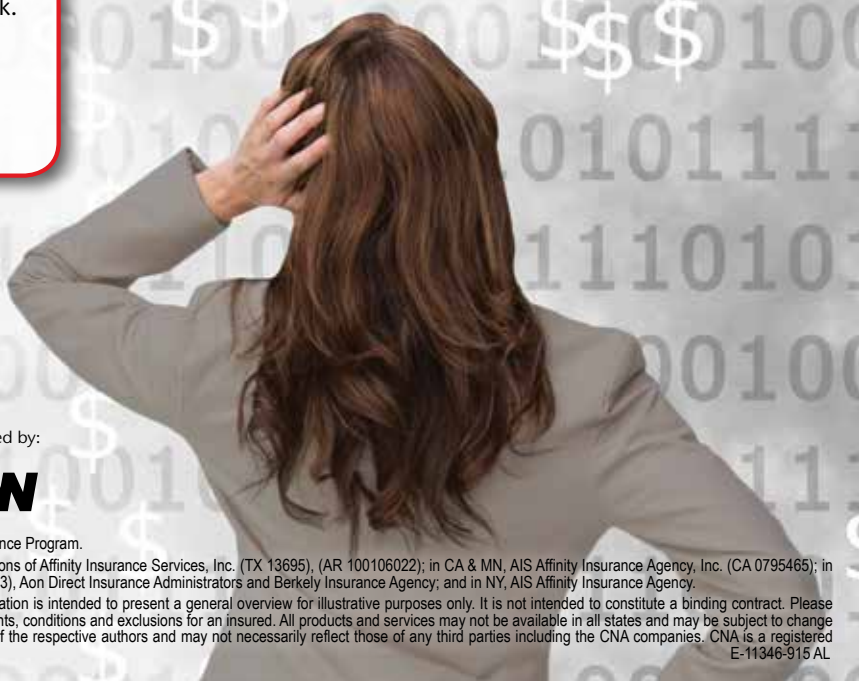

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