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Civil and Criminal Employment Tax Enforcement— Employers Beware

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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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