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Ten More Consequences of Reclassifying Independent Contractors as Employees

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I recently suggested 10 things you should consider when workers who are treated as independent contractors are recharacterized as employees* and the topic has resonated with readers.

In fact, it turns out that readers thought of additional areas requiring attention, well beyond the 10 things I had mentioned. All told, it seems there are at least 20 things to worry about in this constantly changing and messy field.

Here, then, are 10 more things to consider on worker recharacterization.

1. OSHA

The U.S. Occupational Safety and Health Administration (OSHA) is an agency of the U.S. Department of Labor. It dates to 1970, though over its nearly 40-year history it has changed substantially. Its mission is to prevent work-related injuries, illnesses, and deaths by issuing and enforcing rules (denominated as “OSHA standards”) for workplace safety and health.

You may well think that if you have workers, whether they are independent contractors or employees, you need to know something about OSHA. As a general proposition, OSHA covers every employee in your workplace, regardless of the worker’s title, status, or

classification. It covers managers, partners, family members, rank-and-file employees, and so on.

Quite significantly, though, OSHA does not apply to independent contractors. Axiomatically, then, if your independent contractors are recharacterized, you need to know something about OSHA. OSHA regulations, or “standards,” are an imposing and voluminous set of requirements, and you will need to at least check the basics.

2. State OSHA

In addition to OSHA, many states have their own workplace condition laws. If your business operates in one of the following states, then you are conducting business in a “state plan state.” That means you would follow the state law rather than OSHA. These states include Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming.

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* See Robert W. Wood, *Ten Consequences of Reclassifying Independent Contractors as Employees*, 123 DTR J-1, 6/30/09.

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In what amounts to a kind of state law preemption, if you operate in one of these states, you would follow the state rules rather than federal OSHA. But do not think that you are necessarily better off. Some states (California for example) have significantly tougher workplace rules than the federal ones.

Once again, the OSHA and state OSHA equivalent rules are designed to operate on the employment relationship, and not to cover independent contractors. That means if your workers are recharacterized from independent contractor to employee status, you should know something about your state OSHA rules.

3. Immigration Reform And Control Act of 1986

The Immigration Reform and Control Act of 1986 (sometimes given the awkward acronym IRCA) significantly reformed U.S. immigration law. In general, the act made it illegal to knowingly hire or recruit illegal immigrants, required employers to attest to their employees' immigration status, and granted amnesty to certain illegal immigrants already in the United States.

The rules are complex and can be somewhat frightening. They have had at least one significant impact in the workplace, and that is the completion of employment verification forms. The Form I-9 contains a certification by the employer and by the employee.

The employer affirms that it has inspected the required documents provided by the employee to establish identity and authorization to be employed, noting that they appear to be genuine. The employee affirms that he or she is a U.S. citizen, permanent resident, or is authorized to work in the United States. It is not a bad idea to use these forms, but do they apply to independent contractors?

Significantly, these employment verification rules do not apply to independent contractors. They are defined as individuals who carry on independent business, contract to do work according to their own means and methods, and who are subject to control only as to results. As in so many other areas, if your workers are recharacterized, you need to pay attention to immigration rules and start complying.

4. Employee Polygraph Protection Act

The Employee Polygraph Protection Act of 1988 (sometimes known as EPPA) generally prevents employers from using lie detector tests in the workplace. The rules apply either for pre-employment screening, or during the course of employment. There are certain exceptions.

However, if you ever use or are considering using polygraphs, and if you have employees, beware.

5. Worker Adjustment And Retraining Notification Act

The Worker Adjustment and Retraining Notification Act (or WARN) protects, employees, their families, and communities by requiring most employers with 100 or more employees to provide advanced notice of plant closings and mass layoffs. The notice requirement mandates 60-calendar-day advance notification. The class of employees covered is broad, including managers and hourly and salaried workers alike.

The act even requires that notice be given to union representatives, the local chief elected official (such as the mayor), as well as the pertinent state agency that handles worker dislocation. The idea, of course, is to give workers and their families transition time when a layoff or plant closing is occurring. Of course, in the current economic climate, 60-day advance notice hardly seems enough. In fact, recently legislators introduced a bill to beef up WARN Act rules.

