WILLCOX SAVAGE

Employment Law Outlook

Fall 2014

GOVERNOR MCAULIFFE CREATES TASK FORCE TO ADDRESS WORKER MISCLASSIFICATION AND PAYROLL FRAUD

William M. Furr

On August 14, 2014, Virginia Governor Terry McAuliffe signed Executive Order 24 to establish an Inter-Agency Task Force to combat worker misclassification and payroll fraud. According to the Executive Order, companies' misclassifications of employees as independent contractors "undermines businesses that follow the law, deprives the Commonwealth of millions of dollars in tax revenues, and prevents workers from receiving legal protections and benefits."

A 2012 study found that one-third of audited employers in certain industries misclassify employees. According to the study, these employers fail to purchase workers' compensation insurance, fail to pay unemployment taxes and payroll taxes, and/or fail to comply with minimum wage and overtime laws. The report estimates that Virginia's state income tax collections are reduced by $28 million per year because of misclassifications.

The Executive Order directs six state agencies, including the Virginia Employment Commission, the Department of Labor and Industry, the State Corporation Commission and the Workers' Compensation Commission, to form a task force to develop procedures for identifying the misclassification of employees as independent contractors. The Executive Order requires the task force to present a plan to Governor McAuliffe by December 1, 2014.

Because of this development, Virginia employers would be wise to review their independent contractors' classifications. If employers are paying workers as independent contractors rather than employees, it is critical to make sure that they satisfy the legal requirements for independent contractor status.■

In This Issue...

WANT TO BE A ROCK STAR AT YOUR COMPANY?

JOIN OUR SEMINAR

401(k) Plan Audit Preparation Strategies

Learn how to navigate through IRS and DOL standards, take corrective actions, and minimize risks of penalties.

DATE
Tuesday, November 11, 2014

TIME
8:00am - 10:00am

LOCATION
Willcox Savage
440 Monticello Avenue
Suite 2200
Norfolk, Virginia 23510

SPEAKERS
Cher E. Wynkoop
Willcox Savage

Tara A. Brooks
Dixon Hughes Goodman

Brian A. Roberts
401(k) Advisors

REGISTRATION
www.willcoxsavage.com

Complimentary Seminar
(Seating is limited)

Submitted for 1.5 HRCI credits

IRS RELEASES DRAFT ACA REPORTING FORMS AND INSTRUCTIONS

Cher E. Wynkoop and Corina V. San-Marina

Employers subject to the shared responsibility reporting requirements under the Affordable Care Act (ACA) have all the information necessary to meet their reporting obligations starting in 2016. The draft reporting forms released on July 28, together with the draft instructions released on August 28, are designed to notify the Internal Revenue Service (IRS) about whether individuals and employers are meeting their obligations concerning health coverage under the ACA and to help individuals determine if they are eligible for a premium tax credit for health coverage purchased through a Marketplace.

An employer with 50 or more full-time employees (including full-time equivalents) must file one or more Forms 1094-C (including a Form 1094-C identified as an Authoritative Transmittal) and a Form 1095-C (or a substitute form) for each employee who was a full-time employee of the employer for any month of the calendar year.

An employer that provides health coverage through a self-insured group health plan must complete Form 1095-C, Parts I and III, for any employee who enrolls in health coverage, whether or not the employee is a full-time employee for any month of the calendar year. If the employee is a full-time employee for any month of the calendar year, the employer must also complete Part II. An employer that provides health coverage through an insured group health plan should not complete Form 1095-C Part III.

The filing deadline for the forms is similar to that of Forms W-2 and Forms 1099; January 31 to employees and no later than February 28 for filing with the IRS, or March 31 if filing electronically.

The type of coverage offered by the employer will dictate the reporting requirements. In general, employers who offer richer coverage will be subject to less detailed reporting. Unless an employer makes a "qualifying offer," full reporting is required for all full-time employees on a month-by-month basis. Employers will need to report on a month-by-month basis the lowest cost monthly premium for self-only coverage, to whom the coverage was offered, whether coverage offered provided minimum value and use indicator codes to report certain other information.

Employers who can certify that they made an offer of "qualifying coverage" for all 12 months can take advantage of simplified reporting for those employees for whom the qualifying offer was made for all 12 calendar months. A "qualifying offer" is an offer of minimum essential coverage providing minimum value at an employee cost for employee-only coverage not exceeding 9.5% of the federal poverty level and includes an offer of at least minimum essential coverage to the employee's spouse and dependents. The employer will file Form 1094-C with employer related information and Form 1095-C with an indicator code to show the qualifying offer was made. Also, the employer must provide a copy of Form 1095-C or a statement to the employee with information that the employee and his or her spouse or dependents are not eligible for a premium tax credit for that calendar year.

Special transition relief for 2015 is available only if the employer certifies that it made a qualifying offer for all 12 calendar months to at least 95% of its full-time employees and files a Form 1094-C and Form 1095-C with a special code indicating that employees who did not receive a qualifying offer (or received no offer) may be entitled to a premium tax credit for one or more months. The employee must be provided with a copy of Form 1095-C or with a letter with the same information and contact information for the employer.

Special transition relief for 2015 is available only if the employer certifies that it made a qualifying offer for all 12 calendar months to at least 95% of its full-time employees and files a Form 1094-C and Form 1095-C...

If employers do not want the burden of identifying and reporting on who their full-time employees are per month, another simplified reporting method is available. An employer must certify that it made an offer of minimum essential coverage providing minimum value to at least 98% of its employees for all months of the calendar year. With this certification the employer is not required to identify which of the employees for whom it is filing were full-time employees.

