



Robert W. Wood

THE TAX LAWYER

TAXES 2/05/2015

Loaded Question: 1099 Or W-2?

Companies were supposed to mail IRS Forms W-2 and 1099 by February 2. Some are still scrambling to mail them. They have until the end of February to transmit them all to the IRS, so there's a bit of wiggle room. Surprisingly, some workers don't think about their status until they get the form, either W-2 or 1099. Companies and workers everywhere may not think about it but they should.

If you're an employee, taxes have to be taken out. That means you'll receive an [IRS Form W-2](#). In contrast, if you're an independent contractor, you'll get full pay with no deductions. Of course, you are liable for your *own* taxes. Assuming your total pay was \$600 or more, you'll receive an [IRS Form 1099](#).

But what if you're the employer not the recipient? This is one of the more momentous decisions in business. It goes beyond taxes and covers workers' compensation, unemployment insurance, state and federal wage and hour laws, pension laws, nondiscrimination laws and more. It also impacts liability, since employees are agents of the company. It's hard to think of a more pivotal issue. Yet this decision is made thousands of times a day all over America.



Image via Wikipedia

Sometimes it is done without much thought. Some employers ask “1099 or W-2?” as if they were asking how you take your coffee. If you’re the worker, you may be tempted to say “1099,” figuring you’ll get a bigger check that way. You will in the short run, but you’ll actually owe *higher* taxes. As an independent contractor, you not only owe income tax, but self-employment tax too. On the first \$118,500 of income, that’s a whopping 15.3% rate. Beyond \$118,500, the rate drops to 2.9%.

In contrast, if you’re an employee, you pay only one-half the Social Security tax (your half is 7.65%) on wages up to \$118,500, plus one-half the Medicare rate (your half is 1.45%) on all wages. See [IRS Publication 225](#). Your employer pays the same. If you have income over \$200,000, you’re subject to an additional 0.9% Medicare tax withholding. The additional Medicare tax [does not apply to employers](#).

Apart from tax law, employee status carries a host of nondiscrimination laws, pension and benefits laws and wage and hour protections. They all apply to employees but not to independent contractors. For all of these reasons, employers have big incentives to use independent contractors. Many start ups and tech companies rely on the branding that uniformity can provide, but don’t want all of the costs and liabilities of employees.

The answer in many cases is independent contractors. Done carefully, such arrangements can work fine and be legitimate. However, some employers push the envelope to treat workers as

independent contractors who are clearly employees if anyone bothers to look. That's where the IRS and many other agencies come in.

Government entities and private parties in lawsuits have reason to ferret out the truth. There are several prevailing legal standards, but many boil down to how much control the company has over the worker. Even so, [some control won't convert independent contractors to employees](#). The area is heating up, with many believing that inappropriate worker status determinations are a major tax loophole. If you're an employer, be careful.

For alerts to future tax articles, follow me at [Forbes.com](#). Email 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.