Texas Unemployment and Payday Law Update

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Corporate Officers / Members of LLCs

- Corporate officers and members of LLCs who perform services for pay for their entities are employees of those entities.
- *Texas Carbonate v. Phinney*, 307 F.2d 289 (5th Cir. 1962), *cert. denied*, 371 U.S. 940 (1962): a corporate officer is employed by his or her own corporate entity.
- Legal presumption: a corporate officer who performs services for his or her corporation for compensation does so for the benefit of the corporation he or she serves, and each such officer directs and controls his own work on behalf of the corporation.
- LLCs: http://www.twc.state.tx.us/tax-law-manual-chapter-1-employing-unit-3#1.5.3

Transfers of Compensation Experience

- Successor in an acquisition of one business by another acquires the UI compensation experience of the predecessor, if:
  - the successor acquires all or part of the organization, trade, or business of the predecessor, and
  - there is shared ownership or officer-level management between the two entities.
- Partial transfer is possible within two years of an acquisition if the acquired portion is separately identifiable and segregable, if:
  - predecessor and successor jointly apply, and
  - they submit up to four years' worth of wage records.

How Audits Get Started

- Former employee files unemployment claim – TWC finds no wages reported and disallows the claim – claimant appeals – this is the highest priority Tax Department investigation – TWC may end up notifying IRS
- "Tattle-tale" letter from employees or competitors
- Random audit – TWC tries to do 1% of all employers each year (DOL guideline)
- Program audit – targeted industries or regions – examples: hair salon industry in the late 1980s, landscape and construction firms in past decade

Misclassification - Red Flags

- Terms such as “1099 employees” or “contract labor”
- Having contractors wear company badges or uniforms indicating their affiliation with the company
- Giving contractors a company e-mail address
- Inviting contractors to company parties and other events using the same invitation that goes to regular employees
- Giving contractors company benefits or wage advances
- Having contractors sign company policy handbooks
- Non-competition agreements

What TWC Looks For In Independent Contractor Cases

- Corporate status
- FEIN
- Registration with Texas Secretary of State
- TWC tax account number
- Reporting wages of their own employees
- Their own business cards
- Invoices on their own stationery
- Advertising
- Written contracts
- E-mails, letters, or other documentation relating to negotiating the parameters of the work
- Substantial investment in their own business

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