SANDS ANDERSON

North Carolina Law Life

2010: The Year of the Employee and $7 Billion in Additional Payroll Taxes?

By: Donna Ray Chmura. ***This was posted Thursday, March 11th, 2010***

2010 may well be the year of the employee. Both the IRS and the Department of Labor are adding investigators to find “misclassified” employees.

For many years, employers have relied on independent contractors as a means of controlling payroll and benefits costs, as well as reducing the costs of recruiting and training new workers. The use of independent contractors was rarely challenged.

The U.S. Department of Labor (DOL) has recently made the misclassification of workers one of its top priorities, with an additional $25 Million allocated for the “Misclassification Initiative.” DOL plans to hire an additional 100 enforcement personnel to investigate claims of misclassifying workers as independent contractors. DOL is concerned that misclassification is denying workers employment protections, such as overtime under the Fair Labor Standards Act and leave under the Family and Medical Leave Act.

The Internal Revenue Service (IRS), however, is looking to collect an estimated $7 Billion in payroll taxes that will be lost over the next 10 years as a result of misclassification. Independent contractors do not pay unemployment taxes.

There is no clear-cut test for whether a person should be an employee or a contractor. The IRS has some guidelines. So does DOL.

A contractor typically can work for more than one person, provided his/her own tools, materials and supplies, works off-site, may hire assistance or subcontractors and have control over the timing and sequencing of the work. Contractors do not receive fringe benefits and are paid by the job.

An employee tends to be paid by salary or hourly wages for indefinite work (rather than being paid a set fee to complete a specific project), can be fired or quit without penalty, is reimbursed expenses, is required to do the job themselves and is given the tools to do the job.

Copyright Sands Anderson Marks & Miller, PC.

THE INFORMATION CONTAINED IN OUR WEB SITE DESCRIBES LEGAL MATTERS HANDLED IN THE PAST BY OUR ATTORNEYS. OF COURSE, THE RESULTS WE HAVE ACHIEVED DEPEND UPON A VARIETY OF FACTORS UNIQUE TO EACH MATTER. BECAUSE EACH MATTER IS DIFFERENT, OUR PAST RESULTS CANNOT PREDICT OR GUARANTEE A SIMILAR RESULT IN THE FUTURE.

Employers may raise red flags if:

- Independent contractors are performing work that is essential to the business.
- The contractor has no other clients or is required to dedicate all his time to the employer's business.
- The industry typically uses employees for a certain job, and the employer is using contractors.
- Some duties are being performed by both independent contractors and employees.

It is essential that employers get the classification right. If you classify an employee as an independent contractor and you have no reasonable basis for doing so, you may be held liable for employment taxes for that worker, and perhaps even overtime pay. There could be interest and penalties, as well as bad publicity.

Copyright Sands Anderson Marks & Miller, PC.

THE INFORMATION CONTAINED IN OUR WEB SITE DESCRIBES LEGAL MATTERS HANDLED IN THE PAST BY OUR ATTORNEYS. OF COURSE, THE RESULTS WE HAVE ACHIEVED DEPEND UPON A VARIETY OF FACTORS UNIQUE TO EACH MATTER. BECAUSE EACH MATTER IS DIFFERENT, OUR PAST RESULTS CANNOT PREDICT OR GUARANTEE A SIMILAR RESULT IN THE FUTURE.