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Civil and Criminal Employment Tax Enforcement— Employers Beware

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TABLE OF CONTENTS

<u>I.</u>	<u>Buckle Your Seatbelts</u>	1
<u>A.</u>	<u>Knowledge:</u>	1
<u>II.</u>	<u>Why Are Employment Taxes in Vogue Once Again?</u>	1
<u>A.</u>	<u>Follow the money</u>	1
<u>B.</u>	<u>Employment tax violators come in all shapes and sizes</u>	2
<u>C.</u>	<u>While a business owner who fails to pay the IRS employment taxes may consider it a simple paper-free loan from the government, the government considers it to be theft</u>	2
<u>III.</u>	<u>The Nuts and Bolts of Employment Taxes</u>	2
<u>A.</u>	<u>Employment taxes are taxes in addition to income taxes</u>	2
<u>B.</u>	<u>Filing Requirements</u>	2
<u>C.</u>	<u>Payment Requirements</u>	3
<u>D.</u>	<u>Employment Tax Obligations of Single-Member LLCs (SMLLCs)</u>	3
<u>E.</u>	<u>Employment Tax Obligations of Limited Partner</u>	4
<u>IV.</u>	<u>IRS Early Interaction initiative</u>	5
<u>A.</u>	<u>Targeted at employers who appear to be falling behind on employment tax payments through a sophisticated algorithm</u>	5
<u>B.</u>	<u>Expect letters (903 Letters), automated phone messages, “other communications,” and, in some cases, a visit from an IRS Revenue Officer</u>	5
<u>C.</u>	<u>Expect IRS non-compliance notice to be used by DOJ Tax to demonstrate the recipient was willfully failing to satisfy payroll tax obligations</u>	6
<u>D.</u>	<u>When Early Intervention for a Non-Compliant Taxpayer Fails</u>	6
<u>V.</u>	<u>Methods to Exponentially Increase the Amount of Unpaid Employment Taxes and PEOs</u>	6
<u>A.</u>	<u>A single company is limited to the amount of employment taxes it can accumulate based on the number of employees and the amount of payroll</u>	6
<u>B.</u>	<u>Another way employers may substantially increase amounts of unpaid employment taxes is to establish a business that leases employees to a number of other businesses, such as a professional employer organization or PEO</u>	7
<u>C.</u>	<u>Tax Increase Prevention Act of 2014 (TIPA), enacted December 19, 2014, Congress substantially modified the law as it relates to PEOs</u>	7
<u>D.</u>	<u>IRS Initiatives to Better Inform Employers Who Utilize Payroll Service Providers</u>	8
<u>VI.</u>	<u>Classification of a Person as Employee or Independent Contractor</u>	9

A.	<u>The wrongful classification and treatment of a person as an independent contractor rather than an employee may also result in the inadvertent (or perhaps purposeful) avoidance of employment tax obligations.</u>	9
B.	<u>Courts, as well as the IRS, look at numerous factors to determine whether a person is an employee or an independent contractor.</u>	9
C.	<u>Business owners often have difficulty in determining the proper treatment or classification of workers they hire.</u>	10
D.	<u>At least 2 forms of Relief for business owners.</u>	10
VII.	<u>The Trust Fund Recovery Penalty.</u>	11
A.	<u>What happens to an employee’s potential refund when an employer pays an employee a net payroll check but fails to pay the employee withholding for employment and income taxes to the IRS?</u>	11
B.	<u>The story is not over when the employee is made whole by the IRS respecting the Form W-2.</u>	11
VIII.	<u>When the Trust Fund Recovery Penalty Becomes the Least of Your Worries - Seemingly Routine Employment Tax Civil Cases Can Transmute into Criminal Cases Very Quickly.</u>	14
A.	<u>DOJ Tax will be pursuing injunctions to stop employment tax abusers from running up more unpaid employment taxes.</u>	14
B.	<u>To initiate the injunction process, the IRS will send the taxpayer Letter 903, <i>You Haven’t Deposited Federal Employment Taxes</i>.</u>	14
C.	<u>Injunctions to stop non–tax-compliant conduct are nothing new to DOJ Tax.</u>	15
D.	<u>Federal courts have both the “inherent power” and statutory authority to ensure that their orders are followed and to coerce parties into compliance with those orders.</u>	15
E.	<u>Injunction Prohibitions</u>	15
F.	<u>Fraud Technical Advisors.</u>	15
G.	<u>Other Sources of IRS CI Referrals.</u>	16
IX.	<u>Prosecution of Criminal Employment Tax Matters.</u>	18
A.	<u>In fiscal year 2015, there were 102 employment tax evasion investigations opened, which resulted in 80 prosecution recommendations and 62 sentencing, with a 77.4 percent incarceration rate.</u>	18
B.	<u>Joe tax evader who never intended to file return or pay tax.</u>	18
C.	<u>Bill’s bad business troubles.</u>	18
D.	<u>Bill’s actions after non-payment of employment taxes.</u>	18
E.	<u>Caroline D. Ciraolo, acting Assistant Attorney General for the DOJ Tax Division, said at the Summer 2015 NYU Tax Controversy Forum that both the IRS and DOJ Tax are both ramping up their focus on criminal enforcement of employment tax issues.</u>	19

