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John Semmens, Editor

Business Owners Must Be Aware of Criminal Tax Consequences for Unfiled and Unpaid Payroll Taxes

By Jared M. Le Fevre

In October 2020, the United States Department of Justice announced a Montana construction company owner had pleaded guilty to criminal tax charges based on payroll tax fraud. *See* https://www.justice.gov/opa/pr/owner-montana-construction-company-pleads-guilty-employment-tax-fraud (last accessed Dec. 11, 2020). The owner of the construction company did not file quarterly employment tax returns, and did not pay to the IRS the payroll taxes it had withheld from employee paychecks. The construction company was a small business, with approximately 10 employees, that employed an outside accountant to prepare its payroll tax forms. However, for at least an eight-year period, the business owner did not file payroll tax returns or pay the appropriate payroll tax. The company owner also did not file his own personal income tax returns. Sentencing for these tax crimes will occur in January 2021, and the business owner already has agreed to pay the federal government over $900,000 in restitution. The business owner faces up to five years in prison.

This criminal payroll tax case should teach business owners several important lessons about federal law governing payroll taxes.

1. **While failing to pay payroll taxes often is treated as a civil tax issue, unpaid payroll taxes also may be pursued under criminal tax laws.** Business owners are no doubt aware that FICA taxes of 15.3% are due from the wages of employees to fund Social Security and Medicare. The employer withholds 7.65% from the employee's paycheck to remit to the IRS (along with federal

income tax withheld by the employer, this is commonly referred to as trust fund taxes), and the employer also pays 7.65% of the employee's wages to the IRS. The FICA taxes typically are due to the IRS on a quarterly basis, and are filed using IRS Form 941. If a business fails to file or pay the taxes, a business may be liable for a civil penalty and interest on the unfiled and unpaid taxes.

In addition, if the employer withholds trust fund taxes from employee paychecks but does not pay the trust fund taxes over to the IRS, the employer and others with authority over company finances may be held personally liable for the unpaid trust fund taxes under the IRS Trust Fund Recovery Penalty. *See* 26 U.S.C. § 6672. But these penalties are considered civil in nature. A business owner is not in danger of going to federal prison so long as the matter remains a civil matter.

However, as demonstrated in the construction company criminal matter discussed above, a business owner also may be investigated by the IRS pursuant to various criminal statutes, including: (i) Willful Failure to Collect or Pay Over Tax—26 U.S.C. § 7202; (ii) Attempt to Evade or Defeat Tax—26 U.S.C. § 7201; and (iii) Willful Failure to File Return, Supply Information, or Pay Tax (26 U.S.C. § 7203).

2. **Business owners should know that IRS criminal investigations and arrests do occur in this region.** The IRS has assigned 10 criminal investigators to cover Montana, four in Wyoming, and presumably a similar amount per capita in North Dakota. On a per capita basis, there are more IRS criminal investigators per capita in Montana, and likely in Wyoming and North Dakota, than in some more populous areas. Therefore, business owners in the region should not fall victim to the fallacy that, just because they do business in Montana, Wyoming, or North Dakota, they are beyond the reach of federal law. IRS Criminal Investigators are active in this region.

3. **The IRS has developed programs that permit business owners with unfiled and unpaid payroll taxes to become compliant while avoiding criminal prosecution.** Business owners with unfiled or unpaid payroll taxes should seek the advice of a tax professional to determine the best approach to become compliant with federal tax laws, to lessen the possibility of civil tax penalties, and to reduce the possibility of criminal investigation. The IRS offers a range of programs that permit a business owner to become compliant with payroll tax laws and avoid criminal investigation. Pursuant to these IRS programs, business owners who are not compliant with federal tax laws have various legal options, including:

- Filing Unfiled Returns. For unfiled and unpaid returns that are not the result of willful or fraudulent acts, the business owner may be able to file any unfiled IRS Form 941s and arrange payment.
- Arranging to Pay Delinquent Tax. The IRS offers installment agreements and offers in compromise that allow taxpayers to pay delinquent taxes over time, or to settle the tax for less than the balance owed. While an offer in compromise may permit the taxpayer to settle outstanding tax liabilities for only a percentage of the tax actually owed, business owners should be wary of companies advertising tax settlements for pennies on the dollar. Business owners also should note that an offer in compromise involves the taxpayer's submission of detailed financial statements to the IRS to determine how much the taxpayer is able to pay.
- Applying for the IRS Voluntary Disclosure Program. The IRS Voluntary Disclosure Program permits a taxpayer to voluntarily approach the IRS to file unfiled tax returns, amend erroneous tax returns, and pay delinquent taxes. It is the IRS's longstanding practice to not refer matters for criminal prosecution if the taxpayer follows all terms of the Voluntary Disclosure Program. While the IRS officially states that "voluntary disclosure does not guarantee immunity from prosecution," *see* Internal Revenue Manual 9.5.11.9(3), I am not aware of any instances in which a

taxpayer has followed the IRS Voluntary Disclosure Program and the IRS has still pursued criminal charges. In order to qualify for IRS Voluntary Disclosure Program, the disclosure must be truthful, timely, and complete. The taxpayer also must cooperate with the IRS in determining tax liability and make good faith arrangements to pay the tax in full, in addition to other requirements. Taxpayers are urged to speak with a tax professional about whether they may qualify for the IRS Voluntary Disclosure Program. One requirement of the IRS Voluntary Disclosure Program deserves particular attention: a "timely" voluntary disclosure requires the disclosure to be made before the IRS has commenced a civil examination or criminal investigation. It is too late to file for voluntarily disclosure if the business owner already is under IRS investigation.

