



Brager Tax Law Group

Treating Employees As Independent Contractors Results in Criminal Tax Conviction

In a **criminal tax** case last year the United States Court of Appeals for the Eighth Circuit upheld the conviction of a man for willful failure to pay the employment taxes of his healthcare staffing business. **U.S. v. McClain (8th Cir. 2011)**. In *United States v. Francis Leroy McClain*, No. 0:08-cr-00010 (D. Minn. Jul. 20, 2009) the United States District Court for the District of Minnesota determined that Francis McClain knew he should have classified the workers for his temporary nursing staffing agency as employees but willfully chose not to.

How did McClain's **payroll tax problems** morph into **criminal tax problems**? First, he never filed federal payroll tax returns (Form 941) for the periods from the fourth quarter of 2002 through the fourth quarter of 2005 and only made one payment in December 2002 in the approximate amount of \$4,200 for employment taxes although the total amount due was approximately \$345,000. McClain's defense was that the nurses were in fact independent contractors and not employees, and even if they weren't he had a good faith belief that the workers were employees.

The courts were not impressed with McClain's arguments since he had a history of misclassifying his temporary nursing staff as independent contractors. In a previous civil tax case involving a predecessor company the IRS argued that McClain willfully misclassified his workers and failed to remit the payroll taxes to the IRS. That lawsuit was eventually settled and the IRS obtained a judgment for the unpaid employment taxes, penalties and interest. As a further part of that settlement McClain agreed that "with respect to any other business similar to the ... entities that he might own, operate, or control in the future, he would treat as employees for tax purposes all workers who performed functions or duties that were the same or similar as the functions or duties performed by the nurses and nursing assistants who worked for the...entities. In other words, defendant McClain was obligated to withhold and pay over employment taxes for the nursing professionals who worked for any of his entities." In addition, McClain did comply with a Minnesota's statute requiring that nurse staffing agencies like his certify that they are treating their nurses as employees and not independent contractors.

Sometimes it's a gray area whether to treat workers as employees or independent contractors; but the wrong decision can have detrimental consequences to an employer, and its officers, resulting in large payroll tax liabilities and even **tax evasion or tax fraud** charges. The IRS has a number of criteria they

use in determining whether a worker is an employee or an **independent contractor** and these federal criteria may differ on a state level as well.

If you have **payroll tax problems** don't let them turn into **criminal tax problems**. Call the former IRS **tax attorneys** at Brager Tax Law Group, A P.C. at 1-800-Tax Litigator.