

Independent Contractor or Employee: Guidelines to Ensure Compliance

By Richard Tay • Wood & Porter • San Francisco

The National Constitution Center's *Independent Contractor or Employee: Guidelines to Ensure Compliance* seeks admirable clarity in a murky area of the law. Anyone who deals with independent contractor versus employee classification issues has undoubtedly had some frustrating moments struggling over the numerous standards, jurisdictions and fact-driven tests. Worker status disputes and liabilities are featured in some acquisitions too.

Big Liability

Worker status liability is a multi-faceted concern, arising under worker's compensation laws, tort and agency laws, federal and state employment law, pension and employee benefits law, and of course, under federal and state income and employment tax law. All of these issues make the worker status question one of the most fundamental—and yet most amorphous—of questions. It can even be difficult to know which type of lawyer to consult when one is faced with a worker status issue. The issues and risks blend across many lines.

Quite apart from the need to know about multiple bodies of law, this multi-faceted legal work itself can trigger a chain reaction. Clients often don't anticipate such matters, so advisers certainly need to. True, a particular worker status matter (say involving an unemployment claim) may seem to involve only a very small amount of money itself.

Yet it may be the first step in a worker recharacterization war that may involve millions of dollars or the very livelihood of a company. Although there may be no precedential or estoppel effect of the small initial matter, it may trigger others. It is not hyperbole to suggest that sometimes a very small kernel grows into a huge and gnarly problem. Even if the company prevails in such bet-the-company-stakes litigation, the costs and fallout can be significant.

For all of these reasons, an introductory session on worker status issues and the fundamentals of discerning the line between employees and independent contractors might benefit most advisers.

This webinar featured James M. Nelson of Greenberg Traurig who spoke from wide experience in labor and employment issues. Nelson enunciated guidelines culled from many independent contractor versus employee disputes. Although the rules haven't materially changed of late, in a bleak economic climate, governments are turning more frequently to enforcement of taxes and penalties on worker misclassification.

It is not hyperbole to suggest that sometimes a very small kernel grows into a huge and gnarly problem. Even if the company prevails in such bet-the-company-stakes litigation, the costs and fallout can be significant.

That's bad news for employers. Not only is the law unclear, but regulatory agencies are focusing on these issues too, waiting to pounce on those they deem not in compliance. That makes it doubly important today to plot a careful course.

Nelson identified common missteps employers make in relationships with their independent contractors. Integration into the employer's business, a continuing relationship between contractor and employer and employer control over the contractor's work process are three biggies that enforcement authorities use to challenge an independent contractor relationship.

Multiple Tasks

In addition, Nelson described the different tests an employer may need to navigate to preserve independent contractor classification. There's the ubiquitous IRS 20 factors, the test under the Fair Labor Standards Act, and more. Later in his presentation, the speaker gave a thorough analysis of the current thought on independent contractor classification, including excerpts from recent court decisions.

Nelson recommended asking specific questions about a client's business *viz.* control of workers, the tenure of the contract, the working relationship and the degree of practical integration. You need this data to analyze the client's position and risk. Clearly, a good contract is important, but it alone is not enough. Although a good contract cannot ensure independent contractor status, a bad contract will almost always be grounds to defeat it.

Winding up, Nelson offered practical tips for employers to help plan against worker classification challenges. There may be few bright lines, but Nelson offered some, including not allowing temps to work more than 1,000 hours a year and doing business with businesses. Of course, there is no way to be bulletproof in an independent contractor classification.

That's especially true today, where state and federal governments are making a concerted effort to increase the frequency and severity of challenges to employers' independent contractor classification. Even so, employers can take protective measures and build some ramparts. In this intensely factual setting, a little spade work may materially improve your (or your client's) situation. Details on this webinar are available at www.constitutionconferences.com/LQ/0/2/p2WH1Pcp3F488NYi/p0e.

ARTICLE SUBMISSION POLICY

THE M&A TAX REPORT welcomes the submission of unsolicited articles. Submissions should be 2,000 words or less and use textual citations, rather than footnotes. All submissions should be made via email attachment in either Microsoft Word or WordPerfect format to Robert W. Wood, Editor-in-Chief, at wood@woodporter.com. THE M&A TAX REPORT reserves the right to accept, reject, or edit any submitted materials.

TO SUBSCRIBE TO THE M&A TAX REPORT CALL 1-800-638-8437.



a Wolters Kluwer business

4025 W. Peterson Ave.
Chicago, IL 60646

PRESORTED
FIRST-CLASS MAIL
U.S. POSTAGE
PAID
CCH