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Lawyer Faces Up To 50 Years Prison Over Payroll Taxes

Portland lawyer Gary B. Bertoni is learning the hard way that the feds take payroll taxes seriously. He was indicted for 10 counts of willfully failing to collect and pay over federal employment taxes. The indictment concerns wages of the employees of his law firm, Bertoni & Associates LLC. From 2009 through 2011, the feds claim that Mr. Bertoni withheld the money but didn't pay the IRS.

The indictment claims that he also didn't deal properly with employee benefits, including health insurance and retirement account contributions. Instead, Bertoni allegedly caused his law firm to make thousands of dollars of expenditures for his personal benefit, including payments to his personal bank account totaling more than $300,000. This is only an indictment, and prosecutors have to prove their case. But it is serious. If convicted, Bertoni faces a up to 50 years in prison, a maximum fine of $2.5 million and restitution to the IRS.

The IRS can be tough on collecting income taxes, but is even tougher where payroll taxes are concerned. After all, the money is withheld from employee wages and supposed to be over to the IRS. If the IRS doesn't get it, the losses can mount quickly. And no matter how good a reason the employer has for using the money for something else, the IRS is strict.

Payroll services are one common answer, so the employer doesn't have discretion to use the money to pay vendors or for anything else. But what if the payroll service takes the money? That horrific possibility features prominently in a report by the Treasury Inspector General warning of payroll tax fraud.

The risk is real, especially considering that 40% of small firms use a third-party payer. The specifics of the payroll service duties and responsibilities vary, but if the payroll services doesn't send in the money to the IRS, the employer is still on the hook.

The report faults the IRS for not cross-checking and verifying payroll services and companies for which they are acting. And catching errors quickly is another big problem. Because of the snowballing nature of payroll tax liabilities, it is important for the IRS to detect and respond immediately when payroll tax defaults occur.

Does any of this mean payroll services are a bad idea? No, but it does suggest caution. The IRS is very clear that if you sign up with a payroll services and outsource all the payroll tax filings and payment functions, the employer is still liable. The payroll service may be liable under your contract, but the IRS still can look to the employer.

And that means the officers and directors of the employer have personal liability too. When a tax shortfall occurs, the IRS can make personal assessments against all responsible persons with ownership in or signature authority over the company. The IRS can assess a Trust Fund Recovery Assessment against every responsible person under Section 6672(a). You can be liable even if have no knowledge the IRS is not being paid.

If you're in business, when you withhold taxes on employee wages, you'd better send it to the IRS. Don't buy a Bentley, a Maserati, or pay for your wedding. Those are some of the purchases prosecutors claimed were made by the former CEO of Arrow Trucking Company, Mr. James Douglas Pielsticker. He got 7.5 years prison over company taxes for conspiracy to defraud the U.S., bank fraud and tax evasion. After that, he'll have 3 more years of supervised release. And he was ordered to pay a whopping $21 million in restitution.

For alerts to future tax articles, email me at Wood@WoodLLP.com. This discussion is not intended as legal advice.