

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

FLASH No. 3 - Proposed Bill Would Control "Misclassification" of Independent Contractors

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In our Flash reports to date, we have emphasized the rules for determining whether a worker is an independent contractor or an employee. Some of our prominent legislators are weighing in with their views on the subject. Senator John Kerry (D-MA) and others have introduced the Taxpayer Responsibility Accountability and Consistency Act of 2009 ("TRACA"). (S. 2882). TRACA is intended to make it more difficult for businesses to successfully claim that their workers are independent contractors.

TRACA would require that businesses using independent contractors register with the IRS. Through the registration process, IRS should be able to identify likely subjects for an audit.

Of even greater concern are the changes proposed for the current safe harbor under Section 530 of the Internal Revenue Code. Under current Section 530, a taxpayer is permitted to treat a worker as an independent contractor, regardless of whether the worker passes the usual common law tests, so long as the taxpayer has a reasonable basis for such treatment. If TRACA is enacted, a taxpayer would be treated as having a reasonable basis for treating an individual as an independent contractor only if the taxpayer first receives (i) a favorable written determination from the IRS addressing the employment status of such individual or another individual holding a substantially similar position with the taxpayer, or (ii) a favorable concluded employment tax examination by the IRS.

There is no doubt that the federal and state governments could collect big dollars if "misclassification" of employees could be controlled. Nor is a taxpayer required to pay social security and Medicare taxes for independent contractors. Nor are they required to pay for state unemployment or workers compensation insurance. Senator Kerry has said that "misclassification" of employees cost the federal government approximately 34.7 billion dollars in tax revenues between the years 1996 and 2004.

Similar bills have been introduced in previous congressional sessions, but have failed to generate much momentum. At the moment, there is no reason to believe that TRACA will do much better. It has been referred to committee. As of March 2010, no hearings are scheduled. However, because

the federal and state governments are desperate for cash, support may be growing and the situation may be different in the next Congress.

Benesch will continue to follow developments and update our clients regarding this proposed legislation. Please call if you have questions or if we can be of further assistance.

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