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IRS Announces Voluntary Worker Classification Program To Help Employers Come Into Tax Compliance

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It is common for some employers to treat certain workers as Form 1099 independent contractors. Sometimes, workers in these job classifications are more accurately classified as employees. But it may be difficult for employers to make a correction to the employee classification out of the fear that a change in classification would give rise to a liability for payroll taxes for prior years.

On September 21, 2011, in Ann. 2011-64, the IRS announced a new Voluntary Employee Classification Settlement Program which gives employers the opportunity to correct such classification errors without opening themselves to payment of payroll taxes for prior tax years.

To be eligible, an applicant must:

- Consistently have treated the workers in the past as nonemployees
- Have filed all required Forms 1099 for the workers for the previous three years
- Not currently be under audit by the IRS, the Department of Labor or a state agency concerning the classification of these workers

Interested employers can apply for the program by filing Form 8952 (Application for Voluntary Classification Settlement Program), at least 60 days before they want to begin treating the workers as employees.

Employers accepted into the program will pay an amount effectively equaling just over one percent of the wages paid to the reclassified workers for the past year. No interest or penalties will be due, and the employers will not be audited on payroll taxes related to these workers for prior years. Participating employers will, for the first three years under the program, be subject to a special six-year statute of limitations, rather than the usual three years that generally applies to payroll taxes.

This program is part of the larger "Fresh Start" initiative at the IRS to promote voluntary compliance. The carrot offered to employers taking advantage of the program is the waiver of payroll taxes, penalty and interest for the past misclassification. If employers with classification issues fail to take advantage of the program, they continue to face the risk that the worker classification issue will come up on audit. If the issue comes up on audit, the employer can expect to face payroll taxes for three years, together with penalties and interest.

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Note, however, that this IRS program does not provide a safe haven from liability for wages, overtime or benefits which may be due to workers who were improperly classified as contractors. Last year, the Department of Labor announced a joint initiative with the IRS targeted at employers whom the DOL and IRS believed misclassified workers as independent contractors. The DOL continues to actively pursue claims against employers, seeking back wages and overtime for up to three years, and liquidated damages in an equal amount for employees misclassified as contractors.

Thus, while the this IRS program presents an opportunity to correct worker classification issues that employers may have overlooked or ignored, exposure under wage and hour laws remains. Your Akerman attorney can assist in identifying problematic worker classifications and taking advantage of this opportunity to avoid the costs of prior payroll taxes, penalties and interest if the worker classification issue emerges at audit.
