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'Independent' Contractors--And Many That Aren't--Shape Work Today

Having employees triggers a litany of federal and state tax withholding. Employees mean a host of anti-discrimination, health care, pension, worker's compensation and unemployment insurance obligations. You avoid these entanglements by hiring [independent contractors](#), or do you?

If they are **really** independent contractors, sure, but labels aren't enough. Disputes are common, and many different agencies can second-guess your decision. There's the IRS, state tax authorities, labor departments, and insurance companies.

All of them scrutinize the [status of workers](#). Even workers who accept their pay and sign contracts as independent contractors can **still** sue claiming they are **really** employees. The last is often a shock to employers. Signing a contract does **not** prevent the worker from suing and winning.

The issue can come up almost anywhere. From drivers to jockeys, couriers to facialists, mercenaries to programmers, and newsboys to scientists, there's no



one-size-fits-all solution. Agencies can reach inconsistent decisions too, and how you do something matters.

It does under [Obamacare](#) too, which defines a [full-time employee](#) as someone who works 30 or more hours a week on average during a 1-month period. Independent contractors aren't covered, assuming their status is legitimate. A central precept is that one can tell the difference between employees and independent contractors.

What if your independent contractor classification doesn't hold up? The taxes and penalties can be crushing, and this risk isn't theoretical. The IRS is active in reclassification efforts and [more scrutiny is coming](#). 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 existing workers and those you might hire in the future. In fact, you should be increasingly vigilant. How do you determine who is an independent contractor?

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? 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 has always been a fact-intensive minefield. And with Obamacare, stakes that were already high are 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.

And be realistic. Many business people are not. Fighting and losing a worker recharacterization battle can cripple a business. Today, some businesses are likely to push the worker status envelope even more. For employers trying to have an independent contractor arrangement that stands up, creativity and careful drafting are needed.

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.