

## **Who's the Boss? It Might be You... (710 words)**

In today's busy world it is not uncommon for professionals to outsource tasks to enable them to keep up with the demands of their careers, families and homes. However, many are either unaware or consciously ignoring the reality that engaging the services of others for what may seem like minimal occasional tasks could classify them as an employer and trigger important legal obligations.

The Internal Revenue Service (IRS) defines the classification of "household employee" to include part-time and full-time housekeepers, maids, babysitters, gardeners, and others who work in or around your private residence as your employee. The definition does not include independent contractors, however the IRS and Department of Labor (DOL) have taken a broad approach in applying the standard "control test" finding in nearly all cases a person regularly providing services in a home, particularly those providing childcare, are employees.

The IRS notes that it looks to factors including whether the worker provides his own tools and supplies and whether his services are offered to the general public, so as to exclude most lawn care providers for example. The DOL has placed specific emphasis as to whether a significant portion of the worker's financial stability is tied to the job and whether the relationship is expected to continue indefinitely. The determination is not to be taken lightly as the IRS considers worker misclassification as tax evasion.

If a household worker rises to the level of an employee, a number of state and federal laws create compliance and reporting obligations. An obvious initial consideration is to ensure the employee is legal to work in the United States. Additionally, the household worker must be paid at least minimum wage and must be compensated appropriately for overtime.

While this on the surface appears simple, a variety of complex considerations can apply in the context of household employment, particularly for live-in employees or those with irregular schedules. For example, a live-in employee does not have to be paid for time spent engaging in normal activities such as eating, sleeping or entertaining. However, if those periods are interrupted to perform duties, the period of interruption must be included in the hours worked. If those periods of interruption are so frequent or consistent that the employee cannot "use the time effectively for his or her own purposes," those entire periods may be considered hours worked.

For meeting the minimum wage requirement, employers can include the reasonable cost or fair value of furnishing an employee with board, lodging, or other facilities as part of the employee's wages under certain circumstances. In the case of lodging, one requirement is that the lodging is provided primarily for the benefit of the employee. As such, if the employer requires the employee to live in their home as a convenience to the employer, it may not be included in the minimum wage calculation.

Under current law, if those wages rise to \$2,000 or more in 2016 to any one household employee, or \$1,000 or more in any calendar quarter of 2015 or 2016 to all household employees, subject to limited exceptions for family and employees under the age of 18, state and

federal employment tax withholding and reporting obligations apply. Compliance typically involves obtaining an employer identification number, providing the employee a Form W-2, filing Schedule H of Form 1040 and paying the withheld federal taxes with the employer's federal income tax return. Further, in Texas, liable employers must register for an unemployment tax account to report and pay unemployment taxes either quarterly or annually.

However, the good news is that where the employee is providing care to the employer's dependents, the employer is generally entitled to tax benefits which may offset the tax liabilities taken on due to their employer status. These benefits may be realized by way of a special Flexible Spending Account allowing the use of pre-tax dollars to pay qualifying expenses or a tax credit for itemized expenses within established limits using IRS Form 2441.

Many resources are available to employers unfamiliar with these obligations, such as online budgeting tools and tables. However, without careful attention this issue can quickly change from a minor record keeping and reporting hassle to a busy professional's nightmare when an audit letter from the IRS shows up at the door.

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