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Avoiding Obamacare With Independent Contractors

One of the precepts of [Obamacare](#) is that all employees ought to have affordable health coverage. That's a laudable goal, but many employers are doing their best not to be covered by the rules. After all, no matter how admirable the goal, the law erects new burdens of complexity. Complexity means expense.

There are technical rules about health coverage and affordability, and it isn't all easy to apply. If you're a small enough employer, you needn't navigate all the hurdles. Small employers, those with [50 full-time employees or less](#), aren't covered.

The act defines a "[full-time employee](#)" as someone who works 30 or more hours a week on average during a 1-month period. You don't have to count seasonal workers who work fewer than 120 days during the year. However, nonseasonal part-time workers are counted.

Of course, many rules hinge on who are your employees—independent contractors aren't covered. But that assumes that your independent contractor classification holds up. If it doesn't and your independent



contractors are recharacterized, you are back in the soup. The risk isn't theoretical, as the IRS is active in independent contractor reclassification efforts. And [more scrutiny is coming](#).

So can you fire all of your employees and make them independent contractors? Hardly. Firing everyone has plenty of other risks too. Besides, no matter how you label someone, the [substance of the work relationship](#) will control. For any independent contractor, it is appropriate to review how strong a case you have for a true independent contractor relationship.

That's so with your existing workers and those you might hire in the future. In fact, you should be increasingly vigilant about these rules. How do you determine who is an independent contractor? You can start with labels, but the IRS says you must [evaluate 20 factors](#) and assess whether you are controlling the method, manner and means of the work.

No one factor is controlling. The duration of your work relationship is important, as is whether it is full or part time, professional credentials, flexible vs. rigid hours, who supplies tools and supplies, expense reimbursements and more. A written contract is key to independent contractor status, but that alone is clearly not enough. Are you paying for a job—like having someone put in a new kitchen—or paying for someone to work by the hour doing reception work.

This fundamental worker status issue has become one of the most consequential legal determinations around. If you guess wrong, the liability for past years can be crushing. And the Inspector General of the IRS—the same one who was in the news over the [Tea Party targeting scandal](#)—has issued a [report](#) saying that despite IRS efforts, employers are **still** getting it wrong.

The report says millions of workers are misclassified as independent contractors. They are really employees, the report claims, and that means payroll tax withholding. Employers are dramatically underpaying employment taxes and that hurts everyone, the report says.

Determining who is an employee is a fact-intensive minefield. It always has been. And with Obamacare, stakes that were already high are getting higher. If you have independent contractors, you may need to retool your written agreement, evaluate which groups of workers should be employees, and further differentiate your independent contractors from employees.

When you do this, be realistic. Many business people are not. Fighting and losing a worker recharacterization battle can cripple a business. And with the push-me-pull-you of Obamacare, some small businesses are likely to start pushing the worker status envelope even more.

You can reach me at Wood@WoodLLP.com. This discussion is not intended as legal advice, and cannot be relied upon for any purpose without the services of a qualified professional.