

Employee or Independent Contractor?

By: Michael Charapp

Businesses of all types have been increasingly classifying personnel as independent contractors instead of full time employees. To the maximum extent possible, the IRS wants people who work for employers to be full-time employees. They want the employers to withhold taxes, make social security and Medicare payments, and issue W-2s at the end of the year.

A recent report by the U.S. Government Accountability Office finds that many of those listed as independent contractors are misclassified, and it has issued an estimate that this misclassification will cost the Treasury Department \$7 billion in lost payroll tax revenue over the next ten years. The U.S. Department of Labor has listed “misclassification” as one of its top priorities for the next fiscal year. Its 2011 budget request includes an additional \$25 million for a “misclassification initiative” that includes 100 additional Department of Labor personnel.

A dealership that classifies personnel as independent contractors and not employees should be sure that the classification is appropriate.

Clean-up Personnel

Personnel that dealers sometimes consider to be independent contractors are people who do vehicle clean-up. Rather than pay them salaries or hourly, dealers pay an amount per vehicle cleaned. As a result, they consider these workers to be independent contractors and not employees.

However, where such personnel work solely or mostly for the dealership, their supplies are provided by the dealership, and they are told what cars to clean and when, their classification as independent contractors is questionable.

Occasional Drivers

Does your dealership use occasional drivers – those folks who drive vehicles to and from auctions or to pick up and deliver DXs – and classify them as independent contractors?

The IRS bases the determination of a driver’s status on numerous issues that differentiate whether the business has the right to control only the result of the work (for example, that the vehicle get to where it is to go with no control over how that is accomplished, indicating an independent contractor) or whether the business can also control how the work will be done, what will be done, or the method of accomplishing the result (indicating that the driver is an employee). The IRS and the courts are generally inclined to stringently apply tests designed to determine whether someone is an independent contractor and are apt to find that drivers are employees rather than independent contractors.

Here are some questions to ask yourself about your occasional drivers:

- Does the driver drive just for your dealership?

- Is the driver bound to pick up and deliver vehicles at times that the dealership sets?
- Is the dealership providing the transportation to take the driver to the point where the cars are picked up or to return them from the place where the cars are delivered?
- Does the dealership expect drivers to follow certain routes?
- Does the dealership pay for meals and expenses?
- Does the dealership state time deadlines for delivering or picking up vehicles?
- Does the dealership set time parameters on the driving, requiring the drive to be made with limited stops and controlling the independence of the drivers?

If the answer to any of these questions is yes, a dealership that is treating its occasional drivers as independent contractors should carefully consider its position.

IRS Guidelines

The IRS has issued multi-factor guidelines for a business to determine whether a worker is an employee or an independent contractor. If you have independent contractors doing work for you, you should review those guidelines, and you would be wise to discuss the issues with your accountant.

Michael Charapp is an attorney with the McLean, VA firm of Charapp & Weiss, LLP, www.cwattorneys.com. The firm specializes in representing auto dealers and dealer trade associations.

Reprinted by CADA with permission from the Charapp & Weiss, LLP, March 2010 newsletter.

Articles are for information only and do not constitute legal advice.