Employers must start reporting in 2016 for coverage offered during 2015. Note that even though employers who have between 50 and 99 full-time employees are generally eligible for transition relief from the employer mandate penalty for the 2015 plan year, they are required to file Forms 1095-C and 1094-C for the 2015 calendar year. Employers who fail to report will be subject to penalties of $200 per return.

In light of the complexity of the new information reporting requirements, employers should review the draft IRS forms and instructions to become familiar with the information they will have to provide and develop a system for making sure that information is collected in a timely manner. Final forms are expected to be released later this year. Copies of the draft forms and instructions are available at: http://apps.irs.gov/app/picklist/list/draftTaxForms.html. ■

THE IMPORTANCE OF DOCUMENT RETENTION AND LITIGATION HOLDS: UNDERSTANDING YOUR BUSINESS

Phillip H. Hucles

A district court for the Central District of California recently held that sanctions were warranted against an employer, Shippers Transport Express, Inc. (Shippers), because it failed to protect relevant text messages between Shippers' managers and purported employees.

In *Perez v. Shippers Transp. Express, Inc.*, Case No. 13-4255 (C.D. Cal. July 8, 2014), the Department of Labor initiated suit on behalf of purported employees of an employer that maintains terminals and storage yards and that coordinates transportation for cargo containers arriving in the Port of Oakland. After an administrative review, the California Wage and Hour Division determined that Shippers violated the FLSA when it misclassified its drivers as independent contractors – the Department of Labor subsequently filed suit on behalf of the drivers.

During discovery, the Department of Labor requested, among other things, any text messages between Shippers and the drivers. The Department of Labor argued that the text messages could establish that Shippers maintained a high level of control over the drivers and therefore could evidence an employment relationship. After objecting to the request, Shippers represented that no relevant documents existed.

The Department of Labor subsequently conducted depositions of several Shippers managers. During these depositions, managers admitted to using text messaging to communicate with the drivers. The Department of Labor inquired why Shippers failed to produce any of these documents and the managers asserted that Shippers never told them to preserve the text messages and that they routinely deleted them – even after the litigation commenced. Based on this new information, the Department of Labor conferred with Shippers' attorneys regarding whether a motion for sanctions should be filed.

Shippers maintained that it had no knowledge that its managers communicated with the drivers via text messaging. After conducting a review, Shippers admitted it failed to safeguard the documents but would take steps to correct any failure on its part. Shippers produced a large portion of the text messages, but many text messages were unrecoverable.

The Department of Labor moved for sanctions and the court agreed that Shippers' conduct warranted sanctions. Shippers' primary defense was that it had no knowledge that its managers communicated with drivers via text message and thus should not suffer sanctions

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RETIREMENT PLAN SPONSORS – TIPS ON SHARING THE FIDUCIARY BURDEN

Cher E. Wynkoop and Corina V. San-Marina

The Employee Retirement Income Security Act (ERISA), the body of law that governs qualified retirement plans, holds retirement plan sponsors to the highest standards of being a prudent investment expert – even though they are almost never investment experts. There is a solution to this conundrum. ERISA has a mechanism by which a plan sponsor can get help to shoulder some of the fiduciary burden related to offering employee retirement plans.

The sponsor can share this fiduciary burden by either retaining an investment *advisor* under ERISA section 3(21) or an investment *manager* under ERISA section 3(38). The difference between the two is the level of discretion over managing, acquiring or disposing of plan assets. Investment advisors under section 3(21) *do not* have discretion over plan assets directly, they give investment advice and recommendations to plan sponsors who may choose to accept or reject it, and become a co-fiduciary with the plan sponsor. The plan sponsor retains the ultimate decision-making power over plan assets.

Since the plan sponsor remains ultimately liable under ERISA, it is important for it to: (1) carefully review all of the materials and service contracts to make sure the investment advisor is offering what it promises in breadth of services and the liability it is willing to assume, and (2) periodically assess if the fees paid are reasonable and commensurate with the benefit received.

Before hiring a section 3(21) investment advisor, a plan sponsor should determine if the advisor has the experience, expertise, credentials and resources to offer adequate advice. While not an exhaustive list, the following questions should be a starting point for any plan sponsor to help choose an investment advisor for its retirement plan.

- Does the advisor have an established presence in the industry?
- Is the advisor a recognized fiduciary expert?
- Does the advisor disclose how it is compensated and the revenue source?
- Is the advisor independent or affiliated with a captive organization such as a bank, insurance company or investment company?
- What periodic benchmarking services will the advisor offer?

If you are interested in learning more about this topic, join our complimentary seminar on Tuesday, November 11 (details on the front page of this newsletter).■

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Return Service Requested

THE IMPORTANCE OF DOCUMENT RETENTION AND LITIGATION HOLDS: UNDERSTANDING YOUR BUSINESS

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from its failure to produce documents it did not know existed. It also argued that it immediately engaged in corrective action to rectify its failure. Among other things, the court found that Shippers had failed to implement an effective litigation hold which led to the destruction of relevant evidence and prejudice to the Department of Labor. The court found little merit in Shippers' argument that it was unaware that relevant text message evidence existed on managers' phones used to conduct business. The court also rejected Shippers' argument that text messaging was a new technology and that it only just became aware of the prevalence of its use. The court stated that an effective litigation hold could have prevented the problems and that text messaging is a common manner of communication. Because Shippers had no substantial explanation for its failure to produce the relevant evidence, the court imposed sanctions, including a negative inference.

This case represents a cautionary tale for employers. First, establishing document retention programs and drafting effective litigation holds are necessary preliminary steps in document intensive litigation. Second, you must understand your business and the tools of communication used by your managers and employees. E-discovery is a fast-changing and dynamic area of the law. Employers must continue to educate themselves with respect to the new technologies it provides its managers and employees and how they may use them.■

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