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Employee Or Independent Contractor? Bigger Than Immigration

As we face immigration reform, tax reform and many other big issues, it is easy to ignore an elephant in the room. For several years, government officials have warned they are cracking down. With the IRS, Labor Department and state governments cooperating like never before, the pressure to pay up is upon us. Add the pressure of aggressive start-ups like Uber and other new economy applications and you have [Silicon Valley's branding dilemma](#).

They stretch the branding and worker classification boundaries with thousands of "non-employees." Add it all up and you have a perfect storm. Make no mistake, there is money at stake like never before. The worker status issue can come up almost anywhere, and not just from the government. Workers who sign contracts as independent contractors can *still* sue claiming they are employees. Third parties injured by an 'independent contractor' can sue saying he or she was *really* an employee so the employer is liable.

Having employees triggers federal and state tax withholding, 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. Signing a contract does *not* prevent the worker from suing and winning.

[Obamacare](#) 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. If your independent contractor classification doesn't hold up, taxes and penalties can be crushing. The IRS is active and [more scrutiny is coming](#).

No matter how you label someone, the [substance of the work relationship](#) will control with existing workers and those you might hire in the future. 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 a [report](#) from the Treasury Inspector General says employers are still getting it wrong. The report says millions of ‘independent contractors’ are really employees and that means payroll tax withholding.

Determining who is an employee has always been a fact-intensive minefield. And with Obamacare, high stakes are higher still. If you have independent contractors, differentiate them from employees, and be realistic. Fighting and losing a worker recharacterization battle can cripple a business.

Some companies get caught pushing the envelope. FedEx Ground has defended its so-called independent contractor model vigorously. But in [Alexander v. FedEx Ground](#), the court found that 2,300 drivers were covered by California’s workplace protection statutes, which could impact other FedEx cases across the country. The FedEx case is a good reminder that no matter how you label someone, the [substance of the work relationship](#) will control.

In franchise operations like Domino’s Pizza, where each store is independently owned, the relationship can be even more attenuated, yet a [\\$32M verdict says there can still be liability to the company](#). And with Uber’s vast valuation, expect more lawsuits there too, whatever the drivers may be called.

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.