NEWSLETTERS

InterConnect FLASH! No. 8 – Was it Real or a Ruse?

The InterConnect FLASH! Practical Bursts of Information Regarding Critical Independent Contractor Relationships

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"It was just really fishy the way this whole thing came down" were the words of Victor LaRosa, president of the Southern California drayage operator Total Transportation Services Inc. ("TTSI"), when he discussed the IRS determination letter that recently landed at his doorstep. The letter was a result of the IRS SS-8 process, which is an individual self-help procedure that a person can follow to request a determination of employment status. Sadly, the SS-8 in this instance was initiated by a driver who worked for the company for one month in 2009. Was this a setup? Who knows. The IRS claims that it afforded TTSI the opportunity to respond to the information provided by the individual submitting the SS-8; however, TTSI claims non-receipt of such request. True or not, there are lessons to be learned.

The first lesson is to remain vigilant regarding any correspondence received from the IRS. Request letters from the IRS providing the opportunity for a company to respond to an SS-8 filing are simple and innocuous correspondence which can often be lost in a company's internal mail. Since they are not generally addressed to a specific individual within the company, the letters often get bounced around from department to department. The response to an SS-8 filing is a very serious and important first step. It's like the TV commercial regarding oil filters-you can pay me now or you can pay me later. A properly detailed and well-supported response to an SS-8 filing can bring the matter to a successful conclusion at the claim's infancy. It is not, however, a 10-minute project and you should not go it alone.

The other takeaway is that the IRS concluded that there was evidence that the motor carrier had "behavioral control" and "financial control" over the individual. The concepts of behavioral control, financial control, and relationship of the parties are the titles that the IRS has introduced to simplify the traditional 20 factor test by reducing the examining criteria to 11 points, organized into these three categories. No matter how you slice it, the crux of the matter is the focus on the right to control. Behavioral control focuses on the instructions and training given to workers to determine whether there is control and procedures on how the work is completed. The scope of inquiry regarding financial control focuses on the significance of investment made by the individual to deliver a service, the corresponding expenses related to that investment, and the opportunity for profit or loss. Accordingly, this is not really new but merely an application of an old test under different words. Therefore the coaching tip remains the same: establish your independent contractor program on an arm's-length vendor/vendee business relationship; focus on the results to be accomplished and not how the work is to be completed; allow the independent contractor reasonable latitude to make business decisions; provide realistic entrepreneurial opportunity to the independent contractor which allows him/her to hopefully succeed, or fail economically; and make

certain that the contract mirrors reality and that the managerial/operational conduct mirrors the contract.

Benesch can assist your business in reviewing your independent contractor programs in this regard. Please call if you have questions or if we can be of further assistance.

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