There are many nuances in the WARN Act, and some exceptions that can get you out of WARN Act requirements. However, if your workers are recharacterized

from independent contractors to employees, you will need to know something about the WARN Act if you have the requisite 100 employees.

6. Family and Medical Leave Act

The Family and Medical Leave Act of 1993 allows employees to take unpaid leave due to a serious health condition that makes the employee unable to perform his or her job. The rule also allows unpaid leave to care for a sick family member or to care for a new child (and in the case of the latter, including by birth, adoption, or foster care).

As you might expect, there are many nuances and requirements, but there is a basic threshold. For the law to kick in, the employer must have 50 or more employees within a 75-mile radius.

Independent contractors are not employees, so they are not covered. Of course, if your workers are recharacterized from independent contractor to employee status, you will need to know something about these rules. Even in the case of recharacterization, it may be helpful that an employee must have worked for the company for at least 12 months and at least 1,250 hours in the preceding 12 months.

7. COBRA Coverage

The Consolidated Omnibus Budget Reconciliation Act of 1985 (shortened to COBRA) was passed by Congress in 1985. These days, the COBRA acronym is almost universally acknowledged to refer to health continuation coverage. COBRA actually adopted many other laws too. Still, the health continuation coverage is probably the most important.

If your independent contractors are recharacterized and treated as employees, you probably will have larger troubles with your health insurance program than worrying about COBRA coverage. Still, you need to know about this too.

Essentially, it mandates giving employees the ability to have continuous health insurance coverage after they leave employment.

Generally, it does not matter why the person leaves employment. They may be fired, leave voluntarily, retire, etc. Other qualifying events can include divorce or legal separation (leaving a spouse potentially uncovered), a dependent child reaching an age where he or she is no longer covered, etc. Usually, COBRA requires the employer to cover these persons for up to 18 months following termination.

This provision generally applies to employees, though it may in some cases apply to independent contractors if they are covered by the company health plan. In any case, if your independent contractors are recharacterized and treated as employees, you probably will have larger troubles with your health insurance pro-

gram than worrying about COBRA coverage. Still, you need to know about this too.

8. State COBRA

As if worrying about federal COBRA obligations was not enough, you should be aware that many states have their own version of COBRA health continuation coverage. That can be significant if the state rules are more strenuous than the federal ones.

In California, for example, the state COBRA rules generally apply to employers having 10 or more employees. Under the federal COBRA rules, you are not subject to these rules unless you have 20 or more employees.

9. State New Hire Registry Reporting Requirements

New hire registries are used for various purposes, including child support and worker compensation enforcement purposes. Most states and the federal government maintain a new hire registry, requiring employers to list new employees and certain key data. Since payroll tax reporting is important, this should be no surprise.

What may seem surprising though is that these rules may apply when you have workers recharacterized from independent contractor to employee status. After all, whether the characterization is retroactive or prospective, if you are starting to treat the worker as an employee for all purposes, it may include this too.

Check with your state employment development department or other agencies to determine what you need to file in your state. In some cases you may already have to file for independent contractors.

10. Insurance

In all likelihood, you will already have thought of workers' compensation and unemployment insurance.

Indeed, these two types of coverage account for many initial recharacterization battles. They can be the first domino falling that sets off a chain reaction.

Still, it is appropriate to check all of your insurance. For example, when you have independent contractors recharacterized as employees, you have additional employees. That means, in virtually any business, it is appropriate to check your general liability coverage.

Suppose you have 10 delivery drivers operating as independent contractors. Suddenly, you learn you must treat those delivery drivers as employees. That means you will be liable if the delivery drivers cause an accident. Classically, if the drivers are independent contractors, there is no liability connection between the contractors and you. In contrast, under the doctrine of respondeat superior, if your employees cause an accident, you are liable too.

For these and other reasons, check all your insurance coverage.

Conclusion

No one said that having employees was easy or inexpensive. If independent contractors are recharacterized as employees (by a court, an agency, or even by you voluntarily), you will have many details to address. I raised many of the bigger issues in my prior article. If you take these two lists together, it is pretty imposing.

We are assuming here that the recharacterization applies across the board, for all purposes. That may be unrealistic, since often these determinations are made on an ad hoc basis with a regrettable lack of consistency between the myriad of different purposes for which workers are either independent contractors or employees. Nevertheless, if you do face a wholesale recharacterization, these and other factors should be considered.