- Applying for Voluntary Classification Settlement Program (VCSP). A business only pays payroll taxes for employees and not for independent contractors. If the business's payroll tax noncompliance consists of erroneously classifying workers as independent contractors rather than employees, the IRS offers the VSCP to limit tax and penalties for qualifying businesses that voluntarily change the classification of workers from independent contractor to employee.
- Negotiating with the U.S. Attorney's Office. If a business owner's noncompliance with federal tax laws was willful or fraudulent in nature and may not be eligible for participation in these IRS programs due to lateness of voluntary disclosure or other disqualification, the business owner may wish to contact the U.S. Attorney's Office to discuss resolving its legal liabilities. The business owner is advised to seek legal counsel in this situation.

In tax year 2019, the IRS Criminal Investigation investigated 250 employment tax matters, up from 140 in 2013. The rate of criminal investigations of payroll tax cases has increased each year during that period. Of the payroll tax cases referred for criminal prosecution, 84% resulted in incarceration, with an average prison sentence of 23 months.

Business owners must take great care to comply with federal law regarding payroll taxes. If the taxpayer has not timely filed or paid payroll taxes, the business owner is urged to contact a tax professional for assistance to come into compliance with federal law and deal with this as a civil tax matter. Business owners do go to federal prison for willful and fraudulent payroll tax violations, even in Montana.

If you would like more information on complying with federal tax law, including payroll taxes, please contact Crowley Fleck's Employment Practice Group or Taxation Practice Group.

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NLRB Expands the Definition of Solicitation During Work Hours

By Ashley Di Lorenzo

Employers should take note that certain employee conduct in the workplace may no longer be protected under the National Labor Relations Act. In *Wynn Las Vegas, LLC*, the National Labor Relations Board (the "Board") overruled two of its prior decisions and broadened the definition of solicitation to be consistent with its own prior decisions and the dictionary definition of the term. *See Wynn Las Vegas, LLC*, 369 NLRB No. 91 (2020). Specifically, the Board expanded its definition of solicitation to include any situation "where an employee makes statements to a coworker during working time that are intended and understood as an effort to persuade the employee to vote a particular way in a union election." Under those facts, the Board concluded an employee had "engaged in solicitation subject to discipline under an employer's validly enacted and applied no-

solicitation policy." As a practical matter, employers may now enforce non-solicitation policies that cover communications made during work hours that are reasonably understood to be made in support of, or against, unionizing, irrespective of whether the employee is actually providing a union authorization card to a co-worker.

In *Wynn Las Vegas*, a labor organization was attempting to organize Wynn security guards for a scheduled union election. Prior to the election, an off-duty Wynn employee approached an on-duty security guard stationed at the highest customer traffic area of the casino and engaged in a three-minute conversation about the upcoming union election. During the exchange, guests walked by and some appeared to need assistance; however, they were unable to talk to the guard because he was engaged in the conversation about voting for the union. Another employee overheard the conversation and reported the incident.

The casino maintained a non-solicitation policy establishing that "solicitation by employees is prohibited in work areas during the work time of the employee initiating the solicitation or the employee being solicited." After Wynn investigated the incident, it issued the off-duty employee a first written warning for violating the employer's non-solicitation policy. An Administrative Law Judge concluded the conduct at issue constituted solicitation; that conclusion was appealed to the Board.

In *Wynn*, the Board revisited its prior decisions, which defined solicitation as "asking someone to join the union by signing his name to an authorization card…" The Board narrowed that definition in *Wal-Mart Stores* and *ConAgra Foods, Inc.*, which required an authorization card to actually be present for the conduct to constitute solicitation. See *Wal-Mart Stores,* 340 NLRB 637 (2003); *see also ConAgra Foods, Inc.*, 361 NLRB 944 (2014). In *Wynn*, the Board overruled those prior decisions and determined its prior requirement that a union authorization card be physically present was overly restrictive. Instead, the Board broadened its standard by holding that union solicitation also "encompasses the act of encouraging employees to vote for or against union representation."

The Board further overruled *Wal-Mart Stores* and *ConAgra Foods, Inc.* to the extent those decisions concluded that solicitation can only occur if the employee's work is actually interrupted. The Board reiterated that "working time is for work," and concluded that any interruption of work, including for union solicitation, interferes with "the balance between employees' right to organize and 'the equally undisputed right of employers to maintain discipline in their establishments.'" As a result, the Board concluded that "a rule prohibiting solicitation during working time is presumed valid, and employers may lawfully discipline an employee who violates such a rule, even if the employee has not interrupted work."

Ultimately, the Board affirmed the Administrative Law Judge's decision that the off-duty employee engaged in union solicitation in violation of the casino's non-solicitation policy. Wynn had previously enforced its non-solicitation policy in two separate matters in which an employee had distributed makeup catalogs around the property and when an employee demanded money from another employee for helping perform certain work. Therefore, the Board held that Wynn did not enforce its policy in a discriminatory manner by singling out union activity.

As a practical matter, many employers already have written employee policies prohibiting solicitation during work hours. The Board's decision in *Wynn* provides important guidance on how employers may enforce those policies. The Board's expanded definition of solicitation provides employers with authority to enforce their non-solicitation policies in new factual situations. This decision effectively forces union supporters, or detractors, to limit any pro-union or anti-union activity to non-working

hours, or risk discipline from the employer. To preserve their ability to enforce their non-solicitation policies, employers should maintain facially neutral non-solicitation policies and enforce them against all kinds of solicitation in the workplace. Employers also should be aware that employees talk often throughout the workday about many topics, and allowing solicitation of any kind during working hours could undermine their ability to enforce non-solicitation policies in other contexts, including proposed unionization.

Please contact Crowley Fleck's Employment Law Practice Group if you are interested in reevaluating your existing employment policies in light of the *Wynn* decision.

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