

## Third-Party Payroll Providers May be in IRS' Crosshairs

By Robert B. Teuber

Running a business involves many moving parts. Aside from trying to generate a profit and providing quality services or products, the business must ensure that it remains in compliance with the law. Abiding by the provisions of the Internal Revenue Code is often seen as a daunting part of this compliance. However, this burden can be somewhat relieved by relying on third-party payroll providers.

*"Where an employer utilizes a third-party payroll service, the employer may believe that the payroll service should bear the responsibility for any unpaid taxes..."*

Employers often delegate their responsibility to cut paychecks and withhold relevant taxes to third-party payroll providers. But what happens when the withheld taxes are not paid to the IRS? A recent internal IRS memorandum may now cause finger pointing between employers and these third-party payroll providers as to who should bear ultimate responsibility for any unpaid employment taxes.

Under Internal Revenue Code Section 6672, a person that is responsible for collecting, accounting for and paying employment taxes to the government can be held liable for an amount equal to any unpaid tax. The result is that business owners and employees can effectively become personally liable for the employment taxes due if they were responsible for the payment of the taxes over to the government.

The IRS memorandum has made clear that the group of potentially responsible persons includes third-party payroll providers and their employees if they willfully failed to pay an employer's taxes to the government. Where an employer utilizes a third-party payroll service, the employer may believe that the payroll service should bear the responsibility for any unpaid taxes. As with all issues under the law, such liability depends on the facts and the IRS may choose to pursue the employer's responsible persons, the third-party payroll provider, or both.

Ultimately, the IRS may assert the liability against any responsible parties based on the facts as it views them. Where an employer feels that the payroll provider should bear some responsibility for the unpaid taxes, it can attempt to direct the attention of the IRS

to that third party. However, the IRS will make its own determination as to liability and the employer cannot force the IRS to do so.

If the IRS is contemplating asserting the liability against the payroll provider in lieu of the employer's representatives, it will consider many factors, including:

- Whether the employer knew of a pattern of noncompliance by the payroll service provider,
- Whether the third-party payer used fraud or deception to conceal the noncompliance from the employer,
- Whether the employer had knowledge of the unpaid taxes,
- For how long the delinquency has continued,
- Whether the employer ignored the noncompliance and
- Any actions taken by the employer to resolve the problem once it became aware of unpaid taxes.

Third-party payroll providers facing the assertion of the Code Section 6672 liability should take the matter seriously and contest any unwarranted liability through the proper IRS procedures. **WBB**



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## Licensed, Bonded & Insured?

By Michael M. Berzowski



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The terms “licensed, bonded and insured” frequently are the calling cards of people who offer to perform services in a home or business. Examples include contractors, electricians, plumbers, and roofers. The question becomes exactly what do these terms mean, and what if a service provider does not have the requisite credentials?

The State of Wisconsin Department of Safety and Professional Services administers certifications, licenses and registrations of approximately 80,000 individuals in 73 categories, to include license application and renewals, exam administration, renewals, continuing education and continuing education course approval. Various municipalities have licensing requirements, as well.

So then, it would appear that the opening requirement is that the person proposing to do the work be properly licensed. Contractors are not required to carry proof of registration on their person. You can, however, check online for the proper credentials. They should be either registered or hold another type of contractor’s credentials.

The alternative to the foregoing is to deal with an unlicensed provider. Here, you are assuming that the individual has the appropriate job knowledge and skills and is performing the job in accordance with required building codes. He will not be able to get a building permit, if one is required.

The term “bonded” can be an elusive concept. It can mean security for completing the project or for supplying goods for a particular job. It could mean covering for employee dishonesty, such as theft.

Under the Wisconsin Statutes, an applicant for a certificate of financial responsibility, which is required to obtain a building permit, must have in force a bond endorsed by a surety company authorized to do business in the State of not less than \$5,000 or a policy of personal or general liability insurance of at least \$250,000. If the bond is utilized, it is supposed to be greater than the estimated cost of completion. The last term, “insured”,

addresses multiple matters. First, the service provider should have general liability insurance issued by an insurer authorized to do business in Wisconsin, insuring the applicant in the amount of at least \$250,000 per occurrence because of bodily injury to or death of others or because of damage to the property of others.

In addition, the applicant should be in compliance with state and federal unemployment insurance rules, plus the service provider should have in force a policy of workers’ compensation insurance or, if the service provider is self-insured, meet statutory requirements.

Failure to observe these requirements, whether of the bond or insurance policy, could result in the owner being liable for any bodily injury to or the death of others or for any damage to the property of others that arises out of work performed or that is caused by any negligence by the contractor that occurs in connection with the work.

Prior to the commencement of a project, the property owner should request a certificate of insurance from the contractor’s insurance company showing the contractor and the property owner as being covered.

Failure to comply with the foregoing could result in liability for workers’ comp, i.e., a worker sues you be-

cause his employer has no insurance, or you could possibly be held liable for property loss or be without a remedy if the project is not properly completed.