F.	<u>Thomas E. Bishop, Assistant Special Agent In Charge for the IRS CI Division in New York, further said at the Summer 2015 NYU Tax Controversy Forum that the IRS’ focus would expand beyond the traditional focus of going after those who use the funds to accommodate a lavish lifestyle.</u>	19
G.	<u>“On the criminal side, we’ve been getting good sentences that will hopefully have a strong deterrent effect.”</u>	19
H.	<u>Aside from the civil and criminal injunctions mentioned above, numerous statutes under Title 26 and Title 18 are in the government’s arsenal to prosecute employment tax matters.</u>	19
X.	<u>Conclusion.</u>	21
A.	<u>Every day, more and more tax practitioners are being confronted with IRS’ actions including those involving employment tax issues.</u>	21

Buckle Your Seatbelts: Employment Taxes Are Back in Vogue and It Will Be a Bumpy Ride—The IRS and Department of Justice Tax Division Are on the Hunt

I. Buckle Your Seatbelts

A. Knowledge:

1. IRS Revenue Officer interviews your client, explains what a responsible person is, warns against paying other creditors before paying employment taxes, and specifically informs them of the duty to file and pay employment taxes.
2. Beware of IRS Form 4180 which must be signed by taxpayer.
3. Letter 903 (with Notice 931) will be sent out each quarter.
 - (a) Multiple trial exhibits and counts.
4. Responsible person fails to pay employment taxes and nonetheless claims withholding on their own personal tax return.
5. Inability to pay the bills does not negate knowledge or willfulness.
6. Prior Trust Fund Recovery Penalty (TFRP) violation (serial employment tax abuser).
7. Payment of TFRP does not negate knowledge or willfulness on continuing non-TFRP portion of the liability.
8. *See* Caryn D. Finley, attorney (criminal enforcement section, Southern Region) DOJ Tax Division December 11, 2015 Remarks 2015 TNT 240-4 (December 14, 2015) Civil Employment Tax Enforcement Aids Criminal Enforcement.

II. Why Are Employment Taxes in Vogue Once Again?

A. Follow the money.

1. In looking at tax enforcement, DOJ Tax and the IRS are on track with their attacks on offshore noncompliance and tax shelters while they are stemming the flow of improper refunds due to ID theft.
2. So where is the next pot of money? The answer is simple—in old fashioned employment tax violators.

- (a) As of September 2015, the cumulative amounts from unpaid Forms 941 was \$59 billion

B. Employment tax violators come in all shapes and sizes.

1. Simple professionals who fail to pay their own employment taxes.
2. Business owners who do not pay the employment taxes of all their employees while using a host of tools to conceal their efforts.
3. Big fish of employment tax abuse: employee leasing/professional employer organization (PEO) companies have the ability to amass huge liabilities on behalf of a number of companies in a short period of time.

- (a) Some of the professional employer organizations are not only failing to turn over withheld employment taxes but are also keeping insurance payments from their clients as well.

C. While a business owner who fails to pay the IRS employment taxes may consider it a simple paper-free loan from the government, the government considers it to be theft.

III. The Nuts and Bolts of Employment Taxes.

A. Employment taxes are taxes in addition to income taxes.

1. Of the 15.3 percent (cumulatively referred to as Federal Insurance Contributions Act (FICA) taxes), the employer and the employee each pay a Social Security portion of 6.2 percent (12.4 percent total) and a Medicare portion of 1.45 percent (2.9 percent total).
2. If someone is self-employed, the calculation is a straightforward 15.3 percent of the wages paid.
3. Code Sections 3101 and 3111.

B. Filing Requirements.

1. Employers must file quarterly Form 941, *Employer's QUARTERLY Federal Tax Return*.
 - (a) The Form 941 must list all employees and the amount of wages paid to them.
 - (b) In employment tax examinations (civil) and investigations (criminal) the Form 941 is usually one of the most important documents in the government's case.

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