



Robert W. Wood

THE TAX LAWYER

TAXES | 2/15/2014

Think Under 50 Employees Definitely Means No Obamacare? Think Again

Like it or not, [Obamacare](#) put the IRS in the health care business. Now, a huge new slug of IRS [Final Regulations](#) has hit the books defining full-time employees that employers must cover. Under the Affordable Care Act, an assessable payment or employer shared responsibility payment—it's easier to call it a tax or a penalty—hits employers with 50 or more full-time employees that fail to provide adequate health insurance.

If you want all the nuances, you have to wade through voluminous regulations. In general, though, a full-time employee is one working at least 30 hours a week. The IRS regulations include several different ways of counting full-time employees, but some of it is intuitive.

On the other hand, the definition can sneak up on you. A new employee who is reasonably expected to be a full-time employee is counted immediately. Full-time **equivalent** employees are counted too. You divide the hours of all part-time employees for the month by 120.



President Obama signing the Patient Protection and Affordable Care Act at the White House (Photo credit: Wikipedia)

If you're a small enough, you needn't navigate all the technical rules about health coverage and affordability. Small employers, those with [50 full-time employees or less](#), aren't covered, and that's why the employee definition is so important. Independent contractors aren't covered, **provided** that your independent contractor classification holds up.

If it doesn't you are back in the soup. That's why every business should be asking: are our independent contractors **really** independent? The risk of having them ruled to be employees isn't theoretical. The IRS is active in independent contractor reclassification efforts, and [more scrutiny is coming](#).

No matter how you label someone, the [substance of the work relationship](#) will control. 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 the work is full or part time. Professional credentials, flexible vs. rigid hours, who supplies tools and supplies, expense reimbursements, etc., all count. A

written contract is a must for independent contractor status, but a contract alone is not enough.

Some people ask whether you are paying for a job—say having someone put in a new kitchen—or paying for someone to work by the hour doing reception work? However you phrase it, the fundamental worker status issue has become one of the most consequential legal determinations around. Yet the IRS Inspector General issued a [report](#) claiming that 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 even higher.

You may need to retool your independent contractor agreement, evaluate which workers should be employees, and differentiate between your independent contractors and employees. Yet sitting down and making changes for the past or even prospectively isn't easy or cheap. There's a tendency to focus on revenue and figure you can always solve the payroll tax issues later if you get caught. However, fighting and losing a worker status battle can cripple a business.

The Congressional Budget Office's [Budget and Economic Outlook](#) warns that by 2024, Obamacare will reduce the size of the U.S. labor force by 2.5 million full-time-equivalent workers. Meanwhile, with payroll taxes, fringe benefits and now health insurance, some small businesses are likely to start pushing the worker status envelope even more. And that could lead to a perfect storm.

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.