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Robert W. Wood
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Miranda-Like Warnings To Independent Contractors?

Yes, you read correctly. Following up on my post September 17, White House Contractor vs. Employee: There Will Be Blood, Congress may soon require them, along with more substantive and procedural changes to the law governing independent contractors and employees. There appears to be considerable interest in the bill, the Fair Playing Field Act of 2010 (H.R. 6128, S. 3786).

This law hasn't yet passed, but the Miranda provision seems particularly noteworthy, requiring everyone using independent contractors (companies and individuals alike) to give them written statements. The required written notice must be given to the worker within a reasonable time after entering into a contract. Think Miranda.

What should it say? The Treasury Secretary is tasked with developing a form document employers can use. Until then, the bill says the written statement must notify the independent contractor of:

- The Federal tax obligations of an independent contractor (that can't be a pretty discussion);
- The labor and employment law protections that *do not apply* to independent contractors (gulp, that should be a long list); and

- The right the independent contractor has to ask the IRS for a determination whether he or she is an employee or independent contractor (ouch).

This may be perfectly appropriate. In fact, there are many workers currently treated as independent contractors who probably have no business (no pun intended) being so treated. Seeking to sidestep the myriad liabilities of having employees, employers sometimes push the envelope so hard that the envelope, well dissolves. The notice provision seems designed to temper the independent contractor "enthusiasm" of at least some employers, and it probably will.

In fairness, the new written notice would only be required to be handed to independent contractors whom you hire on a regular and ongoing basis, and only within the scope of your trade or business. So presumably, the notice would not apply to your plumber whom you hire to install a new faucet at home, nor to the gardener who prunes the trees in your hard several times a year, even if he does it year in and year out for 20 years.

But the ongoing business use of independent contractors will be covered. The Miranda-like warning will most certainly prompt some workers who receive it to think twice about their status. A worker might think:

> "Gee, you mean I have to pay taxes on this money? You mean I have to pay self-employment tax too? And I get to medical benefits, no vacation, no pension, no insurance, no workers compensation if I'm injured, no employment benefits if I'm "laid off." This contractor gig doesn't sound so hot after all."

The icing on the cake is the required notice that the worker can ask for a ruling from the IRS. This isn't a hard thing to do. An IRS Form SS-8 is a streamlined worker ruling form. Any worker or company can fill one out to obtain an IRS determination on a worker's status. And unlike most other rulings from the IRS where you have to pay a fee, this one is free.

But most forms submitted are by workers—about 90 percent. And most forms produce an IRS ruling that the worker is an employee. In fact, for fiscal year 2008, the IRS says 72 percent of all Form SS-8 requests it

received produced rulings the workers were employees. Twenty five percent were closed without any ruling, and in only 3 percent were workers ruled independent contractors! The overwhelming penchant of the IRS is to come out in favor of withholding and employment tax.

For more on independent contractor issues, see:

Bada-bing: Exotic Dancers, Wages and the IRS, Los Angeles Daily Journal (Sept. 29, 2009), p. 6. Simultaneously published in San Francisco Daily Journal (Sept. 29, 2009), p. 6.

Legal Requirements That Influence Control of Independent Contractors and Employees, Vol. 81, No. 2, New York State Bar Association Journal (Feb. 2009), p. 36.

New Age Scrutiny on Employee vs. Contractor Liabilities, Vol. 2, State Bar of California Business Law News (2009), p. 11.

Robert W. Wood practices law with Wood & Porter, in San Francisco. The author of more than 30 books, including Legal Guide to Independent Contractor Status (5th Ed. 2010, Tax Institute) and Taxation of Damage Awards & Settlement Payments (4th Ed. 2009, Tax Institute), he can be reached at wood@woodporter.com.