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Obamacare Kills 2.5 Million Jobs? That Doesn't Count Independent Contractors

One of the precepts of [Obamacare](#) is that all employees ought to have affordable health coverage. That's a laudable goal, but the details have become more than messy. Besides, after the website gaffes, the 'like-your-plan-keep-your-plan' debacle, and other stumbles, what's the cost?

Now the Congressional Budget Office released a 182-page [Budget and Economic Outlook](#) tallying the effect of Obamacare on the job market. Turns out if you don't make people work, they may not want to work. The report claims that by 2024, Obamacare will reduce the size of the U.S. labor force by 2.5 million full-time-equivalent workers, roughly triple CBO's estimate three years ago.

Perhaps only in Washington could someone turn such a dire report on its head. It takes an optimist to see the true silver lining. Heck, this glass isn't just half full, it's filling right up to the brim, and with lemonade to boot.



Half full (Photo credit: Irish Typepad)

White House Press Secretary Jay Carney [published a statement](#) lauding the great empowerment and family values these millions of workers tuning out must represent:

‘Over the longer run, CBO finds that because of this law, individuals will be empowered to make choices about their own lives and livelihoods, like retiring on time rather than working into their elderly years or choosing to spend more time with their families. At the beginning of this year, we noted that as part of this new day in health care, Americans would no longer be trapped in a job just to provide coverage for their families, and would have the opportunity to pursue their dreams.’

Of course, long before 2024, many employers are likely to do their best not to be covered by the rules. 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.

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.

This fundamental worker status issue has become one of the most consequential legal determinations around. Yet 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. Determining who is an employee has always been a fact-intensive minefield. And with Obamacare, the stakes are higher. You may need to retool your independent contractor agreement, evaluate which

workers should be employees, and differentiate between your independent contractors and employees.

But be realistic. Fighting and losing a worker status 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.