In today’s times, with people being extremely cost-conscious, there may be a tendency to cut corners and engage the services of someone who is not in compliance with the rules. The benefit is that the rates will probably be less; the risk is that the property owner assumes a liability which may not have been anticipated. Not only that, the property owner in the case of unlicensed individuals is relying upon representations of the service provider with regard to ability to properly complete a project, which ability may or may not be present. In the final analysis, as in all things, the choice falls upon the property owner. Hopefully, it will be an informed choice, balanced with a weighing of risks. It certainly is easy to ask, “Are you licensed, bonded or insured?” **WBB**

## What should you do when emails from China offer to register your trademarks?

By Charles R. Stone

You receive an email from a consultant in China. He claims that a third party has just submitted an application for one of your trademarks. An immediate response will allow this consultant to block the application that was made in bad faith. Or maybe he can help you expedite the registration process and obtain the trademark before the other party. The email is full of typos and the grammar is bad, but its author does describe your trademark accurately and he does have the correct contact information. What should you do?

If your company has ever done business in China, odds are you will eventually receive such an email. They are almost always a scam, but that is only half of the story.

Offers to block another party's attempt to register your trademark, or to expedite your own trademark application, are obviously scams because there are no such procedures in China. China is a first-to-file country. If the person who files for a trademark convinces the Chinese Trademark Office that the mark is distinctive, has not previously been registered in China, and does not violate Chinese law, the office will approve the mark for publication in the PRC Trademark Gazette. It doesn't matter if the applicant has never used the mark. Then, if there is no opposition to the mark after it has been listed in the gazette for

three months, it will be registered and will eventually become a trademark. Only the Trademark Office determines when a trademark application is allowed to proceed, and I am not aware of any procedures for "blocking" applications merely because someone decided that they should have filed earlier.

*"You receive an email from a consultant in China. He claims that a third party has just submitted an application for one of your trademarks... what should you do?"*

An offer out of the blue to file your trademark in China is therefore almost always either a phishing scam or an offer to do at a very high price something that could have been done rather cheaply. But while it is best to ignore such offers, that does not necessarily mean that you should ignore the issue of trademarks completely.

If you sell or manufacture products in China, and you have a trademark worth protecting, you should register the mark in China. Having a trademark in the US alone offers no protection, just as having a trademark in China alone offers no protection in the US. You should register the

mark before you go to China, and you should definitely register before you sell any products there.

But I thought China didn't have any intellectual property rights. Why should I bother to register anything if my rights won't be protected?

Of copyrights, patents, and trademarks, trademarks are probably the most rigorously enforced today. "Rigorous" is, of course, a relative term. But that doesn't mean that potentially inconsistent enforcement is a good reason for you to take unnecessary risks with your trademarks.

For example, let's say you have been manufacturing products in China for years. Your products are trademarked in the US but you have not filed in China. You don't even sell your products in China, and you see no need to file there. But because China is a first-to-file country, and whoever files for a mark is likely to get it, if somebody else files for "your" mark, they will probably be able to prohibit your products from leaving China because they now violate their trademark. It doesn't matter that the person who filed for the mark never used it and it doesn't matter that the product is not going to be sold in China.

In fact, even if you have never thought about China, and have never sold your products in China, that doesn't mean that



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somebody over there (they don't even have to be Chinese) hasn't already filed for "your" trademarks. The US trademark office publishes the Official Gazette for Trademarks every Tuesday. It is available via the Internet, and it contains enough information for anybody to file in China if you don't. It also contains enough contact information to allow anybody to file your mark in China and later attempt to sell it back to you.

If you own a mark that you would like to protect in China, today or some day in the future, you should file for trademark protection in China now. **WBB**



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**Comments?** We'd like to hear from you. Please send an email to the editor: Megan Wiseman at [reporter@wbb-law.com](mailto:reporter@wbb-law.com).

### **AT THE FIRM...**

**Michael M. Berzowski** has begun a series of blog posts for *The Wisconsin Law Journal* on attorney ethics. So far, posts have centered on compliance with professional responsibility rules and recent actions by the Office of Lawyer Regulation and Board of Administration Oversight. The posts are available on *The Wisconsin Law Journal's* website.

Milwaukee is still excited about its "Summer of China." Recently, Weiss Berzowski Brady co-sponsored an event entitled "The Art of War and the War of Business" presented through the MMAC's China Business Council.

Registration will soon be open for our upcoming Tax & Business Seminar. This annual event will take place at the Wisconsin Club. Past topics include: Purchasing Businesses in a troubled financial condition, Health Care Reform - who is paying for what?, and Charitable Contribution - Private foundation vs. public foundation, advantages/disadvantages. This year promises the same great variety and timely topics; we hope to see you there! Please see our website for more details and to register, or contact Megan Wiseman at 414-270-2559 ([mkw@wbb-law.com](mailto:mkw@wbb-law.com))

### **2011 Schedule of Events**

**TAX & BUSINESS SEMINAR**  
September 21, 2011

**EMPLOYMENT LAW CONFERENCE**  
October 19, 2011

All events will be held at the Wisconsin Club at 900 W. Wisconsin Ave., Milwaukee. Please check our website ([wbb-law.com](http://wbb-law.com)) for more event information.