



## **DOL/IRS Collaboration Memo Makes For Interesting Reading**

Insights

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We wrote previously about the announcement of a cooperative alliance between the U.S. Labor Department and the U.S. Internal Revenue Service aimed at ending what the Secretary of Labor called "the business practice of misclassifying employees [as independent contractors] in order to avoid providing employment protections."

If that news was not enough to get everyone's attention, the terms of the "Memorandum of Understanding" between these agencies (link to copy below; copy courtesy of CCH) should cause all employers to take notice. DOL and IRS have agreed to implement their agreement "through enhanced information sharing and other collaboration" led by a "joint IRS-DOL team".

### **Some Of The Details**

Among other things, DOL will "refer to the IRS . . . Wage and Hour Division investigation information and other data that DOL believes may raise Internal Revenue employment tax compliance issues related to misclassification." DOL will also share "Wage and Hour Division training materials and opportunities with the IRS . . ."

For its part, IRS "will evaluate and classify employment tax referrals provided by the DOL and . . . [will] conduct examinations to determine compliance with employment tax laws." And in at least some instances IRS is prepared to "share the employment tax referrals provided by the DOL with state and municipal taxing agencies . . ."

The two agencies have also committed to "coordinate national outreach activities." This will include such steps as "joint national press releases" and "joint messages to national stakeholder organizations." The Memorandum does not identify any of these "stakeholder organizations", but one may hazard an educated guess as to what the identities of at least some of them might be.

The administration's "transparency" mantra has been suspended where the Memorandum is concerned. For example, the document asserts "a need for the government to provide information to other law enforcement bodies without making a public disclosure." DOL and IRS say that they intend to preserve their "legal privileges or other legal protections against disclosure" to outsiders, and they contend that information exchanges between them will not be a "public disclosure" under the federal Freedom of Information Act.

### **Points To Consider**

## POINTS TO CONSIDER

The many take-aways include these:

- ◇ Once again, every company or other organization relying even in part upon a contingent of independent contractors should *immediately* evaluate whether there is any vulnerability to a successful claim that those workers are instead employees.
- ◇ Every such company or other organization being investigated by DOL should assume that information provided about independent contractors will be given to IRS and, potentially at least, to analogous state or local agencies and officials.
- ◇ Employers must of course abide by their legal obligations in DOL and IRS investigations and audits. But, within those parameters, management should be careful in deciding (i) what documents and other information to provide, and (ii) how, under what circumstances, and with what caveats to disclose them. DOL and IRS say that they intend to protect certain confidential or private information and trade secrets that are covered by federal laws and regulations. However, an employer cannot be sure whether DOL or IRS will agree with the employer (or even with one another) that each document or item of information is protected against disclosure to some other person or entity, or that a court will agree with DOL's or IRS's views in some later third-party legal action to compel disclosure. And the best of intentions cannot preclude an erroneous, mistaken, or inadvertent release of information to the public.
- ◇ While the Memorandum's principal focus appears to be worker misclassification, it does not say that the collaboration is restricted to this topic. For instance, the "joint outreach" is said also to encompass "other issues of mutual interest."

[DOL IRS Memorandum of Understanding.pdf \(216.50 kb\)](#)