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- Pollution and other environmental crimes
- Anti-kickback allegations
- Financial institution, insurance fraud and embezzlement
- Securities and other financial frauds
- Insider trading
- U.S. Customs violations

For additional information on this or any white collar criminal law-related issue, please contact RMF's White Collar Crime & Investigations co-chairs: **Alexander G. Bateman**, who can be reached at 516-663-6589 or abateman@rmfpc.com or **Gregory J. Naclerio**, who can be reached at 516-663-6633 or gnaclerio@rmfpc.com



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Prosecution of Tax Crimes on the Rise

Nassau District Attorney Kathleen Rice and New York State Department of Taxation and Finance Acting Commissioner Jamie Woodward recently announced a statewide sweep targeting tax fraud. The opening salvos included charges against nine individuals, including one physician, whose arrests were announced on January 19 and February 2, 2010. With interdepartmental cooperation at the state and local levels, these arrests are just the beginning of a wide-scale effort to identify and prosecute individuals who attempt to defraud the tax system.

Effective April 7, 2009, New York State completely overhauled the criminal provisions of the tax law. While the new provisions eliminate inconsistencies that existed under the somewhat former byzantine tax crimes statutes, they also expand the definition of illegal conduct that could result in a felony tax fraud charge. For example, under the old tax law, a person could not be charged with failure to file a return unless he failed to file for three years in a row. Under the new revisions a single instance, with demonstrable criminal intent, is sufficient to create liability.

The new law defines eight distinct “tax fraud acts” in tax law sections 1801(a)(1-8), and it assigns five offense levels based upon monetary thresholds in tax law sections 1802 through 1806. At the root, all eight tax fraud acts require both willful conduct and intent to evade tax liability.

Briefly, the new “tax fraud acts” are:

1. Failure to make, render, sign, certify, or file a tax return [1801(a)(1)];
2. Knowingly making a false statement or omitting material information from a tax return or filing [1801(a)(2)];
3. Knowingly supplying materially false or fraudulent information in connection with any tax return, audit, or investigation [1801(a)(3)];
4. Engaging in a scheme to defraud the state by false or fraudulent pretenses in connection with any tax imposed [1801(a)(4)];
5. Failing to remit any tax collected in the name of the state [1804(a)(5)];
6. Failing to collect any tax required to be collected under the tax law [1804(a)(6)];
7. Failing to pay any tax owed with the intent to evade the tax [1804(a)(7)]; and
8. Knowingly issuing a false or fraudulent exemption certificate, which falsely certifies that tax has been paid or is not owed [1804(a)(8)].

The levels of tax fraud identified by the new act start with criminal tax fraud in the fifth degree, which is a class A misdemeanor under Section 1802. This offense does not require any minimum dollar value. The remaining offense levels are:

Tax Law Section	Classification	Degree	Monetary Threshold
1803	E felony	Fourth	Greater than \$3,000
1804	D felony	Third	Greater than \$10,000
1805	C felony	Second	Greater than \$50,000
1806	B felony	First	Greater than \$1,000,000

For all of the above tax fraud levels, the law limits the value calculations to “a period of not more than one year.” However, tax law section 1807 allows a prosecutor to aggregate all tax fraud acts committed within one year into a single count. This is particularly useful for sales tax prosecutions, so that a prosecutor may aggregate a defendant’s sales tax liability for an entire year instead of having to charge each instance of tax fraud in a single count.

As a result of these law revisions, business owners must be aware of the increased liability they face and increased scrutiny that may occur. In particular, individuals should be aware that the revisions criminalize verbal representations as well as written ones. This makes lying to a tax auditor a crime, so taxpayers should exercise particular care during a face-to-face audit. With this in mind, taxpayers would do well to consult experienced criminal counsel in addition to an accountant if and when they receive communications from the New York State Tax Department, or worse, a prosecutor’s office.

Employers Subject to Increased Penalties for Misclassifying Employees

Employers who misclassify employees as independent contractors and pay them via 1099s may find themselves subject to increased penalties following audits on both the state and federal levels, thanks to increased funding to enhance and create misclassification task forces.

New York launched a misclassification task force in September 2007, headed by M. Patricia Smith, then New York State Commissioner of Labor. Ms. Smith was recently appointed by President Obama to be Solicitor General of the U.S. Department of Labor. The Obama Administration’s proposed budget for fiscal year 2011 authorized \$25 million to the Department of Labor to target employee misclassification and “enhances the ability of both agencies to penalize employers who misclassify.” See FY 2011, Congressional Budget Justification, Wage and Hour Div. (U.S. Dep’t of Labor), at WHD- 23. See also FY 2011 Department of Labor, Budget in Brief, at 44 (Wage and Hour Division).

With a renewed push for increased recordkeeping requirements by employers to prevent employee misclassification, and a movement to amend the federal Fair Labor Standards Act, employers should expect more audits by both state and federal agencies as they seek to crack down on what has been called, “the underground economy.” Of course, if the authorities believe that an employer has intentionally misclassified employees as independent contractors and has falsified business records to justify the misclassification, the potential for criminal liability in addition to civil penalties is very real. Employers who are unsure about their past business practices in this regard should consult with experienced white collar criminal counsel before responding to audits or record requests from state or federal labor officials.



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